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DEPT OF PLANNING
 AND PERMITTING
 CITY & COUNTY OF HONOLULU

Attorneys for Applicant
 DEPARTMENT OF ENVIRONMENTAL SERVICES,
 CITY AND COUNTY OF HONOLULU

BEFORE THE PLANNING COMMISSION
 OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of)	FILE NO. 2008/SUP-2
)	
DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU)	DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S MEMORANDUM IN OPPOSITION TO INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE SHIMABUKURO'S MOTION TO EFFECT THE CONSOLIDATION OF THE SEPARATE PROCEEDINGS IN 2008 SUP-2 AS ORDERED BY THE STATE LAND USE COMMISSION; CERTIFICATE OF SERVICE
To delete Condition No. 14 of Special Use Permit No. 2008/SUP-2 (also referred to as Land Use Commission Docket No. SP09-403) which states as follows:)	
)	
"14. Municipal solid waste shall be allowed at the WGSF up to July 31, 2012, provided that only ash and residue from H-POWER shall be allowed at the WGSF after July 31, 2012.")	
)	

DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S MEMORANDUM OPPOSITION TO INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE SHIMABUKURO'S MOTION TO EFFECT THE CONSOLIDATION OF THE SEPARATE PROCEEDINGS IN 2008 SUP-2 AS ORDERED BY THE STATE LAND USE COMMISSION

COMES NOW DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU (hereinafter, "Applicant"), by and through its attorneys, DANA VIOLA and ROBERT BRIAN BLACK, Deputies Corporation Counsel, and hereby opposes

Intervenors KO OLINA COMMUNITY ASSOCIATION and MAILE SHIMABUKURO's (together "Intervenors") Motion to Effect the Consolidation of the Separate Proceedings in 2008 SUP-2 as Ordered by the State Land Use Commission.

Intervenors have erroneously represented that the act of consolidating Applicant's December 3, 2008 application for a Special Use Permit ("2008 Application") and its Application To Delete Condition No. 14 of Special Use Permit No. 2008/SUP-2 (also referred to as Land Use Commission Docket No. SP09-403) ("2011 Application") is purely ministerial and therefore required. The Hawai'i Supreme Court in *Dep't of Env'tl. Servs. V. Land Use Comm'n*, 127 Hawai'i 5 (2012) did not order the State Land Use Commission ("LUC") to consolidate the 2008 and 2011 Applications because the 2011 Application was not before the Supreme Court. The most the Supreme Court did was "**encourage** the LUC to consider any new testimony developed before the Planning Commission [the 2011 Planning Commission proceeding ("2011 petition")]" via a footnote in the opinion. *Dep't of Env'tl. Servs v. Land Use Comm'n*, at footnote 16, p. 36. (emphasis added).

Further, the LUC cannot order the consolidation because it does not even have jurisdiction over the 2011 Application. The City and County Planning Commission ("Planning Commission") has not rendered a decision, much less transmitted its decision to the LUC for review and final decision as provided in Hawai'i Revised Statutes § 205-6 and Hawaii Administrative Rules § 15-15-95. Without jurisdiction over this matter, the LUC cannot order the Planning Commission to act with regard to the 2011 Application.


Intervenors cite to an unpublished Court of Appeals of Washington case, *Anderson v. City of Spokane*, No. 22749-9-III, 2005 Wash. App. LEXIS 1889 (Wash. Ct. App. Jul. 28, 2005) as its authority. However, this case is distinguishable from the present matter. In *Anderson*, the

Department of Labor & Industries issued an order regarding insurance benefits which the plaintiff appealed. The Board of Industrial Insurance Appeals then reversed the Department's order, which the plaintiff did not appeal. The Department then reissued its order to comply with the Board's reversal, which the plaintiff appealed. The Washington court ruled that the plaintiff could not appeal the Department's second order because "[a]n order implementing a prior order of the Board is a purely ministerial act and cannot be appealed." The facts in the present case are clearly distinguishable from these facts. Unlike the Board in the *Anderson* case, the Hawaii Supreme Court did **not** dictate the action that the administrative body (the LUC) is now requesting. The Supreme Court did **not** order the consolidation of the 2008 and 2011 Applications and could not do so because the 2011 Application was not before them to consider. This consolidation is clearly not ministerial because the Supreme Court did not dictate such action, the LUC does not have jurisdiction over the 2011 Application, and the Planning Commission has not even rendered a decision for the 2011 Application.

Accordingly, the Planning Commission is not required to effect the consolidation of the 2008 and 2011 Applications.

DATED: Honolulu, Hawaii, January 23, 2013.

DIANE T. KAWAUCHI
Acting Corporation Counsel

By 

DANA VIOLA
R. BRIAN BLACK
Deputies Corporation Counsel
Attorneys for Applicant
DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY
OF HONOLULU

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of) FILE NO. 2008/SUP-2
)
DEPARTMENT OF ENVIRONMENTAL) CERTIFICATE OF SERVICE
SERVICES, CITY AND COUNTY OF)
HONOLULU)
)
To delete Condition No. 14 of Special Use)
Permit No. 2008/SUP-2 (also referred to as)
Land Use Commission Docket No. SP09-403))
which states as follows:)
)
"14. Municipal solid waste shall be allowed at)
the WGSL up to July 31, 2012, provided that)
only ash and residue from H-POWER shall be)
allowed at the WGSL after July 31, 2012."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A COPY OF THE DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S OPPOSITION TO INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE SHIMABUKURO'S MOTION TO EFFECT THE CONSOLIDATION OF THE SEPARATE PROCEEDINGS IN 2008 SUP-2 AS ORDERED BY THE STATE LAND USE COMMISSION was duly served by either hand-delivery or U. S. Mail, postage prepaid, to the following on the date below, addressed as follows:

DEPARTMENT OF PLANNING AND PERMITTING
City and County of Honolulu
650 South King Street, 7th Floor
Honolulu, Hawai'i 96813

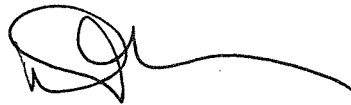
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Attorneys for Intervenors
KO OLINA COMMUNITY ASSOCIATION and MAILE SHIMABUKURO

DATED: Honolulu, Hawai'i, January 23, 2012.



DANA VIOLA
R. BRIAN BLACK
Deputies Corporation Counsel