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CITY & COUNTY OF HONOLU.

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KO OLINA COMMUNITY ASSOCIATION

and MAILE SHIMABUKURO

BEFORE THE PLANNING COMMISSION

OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
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.”

FILE NO. 2008/SUP-2

INTERVENORS KO OLINA
COMMUNITY ASSOCIATION AND
MAILE SHIMABUKURO'S
PREHEARING CONFERENCE
STATEMENT

CERTIFICATE OF SERVICE

**INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE
SHIMABUKURO'S PREHEARING CONFERENCE STATEMENT**

Intervenors Ko Olina Community Association (“KOCA”) and Maile
Shimabukuro (together “Intervenors”) submit their prehearing conference

statement in the matter of the Honolulu Department of Environmental Services' (the "ENV") Application to Modify Special Use Permit No. 2008/SUP-2 by deleting Condition No. 14 in the Hawai'i Land Use Commission's (the "LUC's") Order Adopting the Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications dated October 22, 2009 (the "2009 LUC Decision"). This statement is submitted pursuant to Honolulu Planning Commission ("Planning Commission") Rule § 2-66.

I. INTRODUCTION

The LUC imposed Condition No. 14. In Condition No. 14, the LUC directed that "[m]unicipal solid waste shall be allowed" at the Waimanalo Gulch Sanitary Landfill (the "WGSL" or "Landfill") "up to July 31, 2012, provided that only ash and residue from H-Power shall be allowed at the WGSL after July 31, 2012." Two years after this condition was imposed, the ENV claims that it cannot comply with the LUC's order. Rather than apply to the LUC for modification of the order, the ENV asks the Planning Commission simply to delete the condition.

The ENV's request raises serious questions. As the members of the Planning Commission and the LUC have frequently observed, the ENV has known for years that it needs to find a new landfill site. Various closure dates have come and gone for nearly a decade. Each time a deadline approaches, the ENV claims that it needs more time to find a new site and to develop other waste management options. Each time, the decision-making bodies are told that their backs are against the wall because there are no alternatives to the Landfill and trash will start piling up in the streets. And with each new extension, the can is kicked farther down the road.

The ENV's request to delete the July 31, 2012 deadline to accept municipal solid waste should be denied. As a threshold matter, the Planning Commission does not have jurisdiction to delete Condition No. 14. The ENV appealed the 2009 LUC Decision imposing Condition No. 14 to the Circuit Court and then to the Hawai'i Supreme Court, where the case is presently pending. While the 2009 LUC Decision is on appeal, neither the Planning Commission nor the LUC has the authority to modify or delete Condition No. 14.

Furthermore, no statute or rule gives the Planning Commission authority to modify a condition imposed by the LUC. On the contrary, HAR § 15-15-94 expressly vests authority to modify LUC conditions in the LUC itself and sets up a specific procedure for seeking such modification. The ENV is making an end-run around those procedures.

Even if the Planning Commission had the power to delete Condition No. 14, the application would still fail because the ENV has not shown "good cause" for the requested modification. The closure deadline was imposed because of concern "for [the] health and safety of the people of the City and County of Honolulu and the rights of the people living in the Leeward Coast that are subjected to the problems from the landfill." March 6, 2008 LUC Meeting Minutes (statement by Commissioner Reuben Wong). Those problems have not gone away. Since 2005, the ENV has been cited numerous times in connection with the operations and management of the Landfill. Just this past January, large quantities of municipal solid waste, sewage sludge, leachate and medical waste were released from the

Landfill into coastal waters. Thus, the deletion of Condition No. 14 and the acceptance of municipal solid waste beyond July 31, 2012, would “adversely affect the surrounding property” and would “be contrary to the objectives sought to be accomplished by” Hawai‘i land use laws. HAR § 15-15-95(b)(2). The ENV has had plenty of time to identify and develop a new landfill site to replace or supplement the existing Landfill and to improve its management of the waste stream. The extensions have to end. The ENV’s request to delete Condition No. 14 should be denied.

II. STATEMENT OF FACTS

The Landfill has been around for a long time. The following timeline identifies the key points in the Landfill’s history:

- The Landfill was established in 1986 pursuant to SUP No. 86/SUP-5. In its decision approving the SUP, the LUC noted that the Landfill was proposed to “serve the Leeward Communities for disposing raw refuse and *[was] projected to have an eight year life.*” (Emphasis added.) The LUC further acknowledged that “[m]ajor concerns are the possible contamination of offshore waters from leachates generated at the [Landfill], visual, noise, dust, odor and traffic impacts on surrounding existing and proposed communities.”
- In 1989, the SUP was amended to include an additional 26 acres for a total permitted area of 86.5 acres.
- In 2003, the SUP was amended to include an additional 21 acres for a total of 107.5 acres. In approving the amendment, the Planning Commission noted that “[t]he landfill is quickly approaching its maximum capacity” and recommended that the ENV “submit to the City Council, an alternative landfill site(s) by December 31, 2003.” The Planning Commission also directed that “[w]ithin 5 years from the date of this Special Use Permit Amendment approval or date of the Solid Waste Management Permit approval for this expansion, whichever occurs later *but not beyond May 1, 2008, the 200-acre property shall be restricted from accepting any additional waste material and be closed in accordance with an approved closure plan.*”

- The LUC approved the amendment with conditions (the “**2003 LUC Decision**”). In the proceedings, the ENV “represented . . . that it would continue to seek alternate disposal sites and other technologies and waste recovery programs to reduce the amount of waste that is disposed of in landfills.” The LUC imposed the following conditions, among others:

1. The Blue Ribbon Site Selection Committee shall make its recommendation for a new landfill site to the City Council by December 1, 2003. The City Council shall select a new site by June 1, 2004. *If a new site is not selected by June 1, 2004, this Special Permit shall immediately expire.*

...

12. Within 5 years from the date of this Special Use Permit Amendment approval or date of the Solid Waste Management Permit approval for this expansion, whichever occurs later *but not beyond May 1, 2008, the 200-acre property shall be restricted from accepting any additional waste material and be closed in accordance with an approved closure plan.*

...

18. The City and County of Honolulu shall, to the extent feasible, *use alternative technologies to provide a comprehensive waste stream management program* that includes H-Power, plasma arc, plasma gasification, and recycling technologies.

- In 2008, the SUP was amended to extend the closure deadline. The LUC observed that on January 31, 2006, the Hawai‘i Department of Health had issued a Notice of Violation to the ENV and Waste Management of Hawaii, Inc. (“WMH”) that “contained 18 violations associated with the management and operation of the WGSL.” The LUC modified Condition No. 12 in the 2003 LUC Decision to read:

The 200-acre Property shall be restricted from accepting any additional waste material and *be closed in accordance with an approved closure plan by November 1, 2009, or until the approved area reaches its permitted capacity, whichever occurs first.*

- In 2009, a new SUP was issued for the Landfill to utilize an additional 92.5 acres. The LUC imposed a number of conditions, including the following:

4. On or before November 1, 2010, the Applicant shall begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGSL. *The Applicant's effort to identify and develop such site shall be performed with reasonable diligence*, and the Honolulu City Council is encouraged to work cooperatively with the Applicant's effort to select a new landfill site on Oahu.

...

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 WGSGL after July 31, 2012.

- The ENV sought judicial review of the LUC's Order. In its appeal, the ENV specifically challenged the LUC's imposition of Condition No. 14 as arbitrary and capricious.
- On September 21, 2010, the state Circuit Court entered an order affirming the LUC's Order (the "**Circuit Court's Order**") and specifically affirmed Condition No. 14.
- The ENV appealed the Circuit Court's Order. According to the ENV, the appeal is presently pending before the Hawai'i Supreme Court.

This chronology brings us to the present. On June 28, 2011, with the appeal pending, the ENV filed its Application to Modify the 2009 LUC Decision by deleting LUC Condition No. 14.

III. ISSUES

The following issues are relevant to the ENV's Application to Modify the 2009 LUC Decision:

1. **Jurisdiction.** The Planning Commission does not have jurisdiction to delete Condition No. 14. When an appeal from a decision of an administrative agency has been taken, the agency is divested of jurisdiction to reconsider, vacate or modify the decision unless there is express statutory language to the contrary. Here, no statute

or rule specific to the Planning Commission or the LUC permits either body to modify an SUP that is under judicial review. On the contrary, when an agency wants to modify a permit pending on appeal before the courts, the agency must apply to the court for leave to submit additional evidence and to modify its prior decision. Nothing suggests that the ENV applied to the court for leave to file the 2011 Application to Modify the LUC's Decision. The condition at issue is on review before the Hawai'i Supreme Court. At this point, neither the Planning Commission nor the LUC has jurisdiction to modify Condition No. 14.

Furthermore, even if an appeal did not deprive an agency of jurisdiction to modify a prior decision, the LUC would have exclusive authority to modify or delete Condition No. 14. Planning Commission Rule § 2-49 only allows the Commission to "modif[y] or delet[e]" conditions imposed by the "Honolulu Planning Commission." The rule has nothing to do with conditions imposed by the LUC. Instead, the LUC's rules govern modification of conditions imposed by the LUC. Those rules vest exclusive jurisdiction for modifications in the LUC.

2. Good Cause. Assuming the Planning Commission had jurisdiction to consider the ENV's application, the application would fail on the merits. The governing standard to modify or delete a condition imposed by the LUC is "good cause." HAR § 15-15-94(b). Whether the ENV has shown good cause to delete Condition No. 14 is informed by the following considerations, among others:

- (1) Whether the ENV can show that it has made an "effort to identify and develop [one or more new landfill sites that shall either replace or supplement the WGSL] with reasonable diligence," as required by Condition No. 4 in the 2009 LUC Decision;

- (2) Whether the deletion of Condition No. 14 would “be contrary to the objectives sought to be accomplished by chapters 205 and 205A, HRS, and the rules of the [LUC],” as contemplated by HAR § 15-15-95(b)(1);
- (3) Whether the deletion of Condition No. 14 would “adversely affect surrounding property,” as contemplated by HAR § 15-15-95(b)(2); and
- (4) Whether “transshipment of solid waste off-island is no longer a viable alternative,” as the ENV contends;
- (5) Whether the continued operation of the Landfill would adversely affect historical and cultural resources;
- (6) Whether there are alternatives to the deletion of Condition No. 14 and the continued acceptance of municipal solid waste at the Landfill;
- (7) Whether the ENV is fully and effectively managing the waste stream; and
- (8) Whether a supplemental environmental impact statement is required in connection with the 2011 Application to Modify.

IV. EXPECTED WITNESSES

Intervenors reasonably anticipate calling the following witnesses and reserve the right to amend and supplement this list as additional witnesses are identified:

A. Lay Witnesses

Daniel Banchiu
General Manager of JW Marriot, Ihilani

Josiah Hoohuli

Abbey Mayer
Former Director of the State Office of Planning

Members of KOCA

Representatives of the ENV

Present and former members of the Mayor’s Advisory Committee on Landfill Site Selection

Representatives of the Honolulu Department of Planning and Permitting

Representatives of the State of Hawai'i Department of Health

Cynthia Rezendes

Maile Shimabukuro

Maeda Timson

Ken Williams

Members of the Neighborhood Boards

Rebuttal witnesses

Intervenors reserve the right to call any witness identified or called by the ENV or Intervenor Schnitzer Steel Hawaii Corp. (“Schnitzer”) and to name additional witnesses identified in discovery or through pleadings or documents served or filed in this case.

B. Expert Witnesses

Michael Dega, Ph. D
Applied Archaeology LLC

Experts in the areas of geotechnical engineering and waste stream management

Rebuttal experts

Intervenors reserve the right to call any witness identified or called by the ENV or Schnitzer and to name additional witnesses identified in discovery or through pleadings or documents served or filed in this case.

V. PROCEDURAL MATTERS

A. Records Requests

Intervenors served a records request to the ENV regarding its efforts to locate a site, sites or alternative methods for disposal of municipal solid waste to replace or supplement the Landfill. The records request also addresses citations or notices of violations issued in connection with the operations at the WGSL.

Intervenors served a records request to the State of Hawai'i Department of Health for documents related to citations or notices of violations issued to the ENV or WMH in connection with the operations at the Landfill.

Finally, Intervenors served a records request to the Mayor's Landfill Site Selection Advisory Committee regarding its efforts to identify a new landfill site.

B. Proposed Scheduling

Intervenors intend to file a motion to dismiss the 2011 Application to Modify for lack of jurisdiction pursuant to Planning Commission Rule § 2-67. Jurisdiction is a threshold question. Intervenors believe that the motion to dismiss should be heard and decided before the parties and the Planning Commission invest substantial time and resources in a contested case hearing on the merits of this matter. Intervenors propose that all prehearing motions be filed by November 15, 2011. The opposition and reply deadlines should follow the usual schedule set out in Planning Commission Rules § 2-67. The Planning Commission may schedule a hearing, if necessary, at its convenience.

If the Planning Commission denies the motion to dismiss, Intervenors propose to set the contested case for hearing on the merits in January 2012. Setting the hearing on the merits for January 2012 gives the parties time to brief the jurisdictional issues and gives the Planning Commission time to decide the issues. Moreover, extending the life of the Landfill would substantially affect Intervenors and those they represent. The ENV's efforts to find alternatives sites, to take more waste out of the waste stream and the gravity of the harm posed by the Landfill should be fully explored during the contested case hearing. Intervenors have

initiated the discovery process by serving records requests on the ENV, the Department of Health and the Mayor's Landfill Site Selection Advisory Committee. In order for Intervenors to have a full and fair hearing in this matter, they must be afforded sufficient time to review and analyze the records. A full exposition of the issues is necessary if the Planning Commission, the LUC and ultimately the Hawai'i courts are to make fully informed determinations on the serious issues before them.

DATED: Honolulu, Hawai'i, October 13, 2011.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day a copy of the foregoing document was
duly served on the following persons by hand delivery or United States mail,
postage prepaid:

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