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DEPT OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLULU

Attorneys for Intervenors

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 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."

FILE NO. 2008/SUP-2

INTERVENORS KO OLINA
COMMUNITY ASSOCIATION AND
MAILE SHIMABUKURO'S
MOTION TO DISMISS

MEMORANDUM IN SUPPORT OF
MOTION

DECLARATION OF
CHRISTOPHER T. GOODIN

EXHIBITS 1 - 14

CERTIFICATE OF SERVICE

Contested Case:
December 7, 2011

KOCA 4

**INTERVENORS KO OLINA COMMUNITY ASSOCIATION
AND MAILE SHIMABUKURO'S MOTION TO DISMISS**

Intervenors Ko Olina Community Association and Maile Shimabukuro move for an order dismissing for lack of jurisdiction the Department of Environmental Services' Application to Modify Special Use Permit No. 2008/SUP-2 by deleting Condition 14 in the Hawai'i Land Use Commission's Order Adopting the Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications dated October 22, 2009.

This motion is made pursuant to Honolulu Planning Commission Rule § 2-67 and is based on the attached memorandum, declaration and exhibits and on the records and materials on file with the Planning Commission.

DATED: Honolulu, Hawai'i, November 7, 2011.

CADES SCHUTTE
A Limited Liability Law Partnership



CALVERT G. CHIPCHASE
CHRISTOPHER T. GOODIN

Attorneys for Intervenors
KO OLINA COMMUNITY ASSOCIATION
and MAILE SHIMABUKURO

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FILE NO. 2008/SUP-2

**MEMORANDUM IN SUPPORT OF
MOTION**

MEMORANDUM IN SUPPORT OF MOTION

The Honolulu Planning Commission (“**Planning Commission**”) must dismiss for lack of jurisdiction the Department of Environmental Services’ (the “**ENV**”) Application to Modify Special Use Permit No. 2008/SUP-2 (the “**Application to Modify**”) by deleting Condition 14 in the Hawai‘i Land Use Commission’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 Decision**”). Intervenors Ko Olina Community Association and Maile Shimabukuro (together “**Intervenors**”) submit their memorandum in support.

I. INTRODUCTION

Condition 14 of the existing special use permit (“SUP”) directs that “[m]unicipal solid waste shall be allowed” at the Waimanalo Gulch Sanitary Landfill (the “Landfill” or “WGSL”) “up to July 31, 2012.” The Land Use Commission imposed Condition 14 in its 2009 Decision. The ENV challenged Condition 14 in court. The ENV lost and took an appeal to the Hawai‘i Supreme Court. The court has not rendered a decision.

Rather than waiting for the court to rule or following the established procedures for modifying a condition imposed by the Land Use Commission, the ENV filed an application with the Planning Commission, the only purpose of which is to delete Condition 14. For two independent reasons, the Planning Commission lacks jurisdiction to hear or consider the ENV’s Application to Modify.

First, the Planning Commission does not have the power to modify a prior decision while the decision is being reviewed by a court, except as provided by statute. Here, the ENV’s challenge to Condition 14 is pending before the Hawai‘i Supreme Court. The ENV must either wait for the court to rule or follow the specific statutory procedures set out in HRS § 91-14(e) for modifying an administrative decision while the decision is under judicial review. The ENV cannot simply ignore its appeal and disregard section 91-14(e).

Second, even if the 2009 Decision was not currently under judicial review, the administrative rules vest original and exclusive jurisdiction to hear an application to modify a condition imposed by the Land Use Commission in the Land Use Commission itself. The Planning Commission has no role in the modification process. If

the ENV wants to delete Condition 14, the ENV must follow the procedures set out in HAR §§ 15-15-70 and -94.

For each of these reasons, the ENV's Application to Modify must be dismissed.

II. BACKGROUND

In 2009, the current SUP was issued for tiwahe Landfill. In approving the SUP, the Planning Commission allowed the ENV to use the Landfill "until capacity as allowed by the State Department of Health is reached." Ex. 1 at 24 (8/4/09 Planning Commission Decision). The Land Use Commission modified the Planning Commission's decision by imposing Condition 14, which directed that "[m]unicipal solid waste shall be allowed at the WGS� up to July 31, 2012, provided that only ash and residue from H-POWER shall be allowed at the WGS� after July 31, 2012." Ex. 2 at 8 (¶ 14).

The ENV sought judicial review of the 2009 Decision. In its appeal, the ENV specifically challenged Condition 14 as arbitrary, capricious and an abuse of discretion. Ex. 3 at 13 (7/14/11 ENV Application for Transfer). On September 21, 2010, the First Circuit Court affirmed the Condition. Ex. 4 (9/21/10 Circuit Court Order).

The ENV appealed to the Hawai'i Intermediate Court of Appeals. Ex. 3 at 10. On August 1, 2011, the appeal was transferred to the Hawai'i Supreme Court, where the case remains pending. Ex. 5 (8/1/11 Order); Ex. 6 (Appellate Docket printed on 11/7/11).

With the appeal pending, the ENV applied to the Planning Commission for an Order modifying State [SUP] No. 2008/SUP-2, which superseded State SUP No. 86/SUP-5, and which permitted a 92.5 acre expansion and time extension

to capacity as allowed by the Department of Health, State of Hawai'i ("DOH") for the disposal of solid waste at the [WGSL].

...

[The ENV] specifically requests that *the Planning Commission modify the [Land Use Commission's] Order* Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications, dated October 22, 2009 (the "2009 LUC Decision"), by deleting the July 31, 2012, deadline to cease disposal of municipal solid waste ("MSW") at WGSL, as set forth in Condition No. 14 of said Order. The [ENV] seeks to use the WGLS until it reaches its permitted capacity, as allowed by the DOH, and as set forth in the Planning Commission's Findings of Fact, Conclusions of Law, and Decision, dated August 4, 2009 (the "2009 Planning Commission Decision").

June 28, 2011 Letter to the ENV at 1–2 (attached to the Application to Modify) (emphasis added).

The Ko Olina Community Association ("KOCA"), Ms. Shimaburkuro and Schnitzer Steel Hawaii Corp. intervened in the proceeding.

III. ARGUMENT

The ENV has filed the wrong application in the wrong forum and under the wrong procedures. The Application to Modify must be dismissed.

A. The Planning Commission Does Not Have Jurisdiction to Hear or Consider the Application to Modify Because the 2009 Decision Is on Appeal to the Hawai'i Supreme Court.

An appeal of an administrative decision divests the administrative body of authority to reconsider, vacate or modify its decision, unless there is express statutory authority to the contrary. *Baltimore Ravens v. Self-Insuring Emp'rs Evaluation Bd.*, 764 N.E.2d 418, 427 (Ohio 2002) ("[I]n the absence of express statutory authority to the contrary, once a decision of an administrative board is appealed to court, the board is divested of its inherent jurisdiction to reconsider, vacate, or modify that

decision.”); *Colorado Anti-Discrimination Comm’n v. Continental Air Lines, Inc.*, 355 P.2d 83, 86 (Colo. 1960) (“[A]n administrative agency is without authority to change, alter or vacate an order while review proceedings are pending in the [reviewing] court . . .”). In other words, the “appeal *terminates* the authority of the tribunal to modify its decisions unless the court remands the matter to the tribunal for its further action, thereby reviving its authority.” *Gagne v. Inhabitants of City of Lewiston*, 281 A.2d 579, 583 (Me. 1971) (emphasis added).

For example, in *American Smelting & Refining Co. v. Arizona Air Pollution Control Hearing Board*, the agency issued an order renewing a conditional operating permit for the company’s smelting facility subject to certain restrictions. 550 P.2d 621, 622 (Ariz. 1976) (a copy of this decision is attached hereto as Ex. 14). The company sought judicial review of the agency’s order. *Id.* While the appeal was pending with the court, the agency vacated the part of its order that had formed the basis of the appeal and ordered a further hearing. *Id.* Because the agency had vacated its order, the trial court dismissed the company’s appeal as moot. *Id.*

The company appealed the dismissal to the Arizona Supreme Court. The company argued that the agency had no authority to vacate a decision that was under judicial review. The court agreed. As the court explained,

It is a well-established principle that where the decision of a board, commission or other inferior tribunal is judicial in character *the effect of an appeal is to oust the inferior tribunal of jurisdiction* to proceed further. . . . A board, commission or tribunal can use its appropriate modification power to reconsider decisions until the time when the appeal is perfected.

Id. (emphasis added). Applying this rule, the court held that once the company had filed its appeal, the agency lost jurisdiction to modify the order. *Id.* Because the

agency had no jurisdiction to modify its order, the court concluded that the purported agency action on the permit “after [the appeal was filed] was void and no effect.” *Id.* at 623; *see also Baltimore Ravens*, 764 N.E.2d at 427–28 (holding that the agency lost jurisdiction to vacate its decision once the decision had been appealed and that the agency’s post-appeal actions were “of no force or effect,” in other words, “a nullity”).

This limitation on an agency’s ability to modify its decision rests on firm legal and prudential foundations. As a matter of law, the “filing of an appeal removes the cause from the administrative tribunal to the [reviewing] Court.” *Gagne*, 281 A.2d at 583. Put another way, legal authority over an action transfers with the appeal. *See id.* Initially, the agency has authority. With the appeal, the agency’s authority ends. *See id.*

Prudentially, divesting an administrative agency of jurisdiction to modify its decision after an appeal has been taken “insures the stability of the [administrative] decision for judicial review.” *Gagne*, 281 A.2d at 583. Indeed, action by the administrative body after an appeal would “tend to nullify” the appeal before the reviewing court. *Am. Smelting*, 550 P.2d at 623 (quotations omitted). The courts cannot allow such a result. The “jurisdiction of [the reviewing] court when properly invoked must be protected” and “cannot be defeated or usurped to the extent that its decision when rendered be nugatory.” *Id.* (quotations omitted).

For these reasons, an agency decision that is under judicial review may only be modified in accordance with an authorizing state statute. Hawai‘i’s Administrative

Procedures Act recognizes that an agency may need to amend a decision while an appeal is pending. To accommodate this possibility, HRS § 91-14(e) provides as follows:

If, before the date set for hearing, application is made to the court for leave to present additional evidence material to the issue in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings, decision, and order by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

Under this section, if the court grants the application and orders that additional evidence be taken before the agency, “[t]he agency may modify its findings, decision, and order by reason of the additional evidence.” There is no other statutory provision allowing an agency to modify a decision that is pending judicial review.

By requiring prior court approval before an agency modifies its decision, the Hawai‘i legislature struck a balance between competing interests. On one hand, the judicial review and appeal process depends upon a fixed record. Significant public and private time and resources would be wasted if an agency could alter the record and either moot an appeal or change the material facts. On the other hand, new situations sometimes arise during the potentially lengthy appeal process. In those circumstances, an agency may need to modify its prior order. The state legislature

considered these interests and crafted a compromise rule.¹ *Cf. Nagle v. Board of Educ.*, 63 Haw. 389, 397, 629 P.2d 109, 114 (1981) (“We will not interfere with this legislative determination by undertaking the sort of balancing of competing public policy considerations normally left to the discretion of the legislature.”).

Because the legislature “has specifically spoken on the issue of when and how the agency can reopen its administrative proceedings after judicial review begins,” the legislature has impliedly “limited the agency’s authority . . . to reopen and revise a prior determination” in other circumstances. *Doctors Nursing & Rehab. Ctr. v. Sebelius*, 613 F.3d 672, 677 (7th Cir. 2010). In other words, by providing a specific procedure for modifying decisions, the legislature has foreclosed all other procedures for modifying decisions. Any other interpretation of an agency’s authority to modify a decision under judicial review would nullify HRS § 91-14(e). *See County of Hawai’i v. C&J Coupe Family Ltd. P’ship*, 119 Haw. 352, 364, 198 P.3d 615, 627 (2008) (“[A] statute must be interpreted to avoid rendering any part of it a nullity.”). Unless modifications must be made in accordance with section 91-14(e), “the remand authority [of the statute] would serve no purpose: the agency [and parties appealing the agency’s decision] would never need to ask the court for a remand.”

¹Other states may follow their own statutory rules. For example, a statute may specifically provide that an agency may modify its decision even if the decision is on judicial review. *See Taylor v. Weinstein*, 217 A.2d 817, 818–19 (Pa. Super. Ct. 1966) (noting that the workers compensation statute “expressly provides, that, where an appeal has been taken from any action of the [agency], a rehearing may be granted by the [agency] at any time, not exceeding eighteen months, before the court takes final action on the appeal,” but concluding that the cases applying this statute had no application in the context of an appeal from a liquor licensing proceeding because the liquor licensing code did not contain a similar provision). In Hawai’i, there is no such statute applying to the Planning Commission.

See Doctors Nursing & Rehab. Ctr., 613 F.3d at 677. The legislature's direction must be followed.²

In this case, the Land Use Commission imposed Condition 14 in its 2009 Decision. Ex. 2 at 8 (¶ 14) (2009 Decision). The ENV appealed the Decision and specifically challenged Condition 14. At that point, the Circuit Court had the power to "affirm," "reverse" or "modify" the Decision or to "remand the case with instructions for further proceedings." HRS § 91-14(g). The Circuit Court affirmed. Ex. 4

²Lacking similar legislative direction, some courts have held that the discovery of new evidence may give the agency authority to reopen a proceeding, particularly where the agency uses the new evidence to revoke a previously issued permit. But these cases are not helpful here.

First, the ENV has not offered new evidence, apart from the passage of time.

Second, the ENV has not asked the Planning Commission to revoke the existing permit. The ENV wants the Planning Commission dramatically to expand the existing permit by deleting Condition 14—the same condition that is currently under judicial review.

Finally, our state legislature has spoken. *See Doctors Nursing & Rehab. Ctr.*, 613 F.3d at 677. HRS § 91-14(e) provides a procedure through which a party may present "additional evidence material to the issue in the case" to the agency such that the "agency may modify its findings, decision, and order by reason of the additional evidence." These procedures must be followed if modification is to occur.

Apart from HRS § 91-14(e), no statute or rule specifically permits the Planning Commission to modify a Land Use Commission decision that is pending judicial review. The provisions governing SUP modification are general in character and do not confer authority on the Planning Commission to modify a decision under judicial review. *See* HAR § 15-15-94 (governing modification of conditions imposed by the Land Use Commission); Planning Commission Rules § 2 49 (governing modification of conditions imposed by the Planning Commission); HRS § 205 6 (setting forth the SUP approval process). As the Arizona Supreme Court held in *American Smelting*, a statute permitting the agency to modify orders for permits, but not *expressly* contemplating modification during judicial review, merely grant the agency jurisdiction "to modify orders until the jurisdiction of the [reviewing] Court is properly invoked," that is, until the orders are appealed. 550 P.2d at 622 (emphasis added).

(9/21/10 Circuit Court Order). And the ENV again appealed. Ex. 3 at 10 (7/14/11 ENV Application for Transfer).

On July 14, 2011 the ENV asked the Hawai'i Supreme Court to hear its appeal. Ex. 3 at 13 (7/14/11 ENV Application for Transfer). The court granted the ENV's request. Ex. 5 (8/1/11 Order). The appeal remains pending. Ex. 6 (Court Docket on appeal printed on 11/7/11).

Having initiated and pursued the appellate process to its furthest extent, the ENV cannot simultaneously ask the Planning Commission to delete Condition 14. The matter is on appeal, and the ENV has not sought or obtained leave of court to file the Application to Modify during the pendency of the appeal pursuant to HRS § 91-14(e). *See* Ex. 7 (Circuit Court Docket); Ex. 3 (7/14/11 ENV Application for Transfer); Ex. 6 (Appellate Docket printed on 11/7/11). Until the appeal is resolved, the agencies lack jurisdiction to hear or consider any request to change the Decision. The ENV's Application to Modify must be dismissed. *Cf. Ass'n of Apartment Owners v. M.F.D., Inc.*, 60 Haw. 65, 70, 587 P.2d 301, 304 (1978) (noting that "[a]n appeal from a decision of an administrative board which acts without jurisdiction confers no jurisdiction on the appellate court," and dismissing the appeal).

B. The Land Use Commission Has Original and Exclusive Jurisdiction to Consider Modifications of Its Conditions.

Even if the 2009 Decision were not pending before Hawai'i Supreme Court, the Planning Commission would still lack jurisdiction to hear the ENV's Application to Modify. The Land Use Commission imposed Condition 14. The Land Use Commis-

sion has original and exclusive jurisdiction to consider any request to delete the Condition. The Planning Commission has no role in the process.

1. *If the ENV wants to delete Condition 14, the ENV must file a motion with the Land Use Commission.*

As the Administrative Rules specifically direct,

If a petitioner, pursuant to this subsection, desires to have a modification or deletion of a condition that was imposed by the [Land Use Commission], or imposed pursuant to section 15-15-90(e) or (f), or modification of the commission's order, *the petitioner shall file a motion in accordance with section 15-15-70* and serve a copy to all parties to the boundary amendment proceeding in which the condition was imposed or in which the order was issued, and to any person that may have a property interest in the subject property as recorded in the county's real property tax records at the time that the motion is filed."

HAR § 15-15-94(a) (emphasis added); *see also id.* § 15-15-03 ("Commission' means the land use commission of the State of Hawai'i.").

Here, the ENV "desires deletion of a condition that was imposed" by the Land Use Commission. Accordingly, the ENV "shall" file a motion in accordance with HAR § 15-15-70. There is no other option.

HAR § 15-15-70 sets out the procedures for filing and hearing motions. After any hearing, a party may file a written motion stating the grounds and relief sought and providing affidavits with respect to facts that are not in the record. HAR § 15-15-70(b). The moving party must serve the motion on all parties, and the opposing party may within seven days, file affidavits and a memorandum in opposition. *Id.* §§ 15-15-70(d), (e). The Land Use Commission may hold a hearing on the motion. *Id.* §§ 15-15-70(i), (j).

The ENV did not file a motion in accordance with section 15-15-70. Instead, the ENV filed an Application to Modify with the Planning Commission. No statute or rule gives the Planning Commission jurisdiction to consider the Application.³

Agencies have limited jurisdiction. Unless there is an ordinance, charter or rule granting authority to consider a particular action, the agency lacks jurisdiction to hear it. *See Swire Properties v. Zoning Bd. of Appeals*, 73 Haw. 1, 5–6, 826 P.2d 876, 878–79 (1992) (holding that the city’s zoning board of appeals did not have jurisdiction to review the city director of the department of land utilization’s decision approving building permits because the city charter was the only law that granted the board jurisdiction to hear to hear appeals of decisions by the administrative officials and the charter did not authorize review of the director’s decision). In this case, there is no ordinance, charter or rule giving the Planning Commission authority to hear or consider an application to modify a condition imposed by the Land Use Commission. *See* Planning Commission Rule § 2-49(a) (granting the Planning Commission authority to modify conditions imposed by the Planning Commission and citing as authority Revised Charter of Honolulu § 4-105.4 (“Rules and regulations affecting the public as may be necessary to the performance of the functions assigned to executive agencies may be promulgated as authorized by this charter or

³As the reviewing administrative body in certain cases, the Land Use Commission has the authority to modify decisions of the Planning Commission. *See* HRS § 205-6; HAR § 15-15-96(a). Modification does not work the other way around. That is, the Planning Commission does not any role in the modification of the Land Use Commission’s conditions.

by law.”) and HRS § 205-6). In the absence of such authority, the ENV should have filed a motion with the Land Use Commission pursuant to section 15-15-70.

The ENV understands the proper procedures. In 2003, the ENV wanted to amend its prior SUP to expand the Landfill. The Planning Commission recommended approval of the amendment, and the Land Use Commission concurred. Ex. 8 (3/13/03 Planning Commission Decision); Ex. 9 (6/9/03 Land Use Commission Decision). However, Land Use Commission imposed Condition 1, which directed in relevant part that 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.” Ex. 9 at 7 (¶ 1) (6/9/03 Land Use Commission Decision).

The City Council asked the ENV to obtain an extension of the deadline. Ex. 10 at 2 (5/6/04 Land Use Commission Decision). Consequently, the ENV filed a motion with the Land Use Commission pursuant to HAR § 15-15-70. *Id.* at 1.

During the proceedings, the Department of Planning and Permitting observed that “since [the Land Use] Commission imposed the condition requiring that a new landfill site be selected by June 1, 2004, the Commission had jurisdiction to consider the requested extension to the deadline without the [Planning Commission] first approving the extension.” *Id.* at 5. The Corporation Counsel representing the Department agreed and added that “[i]f the [ENV] is pursuing an extension of the time limit that was imposed by [the Land Use Commission] alone, *it would be appropriate for this body to be the determiner since it imposed the condition in*

the first place.” Ex. 11 at 8 (4/1/04 Land Use Commission Minutes of Meeting) (emphasis added).

In further briefing on the jurisdictional question, Corporation Counsel for the ENV reported that “prior approval of the City Planning Commission [(“CPC”)] is not required, and Petitioner may bring its request to amend directly to the LUC, which imposed the condition in question.”⁴ Ex. 12 at 2 (4/8/04 ENV Brief). Taking the Land Use Commission through each part of the jurisdictional analysis, Corporation Counsel explained the applicable rules as follows:

- “[T]he approval of the CPC is not required, as the LUC alone imposed the condition in question.” *Id.* at 5;
- Planning Commission Rules § 2-49(a) “on modification or deletion of a condition *applies only to conditions imposed by the CPC.*” *Id.* at 6 (emphasis added).
- “Stated another way, for a condition imposed by the LUC and not the CPC, such as the subject condition in this instance, *the CPC rules do not require prior CPC action.*” *Id.* at 6 (emphasis added).
- HAR § 15-15-94 “on modification of conditions or orders imposed by the LUC *clearly instructs a petitioner to file a motion with the LUC,* . . . and does not contain any requirement that prior CPC approval must first be obtained.” *Id.* at 7 (emphasis added).
- The ENV’s “understanding is that the LUC applies the procedures of [HAR § 15-15-94] to modification or deletion of conditions or orders in SUP proceedings.” *Id.* at 7 n.10.
- “Considering the plain language of the CPC rules and the LUC rules, which provide for action by the CPC or LUC, respectively, only when modifications are sought to conditions they imposed, there is no specif-

⁴The briefing addressed this question: “When a Petition seeks to amend a Special Use Permit condition imposed by the LUC, and not by the City Planning Commission, is the Petition required to first seek the approval of the City Planning Commission?” Ex. 12 at 2 (4/8/04 ENV Brief).

ic requirement that CPC approval be sought and obtained prior to bringing a motion before the LUC to amend a LUC-imposed condition.” *Id.* at 8.

The Land Use Commission was persuaded by the ENV’s analysis and concluded that “it had jurisdiction . . . in regard to the [ENV]’s request to extend the site selection deadline for a new landfill from June 1, 2004, to December 1, 2004.”⁵ Ex. 10 at 4 (5/6/04 Land Use Commission Decision).

The conclusion reached in 2004 by Planning Department, ENV and Land Use Commission was correct. The rules have not changed. Administrative Rule § 15-15-94 gives the Land Use Commission original jurisdiction to modify or delete its prior conditions. To invoke the Land Use Commission’s jurisdiction, a party “shall” file a motion pursuant to HAR § 15-15-70. The word “shall” imposes a mandatory directive. *See, e.g., Dejetley v. Kaho’ohalahala*, 122 Hawai’i 251, 263, 226 P.3d 421, 433 (2010) (holding that the term “shall” in the phrase “shall immediately forfeit office” indicated “a mandatory, instant, loss of office”); *Leslie v. Board of Appeals of County of Hawaii*, 109 Hawai’i 384, 393, 126 P.3d 1071, 1080 (2006) (holding that

⁵Of course, the process under HRS § 205-6 to obtain a special use permit for a parcel of 15 acres or more directs that an applicant file with the Planning Commission, whose decision is then subject to review by Land Use Commission. But this procedural sequence offers no guidance when the special use permit has already been issued. As was true with the ENV’s 2004 request to modify, the ENV has not applied for a *new* permit. Rather, the ENV wants to modify the Land Use Commission’s conditions on an *existing* permit.

The modification of Planning Commission conditions is governed by section 2-49. The modification of Land Use Commission conditions is governed by HAR § 15-15-94. Section 15-15-94 simply does not extend to the Planning Commission any role in a request to modify a Land Use Commission condition. The Land Use Commission has original and exclusive jurisdiction.

provisions of the Hawai'i County Code containing the term "shall" were "mandatory and not discretionary").

In accordance with the mandatory directive in section 15-15-94, the ENV should have filed a motion with Land Use Commission. The Planning Commission has no role in the process. Because there is no statute or rule extending the Planning Commission's jurisdiction to a request to delete a Land Use Commission condition, the ENV's Application must be dismissed.

2. *The ENV's claimed bases for filing the Application to Modify with the Planning Commission have no merit.*

The ENV anticipated that filing its Application to Modify with the Planning Commission could raise jurisdictional questions. In an attempt to sidestep those issues, the ENV's Application to Modify contained the following representations:

This Application is made in accordance with Section 2-18 and Section 2-49 of the Rules of the Planning Commission and Section 15-15-70 of the State of Hawai'i, Land Use Commission ("LUC") Rules. Further, the LUC has formally asserted to the Circuit Court of the First Circuit that there is nothing precluding the [ENV] from requesting relief from conditions of the 2009 LUC Order in the future: "there is nothing to preclude ENV from requesting [from the Planning Commission] an extension of the 2012 date if it is unable, using reasonable diligence as required in Condition No. 4, to identify and develop a new landfill site." See Exhibit "A," Appellee State of Hawai'i, Land Use Commission's Answering Brief, filed on April 12, 2010, *In the Matter of Department of Environmental Services, City and County of Honolulu vs. Land Use Commission, State of Hawai'i, et al.*, Civil No. 09-1-2719-11, p. 9, attached hereto and incorporated herein.

Also, presenting this application first to the Planning Commission for its consideration, rather than directly to the LUC, will promote the maximum opportunity for public participation and input by all interested parties. Furthermore, in light of the lack of specificity in the applicable rules, enabling both the Planning Commission and the LUC to consider Applicants request will reduce the possibility of a procedural challenge. Finally, if the Planning Commission determines that it does not have the authority to consider this

request, it may so conclude and direct Applicant to seek consideration from the LUC.

June 28, 2011 Letter from the ENV at 1–2 (attached to the Application to Modify) (second bracketed text added by the ENV). We address each of the ENV's representations in turn.

First, Planning Commission Rules 2-18 and 2-49 have nothing to do with modifying a Land Use Commission condition. Section 2-18 deals with the scheduling and conduct of meetings of the Planning Commission. As the ENV previously explained to the Land Use Commission, Planning Commission Rule 2-49(a) regarding "modification or deletion of a condition applies only to conditions imposed by the CPC."⁶ Because the Planning Commission did not impose Condition 14, Rule 2-49(a) is irrelevant.

Second, the ENV's application was not "made in accordance" with HAR § 15-15-70. As discussed above, Section 15-15-70 instructs that, after a hearing, a party may file a motion with the Land Use Commission stating the grounds and relief sought and providing affidavits with respect to facts that are not in the record. HAR § 15-15-70(b). The moving party must serve the motion on all parties. *Id.* § 15-15-70(d). The ENV did not follow these procedures.

⁶One could hardly read section 2-49 otherwise. Planning Commission Rule 2-49 provides that a "petitioner who desires a modification or deletion of a condition imposed by the commission shall make such a request to the commission in writing." The Rules define the term "Commission" to "mean[] the planning commission of the city and county of Honolulu or the commission's duly authorized representative." Planning Commission Rule § 1-5(f).

Third, the Land Use Commission did not “formally assert[]” that “there is nothing to preclude ENV from requesting [from the Planning Commission] an extension of the 2012 date if it is unable, using reasonable diligence as required in Condition No. 4, to identify and develop a new landfill site.” June 28, 2011 Letter from the ENV at 1 (Attached to the Application to Modify) (citation omitted; second bracketed text added by the ENV). The Land Use Commission actually stated:

Although ENV may claim that Condition No. 14 does not provide adequate time to identify and develop a new landfill, ENV has been on notice for years in prior special permit proceedings relating to the WGSL that it was required to do so. Indeed, the special permit for the existing landfill required closure of WGSL in 2008 and was extended to November 2009. ENV has had years to being the process of identifying a new landfill site or sites. Further, there is nothing to preclude ENV from requesting an extension of the 2012 date if it is unable, using reasonable diligence as required in Condition No. 4, to identify and develop a new landfill site.

Ex. 13 (4/12/10 Land Use Commission Answering Brief).

The ENV invented the bracketed text in its Application to Modify. When the Land Use Commission’s statement is read as it was written and in context, it is plain that the Land Use Commission meant that the ENV could seek modification of Condition 14 in the only manner a Land Use Commission Condition can be modified—through HAR § 15-15-70.

Fourth, the ENV’s claim that filing the application with the Planning Commission will maximize public participation rings hollow. Recall that the ENV opposed Intervenor’s application to intervene, despite the fact that Intervenor and their members and constituents are directly affected by the Landfill. In any event, the Land Use Commission’s Rules allow KOCA to oppose the Motion. HAR § 15-15-70(e). The Rules further allow “all interested persons an opportunity to submit data,

views, arguments or present oral testimony on any agenda item in an open meeting.” HAR § 15-15-10(b).

Fifth, the applicable rules do not “lack specificity.” As the ENV previously advised the Land Use Commission, section 15-15-94 regarding “modification of conditions or orders imposed by the LUC *clearly* instructs a petitioner to file a motion with the LUC.” Ex. 12 at 7 (emphasis added). Section 15-15-94 has not grown murky in the short passage of time. Section 15-15-94 still directs that motion to modify or delete a Land Use Commission Condition “shall” be filed “in accordance with section 15-15-70.” Section 15-15-70 still sets out the procedures for filing the motion with the Land Use Commission, serving the motion, opposing the motion and holding a hearing on the motion. These sections leave no room for procedural doubt.

Finally, the ENV's closing statement is correct. Dismissing the Application for lack of jurisdiction will not prejudice the ENV. The ENV will simply file with the Land Use Commission, where the Application should have been filed in the first place.

IV. CONCLUSION

The Planning Commission does not have jurisdiction to hear or consider the Application to Modify the 2009 Decision or to delete Condition 14. No agency has the power to modify the 2009 Decision while the Decision is on appeal to the Hawai'i Supreme Court without first obtaining leave of court. Even if the appeal had not ousted the agency's jurisdiction, the Land Use Commission would have original and exclusive jurisdiction to consider modify its condition.

There is no reason to spend public and private resources on a contested case proceeding. The Planning Commission does not have jurisdiction. The ENV's Application to Modify the Land Use Commission's 2009 Decision by deleting Condition 14 must be dismissed.

DATED: Honolulu, Hawai'i, November 7, 2011.

CADES SCHUTTE
A Limited Liability Law Partnership

A handwritten signature in cursive script, appearing to read "Chip Good", is written over a horizontal line.

CALVERT G. CHIPCHASE
CHRISTOPHER T. GOODIN

Attorneys for Intervenors
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

FILE NO. 2008/SUP-2

**DECLARATION OF
CHRISTOPHER T. GOODIN**

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.”

DECLARATION OF CHRISTOPHER T. GOODIN

I, Christopher T. Goodin, hereby declare as follows:

1. I am one of the attorneys for Intervenors Ko Olina Community Association and Maile Shimabukuro in this matter and make this declaration based on person knowledge in support of their Motion to Dismiss (the “**Motion**”).

2. Attached to the Motion as Exhibit 1 is a true and correct copy of the Honolulu Planning Commission’s (“**Planning Commission**”) Findings of Fact, Conclusions of Law, and Decision and Order dated August 4, 2009, attached to and marked as Exhibit K to the Honolulu Department of Environmental Services’ (“**ENV**”) Applica-

tion to Modify Special Use Permit No. 2008/SUP 2 (the “**Application to Modify**”) in this matter.

3. Attached to the Motion as Exhibit 2 is a true and correct copy of the Hawai‘i Land Use Commission’s (the “**Land Use Commission**”) Order Adopting the City and County of Honolulu Planning Commission’s Findings of Fact, Conclusions of Law, and Decision and Order With Modifications dated October 22, 2009, marked as Exhibit M and attached to the ENV’s Application to Modify.

4. Attached to the Motion as Exhibit 3 is a true and correct copy of the ENV’s Application for Transfer to the Supreme Court filed July 14, 2011, in *Department of Environmental Services v. Land Use Commission*, No. SCAP-10-0000157 (Haw.).

5. Attached to the Motion as Exhibit 4 is a true and correct copy of the Hawai‘i First Circuit Court’s Order Affirming Land Use Commission’s Order Adopting the City and County of Honolulu Planning Commission’s Findings of Fact, Conclusions of Law, and Decision and Order Dated October 22, 2009 With Modifications filed September 21, 2010, in *Department of Environmental Services v. Land Use Commission*, Civil No. 09-1-2719-11 RAN (Haw. 1st Cir. Ct.).

6. Attached to the Motion as Exhibit 5 is a true and correct copy of the Hawai‘i Supreme Court’s Order Granting Application for Transfer filed August 1, 2011, in *Department of Environmental Services v. Land Use Commission*, No. SCAP-10-0000157 (Haw.).

7. Attached to the Motion as Exhibit 6 is a true and correct copy of the docket sheets in *Department of Environmental Services v. Land Use Commission*,

No. SCAP-10-0000157, including the dockets for the Hawai'i Intermediate Court of Appeals and the Hawai'i Supreme Court, printed on November 7, 2011.

8. Attached to the Motion as Exhibit 7 is a true and correct copy of the Hawai'i Circuit Court's docket sheet in *Department of Environmental Services v. Land Use Commission*, Civil No. 09-1-2719-11 RAN (Haw. 1st Cir. Ct.).

9. Attached to the Motion as Exhibit 8 is a true and correct copy of the Planning Commission's Findings of Fact, Conclusions, and Decision dated March 13, 2003, marked as Exhibit E and attached to the ENV's Application to Modify.

10. Attached to the Motion as Exhibit 9 is a true and correct copy of the Land Use Commission's Decision and Order Approving Amendment to Special Use Permit dated June 9, 2003, marked as Exhibit F and attached to the ENV's Application to Modify.

11. Attached to the Motion as Exhibit 10 is a true and correct copy of the Land Use Commission's Order Granting in Part and Denying in Part Motion to Amend and/or stay the Decision and Order Approving Amendment to Special Use Permit dated June 3, 2003, which order is dated May 10, 2004, marked as pages 3425-31 in the record on appeal in *Department of Environmental Services v. Land Use Commission*, No. SCAP-10-0000157 (Haw.).

12. Attached to the Motion as Exhibit 11 is a true and correct copy of the Land use Commission Minutes of Meeting dated April 1, 2004, available online at http://luc.state.hi.us/minutesofmtgs/2004/0401_2004.pdf (last visited Nov. 7, 2011).

13. Attached to the Motion as Exhibit 12 is a true and correct copy of the ENV's Post-Hearing Brief filed April 8, 2004, with the Land Use Commission, without exhibits.

14. Attached to the Motion as Exhibit 13 is a true and correct copy of an excerpt of the Land Use Commission's Answering brief in *Department of Environmental Services v. Land Use Commission*, Civ. No. 09-1-2719-11 RAN (Haw. 1st Cir. Ct.), marked as Exhibit A and attached to the ENV's Application to Modify.

15. Attached to the Motion as Exhibit 14 is a true and correct copy of *American Smelting & Refining Co. v. Arizona Air Pollution Control Hearing Bd.*, 550 P.2d 621 (Ariz. 1976).

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

DATED: Honolulu, Hawai'i, November 7, 2011.


CHRISTOPHER T. GOODIN

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

For a New Special Use Permit to supersede
Existing Special Use Permit to allow a 92.5-
acre Expansion and Time Extension
For Waimanalo Gulch Sanitary Landfill,
Waimanalo Gulch, Oahu, Hawaii,
Tax Map Key Nos. (1) 9-2-003:072 and 073.

FILE NOS. 2008/SUP-2 (RY) AND 86/SUP-5

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER

I certify that this is a full, true and
correct copy of the original document
on file with the Planning Commission,
City and County of Honolulu.

Patricia J. Kalapa
August 4, 2009
DATE

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER**

This matter came on for a contested case hearing before the Planning Commission, City and County of Honolulu (the "Planning Commission"), on June 22, 2009, June 24, 2009, July 1, 2009, July 2, 2009 and July 8, 2009. Based on the record in this matter, including the evidence presented at the contested case hearing, the credibility of the witnesses testifying at the hearing, and the proposed findings of fact, conclusions of law, and decisions and orders submitted by the parties and their respective responses thereto, and the written arguments of the parties, the Planning Commission hereby makes the following findings of fact, conclusions of law, and decision and order:

FINDINGS OF FACT

PROCEDURAL MATTERS:

1. The Waimanalo Gulch Sanitary Landfill ("WGSL" or the "landfill") is located at 92460 Farrington Highway, Honouliuli, Ewa, Oahu. See Planning Division Master Application Form included within the Special Use Permit Application filed on December 3, 2008.

EXHIBIT

1

EXHIBIT K

2. On November 23, 2006, the Office of Environmental Quality Control, State of Hawaii ("OEQC"), published notice in *The Environmental Notice* that the Environmental Impact Statement ("EIS") Preparation Notice for the expansion of WGS� was available for public review and comment. See Letter from David Tanoue, Director of the Department of Planning and Permitting, to Karin Holma, Chair of the Planning Commission, dated May 1, 2009 ("DPP Recommendation") at 6.

3. On October 13, 2008, the *Final Environmental Impact Statement, Waimanalo Gulch Sanitary Landfill Lateral Expansion, Waimanalo Gulch, Oahu, Hawaii, TMKs: (1) 9-2-003: 072 and 073*, dated October 2008 ("2008 FEIS"), for the expansion of WGS�, was accepted on behalf of the Mayor by the Department of Planning and Permitting ("DPP"). Id.; Exhibit "7" to the Department of Environmental Services, City and County of Honolulu's July 6, 2009 Memorandum in Opposition to Intervenor's Motion to Dismiss the Application.

4. On October 23, 2008, OEQC published notice of the 2008 FEIS Acceptance in *The Environmental Notice*, in accordance with the Hawaii Environmental Policy Act ("HEPA"), Hawaii Revised Statutes ("HRS") Chapter 343. See DPP Recommendation at 6.

5. On December 3, 2008, the Department of Environmental Services, City and County of Honolulu ("Applicant" or "ENV"), filed a State Special Use Permit Application ("Application"), with DPP pursuant to HRS Section 205-6, and Rules of the Planning Commission, City and County of Honolulu ("RPC"), Subchapter 4, Rules Applicable to State Special Use Permits. See Application. The Application, designated as Special Use Permit Application File No. 2008/SUP-2, is for a new Special Use Permit ("SUP") for the use of the approximately 200.622-acre property (the "Property"), identified by Tax Map Key ("TMK")

Nos. (1) 9-2-003: 072 and 073, in Waimanalo Gulch, Oahu, Hawaii. See Application at Figure 1-1 and Planning Division Master Application Form. The Application seeks to expand the current operating portion of the Property, approximately 107.5 acres, by approximately 92.5 acres (the "Project"). See Application at Planning Division Master Application Form and p. 1-2.

6. The Applicant concurrently seeks to withdraw its existing SUP permit for approximately 107.5 acres, Special Use Permit File No. 86/SUP-5, and the conditions imposed therein, if the Application for the new SUP permit is granted. See April 2, 2009 memorandum from Applicant to DPP; Transcript ("Tr.") 7/2/09, 20:4-10; DPP Recommendation at 3, 24.

7. The Applicant has also filed a petition with the Land Use Commission, State of Hawaii, for a district boundary amendment to reclassify the Property from the State Agricultural District to the Urban District, which may be withdrawn if the Application is granted. See Application at p. 2-2, fn.1.

8. The Planning Commission's public hearing to consider ENV's application was scheduled for May 6, 2009. On April 3, 2009, a notice of the hearing of the matter was published in the *Honolulu Star-Bulletin*.

9. On April 16, 2009, Ko Olina Community Association ("KOCA"), Colleen Hanabusa, and Maile Shimabukuro (collectively, "Intervenors") filed a Petition to Intervene in this matter. On April 24, 2009, Applicant filed a Memorandum in Opposition to Intervenors' Petition to Intervene.

10. On May 1, 2009, DPP transmitted its report and recommendation for approval of the Application to the Planning Commission. See DPP Recommendation.

11. On May 1, 2009, the Planning Commission conducted a site visit to the Property and to the H-POWER facility.

12. At the public hearing on May 6, 2009, at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii, the Planning Commission heard public testimony. The Planning Commission was also scheduled to hear argument regarding Intervenor's Petition to Intervene. At Intervenor's request, however, the Planning Commission continued the public hearing and consideration of Intervenor's Petition to Intervene to May 20, 2009.

13. On May 7, 2009, Todd K. Apo ("Apo") filed a Petition to Intervene in this matter. On May 18, 2009, Applicant filed a Memorandum in Opposition to Apo's Petition to Intervene.

14. On May 19, 2009, Intervenor's filed a Motion to Recuse Commissioner John Kaopua.

15. On May 20, 2009, the public hearing was continued at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. At the continued public hearing, the Planning Commission heard and granted Intervenor's Petition to Intervene. Pursuant to RPC Subchapter 5, the matter was noted as a contested case. The Planning Commission also began hearing argument regarding Apo's Petition to Intervene and continued that matter to June 10, 2009.

16. On June 5, 2009, Applicant filed a Memorandum in Opposition to Intervenor's Motion to Recuse Commissioner John Kaopua.

17. On June 10, 2009, the hearing was continued at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. The Planning Commission heard and granted Intervenor's Motion to Recuse Commissioner John Kaopua. The Planning Commission denied Apo's Petition to Intervene on the grounds that it was untimely filed, that Apo's position regarding that Application was substantially the same as the position of

the Intervenor, and that the proceeding will be inefficient and unmanageable if Apo was allowed to intervene. See Findings of Fact, Conclusions of Law, and Order issued on July 27, 2009. Thereafter, the Planning Commission closed the public hearing on the Application.

18. On June 15, 2009, Intervenor filed their List of Witnesses, listing 42 potential witnesses including Apo. Applicant also filed its List of Witnesses, listing six potential witnesses.

19. On June 22, 2009, the contested case hearing began on the Application at Kapolei Hale, 1000 Uluohia Street, Kapolei, Hawaii. The Applicant submitted Exhibits "A1" through "A31," which were accepted into the record by the Planning Commission. See Tr. 6/22/09, 29:2-13. The Applicant presented its first two witnesses: Brian Takeda, who was qualified as an expert in the field of urban and regional planning, and Hari Sharma ("Sharma"), who was qualified as an expert in the field of geotechnical and geo-environmental engineering. Id. at 33:5-8; 234:7-12. Intervenor offered, and the Planning Commission received into the record, Exhibits "B1" and "B4." Id. at 81:6-11; 226:14-15.

20. On June 24, 2009, the Planning Commission resumed the contested case hearing on the Application at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. The examination of Sharma was completed. The Applicant presented its third witness Joseph R. Whelan ("Whelan").

21. On June 29, 2009, Intervenor filed a Motion to Dismiss the Application, contending that the 2008 FEIS did not cover the entire 200.622-acre site and therefore, ENV's Application had to be dismissed.

22. On July 1, 2009, the Planning Commission resumed the contested case hearing on the Application at Kapolei Hale, 1000 Uluohia Street, Kapolei, Hawaii. The examination of

Whelan was completed. The Applicant presented its fourth and fifth witnesses: Richard Von Pein, who was qualified as an expert in the field of landfill design and geotechnical engineering, and Frank Doyle, Chief of the Division of Refuse, City and County of Honolulu. See Tr. 7/1/09, 93:2-8; 176:4-9. Applicant offered, and the Planning Commission accepted for the record, Exhibit "A32." Id. at 168:16-17.

23. On July 2, 2009, the Planning Commission resumed the contested case hearing on the Application at the City Council Chambers, Third Floor, 530 South King Street, Honolulu, Hawaii. The Applicant offered no further witnesses and concluded its case-in-chief. See Tr. 7/2/09, 4:15-17. Intervenors began their case-in-chief and presented the following seven witnesses: Abbey Mayer; Josiah Hoohuli; William J. Aila, Jr.; Daniel Banchiu; Cynthia Rezentes; Maeda Timson; and Apo. The Applicant offered, and the Planning Commission received into the record, Exhibits "A33" and "A34." Id. at 32:20-25; 240:7-13. Intervenor offered, and the Planning Commission received into the record, Exhibit "B5." Id. at 185:21-23. Other documents were referenced by the Planning Commission and the parties as Exhibits "B2" through "B3." Intervenors rested their case. Id. at 279:15.

24. On July 6, 2009, Applicants filed a Memorandum in Opposition to Intervenors' Motion to Dismiss the Application.

25. On July 8, 2009, the Planning Commission resumed the contested case hearing on the Application at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. Applicant presented David M. Shideler as a rebuttal witness, who was qualified as an expert in archaeology and historical cultural resources. See Tr. 7/8/09, 11:15-21. Applicant offered, and the Planning Commission received into the record, Exhibits "A35," "A36," and "A37." Id. at 8:25-9:5, 65:14-22, 68:6-13. Intervenors made their witness, Apo,

available for additional questions by Commissioner Beadie Dawson. The examination of Apo was completed.

26. On July 8, 2009, the Planning Commission also heard and denied Intervenor's Motion to Dismiss the Application on the grounds that the Planning Commission does not have jurisdiction to consider the sufficiency of the 2008 FEIS and that Intervenor Hanabusa had previously filed the appropriate matter contesting the sufficiency in State circuit court. The Planning Commission scheduled decision-making for the Application on July 31, 2009, at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. Id. at 110:15-25; 111:1-5, 20-21.

EXHIBITS AND WITNESSES

27. The Applicant offered, and the Planning Commission received into the record, Exhibits "A1" to "A37," without objection.

28. Intervenor's offered, and the Planning Commission received into the record, Exhibits "B1," "B4," and "B5," without objection.

29. The Applicant called the following witnesses: Brian Takeda, who was qualified as an expert in the field of urban and regional planning; Hari Sharma, who was qualified as an expert in the field of geotechnical and geo-environmental engineering; Joseph R. Whelan; Richard Von Pein, who was qualified as an expert in the field of landfill design and geotechnical engineering; Frank Doyle; and David M. Shideler, who was qualified as an expert in the field of archaeology and historical cultural resources.

30. Dr. Sharma prepared a report entitled "Engineering Report for Landfill Expansion; Waimanalo Gulch Sanitary Landfill," dated March 12, 2008, which is Exhibit "A29." See Tr. 6/22/09, 235:4-25.

31. Intervenor called the following witnesses: Abbey Mayer; Josiah Hoohuli; William Aila, Jr.; Daniel Banchiu; Cynthia Rezentes; Maeda Timson; and Todd Apo. Intervenor did not move to qualify any of these persons as expert witnesses.

32. Intervenor Ko Olina Community Association, Colleen Hanabusa, and Maile Shimabukuro did not testify and did not submit any written testimony during the contested case hearing.

33. Mr. Doyle testified that the Applicant will begin in 2010 efforts to identify and develop a new landfill site to supplement WGS. See Tr. 7/1/09, 251:18-24.

34. Mr. Doyle also testified that it would take more than seven years to identify and develop a new landfill site. *Id.* at 260:16-22; 261:3-22.

POST-HEARING SUBMISSIONS BY THE PARTIES

35. On July 17, 2009, Applicant filed the Department of Environmental Services, City and County of Honolulu's Post-Hearing Brief and the Department of Environmental Services, City and County of Honolulu's Proposed Findings of Fact, Conclusions of Law, and Decision and Order; and Certificate of Service.

36. On July 17, 2009, Intervenor filed the Post Hearing Brief of Intervenor, Certificate of Service and Intervenor's Ko Olina Community Association, Colleen Hanabusa and Maile Shimabukuro Proposed Findings of Fact and Conclusions of law and Decision and Order, and Certificate of Service.

37. On July 29, 2009, Applicant filed that certain Department of Environmental Services, City and County of Honolulu's (1) Response to Post-Hearing Brief of Intervenor and (2) Exceptions to Intervenor's Proposed Findings of Fact, Conclusions of Law, and Decision and Order; Declaration of Gary Y. Takeuchi; Exhibits "1" - "3"; and Certificate of Service.

38. On July 29, 2009, Intervenors filed that certain Reply Brief of Intervenors, Certificate of Service.

PROPOSAL FOR SPECIAL USE PERMIT

39. A special use permit is being sought for the continued use of the Property as a landfill. See Application at 1-1. The 107.5-acre portion of the Property currently used as a landfill is proposed to be expanded by the remaining approximately 92.5 acres. Id. Of the approximately 92.5 acres in the expansion area, approximately 37 acres will be utilized for landfill cells. See Exhibit "A1" at 3-1, 4-4, 11-1. In addition, the expansion area will include the development of landfill-associated support infrastructure, including drainage, access roadways, a landfill gas collection and monitoring system, leachate collection and monitoring systems, stockpile sites, a public drop-off center, and a landfill gas-to-energy system and other related features. Id.; see also Application at Part I.

40. The SUP will cover the entire Property. See Application at Part I.

DESCRIPTION OF THE PROPERTY

41. The Property is owned by the City and County of Honolulu ("City") and operated by Waste Management of Hawaii, Inc ("Waste Management"). See Tr. 7/1/09, 179:4-8.

42. The state land use district designation for the Property is Agricultural District. See DPP Recommendation at 1; Application at Planning Division Master Application Form.

43. The existing City zoning district for the Property is AG-2, General Agricultural District. See Application at Planning Division Master Application Form; DPP Recommendation at 1.

44. The Ewa Development Plan recognizes the existing landfill. See Exhibit "A5"; DPP Recommendation at 1.

45. Existing uses of the property are landfill and open space. See DPP Recommendation at 2.
46. Elevations at the Property range from a low of 70 feet above mean sea level (msl) to 940 feet (msl) in the northern portion. Except for areas of fill, the steep-sloped valley contains dryland grasses and an abundance of rock outcrops. See DPP Recommendation at 8.
47. The area is fairly dry. According to an on-site rain gauge, located at the weather station, the average rainfall at WGSL is approximately 15 inches per year. See Application at 2-27; DPP Recommendation at 9.
48. The soil found at the Property consists primarily of Rock Land (rRK) with small amounts of Stony Steep Land (rSY). See Application at 2-30.
49. According to the Agricultural Lands of Importance ("ALISH") to the State of Hawaii system, the Property is not classified as Prime Agricultural Land, Unique Agricultural Land or Important Agricultural Lands. See Figure 8-2 of Exhibit "A1."
50. The University of Hawaii Land Study Bureau overall master productivity rating for the Property is "E," which indicates very poor crop productivity potential. See Application at 2-31.
51. The Federal Emergency Management Agency, Flood Insurance Rate Map, identifies the landfill property as within "Zone D," an area in which flood hazards are undetermined, but possible. See Figure 5-9 of Exhibit "A1."
52. The Property is not located within the Special Management Area. See Figure 8-3 of Exhibit "A1."

SURROUNDING USES

53. Surrounding uses to the Property include the Hawaiian Electric Company Kahe Power Plant to the west, single-family dwellings and the Ko Olina Resort to the south, and vacant lands to the north and east. See Figure 7-3 of Exhibit "A1."

54. Farrington Highway is located south of the Property. Id.

55. The region east of Property comprises the Makaiwa Hills development, which is scheduled for development. See Tr. 6/22/09, 64:6-8; Figure 7-3 of Exhibit "A1." WGS� has been in operation since 1989. See Tr. 7/1/09, 179:9-10. In 2008, the Makaiwa Hills parcel was rezoned for single family, mixed and apartment use by Ordinance 8-26, Bill 47 (2008). See Exhibit "A36."

56. The Makaiwa Hills developer's intention, according to its Final EIS dated October 2007 (the "Makaiwa Hills EIS"), is to proceed with development from makai (south) proceeding in a mauka (north) direction, as well as proceeding from east to west. See Tr. 6/22/09, 167:6-25. The Makaiwa Hills EIS indicates that construction of the western portion of its development closest to WGS� will not proceed until 2015. Id. at 167:25-168; Exhibit "A37" at p. 4-60.

57. WGS� plans to initiate closure of the existing landfill cells in the area nearest Makaiwa Hills' proposed residences prior to 2015. See Tr. 6/22/09, 168:1-8; 188:17-25, 189:1-14. In particular, cell E2 and portions of cells E1, E3, and several other MSW cells (labeled Closure Sequence "A" in Exhibit "A12") are anticipated to be covered, capped, and closed by 2012. See Exhibit "A12"; Tr. 6/24/09, 91:7-92:1.

58. There is a ridgeline between Makaiwa Hills and WGS�. See Tr. 6/22/09, 191:12-18. The area of Makaiwa Hills nearest to WGS�'s landfill cells in the proposed

expansion area is identified as open space on the Makaiwa Hills property and will not be developed. Id. at 191:4-8; Exhibit "A11."

59. The current landfill access road proceeds up to the scalehouse, past the ash cells, veers due west to the west side of the Property, and travels up the western side of the Property and into the proposed expansion area. See Tr. 6/24/09, 89:5-16. This course takes the road away from the eastern boundary of the Property and away from Makaiwa Hills. Id.

60. Waste Management documents and responds to complaints received about the operations of WGS. Id. at 100:9-101:3. Waste Management received and investigated six complaints in 2007, three complaints in 2008, and three complaints to date in 2009. Id. at 101:4-7.

61. Daniel Banchiu, general manager of JW Marriott, Ihilani ("Marriott"), testified for Intervenor at the July 2, 2009 hearing on the Application. See Tr. 7/2/09, 99:1-13. The Marriott operates a hotel at the Ko Olina resort. Id. at 99:21-24. He testified that he is aware of view and odor complaints from his guests but that the Marriott has not notified Waste Management about any complaints. Id. at 100:14-101:12; 110:1-10. He also testified that guests complained of views of a smokestack in the distance. On cross-examination, however, he admitted that he has never been to the landfill and that the smokestack could be located at some other facility--perhaps a facility with a smokestack. Id. at 106:1-25; 107:1-12. WGS does not have a smokestack, but the Kahe Power Plant, which is adjacent to the Property, does. See Exhibit "A1" at p. 5-93.

STABILITY, CONTROLLED BLASTING AND BERMS

62. Pursuant to federal and state regulations governing landfills, a seismic hazard evaluation was performed to determine seismic slope stability of the landfill. See Tr. 6/22/09 at

238:21-239:5. Consistent with accepted industry practice, the Project was analyzed for a design earthquake of magnitude 7.0, with an acceleration of 0.25 G. Id. at 240:1-9.

63. Under the Resource Conservation and Recovery Act ("RCRA"), Subtitle D, Seismic Design Guidance document, the acceptable displacement of landfills due to a seismic event is 12 inches. Id. at 248:25-249:13. The seismic deformation analysis of the design for the expanded landfill showed that seismic deformations were six inches or less, meeting the seismic stability criteria. Id. at 249:14-23.

64. The use of controlled blasting at the Property, which is very common in many landfill excavations, will not affect the stability of WGSJ because the imparted energy of controlled blasting is so small and significantly less than 0.1 G. Id. at 240:12-23; 250:3-16; 253:3-7. Monitoring probes installed by the Hawaiian Electric Company near the western Property boundary to measure vibrations from controlled blasting efforts at the currently permitted landfill did not detect any measurable readings. See Tr. 6/22/09, 252:1-15.

65. In order to alleviate community concerns about controlled blasting, a blast test program will be implemented at the Property, wherein distance, velocity, and frequencies transmitted by controlled blasting will be monitored. Id. at 251:7-16; 252:16-253:2. According to Dr. Hari Sharma, if the controlled blasting affects the landfill or any of the structures nearby, adjustments will be made. Id. at 251:7-16. There are no concerns regarding stability during the blast test program itself. Id. at 251:17-19.

66. A slope stability study was also prepared for the proposed Project. Id. at 244:2-4; 250:15-17. The proposed design meets the required factors of safety of 1.3 and 1.5 for short-term and long-term conditions, respectively. Id. at 245:18-246:11.

67. The impact of accumulated leachate on stability was also studied. According to Dr. Sharma and Richard Von Pein, even under extreme circumstances of leachate accumulation, using worst case scenarios that have never been experienced, the landfill would remain stable. See Tr. 6/24/09, 61:2-24; Tr. 7/1/09, 170:16-25, 171:1-15.

68. Whenever new cells are designed, a seismic deformation analysis and slope stability analysis must be performed to determine how the design impacts the existing cells. See Tr. 6/24/09, 9:19-23.

69. Berms are included in the design for several reasons, including for diversion of the surface water to make sure leachate is contained within the landfill and to create airspace while ensuring stability. See Tr. 6/22/09, 236:18-237:2; Tr. 6/24/09, 24:13-20; Tr. 7/1/09, 100:12-15.

70. A small Ash Toe Berm was a part of the original design for WGS. See Tr. 7/1/09, 142:12-15; 142:21-143:3. The Ash Toe Berm was expanded in 2005 to address a small area where the factor of safety was less than 1.5. Id. at 142:17-20.

71. The E1 and West Berms were a part of the 2002 design for the 14.9-acre landfill expansion. Id. at 168:19-170:1; Exhibit "A32."

72. The West Berm will be extended further into the canyon under the proposed design for the expansion. See Tr. 6/22/09, 237:3-23; Tr. 6/24/09, 36:25-38:11.

STORM WATER AND LEACHATE

73. Leachate is rain water that falls on open landfill cells. See Tr. 7/1/09, 14:11. The bottom of the individual landfill cell is contoured to direct leachate to a low point ("sump") and has a multi-layered composite liner system. Id. at 15:4-13; 101:2-25; 102:1-4; Exhibit "A1" at Figure 4-3. Within the sump is a permanent riser that contains a pump, which pumps the

leachate in a hard pipe up to the surface, where it is then pumped into a tank for disposal at a wastewater treatment facility. Id. at 15:4-13, 17:12-15. The wastewater treatment facility accepts the leachate for treatment after determining it meets the requirements of the wastewater treatment facility's own permits and would not violate the Clean Water Act. Id. at 18:6-15; Tr. 6/22/09, 144:7-19, 147:2-5. Each of the leachate sumps is equipped with an automated pump that activates at a preset level below the compliance level. Id. at 105: 9-12. There is an alarm that lets Waste Management know if the pump is no longer functioning. Id. at 105:13-16. In addition, Waste Management physically monitors the sumps. Id. at 105:13-16; 16:23-17:2.

74. Drainage for the Property is intended to capture storm water and divert it around the landfill if it originates off site (surface run-on) or into the existing sedimentation basin if it originates onsite (surface run-off). Id. at 13:16-25; Tr. 6/22/09, 119:17-25. The sedimentation basin is designed to allow storm water to settle so that dissolved solids that come off the landfill can settle out in that basin. See Tr. 7/1/09, 77:21-24. The water is eventually discharged to the ocean subject to State of Hawaii Department of Health ("DOH") permitting requirements under the national pollution discharge elimination system ("NPDES"). Id. at 77:19-78:6. A third-party company takes samples to ensure compliance with certain discharge limits. Id. at 78:7-79:5. In addition, DOH inspects Waste Management's ditches and slopes. Id. at 78:7-15.

75. Leachate does not come into contact with storm water. Id. at 76:21-23. The storm water or surface water system is separate from the leachate collection system. Id. at 76:25-77: 8; 97:15-98:8.

76. Groundwater in the area of the Property is monitored for leachate contamination. Id. at 98:12-17.

GAS COLLECTION AND CONTROL SYSTEM AND EPA NOTICE OF VIOLATION

77. On April 4, 2006, the Environmental Protection Agency ("EPA") issued a Notice of Violation to WSGL, which included the late installation of a landfill gas collection and control system (the "GCCS") and alleged violations of reporting requirements. Id. at 19:3-8; Appendix B, Volume II of III, of Exhibit "A1." Both issues were resolved by August 2005. Tr. 7/1/09, 19:3-8. There are currently 40 gas wells at the Property. Id. at 22:18-25.

78. The GCCS collects landfill gases that are formed from the decomposition of the waste material. The gas is burned off at the onsite flare pursuant to a DOH-issued air quality permit. Id. at 23:6-11.

79. In installing the GCCS, elevated temperatures above the EPA's standard operating temperature of 131° Fahrenheit were discovered at WGS. See Tr. 7/1/09, 112:7-10; 113:25-114:2. Waste Management has submitted a demonstration to the EPA establishing that WGS can be safely operated at higher than the standard operating temperatures. Id. at 112:11-15.

80. The EPA Notice of Violation is pending resolution of two outstanding issues that evolved from the Notice of Violation: the temperature issue and a monetary settlement. Id. at 106:2-13.

81. The EPA has not issued any notice of violation for the elevated temperatures at WGS. See Tr. 6/24/09, 21:18-22:1. There is no evidence that there has ever been, or that there is currently, a landfill fire at WGS. See Tr. 7/1/09, 108:8-14. If there was combustion at WGS, Waste Management would implement its contingency plan, including turning off the gas wells in the area of the fire, thereby depriving the combustion area of needed oxygen, which is standard procedure for handling landfill oxidation events. Id. at 107:8-25; 108:1-7.

TRAFFIC

82. A traffic impact report ("TIR") was prepared for the Project. See Tr. 6/22/09, 51:6-17; Appendix I of Exhibit "A1." The TIR analyzes the amount of existing traffic transiting Farrington Highway on both the eastbound and westbound approaches, as well as the volume of traffic entering and coming out of the Property. Id.

83. The TIR concluded that even with the expansion of the landfill, the volume of traffic would not be expected to increase dramatically. Traffic going in and out of the landfill is less than approximately one percent of the total volume of traffic in the region. See Tr. 6/22/09, 51:18-24.

ARCHAEOLOGICAL AND CULTURAL RESOURCES

84. An *Archaeological Inventory Survey, Waimānalo Gulch Landfill Expansion*, 2008 ("AIS") and a *Cultural Impact Assessment (Draft), Waimānalo Gulch Landfill Expansion*, 2008 ("CIA") were prepared for the Property. See Appendices G and H of Exhibit "A1," respectively.

85. One historic property, State Inventory of Historic Properties ("SIHP") # 50-80-12-6903, was identified by the study. See AIS (Appendix G of Exhibit "A1") at 45. SIHP# 50-80-12-6903 consists of three large upright boulders potentially utilized as trail or boundary markers. Id.

86. Applicant proposes to address SIHP# 50-80-12-6903 within a mitigation/preservation plan to be reviewed and accepted by the State Historic Preservation Division, Department of Land and Natural Resources, State of Hawaii ("SHPD"). See Tr. 6/22/09, 49:21-50:5; Exhibit "A3." Specifically, Applicant has proposed to temporarily relocate the upright stones to Battery Arizona, and return the upright stones as close as possible to their current locations after the landfill has been closed. See Tr. 6/22/09 at 49:5-20; Exhibit "A3."

87. SHPD has reviewed Applicant's proposed mitigation and determined that there is no effect to historic properties, as stated in a letter from Nancy McMahon, Deputy State Historic Preservation Officer of SHPD, to David Tanoue, Director of DPP, dated April 2, 2009. See Tr. 6/22/09, 49-20-51:1; Exhibit "A4."

88. No native Hawaiian customary and traditional rights or practices at the Property were identified. See CIA (Appendix "H" of Exhibit "A1") at 79.

PURPOSE AND NEED

89. According to Joseph Whelan, as of March 16, 2009, there was approximately 12 month of landfill airspace capacity remaining in the municipal solid waste ("MSW") portion of the current SUP area, and approximately 24 months of landfill airspace capacity remaining in the ash portion of the current SUP area. See Tr. 6/24/09, 81:22-82:6; 83:1-14.

90. On December 1, 2004, the City Council adopted Resolution No. 04-349, CD1, FD1, which selected the Property as the site for the City's landfill. See Exhibit "A20."

91. The proposed expansion of the landfill within the Property is needed because WGSL is a critical part of the City's overall integrated solid waste management efforts. See Tr. 7/1/09, 181:4-8.

92. Continued availability of WGSL is required as a permit condition to operate H-POWER and to engage in interim shipping of waste, for cleanup in the event of a natural disaster, and because there is material that cannot be combusted, recycled, reused, or shipped. Id. at 181:9-18; 182:2-4, 10-17; 197:2-22.

93. Therefore, a landfill is currently necessary for proper solid waste management, the lack of which would potentially create serious health and safety issues for the residents of Oahu. See Application at 2-6.

94. WGS� is the only permitted public MSW facility on the island of Oahu and the only permitted repository for the ash produced by H-POWER. Id. at 181:20-183:4.

95. WGS� is a critical portion of the City's overall Integrated Solid Waste Management Plan ("ISWMP"), which looks at all of the factors that make up solid waste management, including reuse and recycling, the H-POWER facility, and landfilling for material that cannot be recycled or burned for energy. Id. at 178:10-18; 181: 7-18. The ISWMP is required by State law and approved by DOH after public comments. Id. at 182:18-183: 25. One theme of the ISWMP is to minimize landfill disposal. Id. at 184:1-3.

96. Currently, approximately 1.8 million tons of waste is produced on Oahu per year. This does not include material deposited at the PVT Landfill. Id. at 179:11-23. Approximately, 340,000 tons of MSW in 2006, and approximately 280,000 tons of MSW in 2008, were landfilled at WGS�. Id. at 179:16-17. These amounts fluctuate based on such things as recycling and the economy. Id. at 179:18-19. Approximately 170,000 to 180,000 tons of ash from the H-POWER facility is deposited at WGS� each year. Id. at 179:24-25; 180:1-4.

97. Other items that cannot be recycled or burned at H-POWER are deposited at WGS�, such as screenings and sludge from sewage treatment plants, animal carcasses, tank bottom sludge, contaminated food waste that cannot be recycled, and contaminated soil that is below certain toxicity levels. Id. at 180:10-21.

98. The WGS� Oversight Advisory Committee consists of citizens primarily from the leeward communities, who meet periodically to discuss concerns with Waste Management and the Applicant regarding WGS� operations. Id. at 184:9-18.

99. The Community Benefits Advisory Committee advises the City on the spending of money for grants and improvements throughout the Waianae Coast. In fiscal year 2008, there

was approximately \$2 million appropriated in the City budget, and for fiscal year 2009, approximately \$2.5 million, for this program. Id. at 184:19-25, 185:1-7.

100. The City is actively reducing waste volume that is directed to the landfill. The H-POWER plant is expanding and its capacity is expected to increase by an additional 300,000 tons of MSW per year by late 2011 or early 2012. Id. at 185:8-25. The expanded H-POWER facility will be able to burn items that the current facility cannot and which are therefore currently being sent to the landfill. Id. at 186: 17-25, 187: 1-12. The City is in the process of completing the full implementation of its island-wide, curbside recycling program by May 2010. Id. at 186:7-13. The City has a program of community recycling bins to encourage schools to recycle cardboard, as well as plastic bottles and cans. Id. at 187:13-18. The City is currently in the process of procuring a new green waste recycling facility that will accept food waste and sewage sludge. Id. at 188:22-25. The City has a facility at the Sand Island Wastewater Treatment Plant that turns bio-solids into fertilizer pellets, with the goal of reusing 100 percent of the material for such uses as golf course fertilizer. Id. at 189:5-18. The City is also requesting technology demonstration proposals to explore alternate technologies. Id. at 194:11-25. ENV has looked at these technologies, like plasma arc and gasification, and to date they are not ready in the size the City needs, and are only demonstration technologies. Id. at 192:8-25; 193:1-25; 194:1-10.

101. By 2012, when H-POWER's third boiler is expected to be operational, the City, through its various solid waste management programs, expects to divert eighty (80) percent of the waste stream, with the remaining twenty (20) percent being landfilled at WGSL. Id. at 201:9-16. Id. at 195: 4-8.

102. In order to ensure there will be no cessation of waste disposal at the Property, construction of a new cell in the expansion area to be used when the capacity of the currently permitted cells is exhausted would need to begin on or around November 1, 2009, due to the amount of time that it takes for cell construction, liner placement, forming, etc. See Tr. 6/24/09, 84:8-20. Before construction can begin, an operating permit is required from DOH. Because the DOH operating permit can only be processed after a SUP or boundary amendment is granted, and given the time it takes to process the operating permit, the SUP or boundary amendment must be granted in August or September of 2009 so that construction can be timely started. See Tr. 6/24/09, 99:11-23.

STATE AND COUNTY LAND USE LAW AND REGULATIONS

103. The Project complies with the guidelines as established by the Planning Commission. See Tr. 6/22/09, 68:3-13; Application at 2-1 through 2-28.

104. The Project is consistent with various provisions of the Hawaii State Plan. See Tr. 6/22/09, 69:4-6; Application at 2-2 through 2-8.

105. The Project is consistent with the energy functional plan. GSL is a generator of naturally occurring methane and other landfill gases, and these gases are planned to be recovered by the City for use in the generation of electricity through a landfill gas-to-energy system. See Exhibit "A1" at p. 8-9; Tr. 6/22/09, 70:1-12.

106. The Project is consistent with the recreational functional plan. The Property will be reclaimed for other purposes that include outdoor recreation; for example, Kakaako Waterfront Park once served as a landfill in Honolulu. See Exhibit "A1" at p. 8-10; Tr. 6/22/09, 70:13-71:2.

107. The Project is consistent with the City's general plan. WGS� is an important public facility that will provide a necessary facility to meet future population needs and accommodate growth in the region; WGS�'s eventual closure will allow the Property to be reclaimed for other public uses; and WGS� is needed in the event of a natural disaster. See Tr. 6/22/09, 71:8-25; 72:1-25; Exhibit "A1" at pp. 8-25 through 8-28.

108. The Project is consistent with the Ewa Development Plan because the facilities map contained therein designates the landfill with the appropriate symbol. See Tr. 6/22/09, 73:9-74:11; Exhibit "A1" at pp. 8-28 through 8-29.

109. The Project is consistent with City zoning because a landfill is considered a "public use" under the Land Use Ordinance, and "public uses and structures" are deemed permitted uses in every City zoning district, without the need for a permit. See Application at 2-28 through 2-29; Tr. 6/22/09, 75:5-22.

110. The parties stipulated that Commissioner Rodney Kim can participate via telephone in decision making for this contested case.

PROPOSED FINDINGS OF FACT OR CONDITIONS

Any proposed findings of fact or conditions submitted by the Applicant or Intervenor that are not expressly ruled upon by the Planning Commission by adoption herein, or rejected by clearly contrary findings of fact, are hereby denied and rejected.

LABELING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

To the extent that any of the foregoing Findings of Fact are more properly deemed to be Conclusions of Law, they are incorporated herein as Conclusions of Law. Should any of the following Conclusions of Law be more properly deemed Findings of Fact, they are incorporated herein as Findings of Fact.

CONCLUSIONS OF LAW

The Planning Commission hereby concludes as follows:

1. The Planning Commission has jurisdiction to hold public hearings and make recommendations on all proposals to adopt or amend the general plan, development plans and zoning ordinances, and to approve special use permits for unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified in accordance with the RPC. Section 6-1506(b), Revised Charter of the City and County of Honolulu 1973 (2000 Edition); Hawaii Revised Statutes Section 205-6(a).

2. Hawaii Revised Statutes Section 91-10(5) provides that:

[T]he party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

The Applicant has the burden of proof to show by a preponderance of the evidence that the Application meets the provisions of Section 2-45 of the RPC.

3. The Applicant seeks a new State Special Use Permit. Chapter 2, Subchapter 4 of the RPC sets forth the rules applicable to State Special Use Permits. Section 2-45 of the RPC provides as follows:

Test to be applied. Certain "unusual and reasonable" uses within agricultural districts other than those for which the district is classified may be permitted. The following guidelines are established as guidelines in determining an "unusual and reasonable" use:

(a) Such use shall not be contrary to the objectives sought to be accomplished by the state land use law and regulations.

(b) That the desired use would not adversely affect the surrounding property.

(c) Such use would not unreasonably burden public agencies to provide public roads and streets, sewer, water, drainage and school improvements, and police and fire protection.

(d) Unusual conditions, trends, and needs have arisen since the district boundaries and regulations were established.

(e) That the land upon which the proposed use is sought is unsuited for uses permitted in the district.

4. Based on the findings set forth above, the Planning Commission concludes that the Applicant's request for a new State Special Use Permit (a) is not contrary to the objectives sought to be accomplished by the state land use law and regulations; (b) would not adversely affect surrounding property as long as operated in accordance with governmental approvals and requirements, and mitigation measures are implemented in accordance with the Applicant's representations as documented in the 2008 FBIS; and (c) would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvements, or police and fire protection. The Planning Commission further concludes that the same unusual conditions, trends, and needs that existed at the time the original Special Use Permit was granted continue to exist and that the land on which WGSL is located continues to be unsuited for agricultural purposes.

5. The Planning Commission concludes that the Applicant has met its burden of proof with respect to the provisions set forth in Section 2-45 of the RPC.

DECISION AND ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, it is the Decision and Order of the Planning Commission to DENY Intervenors' Motion to Dismiss Application. It is the further Decision and Order of the Planning Commission to APPROVE Applicant's Special Use Permit Application File No. 2008/SUP-2 ("2008/SUP-2"), for a new SUP for the existing and proposed expansion of WGSL, located at Tax Map Key Nos. 9-2-3: Parcels 72 and 73, totaling approximately 200.622 acres, until capacity as allowed by the State Department of Health is reached, subject to the following conditions:

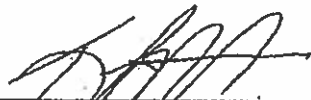
1. On or before November 1, 2010, the Applicant shall begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGSL. The Applicant's effort to identify and develop such sites shall be performed with reasonable diligence, and the Honolulu City Council is encouraged to work cooperatively with the Applicant's effort to select a new landfill site on Oahu. Upon the selection of a new landfill site or sites on Oahu, the Applicant shall provide written notice to the Planning Commission. After receipt of such written notice, the Planning Commission shall hold a public hearing to reevaluate 2008/SUP-2 and shall determine whether modification or revocation of 2008/SUP-2 is appropriate at that time.
2. The Applicant shall continue its efforts to use alternative technologies to provide a comprehensive waste stream management program that includes H-POWER, plasma arc, plasma gasification and recycling technologies, as appropriate. The Applicant shall also continue its efforts to seek beneficial reuse of stabilized, dewatered sewage sludge.
3. The Applicant shall provide, without any prior notice, annual reports to the Planning Commission regarding the status of identifying and developing new landfill sites on Oahu, the WGSL's operations, and Applicant's compliance with the conditions imposed herein. The annual reports also shall address the Applicant's efforts to use alternative technologies, as appropriate, and to seek beneficial re-use of stabilized, dewatered sewage sludge. The annual reports shall be submitted to the Planning Commission on June 1 of each year subsequent to the date of this Decision and Order.


4. Closure Sequence "A" for the existing landfill cells at WGSL as shown on Exhibit "A12" must be completed, and final cover applied, by December 31, 2012.
5. WGSL shall be operational only between the hours of 7:00 a.m. and 4:30 p.m. daily, except that ash and residue may be accepted at the Property 24-hours a day.
6. The Applicant shall coordinate construction of the landfill cells in the expansion area and operation of WGSL with Hawaiian Electric Company, with respect to required separation of landfill grade at all times and any accessory uses from overhead electrical power lines.
7. The operations of the WGSL under 2008/SUP-2 shall be in compliance with the requirements of Section 21-5.680 of the Revised Ordinances of the City and County of Honolulu 1990, to the extent applicable, and any and all applicable rules and regulations of the State Department of Health.
8. The Planning Commission may at any time impose additional conditions when it becomes apparent that a modification is necessary and appropriate.
9. Enforcement of the conditions to the Planning Commission's approval of 2008/SUP-2 shall be pursuant to the Rules of the Planning Commission, including the issuance of an order to show cause why 2008/SUP-2 should not be revoked if this Commission has reason to believe that there has been a failure to perform the conditions imposed herein by this Decision and Order.
10. The Applicant shall notify the Planning Commission of termination of the use of the Property as a landfill for appropriate action or disposition of 2008/SUP-2.

IT IS ALSO the Decision and Order of the Planning Commission to APPROVE the withdrawal of Special Use Permit File No. 86/SUP-5 upon 2008/SUP-2 taking effect and that all conditions previously placed on the Property under Special Use Permit File No. 86/SUP-5 shall be null and void.

Dated at Honolulu, Hawaii, this 4th day of August, 2009.

PLANNING COMMISSION
CITY AND COUNTY OF HONOLULU

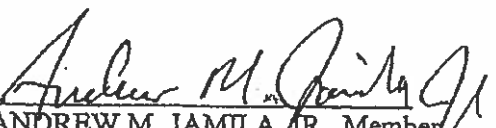
By 
KARIN HOIMA, Chair

By 
RODNEY KIM, Vice Chair

By _____
BEADIE K. DAWSON, Member

By 
HAROLD J. DIAS, JR., Member

By _____
VICKI GAYNOR, Member

By 
ANDREW M. JAMILA, JR., Member

By (RECUSED)
JOHN S. KAOPUA, III, Member

By 
KERRY M. KOMATSUBARA, Member

By 
JAMES C. PACOPAC, Member

FILE NOS. 2008/SUP-2 (RY) AND 86/SUP-5, IN THE MATTER OF THE APPLICATION
OF DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF
HONOLULU - FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND
ORDER



BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In The Matter Of The Application Of The	)	DOCKET NO. SP09-403
)	
DEPARTMENT OF ENVIRONMENTAL	)	ORDER ADOPTING THE CITY
SERVICES, CITY AND COUNTY OF	)	AND COUNTY OF HONOLULU
HONOLULU	)	PLANNING COMMISSION'S
	)	FINDINGS OF FACT,
For A New Special Use Permit To	)	CONCLUSIONS OF LAW, AND
Supersede Existing Special Use Permit To	)	DECISION AND ORDER WITH
Allow A 92.5-Acre Expansion And Time	)	MODIFICATIONS
Extension For Waimānalo Gulch Sanitary)	
Landfill, Waimānalo Gulch, O'ahu,)	
Hawai'i, Tax Map Key: 9-2-03: 72 And 73)	
)	

ORDER ADOPTING THE CITY AND COUNTY OF HONOLULU
PLANNING COMMISSION'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER WITH
MODIFICATIONS

On July 31, 2009, the City and County of Honolulu Planning Commission ("Planning Commission") met at the City Council Committee Meeting Room, Second Floor, in Honolulu, Hawai'i, to consider a new special use permit application ("Application") filed by the Department of Environmental Services, City and County of Honolulu ("Applicant"), to supersede the existing special use permit to allow a 92.5-acre expansion and time extension for the

EXHIBIT

2

EXHIBIT M

existing Waimānalo Gulch Sanitary Landfill ("WGSL") located at Waimānalo Gulch, O'ahu, Hawai'i, Tax Map Key: 9-2-03: 72 and 73 ("Property").

After due deliberation and consideration of the record in this matter, the Planning Commission recommended approval of the Application (County Special Use Permit File No. 2008/SUP-2), subject to ten conditions, and further recommended approval of the withdrawal of County Special Use Permit File No. 86/SUP-5 upon 2008/SUP-2 taking effect, and that all conditions previously placed on the Property under County Special Use Permit File No. 86/SUP-5 shall be null and void.

On August 11, 2009, the Land Use Commission ("LUC") received the decision and a portion of the record of the Planning Commission's proceedings on the Application.

On August 20, 2009, the LUC received the remaining portion of the record.

On September 10, 2009, the Ko Olina Community Association, Colleen Hanabusa, and Maile Shimabukuro ("Intervenors") filed a Motion To Intervene.¹

¹ At the September 24, 2009 meeting the LUC recognized Ms. Hanabusa, Ms. Shimabukuro and the Ko Olina Community Association as intervenors in the LUC's proceeding based upon their intervenor status before the Planning Commission and therefore denied the Motion to Intervene as moot.

On September 17, 2009, the Applicant filed a Memorandum In Opposition To Intervenor Ko Olina Community Association, Colleen Hanabusa, And Maile Shimabukuro's Motion To Intervene.

On September 21, 2009, Intervenor filed a Motion To Deny Petition.

On September 23, 2009, the Applicant filed a Memorandum In Opposition To Intervenor Ko Olina Community Association, Colleen Hanabusa And Maile Shimabukuro's Motion To Deny Petition.

On September 24, 2009, the LUC conducted a meeting on the Application in the Kaua'i Meeting Room, Sheraton Waikiki Hotel, in Honolulu, Hawai'i. Gary Y. Takeuchi, Esq., and Jesse K. Souki, Esq., appeared on behalf of the Applicant. Colleen Hanabusa, Esq.; Ken Williams; and Maile Shimabukuro were present on behalf of the Intervenor. Bryan C. Yee, Esq., and Abbey Mayer were also present on behalf of the State Office of Planning, and Don Kitaoka, Esq., and Robert Bannister were present on behalf of the Department of Planning and Permitting.² At the meeting, both the Applicant and Intervenor provided

² Pursuant to section 92-3, HRS, the LUC heard public testimony from Fred Dodge; William Aila, Jr.; City Council Chair Todd Apo; Mel Kahele; Abbey Mayer; and Robert Bannister. The LUC also received written testimony from Ka'eo Gouveia; Nobuko Maria Mori; Ali Mahmoodi; Laura Kay Rand; Mario Beekes; Lorita Nordlum; Paulette Dibibar; Clara Batongbacal; Elizabeth Dunne; Kalena Hew Len; Kamaki Kanahale; Ralph F. Harris; James C. Barigan III; Greg Nichols; Howard Perry, Jr.; and Michael Nelson. At the meeting, the LUC denied Intervenor's Motion To Deny Petition.

oral argument in support of their respective positions on the Application.

Following discussion, a motion was made and seconded to grant the Application subject to (1) the withdrawal of County Special Use Permit File No. 86/SUP-5 and LUC Docket No. SP87-362, provided that the existing conditions therein shall be incorporated to the extent they are consistent with and applicable to this decision and are not duplicative of any additional conditions imposed hereafter; (2) the conditions as recommended by the Planning Commission in County Special Use Permit File No. 2008/SUP-2 (LUC Docket No. SP09-403) and modified as appropriate; and (3) the following additional conditions: 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; the Honolulu City Council through the City Administration shall report to the public every three months on their efforts regarding the continued use of the WGSF, including any funding arrangements that are being considered by the City Council and the City Administration; and the City Council and the City Administration shall have a public hearing every three months to report on the status of their efforts to either reduce or continue the use of the WGSF. By a vote of 5 ayes, 3 nays, and 1 absent, the motion carried.

The LUC, upon consideration of the Planning Commission's

Findings Of Fact, Conclusions Of Law, And Decision And Order, the oral

Docket No. SP09-403 Department of Environmental Services, City and County of Honolulu
Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact,
Conclusions of Law, and Decision and Order With Modifications

arguments of the parties and the record and files herein, and good cause existing and upon motion duly passed by the LUC,

HEREBY ORDERS that the LUC shall adopt the Planning Commission's Findings Of Fact, Conclusions Of Law, And Decision And Order as its own Findings Of Fact, Conclusions Of Law, And Decision And Order, subject to the following conditions:

1. The Applicant shall obtain all necessary approvals from the State Department of Health, Department of Transportation, Commission on Water Resource Management, and Board of Water Supply for all onsite and offsite improvements involving access, storm drainage, leachate control, water, well construction, and wastewater disposal.

2. In accordance with Chapter 11-60.1 "Air Pollution Control," Hawai'i Administrative Rules, the Applicant shall be responsible for ensuring that effective dust control measures during all phases of development, construction, and operation of the landfill expansion are provided to minimize or prevent any visible dust emission from impacting surrounding areas. The Applicant shall develop a dust control management plan that identifies and addresses all activities that have a potential to generate fugitive dust.

3. That the City and County of Honolulu shall indemnify and hold harmless the State of Hawai'i and all of its agencies and/or employees for

any lawsuit or legal action relating to any groundwater contamination and noise and odor pollution relative to the operation of the landfill.

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 WGSF. The Applicant's effort to identify and develop such sites 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. Upon the selection of a new landfill site or sites on Oahu, the Applicant shall provide written notice to the Planning Commission. After receipt of such written notice, the Planning Commission shall hold a public hearing to reevaluate 2008/SUP-2 (SP09-403) and shall determine whether modification or revocation of 2008/SUP-2 (SP09-403) is appropriate at that time. The Planning Commission shall make a recommendation to the Land Use Commission.

5. The Applicant shall continue its efforts to use alternative technologies to provide a comprehensive waste stream management program that includes H-POWER, plasma arc, plasma gasification and recycling technologies, as appropriate. The Applicant shall also continue its efforts to seek beneficial reuse of stabilized, dewatered sewage sludge.

6. The Applicant shall provide, without any prior notice, annual reports to the Planning Commission and the Land Use Commission regarding the status of identifying and developing new landfill sites on Oahu, the WGSL's operations, and Applicant's compliance with the conditions imposed herein. The annual reports also shall address the Applicant's efforts to use alternative technologies, as appropriate, and to seek beneficial re-use of stabilized, dewatered sewage sludge. The annual reports shall be submitted to the Planning Commission and Land Use Commission on June 1 of each year subsequent to the date of this Decision and Order.

7. Closure Sequence "A" for the existing landfill cells at WGSL as shown on Exhibit "A12" must be completed, and final cover applied, by December 31, 2012.

8. WGSL shall be operational only between the hours of 7:00 a.m. and 4:30 p.m. daily, except that ash and residue may be accepted at the Property 24 hours a day.

9. The Applicant shall coordinate construction of the landfill cells in the expansion area and operation of WGSL with Hawaiian Electric Company, with respect to required separation of landfill grade at all times and any accessory uses from overhead electrical power lines.

10. The operations of the WGS� under 2008/SUP-2 (SP09-403) shall be in compliance with the requirements of Section 21-5.680 of the Revised Ordinances of the City and County of Honolulu 1990, to the extent applicable, and any and all applicable rules and regulations of the State Department of Health.

11. The Planning Commission may at any time impose additional conditions when it becomes apparent that a modification is necessary and appropriate.

12. Enforcement of the conditions to the Planning Commission's approval of 2008/SUP-2 (SP09-403) shall be pursuant to the Rules of the Planning Commission, including the issuance of an order to show cause why 2008/SUP-2 (SP09-403) should not be revoked if the Planning Commission has reason to believe that there has been a failure to perform the conditions imposed herein by this Decision and Order.

13. The Applicant shall notify the Planning Commission and Land Use Commission of termination of the use of the Property as a landfill for appropriate action or disposition of 2008/SUP-2 (SP09-403).

14. Municipal solid waste shall be allowed at the WGS� up to July 31, 2012, provided that only ash and residue from H-POWER shall be allowed at the WGS� after July 31, 2012.

15. The Honolulu City Council through the City Administration shall report to the public every three months on the efforts of the City Council and the City Administration in regard to the continued use of the WGSL, including any funding arrangements that are being considered by the City Council and the City Administration.

16. The City Council and the City Administration shall have a public hearing every three months to report on the status of their efforts to either reduce or continue the use of the WGSL.

APPROVED AS TO FORM

Diane Jackson
Deputy Attorney General

LAND USE COMMISSION
STATE OF HAWAII

By Ransom Piltz
RANSOM PILTZ
Chairperson and Commissioner

By (Excused)
VLADIMIR PAUL DEVENS
Vice-Chairperson and Commissioner

By Reuben S. F. Wong
REUBEN S. F. WONG
Vice-Chairperson and Commissioner

By (Nay)
KYLE CHOCK
Commissioner

By Thomas Contrades

THOMAS CONTRADES

Commissioner

By (Nay) _____

LISA M. JUDGE

Commissioner

By Duane Kanuha

DUANE KANUHA

Commissioner

By (Nay) _____

NORMAND LEZY

Commissioner

Filed and effective on:

October 22, 2009

Certified by:

By Nicholas W. Teves, Jr.

NICHOLAS W. TEVES, JR.

Commissioner

Orlando Davidson

ORLANDO DAVIDSON

Executive Officer

Electronically Filed
Supreme Court
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CAAP 10-0000157

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

In the Matter of	)	CIVIL NO. 09-1-2719-11
)	
DEPARTMENT OF ENVIRONMENTAL	)	APPEAL FROM THE
SERVICES, CITY AND COUNTY OF	)	1) ORDER AFFIRMING LAND USE
HONOLULU,	)	COMMISSION'S ORDER ADOPTING
	)	THE CITY AND COUNTY OF
Appellant-Appellant,	)	HONOLULU PLANNING
	)	COMMISSION'S FINDINGS OF FACT,
vs.	)	CONCLUSIONS OF LAW, AND
	)	DECISION AND ORDER DATED
LAND USE COMMISSION, STATE OF	)	OCTOBER 22, 2009 WITH
HAWAII; COLLEEN HANABUSA, MAILE	)	MODIFICATIONS, filed herein on
SHIMABUKURO, AND KO OLINA	)	September 21, 2010
COMMUNITY ASSOCIATION,)	
	)	2) FINAL JUDGMENT, filed herein on
Appellees-Appellees.	)	October 19, 2010
)	
	)	3) NOTICE OF ENTRY OF JUDGMENT,
	)	filed herein on October 21, 2010
)	
	)	FIRST CIRCUIT COURT
)	
	)	HONORABLE RHONDA A. NISHIMURA
	)	Judge

PETITIONER/APPELLANT-APPELLANT DEPARTMENT OF
ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S
APPLICATION FOR TRANSFER TO THE SUPREME COURT

DECLARATION OF SHARON LAM BLANCHARD

AND

CERTIFICATE OF SERVICE

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CITY AND COUNTY OF HONOLULU

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**PETITIONER/APPELLANT-APPELLANT DEPARTMENT OF
ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S
APPLICATION FOR TRANSFER TO THE SUPREME COURT**

COMES NOW, Petitioner/Appellant-Appellant Department of Environmental Services ("ENV"), City and County of Honolulu ("City"), by and through its attorneys ROBERT CARSON GODBEY, Acting Corporation Counsel, and GARY Y. TAKEUCHI, SHARON LAM BLANCHARD and DANA VIOLA, Deputies Corporation Counsel, and hereby respectfully submits this application for transfer to the Hawai'i Supreme Court ("Supreme Court"), pursuant to Rule 40.2 of the Hawai'i Rules of Appellate Procedure ("HRAP") and Hawai'i Revised Statutes ("HRS") § 602-58.

I. REQUEST FOR TRANSFER TO THE SUPREME COURT

ENV requests a transfer of its appeal, In the Matter of Department of Environmental Services, City and County of Honolulu, vs. Land Use Commission, State of Hawaii; Colleen Hanabusa, Maile Shimabukuro, and Ko Olina Community Association, CAAP 10-0000157, from the Intermediate Court of Appeals ("ICA") to the Supreme Court.

II. PRIOR PROCEEDINGS

A. ENV's Application for a Special Use Permit ("SUP") for the Expansion of the Waimanalo Gulch Sanitary Landfill ("WGSL" or "landfill").

WGSL is the only permitted public municipal solid waste ("MSW")¹ landfill on the island of O'ahu and the only permitted repository for the ash and residue produced by

¹ Municipal solid waste is generally household waste. However, the landfill is also permitted to accept certain other wastes, including non-hazardous industrial waste and special waste. [Volume ("Vol.") X, Record on Appeal ("ROA") Part C-8B at 15:7-13]

the City's H-POWER waste-to-energy facility. [Vol. XIII, ROA Part C-11 at 311; PC ORDER ¶ 94]

1. **ENV's Application to the City Department of Planning and Permitting.**

On December 3, 2008, ENV filed an application for a new Special Use Permit ("SUP") to supersede the then-existing SUP, to allow a 92.5-acre expansion and time extension for the existing operating portion of WGSL (the "Application"). [Vol. IV, ROA Part C-2 at 7-167] The Application, designated as County Special Use Permit File No. 2008/SUP-2 by the City Department of Planning and Permitting ("DPP"), was processed by DPP, which recommended to the Planning Commission of the City and County of Honolulu ("Planning Commission") that the Application be approved with conditions. [Vol. VI, ROA Part C-4 at 34]

The Application was for a new SUP for the use of the approximately 200.622-acre property, identified by Tax Map Key ("TMK") Nos. (1) 9-2-003: 072 and 073, in Waimanalo Gulch, O'ahu, Hawai'i (the "Property"). [Vol. I, ROA Part C-1 at 168-169] ENV proposed expanding the 107.5-acre portion of the Property being used as a landfill by the remaining approximately 92.5 acres. [Vol. IV, ROA Part C-2 at 14; 18 (Figure 1-1)] ENV concurrently sought to withdraw its then-existing SUP permit for approximately 107.5 acres, File No. 86/SUP-5, and the conditions imposed therein, if the new SUP permit was granted. [Id.]

Of the approximate 92.5 acres in the expansion area, approximately 37 acres were proposed for use as new landfill cells. [Vol. IV, ROA Part C-2 at 15] ENV proposed that the remaining expansion area be used for landfill-associated support infrastructure, including drainage, access roadways, a landfill gas collection and monitoring system,

leachate collection and monitoring systems, stockpile sites, a public drop-off center, a landfill gas-to-energy system, and other related features. [Vol. IV, ROA Part C-2 at 12; Vol. XII, ROA Part C-10 at 3289 (*Final Environmental Impact Statement, Waimanalo Gulch Sanitary Landfill Lateral Expansion, Waimanalo Gulch, Oahu, Hawaii, TMKs: (1) 9-2-003: 072 and 073, dated October 2008 ("2008 FEIS")*)] at Part II] The proposed SUP would cover the entire Property. [Vol. IV, ROA Part C-2 at 15; Vol. XII, ROA Part C-10 at 3289 (2008 FEIS at Sec. 1.1.)]

2. Proceedings Before the Planning Commission.

After receipt of DPP's recommendation, the Planning Commission conducted a contested case hearing on the Application on June 22, 2009, June 24, 2009, July 1, 2009, July 2, 2009, and July 8, 2009. [Vol. XIII, ROA Part C-11 at 293] On July 31, 2009, the Planning Commission recommended approval of the Application subject to 10 conditions, and further recommended approval of the withdrawal of the prior SUP for WGSJ (SUP File No. 86/SUP-5) upon 2008/SUP-2 taking effect, and that all conditions previously placed on the Property under SUP File No. 86/SUP-5 would then be null and void. [Vol. XIII, ROA Part C-11 at 316-320; see also Vol. 1, ROA Part C-1 at 169]

The decision of the Planning Commission was set forth in its FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER dated August 4, 2009 ("PC ORDER"). [Vol. XIII, ROA Part C-11 at 293-320] The PC ORDER was based on the evidence presented at the contested case hearing, the credibility of the witnesses testifying at the hearing, the proposed findings of fact, conclusions of law, and decisions and orders submitted by the parties and their respective responses thereto, and the written arguments of the parties. [Vol. XIII, ROA Part C-11 at 293] The PC

ORDER contained the following relevant Findings of Fact which were supported by citations to the record:

33. [Chief of the City Department of Environmental Services, Refuse Division] Mr. Doyle testified that the Applicant will begin in 2010 efforts to identify and develop a new landfill site to supplement WGS�.

34. Mr. Doyle also testified that it would take more than seven years to identify and develop a new landfill site.

91. The proposed expansion of the landfill within the Property is needed because WGS� is a critical part of the City's overall integrated solid waste management efforts.

92. Continued availability of WGS� is required as a permit condition to operate H-POWER and to engage in interim shipping of waste, for cleanup in the event of a natural disaster, and because there is material that cannot be combusted, recycled, reused, or shipped.

93. Therefore, a landfill is currently necessary for proper solid waste management, the lack of which would potentially create serious health and safety issues for the residents of Oahu.

94. WGS� is the only permitted public MSW facility on the island of Oahu and the only permitted repository for the ash produced by H-POWER.

95. WGS� is a critical portion of the City's overall Integrated Solid Waste Management Plan ("ISWMP"), which looks at all of the factors that make up solid waste management, including reuse and recycling, the H-POWER facility, and landfilling for material that cannot be recycled or burned for energy. The ISWMP is required by State law and approved by DOH after public comments. One theme of the ISWMP is to minimize landfill disposal.

96. Currently, approximately 1.8 million tons of waste is produced on Oahu per year. This does not include material deposited at the PVT Landfill. Approximately, 340,000 tons of MSW in 2006, and approximately 280,000 tons of MSW in 2008, were landfilled at WGS�. These amounts fluctuate based on such things as recycling and the

economy. Approximately 170,000 to 180,000 tons of ash from the H-POWER facility is deposited at WGSL each year.

97. Other items that cannot be recycled or burned at H-POWER are deposited at WGSL, such as screenings and sludge from sewage treatment plants, animal carcasses, tank bottom sludge, contaminated food waste that cannot be recycled, and contaminated soil that is below certain toxicity levels.

101. By 2012, when H-POWER's third boiler is expected to be operational, the City, through its various solid waste management programs, expects to divert eighty (80) percent of the waste stream, with the remaining twenty (20) percent being landfilled at WGSL.

[Vol. XIII, ROA Part C-11 at 300; 310-312]

The PC ORDER did not contain any expiration date for the SUP or any deadline to cease the acceptance of MSW at WGSL. **[Vol. XIII, ROA Part C-11 at 316]**

Commissioner Kerry Komatsubara ("Komatsubara"), who authored the PC ORDER, explained that "[t]he term or the length of the new SUP shall be until the Waimanalo Gulch landfill reaches its capacity as compared to a definite time period of 'X' number of years." **[Vol. XIII, ROA Part C-11 at 326]** Komatsubara found that ENV had "demonstrated that we need a landfill. I think it's pretty obvious; we need a landfill on this island for us to move forward...it would not be in the community's best interest if we were to close this landfill before we find another landfill." **[Vol. XIII, ROA Part C-11 at 327]** Komatsubara further explained his reasoning as follows:

In my opinion, simply putting on a new closure date to this new SUP will not lead to the closure of the Waimanalo Gulch Sanitary Landfill. I believe that the focus should not be on picking a date. The focus should be on how do we get the City to select a new site because you're not going to

close this landfill until you find another site. I don't think it's in the interest of our community not to have a landfill.

So what this proposal does is, it says look, [ENV] can keep [WGSL] open until your [sic] full, until you've reached the capacity, but you have an obligation starting from next year [2010] to start looking for a new site. Now whether you take it seriously or not, that's up to you because we have the power to call you in, and you have the obligation now to report every year on what you're doing to find a new landfill site whether it be a replacement site or supplemental site or both. We have the right to hold a hearing at any time we feel that you are not...the applicant is not in good faith moving forward with reasonable diligence to find a new site.

...I think going down the old path of just putting a [closure] date in there has not worked. We put it down three or four times before and every time we came to that date, it was extended further and further...I'd rather not say it's a certain date only to know that when we reach that date we're going to extend it further until we find the new site. I'd rather focus on an effort to find a new site and have [ENV] come in every year and explain to us where you are in your effort to find a new site. That's what this [order] does.

[Vol. XIII, ROA Part C-11 at 328]

3. Proceedings Before the State of Hawaii, Land Use Commission.

On August 11, 2009, the State of Hawai'i, Land Use Commission ("LUC") received the PC ORDER and a portion of the record of the Planning Commission's proceedings on the Application. [Vol. I, ROA Part C-1 at 169] On August 20, 2009, the LUC received the remaining portion of the record. [Id.]

Pursuant to HRS § 205-6(e) and Hawai'i Administrative Rules ("HAR") § 15-15-96(a), the LUC was required to approve, approve with modification, or deny the Application based on the record established at the Planning Commission within 45 days, or on or before Monday, October 5, 2009. [Vol. I, ROA Part C-1 at 187]

At its meeting on September 24, 2009, the LUC considered the Application, and
Commissioner Reuben Wong offered the following motion:

. . . I'd like to move that the special use permit application before us be granted with a number, a number of conditions such as that all of the conditions that were set forth in the '86 SUP [SUP File No. 86/SUP-5] be incorporated.

That is to say, for example, conditions dealing with blasting, with hours of operation, building a berm -- and I believe there are 19 of them, that we ultimately ended up with 19; subject also to the condition that solid waste be allowed at the Waimanalo Gulch but only up to July 31, 2012.

Let me comment momentarily. I think the record indicates that the third [H-Power] burner would be built by around the end of 2011 but fully operational by July 31st, 2012.

Another condition would be that after July 31, 2012 only ash and residue from the H-Power be allowed to be placed on the Gulch. To make that clear, what we're saying is that no more municipal waste, no rubbish, trash, that sort of thing, save and except the ash and residue that may come from the H-Power plant.

Another condition is that the City Administration is a party in this case and the city council through the City Administration be required to report to the public every three months what the City Administration is doing and what the city council is doing with respect to the continued use of the Waimanalo Gulch.

Those reports shall also include what funding arrangements are being considered by the city council and the City Administration to fulfill whatever position they plan to report on.

By that I mean, for example, if they're gonna say that, 'We hope to reduce the amount of municipal waste on Waimanalo Gulch' that the report should indicate whether or not -- how it's going to be done, and whether or not there's money for it.

Another condition is that in reporting to the public that the city council and the Administration every three months

would have a public hearing to report to the public the status of the attempt to either reduce or continue use of the Waimanalo Gulch so that it's not only publication through the media but there will be public hearings so that people can attend and the officials can face the public and tell them face-to-face, 'This is what we are going to do.'

So that, Mr. Chairman, is my motion. I know it's lengthy but hopefully with the second I can have further discussion.

[Vol. III, ROA Part C-1 at 522:19-524:19; LUC Transcript ("Tr.") 09/24/09 at 200:19-202:19]

Following discussion, the LUC commissioners adopted the following motion by a 5 to 3 vote (Commissioner Vladimir Devins not present):

[A] motion to approve SP09-403 with all of the conditions recommended by Commissioner Wong, the exact verbiage of which will be taken from the transcript for purposes of the Order. So I won't try to summarize them here.

[Vol. III, ROA Part C-1 at 543:7-12; LUC Tr. 9/24/09 at 221:7-12]

On October 22, 2009, the LUC issued its written ORDER ADOPTING THE CITY AND COUNTY OF HONOLULU PLANNING COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER WITH MODIFICATIONS ("LUC ORDER"). **[Vol. I, ROA Part C-1 at 168-179]** Importantly, in said order, the LUC adopted the PC ORDER as its own findings of fact, conclusions of law, and decision and order.² **[Vol. I, ROA Part C-1 at 172]** The LUC ORDER granted the Application subject to "(1) the withdrawal of County Special Use Permit File No. 86/SUP-5 and LUC Docket No. SP87-362, provided that the existing conditions therein shall be incorporated to the extent they are consistent with and applicable to this decision and are not duplicative of any additional conditions

² Therefore, the specific findings of fact and conclusions of law determined by the Planning Commission, on the basis of the record developed in the contested case before the Planning Commission, all of which is before this Court as part of the record on appeal, must be considered when seeking a proper understanding of the LUC ORDER.

imposed hereafter; (2) the conditions as recommended by the Planning Commission in County Special Use Permit File No. 2008/SUP-2 (LUC Docket No. SP09-403) and modified as appropriate"; and (3) the following relevant conditions:

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.

15. The Honolulu City Council through the City Administration shall report to the public every three months on the efforts of the City Council and the City Administration in regard to the continued use of the WGSL, including any funding arrangements that are being considered by the City Council and the City Administration.

16. The City Council and the City Administration shall have a public hearing every three months to report on the status of their efforts to either reduce or continue the use of the WGSL.

[Vol. 1, ROA Part C-1 at 171; 175-176]

On October 29, 2009, ENV filed with the LUC a MOTION FOR RECONSIDERATION and a MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION (collectively "RECONSIDERATION MOTION"), pursuant to HAR §§ 15-15-70 and 15-15-84. **[Vol. 1, ROA Part C-1 at 183-202]** ENV requested the modification of Condition No. 14 and the deletion of Conditions No. 15 and 16 of the LUC ORDER. **[Vol. 1, ROA Part C-1 at 184]**

By written order dated December 1, 2009, the LUC denied ENV's RECONSIDERATION MOTION. **[Vol. 1, ROA Part C-1 at 227-237]**

B. Proceedings Before the Circuit Court.

On November 19, 2009, ENV filed its NOTICE OF APPEAL; STATEMENT OF THE CASE; DESIGNATION OF RECORD ON APPEAL; ORDER FOR CERTIFICATION AND TRANSMISSION OF RECORD; EXHIBITS "A" AND "B" with the Circuit Court of the First Circuit ("Circuit Court"). [ROA at 11-74]

On September 21, 2010, the Circuit Court issued its Order Affirming Land Use Commission's Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law and Decision and Order Dated October 22, 2009 with Modifications. [ROA at 197] Said Order modified Conditions No. 15 and 16 of the LUC ORDER by deleting the references to the Honolulu City Council and the City administration, and substituting the same with ENV. [Id.] The Order also erroneously affirmed Condition No. 14 of the LUC ORDER. [Id.]

Final Judgment was filed on October 19, 2010, and the Notice of Entry of Judgment was filed on October 21, 2010. [ROA at 200; 202]

C. Current Appeal Before the ICA.

On November 12, 2010, ENV timely filed its Notice of Appeal and Civil Appeals Docketing Statement to the ICA relating to that portion of the Circuit Court's Order which wrongly affirmed the LUC's arbitrary and unsupported deadline of July 31, 2012, to cease acceptance of MSW at WGSL. [ROA at 204; 215]

ENV filed its Opening Brief on February 15, 2011. The LUC filed its Answering Brief on April 27, 2011. On May 11, 2011, ENV filed its Reply Brief to the LUC's Answering Brief. Having requested and received three extensions of time to file their

Answering Brief, Appellees filed said brief on June 30, 2011. ENV filed its Reply Brief to Appellees' Answering Brief on July 14, 2011.

III. STATEMENT OF FACTS

As discussed *supra*, this case involves ENV's application for an SUP for the expansion of the WGSL by approximately 92.5 acres. Under HRS § 205-6, an SUP application for land area greater than fifteen acres must first be approved by the Planning Commission, and then by the LUC, which may approve, modify or deny the Planning Commission's decision.

An SUP was necessary for the expansion of the landfill because it is located on City-owned property in the State Agricultural District. [Vol. VI, ROA Part C-4 at 9; 41] Pursuant to HRS § 205-6, certain unusual and reasonable non-agricultural uses, such as a municipal landfill, are allowed within the Agricultural District with an SUP. A portion of the Property has been operated as a City landfill subject to an SUP since 1989. [Vol. X, ROA Part C-8B at 225:9-10; PC Tr. 07/1/09 at 179:9-10] As additional portions of the Property were needed for landfill use, additional environmental reviews and studies were conducted, and the then-existing SUP was extended and expanded. [Vol. X, ROA Part C-8A at 11:23-25; PC Tr. 06/22/09 at 5:23-25] ENV's Application for a new SUP (File No. 2008/SUP-2) to allow a 92.5-acre expansion and time extension, for the use of the whole approximately 200.622-acre Property, superseded the prior-existing SUP File No. 86/SUP-5. [Vol. I, ROA Part C-1 at 168-169; see also Vol. IV, ROA Part C-2 at 14; 18 (Figure 1-1)]

In brief, the Planning Commission decision herein allowed the continued use of WGSL for the disposal of MSW and ash and residue from the City's H-POWER waste-

to-energy facility until the Property reaches capacity. [Vol. XIII, ROA Part C-11 at 316-319] The LUC, however, modified the Planning Commission's decision and ordered that WGS� cease accepting MSW for disposal on July 31, 2012. [Vol. I, ROA Part C-1 at 175] The LUC's decision to impose this deadline for waste acceptance is patently arbitrary and capricious, characterized by abuse of discretion and a clearly unwarranted exercise of discretion in light of the record established before the Planning Commission, which was adopted by the LUC. [Vol. I, ROA Part C-1 at 172] The Circuit Court erred in affirming the LUC's decision with regard to the waste acceptance deadline. [ROA at 198]

The record below established that WGS� is the only public landfill on O'ahu permitted to receive MSW. [Vol. XIII, ROA Part C-11 at 34; PC ORDER ¶ 94] As such, WGS� plays a vital role in the proper management of O'ahu's solid waste. [Vol. XIII, ROA Part C-11 at 311; PC ORDER ¶ 95] Moreover, the record below established that there will always be a need for a landfill as part of any integrated solid waste management program. [Vol. XIII, ROA Part C-11 at 310-311; PC ORDER ¶¶ 91, 95] Further, the record evinced that even with the City's various efforts to divert MSW from WGS�, such as expanding H-POWER, the island-wide implementation of a curbside collection program for recyclable materials, programs for greenwaste and biosolids reuse, interim off-island shipping of part of the MSW stream, and other initiatives, there will always be waste material that cannot be combusted, recycled, reused, or shipped. [Vol. XIII, ROA Part C-11 at 310-312; PC ORDER ¶¶ 92, 97, 100] A landfill is needed for proper disposal of these materials. [Vol. XIII, ROA Part C-11 at 310; PC ORDER ¶ 92] The record also clearly established that it will take more than seven years to identify and

develop a new landfill site. [Vol. XIII, ROA Part C-11 at 300; PC ORDER ¶¶ 33, 34]
Given these realities, if the LUC's July 31, 2012, deadline to cease acceptance of MSW at WGSF is permitted to stand, serious public health and safety issues could arise. [Vol. XIII, ROA Part C-11 at 310; PC ORDER ¶ 93]

The City must be able to properly manage MSW in order to protect the public health and safety of all O'ahu residents and visitors. Accordingly, ENV is compelled to appeal that portion of the Circuit Court's decision which erroneously affirmed the LUC's arbitrary July 31, 2012, deadline to close WGSF to MSW disposal.

IV. STATEMENT OF POINT OF ERROR

As set forth in its Opening Brief filed on February 15, 2011, ENV contends that the Circuit Court erred in affirming Condition No. 14 of the LUC ORDER. The LUC's imposition upon ENV of a July 31, 2012, deadline to cease the disposal of MSW at WGSF was arbitrary and capricious, characterized by abuse of discretion and a clearly unwarranted exercise of discretion in light of the record developed before the Planning Commission. That record, which was the required basis for the LUC ORDER, clearly established that there will always be waste material that cannot be combusted, recycled, reused, or shipped and that a landfill is needed to properly dispose of these waste materials. Further that record clearly indicated it will take more than seven years to identify and develop a new landfill site. The LUC adopted these findings of the Planning Commission as its own, and yet also adopted Condition No. 14, which is clearly inconsistent with those very facts. It is evident that an MSW landfill disposal option will continue to be necessary after July 31, 2012. A new landfill site will not be selected, much less developed, by that date. It is clear that the only viable landfill disposal option

for MSW is and, for the foreseeable future will continue to be, WGS�: the only public repository for MSW on O'ahu.

V. STATUTORY QUALIFICATIONS FOR TRANSFER

The Supreme Court "shall" grant an application to transfer a case within the jurisdiction of the ICA when a case involves a "question of imperative or fundamental public importance." See HRS § 602-58(a)(1).

ENV respectfully submits that the closure of WGS� to MSW on the unsupported deadline of July 31, 2012, raises a "question of imperative or fundamental public importance" as the need for WGS� will continue to exist after that date, since no other landfill disposal option will be available by that date. [Vol. XIII, ROA Part C-11 at 300, 310-311] If WGS� is forced to cease accepting MSW on July 31, 2012, then the City will be placed in the untenable position of having nowhere to properly dispose of certain critical wastes. [Vol. XIII, ROA Part C-11 at 311] Further, the City would also be forced to close the H-POWER facility because the continued availability of WGS� is required as a permit condition to operate H-POWER. [Vol. XIII, ROA Part C-11 at 310] The lack of WGS� "would potentially create serious health and safety issues for the residents of Oahu." [Vol. XIII, ROA Part C-11 at 310]

There is a pressing need for immediate adjudication of this matter as July 31, 2012, is approximately one year from now. Due to the significant risks to public health and safety that could ensue if WGS� is forced to cease accepting MSW on that date, ENV is compelled to file this application for transfer so that the Supreme Court can decide this matter expeditiously.

VI. CONCLUSION

Based on the foregoing, ENV respectfully requests that its application for transfer to the Supreme Court be granted.

DATED: Honolulu, Hawai'i, July 14, 2011.

ROBERT CARSON GODBEY
Acting Corporation Counsel

By /s/ Sharon Lam Blanchard
GARY Y. TAKEUCHI
SHARON LAM BLANCHARD
DANA VIOLA
Deputies Corporation Counsel
Attorneys for Petitioner/Appellant-Appellant

MARK J. BENNETT 2672
Attorney General of Hawai'i

RUSSELL A. SUZUKI 2084
DIANE ERICKSON 1589
Deputy Attorneys General
Department of the Attorney General
State of Hawai'i
465 South King Street
Honolulu, Hawai'i 96813
Telephone: (808) 586-0618
Facsimile: (808) 586-1372

Attorneys for Appellee State of Hawai'i
Land Use Commission

1ST CIRCUIT COURT
STATE OF HAWAII
FILED

2010 SEP 21 AM 8:38

N. ANAYA
CLERK.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU,

Appellant,

vs.

LAND USE COMMISSION, STATE OF
HAWAII; COLLEEN HANABUSA, MAILE
SHIMABUKURO, AND KO OLINA
COMMUNITY ASSOCIATION,

Appellees.

CIVIL NO. 09-1-2719-11
(Agency Appeal)

ORDER AFFIRMING LAND USE
COMMISSION'S ORDER ADOPTING
THE CITY AND COUNTY OF
HONOLULU PLANNING
COMMISSION'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER DATED
OCTOBER 22, 2009 WITH
MODIFICATIONS

Date: July 14, 2010
Judge: Hon. Rhonda A. Nishimura

ORDER AFFIRMING LAND USE COMMISSION'S ORDER ADOPTING
THE CITY AND COUNTY OF HONOLULU PLANNING COMMISSION'S
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND
ORDER DATED OCTOBER 22, 2009 WITH MODIFICATIONS

On July 14, 2010, the appeal of DEPARTMENT OF ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF HONOLULU, from the above-referenced Order of Appellee, State of

EXHIBIT

4

EXHIBIT N

Hawai'i, Land Use Commission, came on for hearing before the Honorable Rhonda A. Nishimura. Gary Y. Takeuchi and Jesse Souki, Deputy Corporation Counsel, appeared on behalf of DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU, Colleen Hanabusa, Esq. appeared on behalf of KO OLINA COMMUNITY ASSOCIATION, COLLEEN HANABUSA and MAILE SHIMABUKURO, and Deputy Attorney General Russell A. Suzuki appeared on behalf of the State of Hawai'i, Land Use Commission. The Court having reviewed and considered the briefs, oral arguments and the files herein, being fully advised in the premises, and good cause appearing therefor,

HEREBY ORDERS, ADJUDGES AND DECREES that:

1. The Department of Environmental Services, City and County of Honolulu, is an "aggrieved person" within the meaning of Hawai'i Revised Statutes section 91-14(a), and the Court will apply the standards set forth in Hawai'i Revised Statutes section 91-14.
2. Condition No. 14 of the Land Use Commission's Order Adopting The City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order Dated October 22, 2009 is **AFFIRMED**.
3. Condition No. 15 and Condition No. 16 of the Land Use Commission's Order Adopting The City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order Dated October 22, 2009 are modified to delete references to the Honolulu City Council and the city administration and substitute the same with the Department of Environmental Services, City and County of Honolulu.
4. In all other respects the Land Use Commission's Order Adopting The City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order Dated October 22, 2009 is **AFFIRMED**.

DATED: Honolulu, Hawai'i, SEP 20 2010

RHONDA A. NISHIMURA

JUDGE OF THE ABOVE-ENTITLED COURT



APPROVED AS TO FORM:

A handwritten signature in black ink, appearing to be "Colleen Hanabusa", written over a horizontal line.

COLLEEN HANABUSA, ESQ.
Attorney for KO OLINA COMMUNITY ASSOCIATION,
COLLEEN HANABUSA, and MAILE SHIMABUKURO

APPROVED AS TO FORM:

A handwritten signature in black ink, appearing to be "Gary Y. Takeuchi", written over a horizontal line.

GARY Y. TAKEUCHI, ESQ.
JESSE SOUKI, ESQ.
Deputy Corporation Counsel
Attorneys for DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF HONOLULU

DEPARTMENT OF ENVIRONMENTAL SERVICES vs. LAND USE COMMISSION, STATE
OF HAWAII; COLLEEN HANABUSA, MAILE SHIMABUKURO, AND KO OLINA
COMMUNITY ASSOCIATION, CIVIL NO. 09-1-2719-11, ORDER AFFIRMING LAND USE
COMMISSION'S ORDER ADOPTING THE CITY AND COUNTY OF HONOLULU
PLANNING COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
DECISION AND ORDER DATED OCTOBER 22, 2009 WITH MODIFICATIONS

Electronically Filed
Supreme Court
SCAP-10-0000157
01-AUG-2011
12:16 PM

NO. SCAP-10-0000157

IN THE SUPREME COURT OF THE STATE OF HAWAII

DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY
HONOLULU, Petitioner/Appellant-Appellant,

vs.

LAND USE COMMISSION, STATE OF HAWAII; COLLEEN HANABUSA;
MAILE SHIMABUKURO; and KO OLINA COMMUNITY ASSOCIATION,
Respondents/Appellees-Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 09-1-2719-11)

ORDER GRANTING APPLICATION FOR TRANSFER
(By: Recktenwald, C.J., for the court¹)

Upon consideration of the application for transfer,
filed on July 14, 2011, by petitioner/appellant-appellant
Department of Environmental Services, City and County of
Honolulu, the papers in support and the record,

IT IS HEREBY ORDERED that the application for transfer
is granted pursuant to HRS § 602-58(a)(1) (Supp. 2010). This
case is transferred to the supreme court effective the date of
this order.

DATED: Honolulu, Hawaii, August 1, 2011.

FOR THE COURT:

/s/ Mark E. Recktenwald

Chief Justice



¹ Considered by: Recktenwald, C.J., Nakayama, Acoba, Duffy, and McKenna,
JJ.

EXHIBIT

5

CASE DETAIL REPORT

Generated: 7-NOV-2011 10:11 AM

User: WEBU9014

Search Criteria: Case Id: CAAP-10-0000157

1 record(s) total

Case Description

Case ID: CAAP-10-0000157 - DEPT OF ENVIRON SRVS, vs. LAND USE COMMISSION -NON JURY- Type: AP - Appeal Status: CLOSED - Closed Case-Judgment Satisfied	Filing Date: FRIDAY, NOVEMBER 12, 2010 Court: Intermediate Court of Appeals Location: Intermediate Court of Appeals	Balance Due: \$0.00
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Violations

No Violations were found.

Related Cases

No related cases were found.

Case Event Schedule

No Case Events were found.

Case Parties

Seq #	Assoc	Expn Date	Type	ID	Name / Address
1			Appellant	CTYHONO	City and County of Honolulu
2		06-JAN-2011	Attorney	A3261	Takeuchi, Gary Y.
3			Appellee	SOH	State of Hawaii
4		06-JAN-2011	Attorney	A2084	Suzuki, Russell A.
5			Deputy Corporation Counsel	A8550	Blanchard, Sharon Kay Lam
6		02-FEB-2011	Deputy Corporation Counsel	A8213	Souki, Jesse Kawika
7			Deputy Corporation Counsel	A6095	Viola, Dana Mie Oshiro
8			Court Reporter	RANDERSO	Anderson-Hernandez, Brooke
9		06-JAN-2011	Attorney	A1589	Erickson, E. Diane
10			Deputy Corporation Counsel	A3261	Takeuchi, Gary Y.

















EXHIBIT

















6













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11			Appellee	@1224132	Colleen Hanabusa, Maile Shimabukuro & Ko Olina Community Ass
12		07-JUN-2011	Attorney	A2105	Hanabusa, Colleen
13		02-FEB-2011	Deputy Prosecuting Attorney	A1589	Erickson, E. Diane
14		02-FEB-2011	Deputy Prosecuting Attorney	A2084	Suzuki, Russell A.
15			Deputy Attorney General	A1589	Erickson, E. Diane
16			Deputy Attorney General	A2084	Suzuki, Russell A.
17			Attorney	A6015	Wurdeman, Richard Naiwieha
18			Merit Panel Judge	JCNAMUR	Nakamura, Craig H.
19			Merit Panel Judge	JAFUISE	Fujise, Alexa D. M.
20			Merit Panel Judge	JKLEONARD	Leonard, Katherine G.












Docket Entries

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12-NOV-2010 15:37:00	Notice of Electronic Filing		
16-NOV-2010 15:11:07	Payment Fees adjusted/waived in the amount of \$275.00.		
22-NOV-2010 10:54:15	Appellate Mediation not Included Excluded		
22-NOV-2010 10:54:15	Notice of Electronic Filing		
22-NOV-2010 16:27:34	Request for Transcript (11/18/10) 7/14/10 ECD 11/26/10		
22-NOV-2010 16:27:34	Notice of Electronic Filing		
23-NOV-2010 07:59:11	Record on Appeal Transcript of 7/14/10 hearing	Anderson-Hernandez, Brooke	








Filing Date	Description	Party Name	Monetary
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06-JAN-2011 15:41:26	 Notice of Electronic Filing		
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06-JAN-2011 15:51:41	 Record on Appeal CR (PART C4 OF C11)		
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	Motion to Withdraw, Jesse K. Souki, as Counsel for Appellant-Appellant		
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	Approving Min to Withdraw Jesse Souki as Counsel for Appellant		
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21-MAR-2011 08:46:17	 Notice of Electronic Filing		
21-MAR-2011 10:53:53	 Letter Notice of 30-Day Extension for Filing an Answering Brief - New due date April 27, 2011	State of Hawaii	
21-MAR-2011 10:53:53	 Notice of Electronic Filing	State of Hawaii	
28-MAR-2011 14:46:13	Clerk's Extension Phone(Richard Wurdeman) req 30D AB ext fr 03/28/11 to 04/27/11.	Wurdeman, Richard Naiwicha	
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29-MAR-2011 15:04:19	 Letter EFile Document upload of type Letter	Colleen Hanabusa, Maile Shimabukuro & Ko Olina Community Ass	
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27-APR-2011 14:21:47	 Notice of Electronic Filing	State of Hawaii	
28-APR-2011 12:08:08	 Other Appellee-Appellee Land Use Commission, State of Hawaii's Statement of No Position to Appellees-Appellees Colleen Hanabusa's, Maile Shimabukuro's, and Ko Olina Community Association's Request for Second Extension of Time to File Answering Brief and Certificate of Service	State of Hawaii	

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CASE DETAIL REPORT

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1 record(s) total

Case Description

Case ID: SCAP-10-0000157 - DEPT OF ENVIRON SRVS, vs. LAND USE COMMISSION -NON JURY- Type: AP - Appeal Status: ACTIVE - Active Case	Filing Date: THURSDAY, JULY 14, 2011 Court: Supreme Court Location: Supreme Court	Balance Due: \$0.00
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Violations

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Related Cases

No related cases were found.

Case Event Schedule





No Case Events were found.

Case Parties

Seq #	Assoc	Expn Date	Type	ID	Name / Address
1			Petitioner	CTYHONO	City and County of Honolulu
2		06 JAN 2011	Attorney	A3261	Takeuchi, Gary Y.
3			Respondent	SOH	State of Hawaii
4		06 JAN 2011	Attorney	A2084	Suzuki, Russell A.
5			Deputy Corporation Counsel	A8550	Blanchard, Sharon Kay Lam
6		02 FEB 2011	Deputy Corporation Counsel	A8213	Souki, Jesse Kawika
7			Deputy Corporation Counsel	A6095	Viola, Dana Mie Oshiro
8		06 JAN 2011	Attorney	A1589	Ericksen, E. Diane
9			Deputy Corporation Counsel	A3261	Takeuchi, Gary Y.
10			Respondent	@1224132	Colleen Hanabusa, Maile Shimabukuro & Ko Olina Community Ass

Seq #	Assoc	Expn Date	Type	ID	Name / Address
11		07-JUN-2011	Attorney	A2105	Hanabusa, Colleen
12		02-FEB-2011	Deputy Prosecuting Attorney	A1589	Erickson, E. Diane
13		02-FEB-2011	Deputy Prosecuting Attorney	A2084	Suzuki, Russell A.
14			Deputy Attorney General	A1589	Erickson, E. Diane
15			Deputy Attorney General	A2084	Suzuki, Russell A.
16			Attorney	A6015	Wurdeman, Richard Naiwieha

Docket Entries

Filing Date	Description	Party Name	Monetary
14-JUL-2011 15:24:17	 Application for Transfer	City and County of Honolulu	
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14-JUL-2011 15:24:17	 Notice of Electronic Filing	City and County of Honolulu	
01-AUG-2011 12:16:02	 Order Granting Application for		
	eff date of this order		
01-AUG-2011 12:16:02	 Notice of Electronic Filing		

*** FOR INTERNAL USE ONLY ***

RUN DATE: 01-04-2011

HAJIS CASE SUMMARY SHEET

PAGE: 1

CASE NO: 1CC09-1-002719

INIT DATE: 11-19-2009

ORIG DIST:

CAUSE OF ACTION: AGENCY APPEAL AMOUNT:

COURT COST:

MILEAGE:

FEE:

PLAINTIFF(S): (PA) DEPT OF ENVIRONMENTAL SVCS

DEFENDANT(S): (DE) LAND USE COMMISSION SOH
(DE) COLLEEN HANABUSA
(DE) MAILE SHIMABUKURO
(DE) KO OLINA COMMUNITY ASSN

ATTORNEY(S) FOR PLAINTIFF(S):

(A3261) (CC) GARY YUKIO TAKEUCHI
(A8213) (CC) JESSE KAWIKA SOUKI
(A8550) (CC) SHARON KAY LAM BLANCHARD

-----COURT APPEARANCE SUMMARY-----

APPEARANCE DATE: 11-19-2009 JUDGE ID: JRNISHIMUR

ASSIGNED CIVIL CALENDAR

(3/16/10: REASSIGNED FR 1ST TO 10TH DIV)

10/18/2010: FINAL JUDGMENT PROCESSED BY 10TH
DIV.

*

APPEARANCE DATE: 04-12-2010 JUDGE ID: JRNISHIMUR

STATUS CONFERENCE

(RE: RESETTING OF ORAL ARGUMENT ON 5/5/2010)

(CIVIL NOS. 09-1-2719 & 09-1-2714)

(CASE TRANSFERRED FROM J. SAKAMOTO)

****IN-CHAMBERS WITH COUNSEL****

PRESENT: GARY TAKEUCHI FOR DEFT OF ENVIRONMENTAL
COLLEEN HANABUSA FOR KO OLINA COMM ASSN
RUSSELL SUZUKI FOR LAND USE

COURT RESET ORAL ARGUMENT FOR WED., 7/14/2010
AT 8:30A. COURT WILL SET ASIDE AN HOUR AND A
HALF FOR ARGUMENT.

APPEARANCE DATE: 05-05-2010 JUDGE ID: JKSAMOTO

ORAL ARGUMENT

(TAD FR 5TH (VACANT) DIVISION)

EXHIBIT

7

RUN DATE: 01-04-2011

HAJIS CASE SUMMARY SHEET

PAGE: 2

CASE NO: 1CC09-1-002719

INIT DATE: 11-19-2009

ORIG DIST:

MINUTE ORDER (3/16/2010):

OFF - JUDGE SAKAMOTO HAS TO RECUSE HIMSELF. CASES
REASSIGNED TO THE 10TH DIVISION WITH JUDGE
RHONDA A. NISHIMURA PRESIDING.

APPEARANCE DATE: 05-05-2010 JUDGE ID: JANY

ORAL ARGUMENT

MINUTE ORDER: AT TERM: 03/11/2010

ORDER OF CASE ASSIGNMENT FILED BY THE COURT ON
FEBRUARY 16, 2010, TRANSFERRING THIS CASE FROM
JUDGE HIPO, 5TH DIVISION, TO JUDGE KARL SAKAMOTO,
1ST DIVISION. THIS MATTER IS THEREFORE TAKEN OFF
CALENDAR.

APPEARANCE DATE: 07-14-2010 JUDGE ID: JRNISHIMUR

ORAL ARGUMENT

(CIVIL NOS. 09-1-2719 & 09-1-2714)

(TRANSFERRED FROM 5TH DIVISION & J. SAKAMOTO'S)

COURT REPORTER: B. ANDERSON-HERNANDEZ

CLERK: K. OTSUKA

PRESENT: COLLEEN HANABUSA & MAILE SHIMABUKURO
FOR KO OLINA COMMUNITY ASSOC.

RUSSELL SUZUKI, DEPUTY ATTORNEY GENERAL.

GARY TAKEUCHI & JESSE SOUKI, DEPUTY

CORPORATION COUNSEL FOR DEPT. OF

ENVIRON. SVCS, CITY & COUNTY OF HON.

WINSTON WONG, DEPUTY CORPORATION COUNSEL

FOR PLANNING COMMISSION, CITY & COUNTY

OF HONOLULU IN CV 09-1-2714.

8:36A - 11:51A

AS A PROCEDURAL MATTER, THE COURT FINDS THAT
UNDER THE STATUTE, ENVIRONMENTAL SERVICES DOES
QUALIFY AS "PERSON AGGRIEVED" AND THE COURT WILL
APPLY THE 91-14 STANDARD.

ARGUMENT HEARD BY MR. TAKEUCHI.

9:23A - RECESS.

9:33A - COURT RECONVENED W/ALL PARTIES NOTED.

REPRESENTATIONS MADE BY MR. WONG.

ARGUMENTS MADE BY MS. HANABUSA.

ARGUMENTS MADE BY MR. SUZUKI.

10:26A - RECESS.

10:51A - COURT RECONVENED W/ALL PARTIES NOTED.

REBUTTAL BY MR. TAKEUCHI, MS. HANABUSA & MR.

SUZUKI.

11:04A - RECESS.

7/14/2010 MINUTE ORDER:

RUN DATE: 01-04-2011

HAJIS CASE SUMMARY SHEET

PAGE: 3

CASE NO: 1CC09-1-002719

INIT DATE: 11-19-2009

ORIG DIST:

COURT WILL TAKE THIS MATTER UNDER ADVISEMENT.

8/3/10 MINUTE ORDER:

AFFIRMED AS TO CONDITION NO. 14 OF THE LUC ORDER. MODIFIED AS TO CONDITION NOS. 15 AND 16 OF THE LUC ORDER, TO DELETE REFERENCES TO THE HONOLULU CITY COUNCIL AND THE CITY ADMINISTRATION AND SUBSTITUTE THE SAME WITH THE DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU.

APPELLEE TO PREPARE THE ORDER.

COPY OF THE MINUTE ORDER GIVEN TO:

COLLEEN HANABUSA FOR KO OLINA COMMUNITY ASSOC.

RUSSELL SUZUKI, DEPUTY ATTORNEY GENERAL.

GARY TAKEUCHI & JESSE SOUKI, DEPUTY

CORPORATION COUNSEL FOR DEPT. OF

ENVIRON. SVCS, CITY & COUNTY OF HON.

-----COURT DOCUMENT SUMMARY-----

FILING DATE: 11-19-2009 FILING TIME: 2:58 P.M. DOC NO: 00000000-00000000
NOTICE OF APPEAL; STATEMENT OF THE CASE; DESIGNATION OF RECORD ON APPEAL; ORDER FOR CERTIFICATION AND TRANSMISSION OF RECORD; EXHIBITS A AND B; C/S

FILING DATE: 12-03-2009 FILING TIME: 8:38 A.M. DOC NO: 00000000-00000000
EX PARTE MOTION FOR ENLARGEMENT OF TIME IN WHICH TO CERTIFY AND TRANSMIT THE RECORD ON APPEAL; DECLARATION OF DIANE ERICKSON; ORDER GRANTING EX PARTE MOTION FOR ENLARGEMENT OF TIME IN WHICH TO CERTIFY AND TRANSMIT THE RECORD ON APPEAL; C/S

FILING DATE: 12-09-2009 FILING TIME: 2:47 P.M. DOC NO: 00000000-00000000
LAND USE COMMISSION, STATE OF HAWAII'S RESPONSE TO APPELLANT'S STATEMENT OF THE CASE FILED ON NOVEMBER 19, 2009; C/S

FILING DATE: 12-10-2009 FILING TIME: 1:54 P.M. DOC NO: 00000000-00000000
APPELLEES' COLLEEN HANABUSA, MAILE SHIMABUKURO AND KOOLINA COMMUNITY ANSWER TO APPELLANT'S STATEMENT OF THE CASE; C/S

FILING DATE: 01-19-2010 FILING TIME: DOC NO: 00000000-00000000
CERTIFIED RECORD ON APPEAL
VOLUME I (PAGE 0001 THRU 0230)
(PLACED IN CONF CAB)
(SEE ORIG DOC IN CIV #09-1-2714)

RUN DATE: 01-04-2011

HAJIS CASE SUMMARY SHEET

PAGE: 4

CASE NO: 1CC09-1-002719

INIT DATE: 11-19-2009

ORIG DIST:

FILING DATE: 01-19-2010 FILING TIME: DOC NO: 00000000-00000000
CERTIFIED RECORD ON APPEAL
VOLUME II - (PAGES 0231 THRU 0331)
(PLACED IN CONF CAB)
(SEE ORIG DOC IN CIV #09-1-2714)

FILING DATE: 01-19-2010 FILING TIME: DOC NO: 00000000-00000000
CERTIFIED RECORD ON APPEAL
VOLUME III - (PAGES 0332 THRU 0540)
(PLACED IN CONF CAB)
(SEE ORIG DOC IN CIV #09-1-2714)

FILING DATE: 01-19-2010 FILING TIME: DOC NO: 00000000-00000000
CERTIFIED RECORD ON APPEAL
VOLUME IV - (PAGES 0541 THRU 0764)
(PLACED IN CONF CAB)
(SEE ORIG DOC IN CIV #09-1-2714)

FILING DATE: 01-19-2010 FILING TIME: DOC NO: 00000000-00000000
CERTIFIED RECORD ON APPEAL
VOLUME V - (PAGES 0765 THRU 1007)
(PLACED IN CONF CAB)
(SEE ORIG DOC IN CIV #09-1-2714)

FILING DATE: 01-19-2010 FILING TIME: DOC NO: 00000000-00000000
CERTIFIED RECORD ON APPEAL
VOLUME VI - (PAGES 1008 THRU 1309)
(PLACED IN CONF CAB)
(SEE ORIG DOC IN CIV #09-1-2714)

FILING DATE: 01-19-2010 FILING TIME: DOC NO: 00000000-00000000
CERTIFIED RECORD ON APPEAL
VOLUME VII - (PAGES 1310 THRU 1606)
(PLACED IN CONF CAB)
(SEE ORIG DOC IN CIV #09-1-2714)

FILING DATE: 01-19-2010 FILING TIME: DOC NO: 00000000-00000000
CERTIFIED RECORD ON APPEAL
VOLUME VIII - (PAGES 1607 THRU 1878)
(PLACED IN CONF CAB)
(SEE ORIG DOC IN CIV #09-1-2714)

FILING DATE: 01-19-2010 FILING TIME: DOC NO: 00000000-00000000
CERTIFIED RECORD ON APPEAL
VOLUME IX - (PAGES 1879 THRU 2263)
(PLACED IN CONF CAB)
(SEE ORIG DOC IN CIV #09-1-2714)

RUN DATE: 01-04-2011

HAJIS CASE SUMMARY SHEET

PAGE: 5

CASE NO: 1CC09-1-002719

INIT DATE: 11-19-2009

ORIG DIST:

FILING DATE: 01-19-2010 FILING TIME: DOC NO: 00000000-00000000
CERTIFIED RECORD ON APPEAL
VOLUME X - PAGE 2264 THRU 2888
(PLACED IN CONF CAB)
(SEE ORIG DOC IN CIV #09-1-2714)

FILING DATE: 01-19-2010 FILING TIME: DOC NO: 00000000-00000000
CERTIFIED RECORD ON APPEAL
VOLUME XI - PAGE 2889 THRU 3282
(PLACED IN CONF CAB)
(SEE ORIG DOC IN CIV #09-1-2714)

FILING DATE: 01-19-2010 FILING TIME: DOC NO: 00000000-00000000
CERTIFIED RECORD ON APPEAL
VOLUME XI - PAGE 2889 THRU 3282
(PLACED IN CONF CAB)
(SEE ORIG DOC IN CIV #09-1-2714)

FILING DATE: 01-19-2010 FILING TIME: DOC NO: 00000000-00000000
CERTIFIED RECORD ON APPEAL
VOLUME XIII - (PAGES 3632 THRU 3964)
(PLACED IN CONF CAB)
(SEE ORIG DOC IN CIV #09-1-2714)

FILING DATE: 01-19-2010 FILING TIME: DOC NO: 00000000-00000000
CERTIFIED RECORD ON APPEAL
VOLUME XII - (PAGES 3283 THRU 3631)
(PLACED IN CONF CAB)
(SEE ORIG DOC IN CIV #09-1-2714)

FILING DATE: 01-19-2010 FILING TIME: 11:24 A.M. DOC NO: 00000000-00000000
CERTIFIED RECORD ON APPEAL; INDEX; EXECUTIVE
OFFICER'S CERTIFICATE; AND C/S

FILING DATE: 01-20-2010 FILING TIME: 3:06 P.M. DOC NO: 00000000-00000000
NOTICE OF ADMINISTRATIVE APPEAL BRIEFING
SCHEDULE
(OPENING BRIEF 3/1/10; ANSWERING BRIEF 4/12/10;
REPLY BRIEF 4/22/10; ORAL ARGUMENT 5/5/10,
11:30A)

FILING DATE: 02-16-2010 FILING TIME: 2:07 P.M. DOC NO: 00000000-00000000
ORDER OF CASE REASSIGNMENT

FILING DATE: 03-01-2010 FILING TIME: 3:57 P.M. DOC NO: 00000000-00000000
APPELLANT DEPT OF ENVIRONMENTAL SERVICES, CITY AND
COUNTY OF HONOLULU'S OPENING BRIEF; C/S

RUN DATE: 01-04-2011

HAJIS CASE SUMMARY SHEET

PAGE: 6

CASE NO: 1CC09-1-002719

INIT DATE: 11-19-2009

ORIG DIST:

FILING DATE: 03-16-2010 FILING TIME: 10:55 A.M. DOC NO: 00000000-00000000
ORDER OF CASE REASSIGNMENT
(CASE REASSIGNED TO JUDGE NISHIMURA, 10THDIV)

FILING DATE: 03-17-2010 FILING TIME: 8:00 A.M. DOC NO: 00000000-00000000
NOTICE OF SETTING
(HRG 4/12/10, 10:00 AM, J/NISHIMURA)

FILING DATE: 04-08-2010 FILING TIME: 1:47 P.M. DOC NO: 00000000-00000000
APPELLEES COLLEEN HANABUSA, MAILE SHIMABUKURO AND
KOOLINA COMMUNITY ANSWERING BRIEF; C/S
(HRG 5/5/10 @ 11:30AM BEFORE J/NISHIMURA)

FILING DATE: 04-12-2010 FILING TIME: 3:55 P.M. DOC NO: 00000000-00000000
APPELLEE STATE OF HAWAII LAND USE COMMISSION'S
ANSWERING BRIEF; C/S (HRG 7/14/10 @ 8:30AM
BEFORE J/NISHIMURA)

FILING DATE: 04-22-2010 FILING TIME: 4:00 P.M. DOC NO: 00000000-00000000
APPELLANT DEPARTMENT OF ENVIRONMENTAL SERVICES
CITY AND COUNTY OF HONOLULU'S REPLY BRIEF; C/S
(HRG 7/14/10 @ 8:30AM BEFORE J/NISHIMURA)

FILING DATE: 09-21-2010 FILING TIME: 8:38 A.M. DOC NO: 00000000-00000000
ORDER AFFIRMING LAND USE COMMISSION'S ORDER
ADOPTING THE CITY AND COUNTY OF HONOLULU PLANNING
COMMISSION'S FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER DATED OCTOBER 22,
2009 WITH MODIFICATIONS

FILING DATE: 10-19-2010 FILING TIME: 8:17 A.M. DOC NO: 00000000-00000000
FINAL JUDGMENT

FILING DATE: 10-21-2010 FILING TIME: 8:31 A.M. DOC NO: 00000000-00000000
NOTICE OF ENTRY OF JUDGMENT

FILING DATE: 11-12-2010 FILING TIME: 3:36 P.M. DOC NO: 00000000-00000000
NOTICE OF APPEAL; EXHIBITS A-C; C/S

FILING DATE: 11-12-2010 FILING TIME: 3:37 P.M. DOC NO: 00000000-00000000
CIVIL APPEAL DOCKETING STATEMENT

FILING DATE: 11-18-2010 FILING TIME: 11:16 A.M. DOC NO: 00000000-00000000
REQUEST FOR TRANSCRIPT OF PROCEEDINGS FOR RECORD
ON APPEAL
(B ANDERSON-HERNANDEZ - 7/14/10)

FILING DATE: 12-21-2010 FILING TIME: 8:13 A.M. DOC NO: 00000000-00000000
REQUEST TO ACCESS COURT RECORD (HCRR)

PLANNING COMMISSION OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

IN THE MATTER OF THE APPLICATION)

OF)

DEPARTMENT OF)
ENVIRONMENTAL SERVICES)

2002/SUP-6

FOR AN AMENDMENT TO A)
STATE SPECIAL USE PERMIT)

FINDINGS OF FACT, CONCLUSIONS, AND DECISION

I. PROPOSAL

The Planning Commission, at its public hearing held on March 5, 2003, pursuant to Section 205-6, Hawaii Revised Statutes and Subchapter 4, Rules of the Planning Commission, City and County of Honolulu, considered the application of Department of Environmental Services to amend Special Use Permit (SUP) File No. 86/SUP-5. The applicant proposes a 21-acre, 5-year capacity expansion to the existing 86.5-acre landfill to allow continued disposal of municipal solid waste (MSW). The proposed expansion includes 4 cells (E1 through E4) for disposing MSW, berms, detention and stilling basins, drainage channels, and access routes located within the State Land Use Agricultural District in Waimanalo Gulch, Honouliuli, Ewa, Oahu. The project area is identified by Tax Map Key 9-2-3: portion of 72 and portion of 73.

EXHIBIT

8

EXHIBIT E

II. FINDINGS OF FACT

On the basis of the evidence presented, the Commission hereby finds that:

1. The subject expansion area is identified by Tax Map Key 9-2-3: portion of Parcel 72 and portion of Parcel 73 and is owned by the City & County of Honolulu.
2. The site is located in Waimanalo Gulch, Honouliuli, Ewa, Oahu.
3. The site is within the State Land Use Agricultural District, is partially within the Urban Growth Boundary of the Ewa Development Plan, and is zoned AG-2 General Agricultural District.
4. The landfill is not classified by the State Agricultural Lands of Importance to the State of Hawaii classification system. The University of Hawaii Land Study Bureau overall master productivity rating for the property is "E" which indicates very poor crop productivity potential.
5. The site is adjacent to Hawaiian Electric Company's Kahe Power Plant and Kahe Point Homes on its northwestern boundary; to the proposed Makaiwa Hills residential and commercial community on its southeastern boundary; and to Farrington Highway on its southwestern boundary. Across Farrington Highway from the site is the Ko Olina Resort, which contains resort and residential units, a golf course and marina. Honokai Hale and Nanakai Gardens residential subdivisions are located about 4,000 feet to the southeast of the site.
6. The Waianae Coast Neighborhood Board No. 24 recommended that Cell E1 be relocated to minimize litter, odor, and visual impacts; that the 5-year deadline to terminate landfill

operations be clarified, and that community members be on the landfill siting team. The Honokai Hale/Makakilo/Kapolei Neighborhood Board No. 34 opposed the placement of refuse towards the front of the landfill.

7. The Department of Planning and Permitting (DPP) accepted the Final Supplemental Environmental Impact Statement (FSEIS) on January 10, 2003. Notice of the DPP's acceptance of the FSEIS was published in the January 23, 2003 issue of the Environmental Notice, in accordance with the Environmental Impact Law, Chapter 343, Hawaii Revised Statutes.
8. The Planning Commission received a Report and Recommendation dated February 28, 2003 from the Director of Planning and Permitting providing an analysis of the Special Use Permit amendment request and its recommendation for approval with 2 additional conditions.
9. At the public hearing of March 5, 2003, 3 persons testified and one written testimony was received. Councilmember Mike Gabbard, representing Council District 1, supported the request with conditions relating to closure of the landfill and to inclusion of community members on a proposed alternative site selection committee. Councilmember Nestor Garcia, representing Council District 9, supported the expansion with conditions relating to closure, alternative site selection, inclusion of community members in the site selection committee, and encouragement of use of alternative technologies and waste recovery programs. State Senator Brian Kanno opposed the expansion request. A member of the Waianae community indicated that there are concerns on impacts to the neighborhood and the environment and opposed the expansion request.

10. The Planning Commission considered the public testimony and recommended that:

- a: The applicant submit to the City Council, an alternative landfill site(s) by December 31, 2003, and
- b: Community members be included on the alternate site selection committee.

Items 10a and 10b are recommendations to the applicant and are not included as conditions of approval of the SUP amendment.

III. CONCLUSIONS OF LAW

The Planning Commission hereby concludes that:

1. The proposed use would not be contrary to the objectives of the State Land Use Law. The landfill and proposed expansion are located on soils that have very poor potential for crop production.
2. The proposed expansion would not adversely affect surrounding property if operated in accordance with relevant governmental approvals and requirements, including conditions of the Special Use Permit. Concerns relating to impacts on the surrounding community and the environment have been adequately disclosed in the FSEIS. Mitigation measures should be implemented in accordance with the applicant's representations as documented in the FSEIS.
2. The proposal will not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, and police and fire protection. Government agencies did not object to the proposed SUP amendment.
3. Unusual conditions, trends and needs have arisen since the Agricultural District boundaries and regulations were established: The landfill is quickly approaching its

maximum capacity, and there is no feasible alternative that can be implemented in time to dispose MSW after the approved landfill capacity is exhausted. At the time the original SUP was granted, the Planning Commission and the Land Use Commission found that the proposal met all 5 guidelines for issuing an SUP. Also at that time, plans for the development of Kapolei as the Second City and development of support housing, Ko Olina Resort, industrial, and support infrastructure in proximity to the landfill were being implemented.

4. The site's soil quality is not conducive crop production and the steep terrain does not lend itself to pasture use. Prior SUP approvals have allowed the removal of the property from agricultural use. Circumstances relating to use of the property for agriculture have not changed since the original SUP was granted. The State Department of Agriculture has not objections to the proposal.

IV. DECISION AND ORDER

Pursuant to the foregoing Findings of Fact, Conclusions and attachment, it was the decision of the Planning Commission, at its meeting of March 5, 2003, to approve Special Use Permit No. 2002/SUP-6, subject to the following additional conditions:

10. 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.
11. Prior to commencing land filling in the 21-acre expansion area, the applicant shall submit to the Director of Planning and Permitting for review and approval, a metes and bounds

description and map of the approved landfill area as permitted by this Special Use Permit and amendments thereto. Any minor modifications to allow reasonable adjustments of the approved area due to engineering and/or health and safety requirements may be approved by the Director of Planning and Permitting, providing there is no net increase to the approved area of 107.5 acre.

Dated at Honolulu, Hawaii this 13th day of March, 2003.

PLANNING COMMISSION

CITY AND COUNTY OF HONOLULU

By Brian Yakata for
CHARLIE RODGERS, Chair

Doc 207619

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In The Matter Of The Application Of The)
)
DEPARTMENT OF ENVIRONMENTAL)
SERVICES, CITY AND COUNTY OF)
HONOLULU (FKA DEPARTMENT OF)
PUBLIC WORKS, CITY AND COUNTY OF)
HONOLULU)

For An Amendment To The Special Use)
Permit Which Established A Sanitary Landfill)
On Approximately 86.5 Acres Of Land Within)
The State Land Use Agricultural District At)
Waimanaló Gulch, Honouliuli, 'Ewa, O'ahu,)
Hawai'i, TMK No: 9-2-03: Portion 72 and)
Portion 73 (fka TMK No: 9-2-03: Portion 2 and)
Portion 13))

DOCKET NO. SP87-362

DECISION AND ORDER
APPROVING AMENDMENT
TO SPECIAL USE PERMIT

This is to certify that this is a true and correct
copy of the document on file in the office of the
State Land Use Commission, Honolulu, Hawaii.

6/9/03

Date

by

Executive Officer

DECISION AND ORDER APPROVING AMENDMENT TO SPECIAL USE PERMIT

EXHIBIT

9

EXHIBIT F

BEFORE THE LAND USE COMMISSION.

OF THE STATE OF HAWAII

In The Matter Of The Application Of The)
)
DEPARTMENT OF ENVIRONMENTAL)
SERVICES, CITY AND COUNTY OF)
HONOLULU (FKA DEPARTMENT OF)
PUBLIC WORKS, CITY AND COUNTY OF)
HONOLULU)

DOCKET NO. SP87-362
)
DECISION AND ORDER
APPROVING AMENDMENT
TO SPECIAL USE PERMIT

For An Amendment To The Special Use)
Permit Which Established A Sanitary Landfill)
On Approximately 86.5 Acres Of Land Within)
The State Land Use Agricultural District At)
Waimanalo Gulch, Honouliuli, 'Ewa, O'ahu,)
Hawaii, TMK No: 9-2-03: Portion 72 and)
Portion 73 (fka TMK No: 9-2-03: Portion 2 and)
Portion 13))

DECISION AND ORDER APPROVING AMENDMENT TO SPECIAL USE PERMIT

On January 17, 2003, the Department of Environmental Services, City and County of Honolulu ("Applicant"), formerly known as the Department of Public Works, City and County of Honolulu, filed an application to amend an existing special use permit ("Amendment") with the Department of Planning and Permitting, City and County of Honolulu ("DPP"), pursuant to section 205-6, Hawaii Revised Statutes ("HRS"), and sections 15-15-95 and 15-15-96, Hawaii Administrative Rules ("HAR"). The Applicant proposes to expand the existing Waimanalo Gulch Sanitary Landfill on approximately 21 acres of land within the State Land Use Agricultural District at

Waimanalo Gulch, Honouliuli, Ewa, O'ahu, Hawai'i, identified as TMK No: 9-2-03: portion 72 and portion 73 ("Property").¹ The Property is owned by the City and County of Honolulu and is under the jurisdiction of the Applicant.

On January 22, 2003, the DPP accepted the Amendment.

On March 5, 2003, the Planning Commission, City and County of Honolulu ("Planning Commission"), conducted a hearing on the Amendment, pursuant to a public notice published on January 31, 2003. After due deliberation, the Planning Commission recommended approval of the Amendment to the Land Use Commission ("LUC"), subject to the existing nine conditions and two additional conditions.

On March 13, 2003, the LUC received a copy of the decision and record of the Planning Commission's proceedings on the Amendment.

The LUC has jurisdiction over the Amendment. Section 205-6, HRS, and sections 15-15-95 and 15-15-96, HAR, authorize the LUC to approve special use permits and amendments thereto for areas greater than 15 acres where application for LUC approval is made within 60 days after the decision is rendered on the request to the Planning Commission.

On March 27, 2003, the LUC met in Waipahu, O'ahu, to consider the Amendment.² Frank Doyle and Maile R. Chun, Esq., appeared on behalf of the

¹ The actual landfill expansion is planned on approximately 14.9 acres. Accessory structures and uses, including, but not limited to berms and detention basins, are planned on the remaining acreage.

SPR7-062 Department of Environmental Services, City & County of Honolulu
(aka Department of Public Works, City & County of Honolulu)
Decision and Order Approving Amendment to Special Use Permit

Applicant. David K. Tanoue, Esq.; Eric G. Crispin; Barbara Kim-Stanton; and Raymond Young appeared on behalf of the DPP. Russell Y. Tsuji, Esq., and Abe Mitsuda were also present on behalf of the Office of Planning. At the meeting, the Applicant presented a chart entitled "Mayor's Blue Ribbon Landfill Site Selection Committee, New Landfill Timeline, March 27, 2003," which the LUC accepted as Exhibit Number 33 to the record in this proceeding. The Applicant represented, among other things, 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.

Conformance With Special Use Permit Criteria

Following discussion by the Commissioners, a motion was made and seconded to grant the Amendment, subject to the conditions as reflected in the minutes of the meeting, including, among other requirements, that if a new landfill site is not selected by December 31, 2003, the special use permit would immediately expire. An amendment clarifying this motion was then made and seconded to amend the date to December 1, 2003; by which the Blue Ribbon Landfill Site Selection Committee is to recommend a new landfill site and to further specify that if the City Council fails to select the new site by June 1, 2004, the special use permit would immediately expire.

The LUC found that i) By Order dated April 20, 1987, the LUC approved a special use

² Pursuant to section 92-3, HRS, Ernest Adaniya, Greg Perry, Darrell Bussell, Paul B. Kekina, Lieutenant Commander Chuck Lewis, Richard Payne, Gail Butchart, Todd Apo, Cynthia K.L. Rezentes, and Kevin Mizuno presented oral testimony, and State Senator Brian Kanno and Councilmember Nestor Garcia submitted written testimony.

permit to establish the Waimanalo Gulch Sanitary Landfill on approximately 60.5 acres. By Order dated October 31, 1989, the LUC approved an amendment to the special use permit to expand the landfill by approximately 26 acres; ii) The current expansion is consistent with the solid waste handling and disposal policies of the 'Ewa Development Plan and will serve all of O'ahu's residents and visitors; iii) The Property is currently in open space and is located adjacent to the existing landfill; iv) No agricultural production occurs on the Property; v) There are no historic sites on the Property and there are no traditional cultural practices that have been identified that are specific to the Property; vi) There are no threatened or endangered species of flora and fauna nor are there any species of concern on the Property; vii) The expansion of the landfill will not adversely affect surrounding properties provided mitigation measures and all applicable government rules and requirements are followed; viii) The Applicant will comply with Federal and State regulations governing siting, design standards, operating requirements, groundwater monitoring and corrective action, closure, post-closure care, and financial assistance; ix) The Property will be restricted from handling or treating toxic hazardous waste material; x) Permanent and temporary fencing will be utilized to control litter in the expansion cells; xi) Vacuum equipment will be employed to clean the litter from the fences, and cleanup crews will be deployed when notice is received that litter has drifted offsite; xii) The Applicant will implement odor and gas emission control measures including a gas recovery and monitoring system, regular use

of odor misters, regular use of cover material, early onsite queuing of waste haulers, and diversion of sewage sludge offsite for drying and processing at the Sand Island Wastewater Treatment Plant; xiii) The expansion is not expected to result in noise levels greater than produced from current activities; xiv) Most of the short-term noise generated will be during operation and mobilization of heavy construction equipment; xv) The Applicant will comply with State noise regulations to mitigate short-term impacts; xvi) Longer term measures to ensure noise abatement include properly muffling equipment with noise attenuation devices, scheduling rock crushing during normal landfill operation hours, and landscaping with vegetation; xvii) Upon closure of the landfill, the Applicant and Waste Management of Hawaii, Inc., the operator of the landfill, will be responsible for capping the entire landfill, monitoring groundwater, methane gas, and leachates for 30 years; xviii) Exposed areas will be seeded or hydromulched, as appropriate, using plants similar to those found around the landfill; xix) Fabric to mimic rock outcrops will also be strategically placed to break up the homogenous appearance of the filled areas relative to the surrounding hillside; xx) The impact of the landfill on Ewa and Nanakuli residential values was studied; xxi) Proximity to the landfill is not a consistent contributor to property values and does not adversely affect property values; xxii) The existing landfill has been in operation since 1989 and the relevant support infrastructure and services for the proposed expansion are adequate; xxiii) The approved capacity of the landfill is rapidly approaching its

maximum; xxiv) The landfill receives on a daily basis 600 tons of ash residue from the Honolulu Program on Waste Energy Recovery and 800 tons of municipal solid waste for a total of 1,400 tons per day; xxv) The Applicant evaluated alternative sites and technologies for the disposal of municipal solid waste; xxvi) The expansion of the landfill is the only feasible alternative that can be implemented in time to dispose of municipal solid waste after the approved landfill capacity is exhausted; and xxvii) The Property has extremely rocky soils and is not conducive to crop production, and the steep terrain is not appropriate for pasture use.

Following discussion by the Commissioners, a vote was taken on the amendment to the motion. There being a vote tally of 7 ayes, 1 nay, and 1 absent, the amendment carried. A vote was then taken on the main motion, as amended. There being a vote tally of 7 ayes, 1 nay, and 1 absent, the motion carried.

ORDER

Having duly considered the complete record of the Amendment and the oral arguments presented by the parties in the proceeding, and a motion and amendment thereto having been made at a meeting conducted on March 27, 2003, in Waipahu, O'ahu, and the motion and amendment having received the affirmative votes required by section 15-15-13, HAR, and there being good cause for the motion and amendment, the Commission hereby APPROVES the Amendment granted by the Planning Commission to expand the existing Waimanalo Gulch Sanitary Landfill on

approximately 21 acres of land within the State Land Use Agricultural District at

Waimanalo Gulch, Honouliuli, Ewa, O'ahu, Hawai'i, identified as TMK No: 9-2-03:

portion 72 and portion 73, and approximately identified on Exhibit "A," attached hereto

and incorporated by reference herein, subject to the following conditions:

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 Use Permit shall immediately expire.

2. In the event that Condition No. 1 is satisfied, Condition No. 14 shall become effective.

3. That an earth berm shall be installed prior to the commencement of any waste disposal operations.

4. The landscaping plans which would include plant names, sizes, quantities and location shall be submitted to the Department of Planning and Permitting for approval and shall be implemented within 90 days of completion of the berm work.

5. The facility shall be operational between the hours of 7:00 a.m. and 4:30 p.m. daily.

6. The Applicant shall obtain all necessary approvals from the State Department of Health, Department of Transportation, Commission on Water Resource Management, and Board of Water Supply for all on-site and off-site improvements

involving access, storm drainage, leachate control, water, well construction, and wastewater disposal.

7. The Planning Commission or Director of the Department of Planning and Permitting may at any time impose additional conditions when it becomes apparent that a modification is necessary and appropriate.

8. The Applicant shall notify the Planning Commission of termination of use for appropriate Planning Commission action or disposition of the permit.

9. In accordance with Chapter 11-60, "Air Pollution Control," Hawai'i Administrative Rules, the Applicant shall be responsible for ensuring that effective dust control measures during all phases of development, construction, and operation of the landfill expansion are provided to minimize or prevent any visible dust emission from impacting surrounding areas. The Applicant shall develop a dust control management plan that identifies and addresses all activities that have a potential to generate fugitive dust.

10. That the City and County of Honolulu shall indemnify and hold harmless the State of Hawai'i and all of its agencies and/or employees for any lawsuit or legal action relating to any groundwater contamination and noise and odor pollution relative to the operation of the landfill.

11. The Applicant shall coordinate construction and operation of the landfill with the Hawaiian Electric Company.

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.

13. Prior to commencing land filling in the 21-acre expansion area, the Applicant shall submit to the Director of the Department of Planning and Permitting for review and approval, a metes and bounds description and map of the approved landfill area as permitted by this Special Use Permit and amendments thereto. Any minor modifications to allow reasonable adjustments of the approved area due to engineering and/or health and safety requirements may be approved by the Director of the Department of Planning and Permitting; provided that there is no net increase to the approved area of 107.5 acres. A copy of the metes and bounds description and map shall be provided to the Land Use Commission.

14. The Applicant shall promptly provide, without any prior notice, annual reports to the Department of Planning and Permitting and the Land Use Commission in connection with the status of the landfill expansion and the Applicant's progress in complying with the conditions imposed herein. The annual report shall be submitted in a form prescribed by the Executive Officer of the Commission.

15. The City and County of Honolulu shall select a new landfill site. The recommendation for a new site shall be forwarded to the Planning Commission and City Council no later than December 1, 2003.

16. The City and County of Honolulu shall ensure that funding for design and planning is included in the FY05 budget to demonstrate the City's commitment to the new site and to ensure that no further extensions are necessary.

17. The City and County of Honolulu shall initiate the public comment and environmental review process for the new site no later than December 31, 2004.

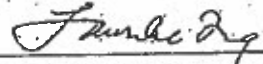
18. The City and County of Honolulu shall, to the extent feasible, use alternative technologies to provide a comprehensive waste stream management program that includes H-Power, plasma arc, plasma gasification, and recycling technologies.


19. The City and County of Honolulu shall appropriately implement by executive order or ordinance the seven bullet points identified in the Applicant's Exhibit 3, Appendix H, page 1-3, regarding the third boiler at H-Power, wood recovery, metal recovery, gypsum recovery, enhanced enforcement of landfill bans, implementation of the bottle bill, and establishment of user fees.

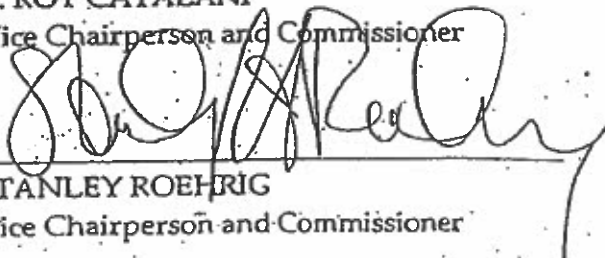
ADOPTION OF ORDER


The undersigned Commissioners, being familiar with the record and the proceedings, hereby adopt and approve the foregoing ORDER this 5th day of June, 2003. The ORDER and its ADOPTION shall take effect upon the date this ORDER is certified and filed by this Commission.

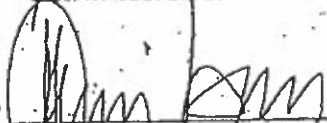
LAND USE COMMISSION
STATE OF HAWAII

By 
LAWRENCE N. C. ONG
Chairperson and Commissioner

By 
P. ROY CATALANI
Vice Chairperson and Commissioner

By 
STANLEY ROEHRIG
Vice Chairperson and Commissioner

By 
BRUCE A. CORREA
Commissioner

By 
PRAVIN DESAI
Commissioner

By

Isaac Fiesta
ISAAC FIESTA, JR.
Commissioner

By

Steven Montgomery
STEVEN MONTGOMERY
Commissioner

By

Randall Sakumoto
RANDALL SAKUMOTO
Commissioner

By

OPPOSED

PETER YUKIMURA
Commissioner

APPROVED AS TO FORM:

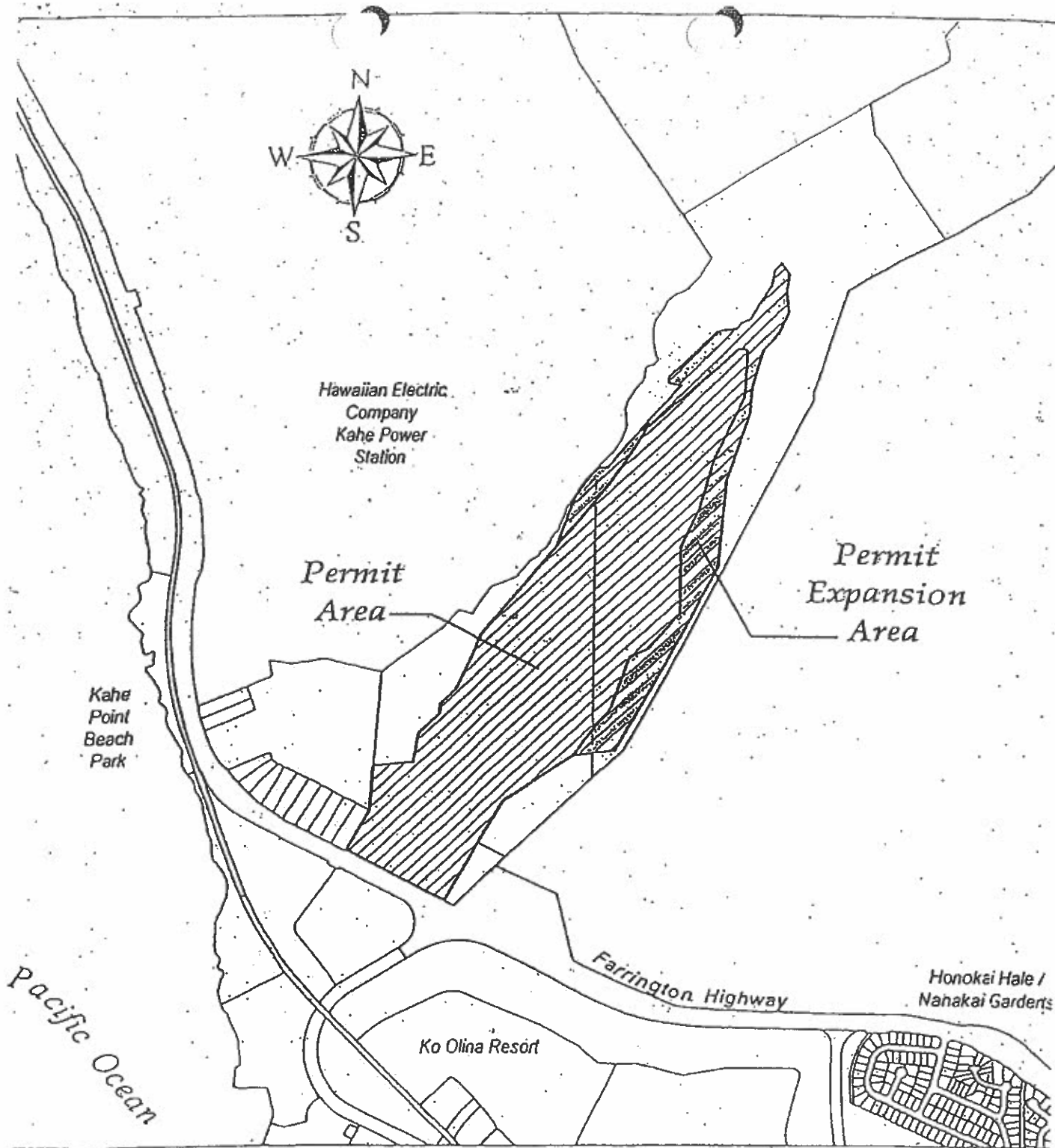
Dean Quicken
Deputy Attorney General

Filed and effective on

June 9, 2003

Certified by:

Anthony J. Helling
Executive Officer



SP87-362 DEPARTMENT OF ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF HONOLULU
(fka Department of Public Works, City and County of Honolulu)

LOCATION MAP

TMK No.: 9-2-3: portion 72 and portion 73
Waimanalo Gutch, Honouliuli, Ewa, O'ahu, Hawai'i
Scale 1" = 1,000 ft
EXHIBIT "A"



BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In The Matter Of The Application Of The	)	DOCKET NO. SP87-362
)	
DEPARTMENT OF ENVIRONMENTAL	)	ORDER GRANTING IN PART
SERVICES, CITY AND COUNTY OF	)	AND DENYING IN PART
HONOLULU (FKA DEPARTMENT OF	)	MOTION TO AMEND AND/OR
PUBLIC WORKS, CITY AND COUNTY OF	)	STAY THE DECISION AND
HONOLULU	)	ORDER APPROVING
	)	AMENDMENT TO SPECIAL
For An Amendment To The Special Use	)	USE PERMIT DATED JUNE 3,
Permit Which Established A Sanitary Landfill	)	2003
On Approximately 107.5 Acres Of Land Within)	
The State Land Use Agricultural District At)	
Waimanalo Gulch, Honouliuli, 'Ewa, O'ahu,)	
Hawai'i, TMK No: 9-2-03: Portion 72 and)	
Portion 73 (fka TMK No: 9-2-03: Portion 2 and)	
Portion 13))	
)	

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO AMEND
AND/OR STAY THE DECISION AND ORDER APPROVING AMENDMENT TO
SPECIAL USE PERMIT DATED JUNE 3, 2003

On March 25, 2004, the Department of Environmental Services, City and County of Honolulu ("Applicant"), formerly known as the Department of Public Works, City and County of Honolulu, filed a Motion To Amend And/Or To Stay The Decision And Order Approving Amendment To Special Use Permit Dated June 3, 2003¹ ("Motion"), pursuant to section 15-15-70, Hawai'i Administrative Rules ("HAR"). The Applicant requested that the Land Use Commission ("Commission") issue an Order (i)

¹ The actual issuance date of the Decision And Order Approving Amendment To Special Use Permit is June 9, 2003.

amending or, in the alternative, staying the site selection deadline for a new landfill as provided in this Commission's Decision And Order Approving Amendment To Special Use Permit dated June 3, 2003²; and (ii) clarifying whether the Waimanalo Gulch Sanitary Landfill is a site that may be considered by the Honolulu City Council ("Council").

Attached to the Motion was an Affidavit of Frank J. Doyle, P.E. ("Affidavit"), Director of the Department of Environmental Services, the Applicant herein. The Affidavit stated, among other things, that (i) in previous testimony before this Commission on March 27, 2003, regarding the expansion of the Waimanalo Gulch Sanitary Landfill, the Applicant represented that it would continue to seek alternate disposal sites and other technologies and waste recovery programs including the expansion of H-POWER to reduce the amount of waste that is disposed of in landfills and that consistent with planning objectives, it would discontinue landfill activities at Waimanalo Gulch by May 1, 2008, but that in accordance with Council Resolution 04-75, CD1, the Applicant was asked by the Council to appear before this Commission and request (a) an extension of the deadline to select a landfill site from June 1, 2004, to December 1, 2004, and (b) clarification from this Commission as to whether Waimanalo

The condition to which the Applicant seeks an amendment or stay is Condition Number 1, which states:

"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 Use Permit shall immediately expire." (Emphasis added)

Gulch may be considered by the Council as one of the available landfill sites; (ii) although the Applicant believes that the Council currently has sufficient information to select a new site for the City landfill, as set forth in Council Resolution 04-75, CD1, the Council believes that "it should not be expected to make a decision on the next landfill site until all available information has been presented and the public given every opportunity to comment." (Emphasis in original); and (iii) should this Commission grant the Applicant's Motion and extend the site selection deadline for six months, this Commission's May 1, 2008, deadline regarding the cessation of operations and closure of the Waimanalo Gulch Sanitary Landfill would also be affected and will require the Applicant to (a) request a six-month extension of the May 1, 2008, deadline; and (b) submit an application requesting allowance of additional acreage within the existing landfill area.

The Commission considered the Motion at its meeting on April 1, 2004, in Honolulu, Hawai'i. Gary Y. Takeuchi Esq., and Frank J. Doyle appeared on behalf of the Applicant. David K. Tanoue, Esq., Don Kitauka, Esq., and Raymond Young appeared on behalf of the Department of Planning and Permitting ("DPP"). John W. K. Chang, Esq. and Abe Mitsuda appeared on behalf of the Office of Planning ("OP").³ At the meeting, the Commission heard testimony from the Applicant's witnesses, i.e.,

³ On March 31, 2004, the OP filed a Statement Of Position Regarding The Motion, which recommended that the deadline for selecting a landfill site be extended from June 1, 2004, to December 1, 2004, and that the decision on the location of the landfill be made by the City and County of Honolulu subject to receipt of all appropriate Federal, State, and County approvals.

Councilmembers Rod Tam and Mike Gabbard and four members of the Blue Ribbon Advisory Committee: Bruce Anderson, Cynthia K. L. Rezentes, Kathy Bryant-Hunter, and Todd K. Apo.⁴ The Commission also received into evidence oral and/or written public testimony from Jim Corcoran; Stann Reiziss; Dr. Terry Shintani; Kamaki Kanahale; Bill and Angela Hutton; Lorrie Stone, Esq.; Arvid Youngquist; Herbert Hew Len; Dayton M. Nakanelua; Councilmember Barbara Marshall; Councilmember Nestor Garcia; Alison and Nicholas Quinlivan; Lily and Oscar Wand; Mario, Henrietta, and Amanda Beekes; John A. and Laura L. Epstein and Family; Dave Dedinsky; Jo Anne SawyerKnoll; Ron and Carol Scherman; Wayne H. Muraoka; and State Senator Colleen Hanabusa.

Following discussion, the Commission clarified that it had jurisdiction only in regard to the Applicant's request to extend the site selection deadline for a new landfill from June 1, 2004, to December 1, 2004, and that Applicant's request for clarification as to whether the Waimanalo Gulch Sanitary Landfill is a site that may be considered by the Honolulu City Council was not within the jurisdiction of this Commission, and therefore it would not be considered as part of the Commission's deliberations on the Motion.⁵ As part of its case-in-chief, the Applicant noted, among

⁴ Councilmembers Tam and Gabbard and Todd Apo also submitted written testimonies.

⁵ The Commission also acknowledged that it would not consider the Applicant's requests for a six-month extension to the May 1, 2008, deadline and for additional acreage to be incorporated within the existing landfill area since the requests were not before the Commission at this time.

other things, that (i) its position that the Waimanalo Gulch Sanitary Landfill would close by May 1, 2008, had not changed; (ii) it believed there was sufficient information for the City Council to select a new site for the landfill; (iii) it opposed the extension to the site selection deadline; and (iv) although some financial information had to be acquired, efforts were already underway to obtain said information.

The DPP stated that it did not take a position on the Motion and further stated that since this Commission imposed the condition requiring that a new landfill site be selected by June 1, 2004, the Commission had jurisdiction to consider the requested extension to the deadline without the City and County of Honolulu Planning Commission first approving the extension.⁶ The DP stated that it had no objections to the extension of the June 1, 2004, deadline.

Following deliberation by the Commissioners, a motion was made and seconded to grant an extension of the deadline to select a landfill site from June 1, 2004, to December 1, 2004, subject to the condition that the City Council submit monthly progress reports to this Commission to include, among other things, updates on the City's efforts to select a new landfill site and to find alternative technologies to reduce or eliminate landfilling. Following discussion by the Commissioners, a vote was taken

⁶ Pursuant to the request of the Commission, the Office of the Corporation Counsel ("OCC") represented that it would provide this Commission with a post-hearing brief affirming the Commission's authority in this matter. The OCC subsequently filed the brief with the Commission on April 8, 2004.

on the motion. There being a vote tally of 7 ayes, 0 nays, and 2 absent, the motion carried.

ORDER

Having duly considered the Applicant's Motion, the supporting Affidavit, the oral and written testimonies of the public witnesses, and a motion having been made at a meeting conducted on April 1, 2004, in Honolulu, Hawai'i, and the motion having received the affirmative votes required by section 15-15-13, HAR, and there being good cause for the motion, this Commission hereby grants an extension of the deadline to select a landfill site from June 1, 2004, to December 1, 2004, subject to the City Council's submittal of monthly progress reports to this Commission to include, among other things, updates on the City's efforts to select a new landfill site and to find alternative technologies to reduce or eliminate landfilling. All other conditions to this Commission's Decision And Order Approving Amendment To Special Use Permit dated June 9, 2003, shall remain in full force and effect. All other matters raised by the pleadings are specifically not granted, either because they are not properly before the Commission or because they are not within the jurisdiction of the Commission.

ADOPTION OF ORDER

The undersigned Commissioners, being familiar with the record and the proceedings, hereby adopt and approve the foregoing ORDER this 6th day of

3430

May, 2004. The ORDER and its ADOPTION shall take effect upon the date this
ORDER is certified and filed by this Commission.

Dated: Honolulu, Hawai'i, May 10, 2004

LAND USE COMMISSION
STATE OF HAWAII

Lawrence N. Geng
By LAWRENCE N. GENG
Chair and Commissioner

APPROVED AS TO FORM:

Dean A. Jensen
Deputy Attorney General

Filed and effective on
MAY 10 2004, 2004

Certified by:

Anthony J. ...
Executive Officer

3431

LAND USE COMMISSION
MINUTES OF MEETING

April 1, 2004

Conference Room 405
Leiopapa A Kamehameha
235 So. Beretania Street
Honolulu, Hawaii

COMMISSIONERS PRESENT: P. Roy Catalani
Bruce Coppa
Pravin Desai
Kyong-Su Im
Lawrence Ing
Randall Sakumoto
Peter Yukimura

COMMISSIONERS ABSENT: Isaac Fiesta
Steven Montgomery

STAFF PRESENT: Diane Erickson, Deputy Attorney General
Anthony Ching, Executive Officer
Bert Saruwatari, Staff Planner
Sandra Matsushima, Chief Clerk
Holly Hackett, Court Reporter

Chair Ing called the meeting to order at 10:10 a.m.

ADOPTION OF MINUTES

Vice Chair Coppa moved to adopt the Land Use Commission meeting minutes of March 18, 2004 and March 19, 2004. Commissioner Desai seconded the motion. Said motion was unanimously approved by voice votes.

TENTATIVE MEETING SCHEDULE

Executive Officer Anthony Ching reported that the next meeting on May 6 - 7 will have three action items on the agenda. These items include consideration of the final environmental



assessment for the Waiolani Mauka docket; the stipulated order being put forth by the parties in the Maui Land and Pineapple docket; and a motion by Lanihau Properties for a time extension to perform the housing study. Mr. Ching also reminded the Commissioners that there will be no second meeting of the Commission in April. Vice Chairs Catalani and Coppa, along with staff, will be attending the American Planning Association's Annual Conference in Washington, D.C. at that time.

Mr. Ching also noted that the upcoming Land Use Commission calendar will be a full one as there are two anticipated filings from Kauai, two from Maui, and three petitions from the Big Island.

LEGISLATIVE REPORT

Executive Officer Anthony Ching briefly summarized three legislative proposals that he has been monitoring pertaining to IAL (Important Agricultural Lands). Where staff has provided testimony to the legislature, copies have also been provided to the Commission. There was a brief discussion by the Commissioners.

DOCKET NO. SP87-362 DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY & COUNTY OF HONOLULU (fka Department of Public Works, City & County of Honolulu) (Oahu)

Chair Ing stated that this was an action meeting on Docket No. SP87-362 Department of Environmental Services, City & County of Honolulu, Oahu.

On March 25, 2004, the Commission received from the Department of Environmental Services, via David Arakawa, Corporation Counsel, a motion to amend and/or Stay the Decision and Order Approving Amendment to Special Use Permit dated June 3, 2003.

Since March 20 to present, the Commission has received numerous correspondence from many individuals and council members.

On March 31, 2004, the Commission received the State Office of Planning's Position Statement on the County's Motion to Amend and/or Stay the Decision and Order Approving Amendment to Special Use Permit dated June 3, 2004, indicating that they were in favor of the extension of time.

APPEARANCES

Gary Takeuchi, Esq., represented City and County of Honolulu
Frank Doyle, represented Department of Environmental Services
David Tanoue, Esq., represented City Department of Planning and Permitting
Don Kitaoka, Esq., represented City and County of Honolulu
Ray Young, Department of Planning and Permitting
John Chang, Esq., represented State Office of Planning
Abe Mitsuda, State Office of Planning

Staff Report

1. Anthony Ching

Mr. Ching, Executive Officer, provided a brief summary of the Land Use law, Chapter 205, HRS, which allows the issuance of special permits by county planning commissions and the Land Use Commission for certain uses within the agricultural and rural districts other than those for which the district is classified.

Mr. Ching indicated that the role of this Commission, in this situation, is limited to:

1. Accepting and ratifying the decision and recommendation of the Planning Commission as is;
2. Accepting and ratifying the decision and recommendations of the Planning Commission and adding some additional conditions;
3. Remanding back to the County Planning Commission the special permit application while stating the objections of the Land Use Commission. In this situation, it is the prerogative of the Planning Commission to address the concerns specified by this Commission or take any other appropriate action.

Mr. Ching noted that it is important to understand that any amendment of the basic special permit and any of the county's conditions of approval would normally first require that the matter be approved by the County Planning Commission prior to any action taken by this Commission. However, questions or a petition for relief from conditions of approval imposed by this Commission may be considered.

Mr. Ching summarized the Department of Environmental Services' motion and listed the four points raised in the motion.

- o The first request is to amend or stay the site selection deadline imposed by the Land Use Commission for selection of a new landfill by the County Council. The motion seeks to change the June 1, 2004 deadline to December 1, 2004.

- o The second request is for the Land Use Commission to clarify whether the Waimanalo Gulch Sanitary Landfill is a site that may be considered by the council.
- o The third request involves a request to extend the May 1, 2008 deadline to close the landfill to November 1, 2008.
- o The fourth item indicates that an application might be submitted by the County, which would allow for additional acreage to be utilized at the Waimanalo Gulch Landfill under this special permit.

Chair Ing described the procedure for this docket, and there were no objections to the procedure by the parties.

Chair Ing asked the City if the four bulleted points raised in the motion, as discussed by Mr. Ching, was correct as presented. Mr. Takeuchi replied in the affirmative.

Mr. Takeuchi added that they were here for two basic purposes, which are the first two bullets. The primary request is to extend the deadline for the city council to select a new landfill site from the current deadline of June 1 to December 1, 2004. The second request asks whether the council may consider the Waimanalo Gulch location as a possible landfill site. Mr. Takeuchi noted that it should be clear that they are not here today to request for any decision on the latter two bullet points or seek any type of conditional amendment in regard to those matters, as they are premature and were merely provided for informational purposes.

MOVANT'S WITNESSES

1. Rod Tam

Councilmember Tam stated that he is the Chairman of the Public Works and Economics Development Committee. Council member Tam expressed his appreciation to the Commission for allowing him the opportunity to testify and commented that the council is requesting an extension to the site selection deadline to December 1, 2004. The extension, if granted, will allow his committee to:

1. Seek additional financial information;
2. Develop a more comprehensive, long-term plan for the city to address future MSW disposal needs;
3. Explore alternative technologies and/or shipping waste strategies as an alternative to developing a new MSW landfill.
4. Allow the city council to conduct further research and convene additional public meetings; and

5. Further research the current contract with Waste Management, the operator of Waimanalo Gulch.

Councilmember Tam added that he realizes that no one wants the landfill site in their backyard. His committee needs to deal with the landfill selection process and will try to do so in a concrete manner with facts, figures, and community input.

After a discussion with the Commissioners, Vice Chair Coppa moved to meet in executive session to discuss legal issues with its counsel. The motion was seconded by Commissioner Im and the motion was carried by voice votes.

The Commission met in executive session at 11:00 a.m. The open meeting reconvened at 11:20 a.m.

Vice Chair Coppa noted that the Land Use Commission does not have the authority to instruct this Blue Ribbon committee, the City Council, or others where the landfill site should be. The only item that should be discussed by this commission is item number 1 for the extension of time. If the city requests to extend the landfill, they will need to return to the Planning Commission for approval, as this Commission does not have that authority.

Chair Ing indicated that in keeping with its limited authority, the Commission would appreciate that all testimony be limited to item number 1, the request for a time extension to December 1, 2004.

2. Mike Gabbard

Councilmember Gabbard expressed his appreciation to the Commission and for the opportunity to provide his testimony. He indicated his support of the extension of the deadline to select a new solid municipal waste landfill for the City and County of Honolulu.

Councilmember Gabbard added that it is important for the city council to make the right decision in this matter and appealed to the Commission for the time extension. He added that it is his future goal to have the city utilize landfill waste only on an emergency or contingency basis. Alternative disposal of MSW might involve shipping the waste out-of-state.

There was a brief discussion by the Commission.

3. Bruce Anderson

Dr. Anderson stated that he is the Director of Environmental Programs at the John A. Burns School of Medicine. Dr. Anderson indicated that he served as a member on the Blue Ribbon Committee and gave a brief overview of the committee's activities.

After Dr. Anderson provided his overview of activities, there were no questions posed by the parties and the Commission.

4. Cynthia Rezentes

Ms. Rezentes stated that she was testifying today in several capacities, primarily as an individual, but also as a member of the Blue Ribbon Committee.

Ms. Rezentes noted that the charge of the committee was essentially to review and select a potential landfill site, not to review alternate technology or recycling. This informational report was transmitted to the administration and then to the city council. She expressed her opposition to the 6-month extension and added that her concern is if the extension is granted, the city will be returning for another extension and for the expansion of the site.

After a brief discussion, there were no further questions by the parties and the Commission.

5. Kathy Bryant Hunter

Ms. Hunter stated that she was testifying in her capacity as a member of the Mayor's landfill site selection committee. She added that she is also the Chair of the Kailua Neighborhood Board, but will not speak on behalf of that board.

Ms. Hunter commented that she is in support of the extension. She believes that it is prudent to allow more time to gather information that the committee was unable to complete its work. Ms. Hunter commended Councilmember Tam and the city council for continuing on this process and protocol requirements in search for solutions.

There were no further questions by the parties or the Commission.

6. Todd Apo

Mr. Apo stated that he is with the Ko'olina Resort Community Association and served as a member on the Blue Ribbon committee. He commented that he opposed the granting of the extension. The extension would unfairly impact the landowners of the four adjacent properties who would live for another six months unsure if their neighborhood is going to be the next landfill site.

Mr. Apo added that he understood today's decision has nothing to do with the May 1, 2008 deadline, but that he believes if they have the 6 months extension, it is likely Mr. Doyle will return seeking another extension for the 2008 deadline, as Mr. Doyle indicated in his affidavit.

After a brief discussion, there were no further questions by the parties or the Commission.

Commissioner Sakumoto noted that it appears the 6-month time extension would not be detrimental and that the permit for expansion or extension is not a matter that will be decided by this Commission. The only decision this Commission will make is whether or not to grant the 6-month extension of time in order to gather additional information and the investigation appears warranted. Commissioner Sakumoto asked if the initial decision on whether to grant or deny an application for a special use permit is made by the City and County's Planning Commission. Mr. Takeuchi replied in the affirmative.

Commissioner Sakumoto asked if the process entails Planning Commission approval and then Land Use Commission ratification. Mr. Takeuchi replied in the affirmative.

Commissioner Sakumoto commented that similarly, any subsequent decision on whether to amend the special use permit should initially be made by the Planning Commission, and if approved, comes before the Land Use Commission for ratification. He asked if this is what happened in this matter.

Mr. Takeuchi replied in the affirmative and explained that this request has not yet gone to the Planning Commission because it was a condition imposed by this body, not the Planning Commission. He added that because the deadline is looming quickly and this condition was imposed by the Land Use Commission, it is appropriate to come before the Land Use Commission for decision on the proposed time extension.

Commissioner Sakumoto requested that they provide a brief on this matter. Mr. Takeuchi indicated that they certainly would provide a brief on the subject to this Commission within a week.

A lunch break was taken at 12:30 p.m. The meeting reconvened at 1:40 p.m.

Chair Ing reconvened the meeting and noted that there were parties traveling from the neighbor island for the second item on the agenda. Chair Ing indicated that if this first agenda item is not finished within the next hour, a recess on this subject matter may be called, to bring the second item before the Commission in order for the parties to catch their return flights.

Mr. Takeuchi indicated that their last witness is Mr. Doyle.

7. Frank Doyle

Mr. Doyle stated that he is Director of the Department of Environmental Services, City and County of Honolulu.

Mr. Doyle commented that the Department's position remains the same, that they will cease operations at the Waimanalo Gulch by May 2008. He added that the city council currently has sufficient information to select a new site for a landfill by the June 1, 2004 deadline. Therefore, he strongly opposed the need for the 6-month extension being sought by the city council.

Commissioner Im asked if the Department of Planning and Permitting (DPP) was asked by Mr. Doyle's department to make this motion to extend the time line.

Mr. Kitaoka replied that the applicant in this case is the Department of Environmental Services. The DPP originally processed the initial request for the expansion to be presented to the Planning Commission. In this case, it is his department's motion for amendment of the Land Use Commission condition.

Mr. Kitaoka further stated that the DPP did not take a position with respect to this motion because this pleading addressed a condition imposed by the Land Use Commission, and not the Planning Commission. If the Department of Environmental Services is pursuing an extension of the time limit that was imposed by this body alone, it would be appropriate for this body to be the determiner since it imposed the condition in the first place. Mr. Kitaoka explained that for purposes of this hearing, he was acting as Deputy Corporation Counsel advising council members who are testifying before the Land Use Commission today.

After a brief discussion, there were no further deliberations by the Commission.

Mr. John Chang stated that the Office of Planning (OP) has submitted their testimony and it is their position that the designation of the site for the landfill should be done by the City and County of Honolulu. The OP has no objections to the extension of time to December 1, 2004 being sought for a naming of the site by the City and County.

There were no questions by the parties and the Commission.

Chair Ing noted at this time that public witnesses who have signed up will be called upon. Also, Chair Ing qualified that the Commission is only looking at one issue, testimony for or against the extension of time from June 1 to December 1, 2004.

PUBLIC WITNESSES

1. Jim Corcoran

Mr. Corcoran stated that he is representing the Kailua Neighborhood Board and the Vice Chair of the Environmental Committee. The neighborhood board will be meeting later in the evening and has not been able to take a position for or against this extension. After a brief discussion, there were no questions posed by the Commission.

2. Stann Reiziss

Dr. Reiziss stated that he is here today as an interested citizen and represent no one, but will speak for a few concerned citizens that he has had discussions with. He expressed his desire for the Commission to grant the time extension till December because he believes that the City Council definitely needs additional time for a variety of reasons. After a brief discussion, there were no questions by the Commission.

3. Kamaki Kanahele

Mr. Kanahele requested if Dr. Shintani could join him in providing testimony at the same time.

4. Terry Shintani

Dr. Shintani stated that he is a physician at the Waianae Coast Comprehensive Health Center.

Mr. Kanahele stated that he is the president of the Nanakuli Hawaiian Homestead Community Association, the Chair of the Hokuipili Foundation, and the Director of the Native Hawaiian Traditional Healing Center at the Waianae Coast Comprehensive Center.

Dr. Shintani commented that he is in support of the time extension because of the need to sort out adequate information to be considered. Mr. Kanahele concurred with Dr. Shintani and added that he would like to state the community's voice. He expressed his support for the time extension as in the best interests of the community. There were no questions by the Commission.

5. Bill Hutton

Mr. Hutton stated that he has been a resident of Ko'olina for about 2 1/2 years. He added that initially he knew of the landfill, but did not notice any odor or noise in the area. After residing there for a little over two years, Waimanalo Gulch is filled up with a mountain of trash and the trash is straying all over and into the ocean. Mr. Hutton expressed his objection to the time extension because he believes there is a serious environmental problem there. There were no questions posed by the Commission.

6. Lorrie Stone

Ms. Stone stated that she is an attorney with Rolhding and Stone representing Ko'olina Resorts. Ms. Stone commented that there are several major developments that will take place in

the resort area and expressed her strong desire for the Commission to not grant the time extension. There were no questions by the Commission.

Chair Ing indicated that the Commission will take a 10-minute recess break and reconvene with the second action item to accommodate the neighbor island travelers. The Commission recessed at 2:45 p.m. The meeting reconvened at 2:55 p.m.

DOCKET NO. A03-744 HILUHILU DEVELOPMENT, LLC (Hawaii)

This was a hearing on Docket No. A03-744 Hiluhilu Development, LLC to consider acceptance of the Final Environmental Impact Statement for reclassification of approximately 725.2 acres of land currently in the conservation and agricultural district into the urban district at Ka'u, North Kona, Hawai'i, Tax Map Key No. 3-7-2-005: 001.

On March 19, 2004, the Commission received Petitioner's Final Environmental Impact Statement.

APPEARANCES

Alan Okamoto, Esq. represented Hiluhilu Development
Guido Giacometti, Hiluhilu Development
Norman Hayashi, County of Hawaii Planning Department
John Chang, Esq., represented State Office of Planning
Abe Mitsuda, State Office of Planning

PUBLIC WITNESSES

1. Matthew L. Meyers

Mr. Meyers stated that he is representing the Office of Hawaiian Affairs, as their policy advocate. He added that after review of the final environmental impact statement, OHA has several concerns. Mr. Meyers stated that there were quite a few archaeological sites identified in the EIS and OHA requests that an overlay of the site plan with these sites identified be prepared by the petitioner. Mr. Meyers also indicated that the EIS was sketchy on the potable and non-potable water issue. After stating concerns regarding cultural resources, housing, education, and traffic, he concluded by noting that they have requested that the petitioner's prepare a more comprehensive EIS.

After a brief discussion, there were no further questions posed by the Commission.

The Land Use Commission provided its staff report via a PowerPoint presentation.

Mr. Okamoto stated that in light of the staff report, he reluctantly requested that the Commission allow the withdrawal of the current Final Environmental Impact Statement for re-submittal immediately. He added that they now have all the technical studies that are required and have a much better understanding of what they need to do to present this matter properly to the Commission.

Mr. Ching added that his recommendation would be that more clarification be provided, as the conservation district is the most highly regulated district and extra importance and emphasis needs to be placed whenever you reclassify lands from that district.

Vice Chair Coppa moved to allow the applicant to withdraw their final environmental impact statement as requested. The motion was seconded by Commissioner Yukimura.

The Commission was polled as follows:

Ayes: Catalani, Coppa, Desai, Im, Ing, Sakumoto, and Yukimura.

The motion passed with 7 yes and 2 absent.

DOCKET NO. SP87-362 DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY & COUNTY OF HONOLULU (fka Department of Public Works, City & County of Honolulu) (Oahu)

Chair Ing stated that this was a continuation of public witnesses for Docket No. SP87-362.

7. Arvid Youngquist

Mr. Youngquist stated that he was Chair of the legislative committee of the Liliha Alewa Heights Neighborhood Board, but here before the Land Use Commission as a private citizen. He expressed his support for the time extension and also commended Mr. Doyle for his hard work. There were no questions from the Commission.

8. Herbert Hewlen

Mr. Hewlen stated that he is the President of Waianae Kai Homestead, a member of the Waianae Comprehensive Health Board, and a member of the Hokupili Foundation. He expressed his concern over the health and welfare of everyone in his community. There were no questions posed by the Commission.

9. Wade Wakayama

Mr. Wakayama stated that he works at Ameron and expressed his support for the time extension, primarily to allow for receipt and digestion by the Council of additional financial information, as cited earlier by Councilmember Tam. After a brief discussion, there were no further questions by the Commission.

10. Rod Tam

Councilmember Tam expressed his appreciation to the Commission for allowing him the additional time to add to his earlier testimony and requested to address some remarks regarding issue number one. He concluded by stating that he had just received news that the council has introduced a new Resolution No. 04-105 entitled Selecting A Site For A New City Landfill.

Commissioner Sakumoto asked if Council member Tam could provide the Commission with progress reports. Councilmember Tam agreed and noted that he, personally, will be attending future Land Use Commission meetings starting from next month to provide the Land Use Commission with reports on this matter.

Commissioner Im asked if the city could also provide a report or attend with Councilmember Tam to show progress in the communication between the two entities. Mr. Doyle replied in the affirmative.

Vice Chair Coppa moved to extend the timeframe for six months but to include that a joint written report or verbal report be submitted by both the city council and the administration to ensure that there is progress being made. The motion was seconded by Commissioner Yukimura.

Commissioner Desai requested that the motion include a report on what alternative technology is being explored and any concrete bids being considered.

Mr. Ching polled the Commission on the motion made to extend the June 1st deadline to December 1, 2004 with monthly written reports, progress reports being provided to the Land Use Commission which cover alternate technologies, as well as site selection, and that a brief be delivered by the Movant to the Commission in one week.

The Commission was polled as follows:

Ayes: Catalani, Coppa, Desai, Im, Ing, Sakumoto, and Yukimura.

The motion passed with 7 yes and 2 absent.

A recess break was taken at 3:55 p.m. The meeting reconvened at 4:10pm

COMMISSION POLICY REGARDING REIMBURSEMENT OF EXPENSES RELATED TO THE PUBLICATION OF NOTICE FOR HEARING OF PETITION FOR DISTRICT BOUNDARY AMENDMENT AND THE SERVICES OF THE COURT REPORTER

Mr. Ching conducted a brief presentation on the steady erosion of the Land Use Commission's operating expense allocation, the proposed FY 05 reductions to operating expenses, the increase in the number of associated Land Use Commission proceedings, especially on the neighbor islands, and the current hearing expenses associated by each county.

Mr. Ching proposed that the Land Use Commission fees has authority from its rules (15-15-30, HAR) to establish a policy requiring reimbursement of expenses related to the publication of hearing notices and the services of the court reporter by district boundary amendment petitioners.

After a brief discussion, Commissioner Im moved that the Commission support the policy that has been presented by staff for reimbursement of Land Use Commission fees. The motion was seconded by Vice Chair Coppa and the motion was unanimously approved by voice votes.

SP00-393 KAMEHAMEHA SCHOOLS BERNICE PAUAHI BISHOP ESTATE (Hawaii)

This was a meeting on Docket No. SP00-393 Kamehameha Schools Bernice Pauahi Bishop Estate (Hawaii) to receive a report by Petitioner on its progress in complying with conditions imposed by the Commission with Special Interest on the Actual Impact of the Development on Traffic Conditions and the effectiveness of its mitigation measures.

APPEARANCES

Linnel Nishioka, representing Kamehameha Schools
Yuki Takemoto, Kamehameha Schools
Peter Uchiyama, Kamehameha Schools
Randall Okaneku, Kamehameha Schools
Ron Tsuzuki, Department of Transportation
John Chang, Esq., represented State Office of Planning
Abe Mitsuda, State Office of Planning

Ms. Nishioka provided a brief overview of the East Hawaii Campus and presented a schematic view of the campus. Ms. Nishioka added that they have completed multiple traffic improvements, as requested by the Commission, under condition 7 of the Commission's order in April 2000. Ms. Nishioka noted that they have completed all of A through F to date, except

condition 7G, which is the other roadway improvements to the Volcano Highway, as required by the Department of Transportation.

Ms. Nishioka added that there was some concern related to their improvements. There was an impact in this area because two lanes would bottle neck into one. Even though it was not required, Kamehameha Schools agreed to re-stripe the area so there is an extra lane there. Completion should be at the end of the month. Ms. Nishioka noted that they had a traffic study analyzed and basically the consultant indicated that traffic would be kept at an acceptable level. The traffic study was based on a school enrollment of 1120 students. The school presently has a total enrollment of 830 students.

Mr. Takemoto noted that the traffic study and everything else was based on a full enrollment of 1120 students and that was the commitment to Kamehameha Schools. If they should extend the school or increase its enrollment further, they would need to have another impact study. Mr. Takemoto added that he believes that Kamehameha Schools has done whatever they could do to mitigate traffic to a level that actually is better than what it was before the existence of the school.

Ms. Nishioka stated that the Department of Transportation (DOT) is asking Kamehameha Schools to basically pay for the entire improvement of the highway; to put in an additional lane, a bikeway, and a traffic lane. She added that Kamehameha Schools feel that they have already contributed more than is needed to alleviate whatever impact is coming from the school.

Vice Chair Coppa asked how the DOT justifies this magnitude of work from the consultant.

Mr. Okaneku indicated that generally a traffic impact analysis measures the impacts of any development and from that point mitigation recommendations are made. The scope of this study would have been equivalent to one prepared for a district boundary amendment, although this study was for a special use permit.

Ms. Nishioka commented that they are seeking to comply with the condition, and not to remove it; that the improvements by Kamehameha Schools have fulfilled the requirement of the Land Use Commission order, under condition 7.

Mr. Takemoto stated that he had a long telephone conversation with the DOT's regional office and at that time, it was clear that they were contemplating having Kamehameha Schools pay for the highway improvements. Mr. Takemoto noted that he requested that DOT submit its needs in writing. He added that he had not received anything in writing to date, except for yesterday's memo dated March 31, 2004, regarding the improvements that the DOT expects Kamehameha Schools to do.

Mr. Mitsuda commented that the state has Ron Tsuzuki from DOT to discuss the traffic study. Mr. Mitsuda added that the conditions range from condition 5 through 11. It is a comprehensive list of conditions dealing with traffic and highways.

Mr. Tsuzuki stated that he had discussions with Kamehameha Schools and that he recalled when Mr. Takemoto spoke to Bob Taira of the Big Island's district office. Mr. Tsuzuki noted that if Mr. Taira had made any representations to the Kamehameha Schools that his views were not to be considered that of the DOT. Mr. Tsuzuki added that they had previously asked the DOT district engineer, Stan Tamura, what actions by Kamehameha Schools would be necessary to mitigate the impacts of the school. Mr. Tsuzuki commented that the recent March memo came from the DOT Director, with comments from the district engineer on the Big Island. Mr. Tsuzuki indicated that he personally does not know much about the situation.

Commissioner Desai stated that since the memo came from Mr. Hiraga, he or a representative should appear in front of the Commission to justify why they came up with these requirements. He added that there has been a traffic study completed and preliminary agreements made. The State DOT needs to justify their position if they require that certain additional traffic improvements be made by the Kamehameha Schools.

Commissioner Sakumoto concurred and added that Mr. Takemoto should ask the DOT for an explanation or rationale in writing. He added that it is incumbent upon the DOT to explain why they are making these requests.

Chair Ing indicated that this matter will be brought up at the next scheduled Commission trip to Hilo. At that time, we will seek to have the DOT Highways administrator from that district available. If that date does not come at an appropriate time, this matter be revisited within the next six months.

Vice Chair Coppa moved to adjourn the meeting, seconded by Commissioner Im. The meeting adjourned at 5:00 p.m.

(Please refer to the Land Use Commission transcript for additional details on all of the above matters.)

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Attorneys for Director of the
Department of Environmental Services

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

LAND USE COMMISSION
STATE OF HAWAII
2008 APR -8 PM 12:16

In the Matter of the	)	DOCKET NO. SP87-362
Application of)	
	)	POST-HEARING BRIEF; EXHIBITS
DEPARTMENT OF ENVIRONMENTAL	)	"A" AND "B"; CERTIFICATE OF
SERVICES, CITY AND COUNTY OF	)	SERVICE
HONOLULU (FKA DEPARTMENT OF)	
PUBLIC WORKS, CITY AND COUNTY)	
OF HONOLULU))	
)	
For an Amendment to the Special)	
Use Permit Which Established a)	
Sanitary Landfill On)	
Approximately 86.5 Acres of)	
Land Within the State Land Use)	
Agricultural District at)	
Waimanalo Gulch, Honouliuli,)	
Ewa, Oahu, Hawaii, TMK No:)	
9-2-03: Portion 2 and)	
Portion-13))	

EXHIBIT

12

POST-HEARING BRIEF

I. INTRODUCTION

On April 1, 2004, a hearing was conducted by the Land Use Commission ("LUC") on the Motion to Amend and/or Stay the Decision and Order Approving Amendment to Special Use Permit Dated June 3, 2003 (the "Motion"), filed by Petitioner Department of Environmental Services ("ENV"), City and County of Honolulu ("City") in the instant matter.¹ At the hearing, ENV was asked to submit to the LUC a post-hearing brief on the following legal issue, with the brief to be filed by April 9, 2004:

When a Petitioner seeks to amend a Special Use Permit condition imposed by the LUC, and not by the City Planning Commission, is Petitioner required to first seek the approval of the City Planning Commission?

For the following reasons, the prior approval of the City Planning Commission is not required, and Petitioner may bring its request to amend directly to the LUC, which imposed the condition in question.

¹ Note that the title of the Motion includes a typographical error; the effective date for the Decision and Order Approving Amendment to Special Use Permit is June 9, 2003, rather than June 3, 2003.

II. FACTS

In January 2003, the City, through ENV, filed an application with the City Department of Planning and Permitting ("DPP") to amend an existing Special Use Permit ("SUP") for the Waimanalo Gulch Sanitary Landfill, pursuant to Hawaii Revised Statutes ("HRS") Section 205-6, and Hawaii Administrative Rules ("HAR"), Sections 15-15-95 and 15-15-96. The amendment to the SUP was sought to allow the expansion of the existing Waimanalo Gulch Sanitary Landfill by approximately twenty-one acres. DPP accepted the amendment and submitted it to the City Planning Commission ("CPC"), which conducted a hearing in March 2003. The CPC recommended approval of the amendment to the LUC, subject to certain conditions.² The matter was then referred to the LUC.

On March 27, 2003, the LUC held a hearing to consider the proposed amendment. On June 9, 2003, the LUC approved the amendment subject to nineteen conditions.³ The condition at issue here provides as follows:

"1. The Blue Ribbon Site Selection Committee shall make its recommendation for

² See CPC Findings of Fact, Conclusions, and Decision, 2002/SUP-6, dated March 13, 2003, hereinafter "CPC Decision", attached hereto as Exhibit "A".

³ See Decision and Order Approving Amendment to Special Use Permit, Docket No. SP87-362 dated June 9, 2003, hereinafter "LUC Order", attached hereto as Exhibit "B".

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 Use Permit shall immediately expire."

By contrast, the CPC Decision had recommended to ENV that, "a. [ENV] submit to the City Council, an alternative landfill site(s) by December 31, 2003, and b. Community members be included on the alternate site selection committee." However, the CPC Decision specifically stated that these were only recommendations to the applicant and were not to be included as conditions of approval by the CPC of the SUP amendment.⁴ Therefore, the only specific requirement that the City Council select a new municipal landfill site by June 1, 2004, is found in the above-quoted condition of the LUC Order.

On March 24, 2004, the City Council adopted Resolution No. 04-75, CD 1, a resolution requesting ENV to appear before the LUC on behalf of the Council to request that the LUC extend the June 1, 2004, deadline by six months, to December 1, 2004.⁵ ENV then filed the Motion on March 25,

⁴ See Exhibit "A", at page 4, para. 10.

⁵ See Resolution No. 04-75, CD 1, attached as Exhibit "A" to the Motion. Note that the resolution also requested that ENV seek a ruling from the LUC as to whether the Waimanalo Gulch site could be considered by the Council as one of the sites for a municipal landfill. During the April 1, 2004 hearing with the LUC, this additional issue was, by agreement of the parties, dropped from consideration.

2004. As previously noted, the LUC held a hearing on the Motion on April 1, 2004.

- A. THE RULES OF THE CPC CONTAIN NO SPECIFIC REQUIREMENTS THAT A CONDITION IMPOSED ONLY BY THE LUC MUST FIRST BE APPROVED BY THE CPC.

In this matter the City Council, through ENV as the Petitioner for the SUP in question, was seeking amendment of a condition in the LUC Order. As noted previously, the subject condition was imposed only by the LUC, and is not found in the CPC Decision. This fact is significant, because the typical process for obtaining a SUP for uses within the agricultural district, when the area of land in question is greater than fifteen acres, would be to first seek approval of the CPC, and then obtain the approval of the LUC.⁶ However, in this case the approval of the CPC is not required, as the LUC alone imposed the condition in question.

Such a conclusion is supported by an examination of the CPC rule concerning modification or deletion of a condition to an approval. Section 2-49(a) of the Rules of the Planning Commission states as follows:

Request for modification or deletion of condition. (a) A petitioner who desires a *modification or deletion of a condition imposed by the [City planning] commission.*

⁶ HRS Sections 205-6(a) through (d).

shall make such a request to the [City planning] commission in writing. This request shall be processed in the same manner as the original petition for a SUP. A public hearing on the request shall be held prior to any [City planning] commission action.

(emphasis added).

Clearly, the CPC rule on modification or deletion of a condition applies only to conditions imposed by the CPC. Stated another way, for a condition imposed by the LUC and not the CPC, such as the subject condition in this instance, the CPC rules do not require prior CPC action.

- B. PURSUANT TO THE RULES OF THE LUC, THE PETITIONER MAY SEEK MODIFICATION OF AN LUC ORDER BY MOTION, AND THERE ARE NO STATED REQUIREMENTS THAT A CONDITION IMPOSED ONLY BY THE LUC MUST FIRST BE APPROVED BY THE CPC.

The LUC rules, at Section 15-15-94, provide as follows:

Modification or deletion of conditions or orders. (a) If a petitioner, pursuant to this subsection, desires to have a *modification or deletion of a condition that was imposed by the [land use] commission, or imposed pursuant to section 15-15-90(e)⁷ or (f)⁸, or modification of the commission's order,* the petitioner shall file a motion in

⁷ Section 15-15-90(e) of the LUC rules concerns mandatory conditions for certain boundary amendments or housing development program exemptions, and as such is inapplicable here.

⁸ Section 15-15-90(f) of the LUC rules concerns mandatory conditions when a SUP is approved pursuant to HRS Section 91-13.5 (automatic approval of business or development-related permits, licenses or approvals), and as such is inapplicable here.

accordance with section 15-15-70⁹ and serve a copy to all parties to the boundary amendment proceeding in which the condition was imposed or in which the order was issued,¹⁰ and to any person that may have a property interest in the subject property as recorded in the county's real property tax records at the time that the motion is filed.

(b) For good cause shown, the commission may act to modify or delete any of the conditions imposed or modify the commission's order.

(c) Any modification or deletion of conditions or modifications to the commission's order shall follow the procedures set forth in subchapter 11.

Thus, the LUC rule on modification of conditions or orders imposed by the LUC clearly instructs a petitioner to file a motion with the LUC (as ENV did in the instant matter), and does not contain any requirement that prior CPC approval must first be obtained.

It stands to reason that a petitioner need not obtain prior CPC approval for modification of a condition imposed only by the LUC. The CPC would presumably be concerned about the conditions it imposed upon a petitioner, but this would not necessarily be the case for a condition imposed solely by the LUC. Such a conclusion is particularly

⁹ Section 15-15-70 of the LUC rules concerns procedures for motions.

¹⁰ Although this rule can arguably be read to apply only to boundary amendment proceedings, our understanding is that the LUC applies the procedures of the rule to modification or deletion of conditions or orders in SUP proceedings as well.

appropriate in a situation such as the instant matter, wherein the CPC only recommended a procedure for selecting an alternative municipal landfill site, and specifically indicated that its recommendations in this regard were not conditions to its approval of the requested SUP amendment. The LUC then imposed additional conditions, including the subject condition.¹¹

Under these circumstances, in which the CPC specifically did not impose any conditions, but the LUC subsequently did impose a condition, it would serve little purpose to seek prior CPC approval to modify a LUC-imposed condition.¹² Further, considering the plain language of the CPC rules and LUC rules, which provide for action by the CPC or LUC, respectively, only when modifications are sought to conditions *they* imposed, there is no specific requirement that CPC approval be sought and obtained prior to bringing a motion before the LUC to amend a LUC-imposed condition, as ENV did at the request of the City Council.

¹¹ The LUC is authorized to impose, in addition to those conditions imposed by the CPC, such additional restrictions as may be necessary or appropriate in granting the LUC's approval. HRS Section 206-6(d) and HAR Section 15-15-96(a).

¹² Although DPP does not necessarily reflect the CPC's ultimate position on any matter, we note that DPP took no position on the Motion before the LUC.

C. GIVEN THE EXIGENCIES OF THE SITUATION, THE POTENTIAL RAMIFICATIONS OF ANY DELAY, AND THE LACK OF ANY SPECIFIC REQUIREMENT THAT PRIOR CPC APPROVAL BE OBTAINED, ENV PROPERLY FILED ITS MOTION DIRECTLY WITH THE LUC.

The condition the City Council sought to amend provides in part that if the City Council does not select a new municipal landfill site by June 1, 2004, the SUP for the Waimanalo Gulch Sanitary Landfill will immediately expire on June 1, 2004. Should such an eventuality occur, there would be no legally authorized municipal solid waste landfill for the island of Oahu. No responsible person would allow such a dire circumstance to occur. With this as the background to the Motion, it is clear that the exigencies of the situation meant that direct consideration of the City Council's request by the LUC was imperative, if permitted.

Had ENV, in an abundance of caution, first filed the City Council's request with the CPC, the matter would have had to have been noticed for a hearing, and ENV would also have had to have filed a request with DPP to review the requested modification. DPP would then have had to prepare a report to the CPC with its recommendations.¹³ Under the CPC rules, the CPC would have had up to sixty (60) days to

¹³ CPC Rules, Section 2-49(a) and (b).

submit its notice of a change of conditions to the LUC.¹⁴ Further, under the LUC rules, the LUC could have taken up to forty-five (45) days after receipt to act upon the CPC's decision.¹⁵

Given the potential maximum timeline, the established June 1, 2004 deadline for a City Council decision on a new landfill site might have come and gone before the LUC could have considered the City Council's request for an extension of time. Under the circumstances (the possibility that the authorization to utilize the Waimanalo Gulch Sanitary Landfill would be automatically revoked, and the absence of any stated requirement in the pertinent rules that prior CPC approval must be obtained), ENV's action in filing the Motion directly with the LUC was both permitted and prudent.

D. CONCLUSION.

The rules of the CPC contain no specific requirement that a condition imposed only by the LUC must first be approved by the CPC. Similarly, the rules of the LUC contain no stated requirement that a condition imposed only by the LUC must first be approved by the CPC. Rather, the LUC rules allow a petitioner to seek modification of an LUC

¹⁴ CPC Rules, Section 2-49(c).

¹⁵ LUC Rules, Section 15-15-96(a).

order by motion. Therefore, the prior approval of the CPC was not required in this instance. Furthermore, given the exigencies of the instant situation, the potential ramifications of any delay, and the lack of any specific requirement that prior CPC approval be obtained, ENV properly filed the Motion directly with the LUC.

DATED: Honolulu, Hawaii, April 8, 2004.

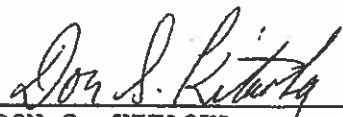
Respectfully submitted,

DAVID Z. ARAKAWA
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By 

GARY Y. TAKEUCHI
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CONCUR:


DON S. KITAOKA
Attorney for City Council
City and County of Honolulu

MARK J. BENNETT 2672
Attorney General of Hawai'i

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FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

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'10 APR 13 P3:19

F. OTAKE
CLERK

Attorneys for Appellee State of Hawai'i,
Land Use Commission

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU,

Appellant,

vs.

LAND USE COMMISSION, STATE OF
HAWAII; COLLEEN HANABUSA, MAILE
SHIMABUKURO, AND KO OLINA
COMMUNITY ASSOCIATION,

Appellees.

CIVIL NO. 09-1-2719-11
(Agency Appeal)

APPELLEE STATE OF HAWAII, LAND
USE COMMISSION'S ANSWERING
BRIEF; CERTIFICATE OF SERVICE

Hearing: July 14, 2010
Time: 8:30 A.M.
Judge: The Honorable Rhonda
A. Nishimura

City Council is encouraged to work cooperatively with the Applicant's effort to select a new landfill site on Oahu. Upon the selection of a new landfill site or sites on Oahu, the Applicant shall provide written notice to the Planning Commission. After receipt of such written notice, the Planning Commission shall hold a public hearing to reevaluate 2008/SUP-2(SP09-403) and shall determine whether modification or revocation of 2008/SUP-2(SP09-403) is appropriate at that time. The Planning Commission shall make a recommendation to the Land Use Commission.

(ROA 0166.)

Clearly ENV is required by condition No. 4 to identify and develop a new landfill site or sites.

1. ENV is Not Precluded from Requesting Relief from the Conditions in the Future.

Although ENV may claim that Condition No. 14 does not provide adequate time to identify and develop a new landfill, ENV has been on notice for years in prior special permit proceedings relating to WGSJ that it was required to do so. Indeed, the special permit for the existing landfill required closure of WGSJ in 2008 and was extended to November 2009. ENV has had years to begin the process of identifying a new landfill site or sites. Further, there is nothing to preclude ENV from requesting an extension of the 2012 date if it is unable, using reasonable diligence as required in Condition No. 4, to identify and develop a new landfill site. In the prior special permit, as noted above, ENV requested and was given extensions of time because the City was unable to identify a new site. Even the Planning Commission and ENV's witness recognized this:

GAYNOR: I'm not sure if you're gonna be comfortable answering this so if you're not, I'll get it answered later on, but one of the exhibits that we have is the 2005 Planning Commission Findings of Fact and Decision

P

Supreme Court of Arizona, In Banc.
AMERICAN SMELTING AND REFINING COM-
PANY and Hayden Smelter, Appellant,

v.

ARIZONA AIR POLLUTION CONTROL HEAR-
ING BOARD, Division of Air Pollution Control of the
State Department of Health and Arthur A. Aymar,
Director, Appellees.

No. 12253-PR.

June 8, 1976.

Rehearing Denied July 13, 1976.

Refining company appealed an order of the Su-
perior Court, Maricopa County, Cause No. C-274191,
Lawrence H. Doyle, Jr., J., dismissing its complaint
for judicial review of an order of Air Pollution Control
Hearing Board affecting company's operations. The
Court of Appeals reversed and remanded, 24
Ariz.App. 66, 535 P.2d 1070, and Supreme Court
accepted review. The Supreme Court, Gordon, J., held
that perfection of appeal by refining company to Su-
perior Court from an order of Board granting company
conditional permit subject to certain restrictions di-
vested Board of jurisdiction to further consider matter
of conditional permit and thus Board did not have
jurisdiction to subsequently vacate portion of order
which was subject of pending appeal in Superior
Court.

Opinion of Court of Appeals vacated, judgment
of Superior Court reversed and case remanded.

West Headnotes

[1] Environmental Law 149E ↪290149E Environmental Law149EVI Air Pollution149Ek289 Administrative Agencies and Pro-
ceedings

149Ek290 k. In General. Most Cited Cases
(Formerly 199k28, 199k25.15(1) Health and En-
vironment)

Perfection of appeal by refining company to su-
perior court from an order of Air Pollution Control
Hearing Board granting company conditional permit
subject to certain restrictions divested Board of juris-
diction to further consider matter of conditional permit
and thus Board did not have jurisdiction to subse-
quently vacate portion of order which was subject of
pending appeal in superior court. A.R.S. §§ 36-1700 et
seq., 36-1713[F], 36-1713.01.

[2] Administrative Law and Procedure 15A
↪67415A Administrative Law and Procedure15AV Judicial Review of Administrative Deci-
sions15AV(A) In General

15Ak674 k. Supersedeas or Stay. Most
Cited Cases

Where decision of a board, commission or other
inferior tribunal is judicial in character, the effect of an
appeal is to oust the inferior tribunal of jurisdiction to
proceed further.

[3] Administrative Law and Procedure 15A
↪49215A Administrative Law and Procedure15AIV Powers and Proceedings of Administrative
Agencies, Officers and Agents15AIV(D) Hearings and Adjudications15Ak489 Decision

15Ak492 k. Modification. Most Cited
Cases

A board, commission or tribunal can use its ap-
propriate modification power to reconsider decisions
until time when an appeal is perfected.

[4] Environmental Law 149E ↪265149E Environmental Law149EVI Air Pollution

149Ek265 k. Permits, Licenses, and Approvals
in General. Most Cited Cases
(Formerly 199k28, 199k25.6(7) Health and Envi-

ronment)

Under statute granting Air Pollution Control Hearing Board authority to modify conditional permits, Board may modify orders until jurisdiction of superior court is properly invoked according to statutory procedures. A.R.S. §§ 36-1700 et seq., 36-1713(F), 36-1713.01.

***243 **621** Evans, Kitchel & Jenckes, P.C. by Harold J. Bliss, Jr., Phoenix, for appellant.

Gary K. Nelson, Former Atty. Gen., Bruce E. Babbitt, Atty. Gen. by Patrick M. Murphy, Asst. Atty. Gen., Phoenix, for appellees.

GORDON, Justice:

Appellant, American Smelting and Refining Company (hereinafter referred to as ASARCO) brought this suit for judicial review of the decision of the Arizona Air Pollution Control Hearing Board (hereinafter referred to as the Board). From the order of the Superior Court of Maricopa County granting the Board's motion to dismiss ASARCO's complaint on the grounds that the issues were moot ASARCO appealed. The Court of Appeals, Division One, reversed the judgment of the Superior Court, 24 Ariz.App. 66, 535 P.2d 1070 (1975), and remanded the case with directions to render judgment in favor of ASARCO and enter such judgment nunc pro tunc. We accepted review. Opinion of the Court of Appeals vacated and judgment of the Superior Court of Maricopa County reversed.

***244 **622** The facts necessary to this review are as follows: On December 29, 1972 the Board issued Order #197216-R which renewed with certain restrictions a conditional operating permit for ASARCO's Hayden Smelter. On March 2, 1973 after exhausting its administrative remedies ASARCO appealed to the Superior Court for judicial review of the Board's order. On May 10, 1973 the Board acted sua sponte vacating part of Order #197216-R which formed the basis for ASARCO's complaint in Superior Court, and ordered a hearing on July 13, 1973 for the purpose of modifying ASARCO's conditional permit for operating its Hayden Smelter. On July 11, 1973 the Board filed a motion to dismiss ASARCO's complaint in Superior Court on the grounds that Order #197216-R had been vacated and that therefore, the issues had become moot. The July 13th hearing was

held on July 20, 1973 when the Board again considered the question of whether to grant ASARCO's Hayden Smelter a conditional operating permit. On August 3, 1973 the Board rendered its Order #197216-M which renewed with restrictions ASARCO's conditional permit for its Hayden Smelter. The Superior Court held hearings on the Board's Motion to Dismiss on July 27, September 7 and October 4, 1973 and received into evidence (over the objection of ASARCO) the transcript of the Board's hearing on July 20, 1973. The Superior Court granted the Board's motion to dismiss on the grounds that the issues had become moot and entered final judgment on November 16, 1973. ASARCO appealed and the Court of Appeals reversed the judgment of the trial court and remanded the case with directions to enter summary judgment in favor of ASARCO nunc pro tunc as of July 11, 1973.

[1] Appellant urges that the Board was without authority to issue its order of May 10, 1973, to hold its hearing on July 20, 1973 and to issue any order pursuant thereto. This contention is based on the fact that ASARCO perfected its appeal as of March 2, 1973, and this action divested the Board of jurisdiction to further consider the matter of the conditional operating permit for the Hayden Smelter. We agree.

[2] It is a well-settled principle that where the decision of a board, commission or other inferior tribunal is judicial in character the effect of an appeal is to oust the inferior tribunal of jurisdiction to proceed further. Burkhardt v. Burkhardt, 109 Ariz. 419, 510 P.2d 735 (1973); Rodriguez v. Williams, 104 Ariz. 280, 451 P.2d 609 (1969); Wammack v. Industrial Commission of Arizona, 83 Ariz. 321, 320 P.2d 950 (1958).

[3][4] A board, commission or tribunal can use its appropriate modification power to reconsider decisions until the time when an appeal is perfected. Wammack v. Industrial Commission of Arizona, supra, quoted with approval in Davis v. Industrial Commission, 103 Ariz. 114, 437 P.2d 647 (1968). Appellee further urges that since the Air Pollution Control Act (A.R.S. s 36-1700 et seq.) embodies the specific power to modify its orders it has the inherent statutory authority to modify conditional permits concurrently with the Superior Court when an order is taken on appeal. The specific authority to modify conditional permits is set forth in A.R.S. s 36-1713(F)

which states:

'F. The hearing board may revoke or modify an order of abatement, a permit or a conditional permit only after first holding a hearing within thirty days from the giving of notice of such hearing as provided in s 36-1714.'

We do not agree. We hold that this provision grants jurisdiction to the Board to modify orders until the jurisdiction of the Superior Court is properly invoked according to the procedures set forth in A.R.S. s 36-1713.01. The necessity for a final administrative decision rule was carefully analyzed in Whitfield Transportation, Inc. v. Brooks, 81 Ariz. 136, 141, 302 P.2d 526, 529 (1956):

'* * * where an appeal had already been perfected from the judgment of the *245 **623 lower court, the Commission's revocation of the certificate it had theretofore issued to Whitfield was a direct and plain invasion of the appellate and revisory powers of this court. The order in question certainly did not aid the appeal; rather, it would tend to nullify it. The jurisdiction of this court when properly invoked must be protected. It cannot be defeated or usurped to the extent that its decision when rendered be nugatory.'

Therefore, any action regarding the conditional permit for ASARCO's Hayden Smelter after March 2, 1973 was void and of no effect. The Superior Court, therefore, had no basis upon which to dismiss ASARCO's complaint. This case is remanded to the Superior Court for consideration of the merits of ASARCO's appeal of the December 29, 1972 order of the Board modifying and renewing ASARCO's conditional permit.

CAMERON, C.J., STRUCKMEYER, V.C.J., and HAYS and HOLOHAN, JJ., concur.

Ariz. 1976.
American Smelting & Refining Co. v. Arizona Air Pollution Control Hearing Bd.
113 Ariz. 243, 550 P.2d 621

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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 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.”

FILE NO. 2008/SUP-2

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned certifies that on this day a copy of the foregoing document was
duly served on the following persons:

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