

ROBERT CARSON GODBEY, 4685
Corporation Counsel
DANA VIOLA, 6095
ROBERT BRIAN BLACK, 7659
Deputies Corporation Counsel
City and County of Honolulu
Honolulu, Hawaii 96813
Telephone: 768-5240
768-5135

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

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

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

DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY
OF HONOLULU'S MEMORANDUM OPPOSITION TO INTERVENORS KO OLINA
COMMUNITY ASSOCIATION AND MAILE SHIMABUKURO'S MOTION TO DISMISS

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

RECEIVED

DEPT OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLULU

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submits the following memorandum in opposition to Intervenor KO OLINA COMMUNITY ASSOCIATION and MAILE SHIMABUKURO's (together "Intervenors") Motion to Dismiss.

I. INTRODUCTION

Applicant opposes Intervenor's Motion to Dismiss because Intervenor has erroneously interpreted the law to unduly restrict means of review, contrary to the applicable statutes and rules. The Planning Commission has jurisdiction and is the proper forum to consider Applicant's application to modify its existing Special Use Permit ("SUP") for Waimanalo Gulch Sanitary Landfill ("WGSL" or "the landfill") because appellate review does not preclude Applicant from seeking other available relief available by law.

The State Land Use Commission's ("LUC'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"), sets forth Condition No. 14 which establishes July 31, 2012 as the deadline to cease disposal of municipal solid waste ("MSW") at Waimanalo Gulch Sanitary Landfill ("WGSL" or "the landfill").

If the Landfill cannot accept MSW for disposal as of July 31, 2012, there will be no viable options to meet O'ahu's solid waste management needs. Certain types of MSW must be disposed of at a permitted landfill. For example, sewage sludge, animal carcasses, treated medical waste, residue from the City's Honolulu Program of Waste Energy Recovery waste-to-energy facility ("H-POWER"), and bulky item waste cannot be disposed of at H-POWER. See 2009 Planning Commission Decision, ¶¶ 94, 97, pg. 19. The only permitted landfill for such waste is WGSL. See 2009 Planning Commission Decision, ¶¶ 91, 92, 94, pgs. 18-19. Without WGSL, the inability to dispose of various wastes potentially will risk public health and safety. See 2009 Planning Commission Decision, ¶ 93, pg. 18.

To alleviate this risk, Applicant filed a new application, seeking to modify Special Use Permit (“SUP”) No. 2008/SUP-2 by deleting Condition No. 14 of the 2009 LUC Decision, thereby allowing the usage of WGS� to dispose of MSW until the site reaches its permitted capacity as provided in the 2009 Planning Commission Decision.

The Planning Commission is the agency with original jurisdiction to consider special permit applications pursuant to Hawaii Revised Statutes (“HRS”), § 205-6, the Rules of the Planning Commission, §§ 2-19 and 2-49, LUC Rules § 15-15-70, as well as applicable law. Thus, the application is proper and should not be dismissed.

II. RELEVANT FACTS

A. The 2008 Application for a New SUP.

On July 31, 2009, the Planning Commission recommended approval of the Department of Environmental Services’ Application for a new SUP. The decision of the Planning Commission was set forth in the 2009 Planning Commission Decision attached hereto and incorporated herein as Exhibit “A.”

Notably, the 2009 Planning Commission Decision does not contain any expiration date for the acceptance of waste at WGS�. Commissioner Kerry Komatsubara (“Komatsubara”), who authored this Decision, 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.” Komatsubara noted that the Department of Environmental Services 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.” 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, [Applicant] 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 [Applicant] 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.

Relevant portions of the transcript of the July 31, 2009 decision-making hearing of the Planning Commission are attached hereto and incorporated herein as Exhibit "B."

On October 22, 2009, the LUC issued its 2009 LUC Decision, attached hereto and incorporated herein as Exhibit "C." The LUC added the following condition:

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.

2009 LUC Decision, pgs. 4, 8-9.

B. Subsequent Court Proceedings Related to the 2009 LUC Decision

On November 19, 2009, the Department of Environmental Services appealed the 2009 LUC Decision to the Circuit Court of the First Circuit ("Circuit Court"). The Department of

Environmental Services challenged the LUC's imposition of a July 31, 2012 deadline for the disposal of MSW at WGSJ as 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.

Oral arguments were held before the Honorable Judge Rhonda A. Nishimura of the Circuit Court on July 14, 2010. On September 21, 2010, the Circuit Court erroneously affirmed Condition No. 14 of the 2009 LUC Decision, in an order attached hereto and incorporated herein as Exhibit "D." On November 12, 2010, the Department of Environmental Services timely filed its Notice of Appeal to the Intermediate Court of Appeals ("ICA"). On July 14, 2011, Applicant moved to transfer the appeal to the Supreme Court, which was granted by the Supreme Court on August 1, 2011. Briefing is concluded, and the case remains pending before the Supreme Court.

III. ARGUMENT

A. Pending Appellate Review of Prior Order Does Not Preclude a New SUP Application

Intervenors' argument that the Planning Commission lacks jurisdiction to amend 2008/SUP-2 due to the pending appeal is misplaced. Applicant is not seeking to reopen the prior proceeding pursuant to which 2008/SUP-2 was granted. Rather, Applicant has filed a new application with the City and County of Honolulu, Department of Planning and Permitting ("DPP") to amend 2008/SUP-2; this proceeding is not a continuation of the prior application now on appeal.¹ Pursuant to the original jurisdiction conferred upon the Planning Commission by HRS § 205-6 to consider applications relating to special use permits as well as the Rules of the

¹ The Planning Commission already acknowledged and affirmed this distinction in its careful consideration of Intervenors' motion to intervene. That motion was denied to the extent it was premised on the application as a continuation of the prior proceeding, but granted based on the Intervenors' interests in the current new application.

Planning Commission, the Planning Commission has jurisdiction to consider the present application.

Section 205-6, HRS, provides in relevant part that:

(a) Subject to this section, the county planning commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. . . .

. . .

(c) The county planning commission may, under such protective restrictions as may be deemed necessary, permit the desired use, but only when the use would promote the effectiveness and objectives of this chapter; provided that a use proposed for designated important agricultural lands shall not conflict with any part of this chapter. A decision in favor of the applicant shall require a majority vote of the total membership of the county planning commission.

The statute clearly gives the county planning commissions original authority to act on special permits. Nowhere in HRS chapter 205 is there a prohibition against filing a new application while an appeal of an old one is pending. Therefore, it is within the Planning Commission's original jurisdiction to consider this new application.

Likewise, the Rules of the Planning Commission do not prohibit resubmitting applications for SUPs. The Rules only provide time restrictions for reapplication.

Specifically, Rule of the Planning Commission §§ 2-51 and 2-80 provide:

Reapplication. The commission shall not accept any petition covering substantially the same request for substantially the same land as had previously been denied by the commission within one year of the date of denial, unless petitioner submits significant new data or additional reasons which substantially strengthen its position.

Reapplication after withdrawal. The commission shall not accept a petition for substantially the same project that was before the commission and withdrawn voluntarily by the petitioner after publication of a public notice for a contested case hearing within two years of the date of such withdrawal.

Clearly, the Rules of the Planning Commission envision and thus enable filing new applications for previously reviewed SUP requests.

In the present matter, the Planning Commission did not deny Applicant's petition for 2008/SUP-2 and even if it had, Applicant's present June 28, 2011 application was filed well over a year after the Planning Commission's last decision on the landfill's SUP on July 31, 2009. Further, Applicant did not withdraw its petition for 2008/SUP-2, which was granted by the Planning Commission and the LUC in 2009. Inasmuch as Applicant is not precluded by the Rules of the Planning Commission, specifically not restricted by §§ 2-51 and 2-80, Applicant may submit and the Planning Commission may consider Applicant's new petition to amend 2008/SUP-2.

Intervenors argue that because an appeal of an administrative decision divests the administrative body of authority to reconsider, vacate or modify its decision, if a prior decision on an SUP is under appeal, the Planning Commission is without authority to consider new applications relating that same SUP. However, the case law cited by Intervenors reveal that filing new actions is distinguishable from reopening matters on appeal.

None of these cases involved a new application for agency action. In *Baltimore Ravens, Inc. v. Self-Insuring Employees Evaluation Board*, 94 Ohio St.3d 449, 764 N.E.2d 449 (2002), the administrative agency (Self-Insuring Employers Evaluation Board) reopened a proceeding to hold a new hearing and issue a second order that corrected a defect in the earlier order, which was under appeal. In *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 143 Colo. 590, 355 P.2d 83 (1960), the administrative agency (Anti-Discrimination Commission) reopened a proceeding to supplement its prior order by entering new findings and new orders while the prior order was under appeal. In *Gagne v. Inhabitants of the City of Lewiston*, 281 A.2d 579, the administrative agency (Zoning Board of Appeals) reopened a proceeding for a second vote when the first vote was under appellate review. In *American Smelting and Refining*

Co., 113 Ariz. 243, 550 P.2d 621 (1976), the administrative agency (Arizona Air Pollution Control Hearing Board) reopened a proceeding to vacate part of its original order during the pendency of an appeal of that order. In *Doctors Nursing & Rehabilitation Center v. Sebelius*, 613 F.3d 672 (2009), the administrative agency (United States Department of Health and Human Services) reopened its administrative proceedings to reconsider the applicant's claims while its original decision was under appeal. In each case, an administrative agency reopened a final order that was on appeal.

Here, Applicant is not trying to reopen an already final administrative decision that is pending appeal. Applicant is asking the Planning Commission to approve a new application. Contrary to Intervenor's contentions, consideration of a new application is not prohibited and in fact the Planning Commission is obligated to do so by HRS § 206-5.

Applicant is not seeking to defeat or usurp the appellate court's decision-making authority. On the contrary, Applicant wishes to preserve the appeal while also applying for the new SUP action. Because the July 31, 2011 deadline for the landfill to accept municipal solid waste may pass before the appellate court makes its decision, Applicant also initiated this separate administrative action—the application to amend 2008/SUP-2. Nothing in this proceeding will change the record under consideration by the Supreme Court because this new application is a different proceeding with its own record. To ensure that the critical need to keep the only legally authorized municipal solid waste landfill on Oahu operational past July 31, 2011 is met, Applicant's dual attempt at timely review is not only permitted and prudent, but imperative.

Further, again contrary to Intervenor's contentions, HRS § 91-14 does not preclude the refiling of an SUP application while that SUP is pending appeal. Intervenor's cite to HRS § 91-

14(e) to argue that such a process is limited to instances where the applicant is granted permission from the appellate court to reopen the case to accept additional material evidence. However, Intervenor's fail to also acknowledge HRS § 91-14(a), which does the opposite of restricting alternate means of "review, redress, relief."

HRS § 91-14(a) provides:

(a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; **but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law.**

(emphasis added).

Interpreting HRS § 91-14(e) and HRS § 91-14(a) together to avoid rendering any part of § 91-14 a nullity as dictated in *County of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 119 Hawai'i 352, 363, 198 P.3d 615, 626 (2008), the legislative intent is not to restrict means of review, redress and relief but to keep it broad as provided in HRS § 91-14(a) and to provide an additional avenue of review via HRS § 91-14(e).

Consequently, the Planning Commission has jurisdiction to consider Applicant's new application to amend 2008/SUP-2 because this means of review and relief is not only not prohibited by law but encouraged by HRS § 205-6, the Rules of the Planning Commission, and HRS § 91-14.

B. New SUP Application is Properly Before the Planning Commission

Intervenor's argue in the alternative that if the 2009 LUC Decision were not pending before the Hawaii Supreme Court, the required forum to consider this application to amend 2008/SUP-2 is the LUC and not the Planning Commission. The fact of the matter is the appeal is

pending and as argued by the Intervenor, the LUC cannot reopen a case for which a final order has been entered and appealed. See Intervenor's Motion to Dismiss.

Regardless, Intervenor extensively cite to Applicant's "Post-Hearing Brief," dated April 8, 2009 (2009 Post-Hearing Brief") in support of their argument that only the LUC can modify an LUC condition. This prior case is clearly distinguishable from the present action. In the prior matter, the LUC decision had not been appealed, so the LUC retained jurisdiction to consider the motion to amend its condition.

It is worth noting that while Intervenor cite extensively to the 2009 Post-Hearing Brief to support their argument, they fail to acknowledge the contrary argument they advanced and prevailed upon before the LUC in "Intervenor's Memorandum in Opposition to Department of Environmental Services, City and County of Honolulu's Motion for Reconsideration," dated November 12, 2009 ("2009 Memo"). In the 2009 Memo, Intervenor's argued:

The LUC Rules which are applicable to a SUP are set forth only in §§ 15-15-95 and 96. No other rules are referenced or incorporated into that process. This is clearly evident in that there is no contested case before the LUC on SUP matters; and the LUC's decision on SUPs are not faced with the requirements of § 15-15-82.

2009 Memo, at page 8 (emphasis added). Intervenor contended that the LUC Rules mostly provide for procedures for district boundary amendment proceedings and that the only LUC Rules that apply to special permit proceedings are §§ 15-15-95 and 15-15-96. Pursuant to this argument, LUC Rule § 15-15-94, the rule providing for modification or deletion of conditions or orders, does not apply to SUP proceedings. Therefore, any modification of an SUP would need to first come before the Planning Commission.

Intervenor may argue that because LUC Rule § 15-15-94 is not contained in Subchapter 9, "Post Hearing Procedures for Hearings Before the Commission," its application is not limited

to district boundary amendment contested case proceedings, but applies to SUP proceedings as well. However, LUC Rule § 15-15-94 makes specific reference to the district boundary amendment process:

If a petitioner, pursuant to this subsection, desires to have a modification or deletion of a condition that was imposed by the 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**

The plain reading of this section is that it applies only to modifications or deletions of conditions or orders in a district boundary amendment proceeding, a reading that undercuts Intervenor's present argument. Intervenor's cite this same section but fail to acknowledge the district boundary amendment reference.²

As evidenced by the divergent arguments espoused by both parties regarding the proper forum to request an amendment imposed by the LUC alone, it appears that both neither the rules of the Planning Commission nor those of the LUC establish clear and specific procedures for such a request. However, as stated above, it is clear that original jurisdiction lies with the Planning Commission to consider applications relating to SUPS. As further articulated in HRS § 205-6:

(d) Special permits for land the area of which is greater than fifteen acres or for lands designated as important agricultural lands shall be subject to approval by the land use commission. The land use commission may impose additional restrictions as may be necessary or appropriate in granting the approval, including the adherence to representations made by the applicant.

(e) . . . Within forty-five days after receipt of the complete record from the county planning commission, the land use commission shall act to approve, approve with modification, or deny the petition. A denial either by the county

² Intervenor's also accuse Applicant of misconstruing the LUC's position in regards to requesting relief from the 2009 LUC Decision. Intervenor's Motion to Dismiss, p. 18. Yet, Intervenor's cite the same paragraph of the LUC's argument as Applicant. Because the LUC did not specify how Applicant would request relief, it is reasonable and certainly not misleading for Applicant to presume that such relief should first be requested from the Planning Commission via a new application to amend the SUP.

planning commission or by the land use commission, or a modification by the land use commission, as the case may be, of the desired use shall be appealable to the circuit court of the circuit in which the land is situated and shall be made pursuant to the Hawaii rules of civil procedure.

The LUC is only empowered to review actions of the county planning commissions and then only when they approve special permits.³ A denial of a special permit by a county planning commission is not subject to the LUC's review, but is a final decision appealable to the Circuit Court. The clear intent of the Legislature in empowering the county planning commissions to issue special permits subject to approval by the LUC was to establish a county-state scheme for the issuance of special permits under which the Planning Commission has original jurisdiction to grant special permits.

Therefore, by submitting a new application to amend the current SUP pursuant to the Rules of the Planning Commission §§ 2-18 and 2-48, Applicant is invoking the original jurisdiction of the Planning Commission to decide upon its application. It is not limiting this review to the evidence presented in prior proceedings and, contrary to Intervenor's contentions, is enabling more extensive review of and public input into the process.⁴

³ Rules of the Planning Commission §2-47(b) provides:

The commission shall transmit a copy of any decision granting a special use permit to the state land use commission within sixty (60) calendar days after the decision is rendered, together with the planning commission's findings.

⁴ A motion to modify or delete a condition or order by the LUC as provided in LUC Rule § 15-15-95 would involve serving the motion on the parties to the already existing proceeding and review by the LUC. In comparison, a new application with the Planning Commission as provided by both the rules of the Planning Commission and the LUC would require submittal of the application to the Department of Planning and Permitting, review of the application by governmental agencies and all interested parties, a report evaluating the application from the Department of Planning and Permitting, a public hearing, the opportunity for interested parties to intervene, a contested case if parties are granted intervene, review by the Planning Commission, if the application is approved then review by the LUC and a public hearing, public comment during the LUC hearing. In this case, Schnitzer Steel Hawaii Corp., who was not a party to the prior proceeding, would not be allowed to intervene in the matter if it is limited to LUC review. Regardless of Applicant's position as to Intervenor's status as parties, clearly the Planning Commission process will afford more extensive review and opportunity for public input.

Moreover, the Supreme Court “customarily accord[s] persuasive weight to the construction given words of broad and indefinite meaning by the agency charged with the responsibility of carrying out the mandate of the statute in question, unless the construction is palpably erroneous.” Aio v. Hamada, 66 Haw. 401, 410, 664 P.2d 727, 737 (1983) (citing Treloar v. Swinerton & Walberg Co., 65 Haw. 415, 424, 653 P.2d 420, 426 (1982)). In carrying out the mandate of HRS § 205-6, the Planning Commission can consider applications for SUPs, including applications seeking to amend the SUPs. This interpretation is not palpably erroneous because it would afford both the Planning Commission and the LUC the opportunity to review the new application and bases for the amendment to the SUP.

IV. CONCLUSION

The rules of the Planning Commission and the LUC contain no specific prohibition against submitting applications relating to SUPs while pending appellate review. Similarly, there is no applicable legal standard that would preclude a new application. Further, given the dire consequences of the impending deadline, the potential ramifications of any delay, and the original jurisdiction conferred by statute upon the Planning Commission to consider special permit applications, Applicant now properly filed its application to modify 2008/SUP-2 with the Planning Commission. The Planning Commission should rule on the application based on its

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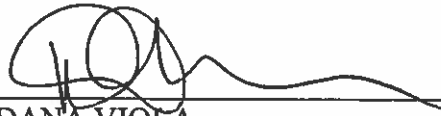
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substantive merits. Accordingly, Applicant respectfully requests that Intervenor's Motion to Dismiss be denied, so that the merits of the matter can be considered.

DATED: Honolulu, Hawaii, November 14, 2011.

ROBERT CARSON GODBEY
Corporation Counsel

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

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of

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 92-460 Farrington Highway, Honouliuli, Ewa, Oahu. See Planning Division Master Application Form included within the Special Use Permit Application filed on December 3, 2008.

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 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, Intervenor filed that certain Reply Brief of Intervenor, 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 WGSF 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 Intervenors 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 WGSF 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 WGSL. 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 WGL, 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 WGL. See Tr. 7/1/09, 112:7-10; 113:25-114:2. Waste Management has submitted a demonstration to the EPA establishing that WGL 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 WGL. 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 WGL. See Tr. 7/1/09, 108:8-14. If there was combustion at WGL, 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 WGSJ 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 WGSJ 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 FEIS; 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 Intervenor's 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:

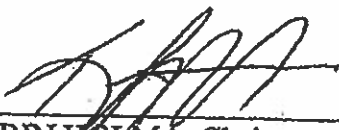
1. On or before November 1, 2010, the Applicant shall begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGS�. The Applicant's effort to identify and develop such sites shall be performed with reasonable diligence, and the Honolulu City Council is 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 WGS�'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 WGSJ as shown on Exhibit "A12" must be completed, and final cover applied, by December 31, 2012.
5. WGSJ 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 WGSJ 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 WGSJ 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

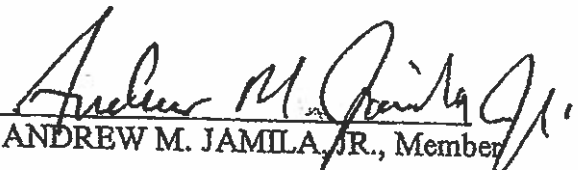
By 
KARIN HOLMA, Chair

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

STATE OF HAWAII

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

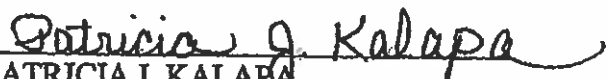
CERTIFICATE OF SERVICE

Attorney for Intervenor
KO OLINA COMMUNITY ASSOCIATION,
COLLEEN HANABUSA, AND MAILE SHIMABUKURO

GARY Y. TAKEUCHI, ESQ.
JESSE K. SOUKI, ESQ.
Deputies Corporation Counsel
Department of the Corporation Counsel
530 South King Street
Honolulu, Hawai'i 96813

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

DATED: Honolulu, Hawai'i, August 4, 2009


PATRICIA J. KALAPA
Secretary-Reporter
Planning Commission

Meeting of the Planning Commission
Transcripts
July 31, 2009

The Planning Commission held a meeting on Friday, July 31, 2009, at 3:05 p.m. at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. Chair Karin Holma presided.

PRESENT:

Karin Holma, Chair
Rodney Kim, Vice Chair (by telephone conference call)
Beadie K. Dawson
Harold J. Dias, Jr.
Vicki Gaynor
Andrew M. Jamila, Jr.
Kerry Komatsubara
James Pacopac

ORIGINAL

RECUSED:

John S. Kaopua III

COMMISSION STAFF:

Patty Kalapa, Secretary-Reporter

CORPORATION COUNSEL: Winston Wong

CONTESTED CASE HEARING

EWA—STATE SPECIAL USE PERMIT APPLICATION—2008/SUP-2(RY)
AND WITHDRAWAL OF STATE SPECIAL USE PERMIT NO. 86/SUP-5(RY)
WAIMANALO GULCH SANITARY LANDFILL

2009 AUG 11 P 1:55
LAND USE COMMISSION
STATE OF HAWAII

HOLMA: I'd like to call the meeting to order. We have State Special Use Permit Application 2008/SUP-2 and withdrawal of the State Special Use Permit number 86/SUP-5, Waimanalo Gulch Sanitary Landfill. First, I want to confirm for the record that the evidentiary portion of the contested case was closed on July 8, 2009. We are here for decision making today. I want to thank all of the commissioners for all of their hard work and attending. We thank the parties for their submittals which we've all read.

What we have passed out at this point is a draft Findings of Fact or a discussion draft Findings of Fact, Conclusions of Law and Decision and Order. We are currently waiting for Commissioner Kim who is on the mainland. It's being faxed to him at this point. We're waiting for him to receive that. I ask the Commissioners to take a look at this draft.

HOLMA: It got there. We should wait ten more minutes, five more minutes? He hung up on me. He was going to pick it up. Hi Rodney, can you hear us?

KIM: Hello.

GAYNOR: Rodney.

KIM: I'm here.

GAYNOR: Can you hear us?

KIM: I can hear you.

HOLMA: Rodney, can you talk again?

GAYNOR: Can you hear us now Rodney?

KIM: Okay. Loud and clear.

HOLMA: Did you receive the fax? Rodney, did you get the fax?

KIM: I've got the fax in front of me.

HOLMA: In order to start discussion on this, we need to have a motion, so I'm going to ask for a motion to approve the applicant's Special Use Permit application file SUP 2008-2 for the new SUP permit with conditions and based on the Findings of Fact and Conclusions of Law that are stated in this draft Decision and Order.

KOMATSUBARA: I'd like to make a motion to approve the circulated draft of the Findings of Fact, Conclusions of Law and Decision and Order. I suggest that maybe the efficient way of doing this is I'll make the motion, if someone can second the motion, and then if we can enter into a discussion, then I'll explain the general terms and how it was put together in the analysis and speak in favor of the motion.

DIAS: Second.

HOLMA: Okay. Discussion.

KOMATSUBARA: This was done at 5:30 this morning. What I basically did after going through all of these days of hearings, it was my feeling that we should approve the application for a new Special Use Permit. So what I did is I followed, in essence, the draft submitted by the applicant, the Department of Environmental Services. However, I've made certain changes. I'd like to describe the proposal that is contained herein. It's really, in essence, similar to the draft put together by ENV, but not identical to the draft put together by ENV.

The best way is, perhaps, if we can go to page 24. This is the meat and the guts of the proposed Findings of Fact, Conclusions of Law and Decision and Order. The first thing that this thing does is it denies intervenors' motion to dismiss the application for the new SUP. It approves the applicant's Special Use Permit application file number 2008/SUP-2 with certain changes and conditions. The first thing that should be noted is that the new SUP covers the entire 200.622 acres which is sought by the applicant. That really is the existing 107.5 and the approximately 92.5 expansion. The 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.

DAWSON: It's an open date, Kerry?

KOMATSUBARA: That's correct...until it reaches its capacity. I'll explain why. This is, in essence, what is being asked for by the applicant. However, the draft that I put together is different. It has different conditions, different terms that they have to comply with in order to maintain this SUP. The most important one, I think, is that the applicant must, on or before November 1, 2009...I'm sorry on or before 2010 begin to

identify and develop one or more new landfill sites that shall either replace or supplement the Waimanalo Gulch Sanitary Landfill. In addition to that, the applicant's effort to identify such sites shall be performed with reasonable diligence. But it must start to commence the process on or before November 1, 2010.

The Honolulu City Council is encouraged to work cooperatively with the applicant's effort. Upon the selection of a new site or sites, the applicant shall notify this Commission of its new selection. This Commission is obligated, at that point in time, to hold a public hearing to re-evaluate the SUP that would be granted hereunder and to determine whether a modification or a revocation of the SUP granted hereunder is appropriate at that time.

The applicant shall continue with its efforts to use alternate technologies to manage and reduce Honolulu's landfill waste. An annual report shall be provided to this Commission regarding the applicant's efforts to diligently move forward to find a new site, and also regarding the applicant's effort to find alternative technologies. That is a major change from what is included in ENV's proposal. ENV's proposal does not have this condition, nor is there any obligation for them to give us annual reports regarding the status of their effort to find a new site.

I also added in here that the operation of the landfill shall be in compliance with Section 21-5.680 of the Revised Ordinance of Honolulu to the extent that it's applicable and to all applicable rules and regulations of the Department of Health. I also added in here into this proposed draft that the enforcement of these conditions shall be pursuant to the powers granted to this Commission under its rules, including the issuance of an order to show cause why the new SUP granted hereunder should not be revoked if this Commission has reason to believe that there has been a failure to perform the conditions imposed herein this Decision and Order.

In addition, this new SUP, upon its taking effect, the existing SUP shall be withdrawn. In essence, that's the description of what this proposal is. It's similar to what ENV has proposed, but it's not identical. Now I'd like to explain how I came up with this draft and what the thought process behind it is.

First of all, for me, I believe that the applicant has met its burden of proof to show by preponderance of the evidence that the application for a new SUP meets the requirements of Section 2-45 of our Rules. Section 2-45 allows unusual and reasonable uses within the agricultural district, and they list five guidelines to make this determination. I believe the applicant has met these guidelines, and the granting of a Special Use Permit is appropriate and in compliance with the law.

I think perhaps a very common sense approach to this whole thing...I found and I believe that they've demonstrated that we need a landfill. I think it's pretty obvious; we need a landfill on this island for us to move forward. This community...it would not be in the community's best interest if we were to close this landfill before we find another landfill. The existing SUP which terminates on November 1 of this year, in my opinion, the answer is not to terminate that or to allow that existing SUP to lapse until we have a new SUP in place. Although there's been discussion regarding new technologies, shipping, etc., I think it's pretty clear that these solutions will not be on board by November 1 of this year. It seemed to be that it's not only reasonable, but it's necessary for us to continue with the operations of the Waimanalo Gulch Sanitary Landfill.

The intervenors have complained about the fairness of having Oahu's only landfill being located in their back yards since the mid 1980s. They alleged that they have been misled many times that the gulch would be closed, and they point to the numerous times when the expiration dates of the previous SUPs were extended. To me, clearly simply having a specified end date certain on the previous SUPs has not resulted in the closure of the Waimanalo Gulch. We have been down this road many times. I

think it's been extended three or four times. 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. That is the problem. I don't know if there is going to be a totally workable solution, but how do you get the City to select a new site? That's the...before they used to say \$64,000 and I guess that's not worth much now, but that's the big question here.

I went through the rules of our Commission and our responsibilities. First of all, I think it's very clear that it's not our Commission's responsibility to select a new site for the landfill. Really what we're doing in this process is merely to, in essence, do a land use process evaluation of a permit. Now, surely we can through the granting or denial of a permit add conditions so on and so forth, but we do not have the power to, for example, impose a fine or levy sanctions if the conditions are not met. The only power we really have is the power to revoke under our rules. But then we come back to the same question. If our only power is to revoke, how meaningful is it when everyone knows that we still need this landfill because, you know, we're not going to throw the baby out with the bath water. That's the biggest problem.

What I've tried to do in drafting this proposal is to try to change the focus, so rather than picking a date certain like it was done before, you know, you can pick a date fifteen years out and in the fourteenth year people start reporting and focusing upon whether you're going to close this landfill. If you don't have a new landfill site ready, then you just extend it another five years. That's what happened in the past.

So what this proposal does is, it says look, you can keep it open until your full, until you've reached the capacity, but you have an obligation starting from next year 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.

This, in essence, is our attempt to keep the applicant true to its representation in the hearing that it will begin in 2010 its effort to identify and develop a supplemental landfill site on Oahu. The problem still remains how to enforce this condition, how to enforce this promise. This is my good faith effort as to how to answer the question. I don't know if there's ever going to be a simple answer, but I think going down the old path of just putting a 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 can understand why people feel that they have been deceived because this keeps on being extended. I personally don't want to go down that road. 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 the applicant come in every year and explain to us where you are in your effort to find a new site. That's what this proposal does.

DAWSON: I want to thank Kerry for the work that he has put into this proposal on his own without any encouragement from anywhere else. This is a difficult decision and I'm very, very grateful to you. I think that what you have proposed could be a great solution, the beginning of a solution, but I think that there are some refinements that need to be put in there. First of all...and this is addressed to our Commission. We have

ADJOURNMENT

The meeting adjourned at 4:25 p.m.

I certify that the foregoing is a true and correct transcription of the proceedings, prepared to the best of my ability, of the hearing held on July 31, 2009.

Patricia J. Kalapa
PATRICIA J. KALAPA, Secretary-Reporter
August 5, 2009
Date



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

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 Kanahele; 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

-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 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 (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 WGS�'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 WGS� as shown on Exhibit "A12" must be completed, and final cover applied, by December 31, 2012.

8. WGS� 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 WGS� 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 [Signature]
RANSOM PILTZ
Chairperson and Commissioner

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

By [Signature]
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



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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Order Adopting the City and County of Honolulu Planning Commission's Finding of Fact, Conclusions of Law and Decision and Order was served upon the following by either hand delivery or depositing the same in the U. S. Postal Service by regular or certified mail as noted:

DEL. Abbey Seth Mayer, Director
 Office of Planning
 P. O. Box 2359
 Honolulu, Hawaii 96804-2359

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

11

Bryan Yee, Esq.
Deputy Attorney General
Hale Auhau, Third Floor
425 Queen Street
Honolulu, Hawaii 96813

REGULAR MAIL David Tanoue, Director
Department of Planning and Permitting
City and County of Honolulu
650 South King Street
Honolulu, Hawaii 96813


REGULAR MAIL Carrie Okinaga, Esq.
Corporation Counsel
City & County of Honolulu
530 South King Street
Honolulu, Hawaii 96813

CERT. Gary Takeuchi, Esq.
Jesse Souki, Esq.
Deputy Corporation Counsel
City and County of Honolulu
530 South King Street, Room 110
Honolulu, HI 96813

CERT. Department of Environmental Services
City & County of Honolulu
1000 Uluohia Street, 3rd Floor
Kapolei, Hawaii 96707

CERT. COLLEEN HANABUSA, Esq.
220 So. King St. , Suite 1230
Honolulu, Hawaii 96813

Dated: October 22, 2009, Honolulu, Hawaii.


Orlando Davidson, Executive Officer



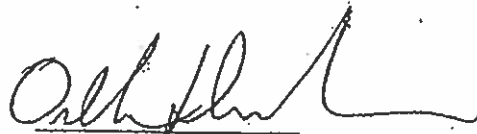
BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAII

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,
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Allow A 92.5-Acre Expansion And Time)	MODIFICATIONS
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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

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.

October 22 2009 by


Executive Officer

Orlando Davidson, Executive Officer

1ST CIRCUIT COURT
STATE OF HAWAII
FILED

N. ANAYA
CLERK.

EXHIBIT D

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:

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

APPROVED AS TO FORM:

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

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A COPY OF THE DEPARTMENT OF
ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S
OPPOSITION TO INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND
MAILE SHIMABUKURO'S MOTION TO DISMISS was duly served by either hand
delivery or U. S. Mail, postage prepaid, to the following on the date below, addressed as follows:

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

IAN L. SANDISON
DEAN H. ROBB
TIM LUI-KWAN
Carlsmith Ball LLP
American Savings Bank Tower
1001 Bishop Street, Suite 2200
Honolulu, Hawai'i 96813

Attorneys for Intervenor
SCHNITZER STEEL HAWAII CORP.

CALVERT G. CHIPCHASE
CHRISTOPHER T. GOODWIN
Cades Schutte LLP
1000 Bishop Street, Suite 1200
Honolulu, Hawaii 96813

Attorneys for Intervenor
KO OLINA COMMUNITY ASSOCIATION and MAILE SHIMABUKURO

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



DANA VIOLA
ROBERT BRIAN BLACK
Deputies Corporation Counsel

11-01661/202629