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DEPT OF PLANNING
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 CITY & COUNTY OF HONOLULU

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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 REOPEN THE CONTESTED CASE
which states as follows:)	HEARING; CERTIFICATE OF SERVICE
)	
"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.")	
_____)	

DEPARTMENT OF ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF HONOLULU'S MEMORANDUM IN OPPOSITION
TO INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND
MAILE SHIMABUKURO'S MOTION TO REOPEN THE CONTESTED CASE HEARING

Applicant **DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU** ("ENV"), by and through its attorneys, DANA VIOLA and ROBERT BRIAN BLACK, Deputies Corporation Counsel, respectfully submits this Memorandum in Opposition to Intervenors Ko Olina Community Association and Maile Shimabukuro's (collectively, "Intervenors") Motion to Reopen the Contested Case Hearing, dated April 27, 2012.¹ The evidence that Intervenors seek to introduce is not relevant and, if introduced, would require reopening the proceeding for additional testimony. The Motion to Reopen should be denied.

After a public hearing, eight days of contested case testimony, and hundreds of exhibits, the record before the Planning Commission is complete and closed as of April 23, 2012. As part of that record, Intervenors introduced Exhibit K258—photographs from an April 20, 2012 meeting of the Mayor's Advisory Landfill Site Selection Committee ("Advisory Committee"). The photographs show the "Preliminary Weighted Site Scores" for the sites evaluated to replace or supplement Waimanalo Gulch Sanitary Landfill ("WGSL"). (Ex. K258.) Intervenors claim that their exhibit now is inaccurate because the *preliminary* site ranking is expected to change when the Advisory Committee issues its final report.

¹ Intervenors' motion, filed with the Department of Planning and Permitting at 4:15 p.m. on Friday, April 27, 2012, states that Intervenors had proposed a joint statement regarding the site rankings and that "Counsel for ENV did not respond to the proposal." (Intervenors' Mot. to Reopen at 4.) In fact, Intervenors made that proposal at 3:02 p.m. on April 27 and ENV responded with a counterproposal at 3:53 p.m. Further correspondence over the weekend and Monday morning did not resolve this dispute.

Planning Commission Rules provide:

The commission may reopen a contested case hearing which has been declared closed, but before it renders its decision, for the express purpose only of admitting new parol and documentary evidence as the same shall be otherwise relevant to the issues in the contested case with notice to all parties. The parties shall be allowed reasonable time in which to submit rebuttal.

Rule 2-71(f). The Planning Commission thus cannot exercise its discretion to reopen a closed proceeding unless the Commission determines that the evidence is new and relevant to the issues in the contested case. Intervenors do not address this standard.²

The specific site rankings from the Advisory Committee are not relevant to this contested case. Whether the Advisory Committee's community criteria resulted in rankings with a Kailua site higher than a North Shore site or vice versa has no impact on this Commission's resolution of ENV's application regarding the deadline to close WGS� to municipal solid waste on July 31, 2012. There is no reason for the Planning Commission's findings of fact or conclusions of law to even reference the exact ranking of the proposed sites.

The only issue peripherally relevant to this contested case is whether ENV has with "reasonable diligence" begun an effort "to identify and develop one or more new landfill sites that shall either replace or supplement the WGS�" in accordance with Condition No. 4 of the Land Use Commission's 2009 Order. (Land Use Commission, Dkt. No. SP09-403, Order ¶ 4 at 6 (Oct. 22, 2009).) ENV's diligence is amply demonstrated by the records of the Advisory Committee meetings—to the extent such records existed through the closure of this proceeding—and the testimony of committee member Janice Marsters and ENV Director Tim Steinberger. Everyone anticipated that the Advisory Committee would continue its work—a fact reflected starkly in Intervenors' Exhibit K258 photograph of the committee's "Preliminary" site

² Intervenors only argue that "[r]eopening the case is appropriate here for the limited purpose of entering evidence to correct the erroneous scored list and map presently in evidence as Exhibit K258." (Intervenors' Mot. to Reopen at 3.)

rankings—and that ENV’s efforts to evaluate the sites would continue even after the committee’s work ended. That the committee’s work, as anticipated, continued after April 23, 2012, does not merit reopening this proceeding.

At some point, the Planning Commission must stop taking evidence. Intervenors’ evidence is not any more new nor relevant than other subsequent stages in the site development process. In the near future, the Advisory Committee is expected to publish a group memory for the April 20 meeting, meet again to discuss its final report, and circulate in advance of the final report an executive summary of its findings. The Commission need not continually reopen this proceeding as the ongoing efforts of the Advisory Committee unfold. The Commission’s current record accurately reflects information available as of April 23, 2012, when the record closed.

Finally, Intervenors might argue that the underlying error that led to a new site ranking fits Dwight Miller’s allegations of incompetence in the Advisory Committee process. Mr. Miller’s critique of the volunteer work of the Advisory Committee is unfounded for all the reasons outlined in testimony by Ms. Marsters and Director Steinberger—*e.g.*, Mr. Miller’s failure to understand the committee’s role as a voice for community values, not a substitute for further geotechnical and other analysis. In the end, Intervenors have presented their evidence regarding Mr. Miller’s theories. A mere data entry error in presenting the “Preliminary” site rankings has no discernible tendency to make those criticisms more or less true.

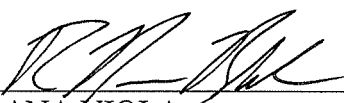
And if the Planning Commission exercised its discretion to admit this evidence, ENV has the right under the Commission’s Rules to offer rebuttal evidence. The data entry error must be understood in context. ENV proffers that on April 20, analysts attempted—during a 15-20 minute break in the Advisory Committee meeting—to perform statistical analyses on the fly with a complex dataset, inadvertently introduced a data entry error, presented the resulting site

rankings as *preliminary* subject to quality control, and uncovered the error while validating the data for quality control. If the Planning Commission deems a simple human mistake in site ranking relevant to ENV's application regarding the impending closure of WGSL to municipal solid waste on July 31, 2012, Intervenor's two limited exhibits do not provide sufficient context.

Based on the foregoing, ENV respectfully requests that the Planning Commission deny Intervenor's Motion to Reopen the Contested Case Hearing.

DATED: Honolulu, Hawaii, May 1, 2012.

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
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In the Matter of the Application of) FILE NO. 2008/SUP-2
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A COPY OF **THE DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S MEMORANDUM IN OPPOSITION TO INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE SHIMABUKURO'S MOTION TO REOPEN THE CONTESTED CASE HEARING** was duly served by hand-delivery to the following on the date below, addressed as follows:

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

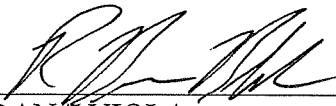
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KO OLINA COMMUNITY ASSOCIATION and MAILE SHIMABUKURO

DATED: Honolulu, Hawai'i, May 1, 2012.



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

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