

CADES SCHUTTE LLP

CALVERT G. CHIPCHASE 7757-0
CHRISTOPHER T. GOODIN 8562-0
1000 Bishop Street, Suite 1200
Honolulu, Hawai'i 96813-4212
Telephone: (808) 521-9200
Facsimile: (808) 521-9210
E-mail: cchipchase@cades.com
cgoodin@cades.com

RECEIVED

'12 MAY 22 P4:09

DEPT OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLULU

Attorneys for Intervenors
KO OLINA COMMUNITY ASSOCIATION
and MAILE SHIMABUKURO

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU
STATE OF HAWAII

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

To delete Condition No. 14 of Special
Use Permit No. 2008/SUP-2 (also
referred to as Land Use Commission
Docket No. SP09-403) which states as
follows:

"14. Municipal solid waste shall be
allowed at the 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."

FILE NO. 2008/SUP-2

**INTERVENORS KO OLINA
COMMUNITY ASSOCIATION AND
MAILE SHIMABUKURO'S
MEMORANDUM IN OPPOSITION
TO DEPARTMENT OF
ENVIRONMENTAL SERVICES'
NOTIFICATION OF SUPREME
COURT DECISION OR IN THE
ALTERNATIVE MOTION FOR
STAY OF CONTESTED CASE
HEARING**

CERTIFICATE OF SERVICE

Contested Case Beginning:
December 7, 2011

KOCA 36

MEMORANDUM IN OPPOSITION

Intervenors Ko Olina Community Association and Maile Shimabukuro (together, “KOCA”) oppose Applicant Honolulu Department of Environmental Services’ (“ENV”) Notification of Supreme Court Decision or in the Alternative Motion for Stay of Contested Case Hearing filed May 15, 2012 (“Motion”).¹

I. INTRODUCTION

The ENV has not told the Commission the whole story. It is true that on May 4, 2012, the Hawai‘i Supreme Court struck down Condition 14 of the Land Use Commission’s (“LUC”) Order Adopting the City and County of Honolulu Planning Commission’s Findings of Fact, Conclusions of Law, and Decision and Order with Modifications (“2009 Order”).² The court concluded that the record did not reflect the “substantial evidence” necessary to support Condition 14. *Dep’t of Envtl. Servs. v. Land Use Comm’n*, No. SCAP-10-0000157, Slip Opinion at 32, a copy of which is attached to the Motion as Exhibit A. But the court did not stop there.

The court went on to vacate the entire 2009 Order approving SUP-2 for the Waimanalo Gulch Sanitary Landfill (“Landfill” or “WGSL”). *Id.* As the court recognized, “Condition 14 was a material condition to the LUC’s approval.” *Id.* Because

¹The ENV styled its motion as a “notice” to the Planning Commission. The title is a misnomer. The ENV has filed a motion to dismiss the contested case proceeding.

²We all know 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.

Ex. K15 at 8 (¶ 14) (10/22/09 LUC order).

a material condition of the order could not stand, the court held that “the LUC’s approval of SUP-2 also cannot stand” *Id.* Accordingly, the court vacated the order and remanded the proceeding on SUP-2 to the LUC “for further hearings as the LUC deems appropriate.”³ *ENV*, Slip Op. at 32. On remand, the LUC must determine whether to approve SUP-2 and if approved, which conditions should attach to the permit.⁴

The court does not expect the LUC to limit its review to the record developed during the 2009 contested case proceeding. On the contrary, the court specifically recognized that “on June 28, 2011, [the ENV] filed a [r]equest for modification of condition 14 of SUP file No. 2008/SUP-2’ with the Planning Commission, and that contested case hearing is ongoing in that proceeding.” *Id.* at 36 n.16 (alteration added). In light of the ongoing contested case, the court “**encourage[d] the LUC to consider any new testimony developed before the Planning Commission in**

³In March 2008, the LUC approved SUP-5 but ordered that the Landfill be “restricted from accepting any additional waste material and be closed in accordance with an approved closure plan by November 1, 2009.” Ex. K155 at 18 (¶ 12) (3/14/08 LUC order). On December 3, 2008, the ENV applied for a new SUP. Ex. K12 at 2 (¶ 5) (8/4/09 HPC order). When the LUC approved SUP-2, the prior special use permit was deemed withdrawn. Without 2008 SUP-2, the Landfill is left with SUP-5, which required the Landfill to stop accepting waste by November 1, 2009. Ex. K155 at 18 (¶ 12) (3/14/08 LUC order).

There is presently no special use permit for the Landfill. Without a special use permit, the Landfill is not a permissible use in the Agricultural district. *See* HRS §§ 205-4.5(c), 205-2(d).

⁴The LUC may “approve, approve with modification, or deny the petition” for SUP-2. HRS § 205-6(e); *see also* Hawai‘i Administrative Rules (“HAR”) § 15-15-96(a). The Commission may also “impose additional restrictions as may be necessary or appropriate in granting the approval, including the adherence to representations made by the applicant.” HRS § 205-6(d); *see also* HAR § 15-15-96(a).

that case. *Id.* (emphasis and alteration added). The court plainly wants the LUC to consider all of the facts.

Despite the court's express expectation that the LUC will consider the record developed in this contested case proceeding, the ENV claims that its Application to Modify SUP-2 ("**Current Application**") is "moot." Motion at 2. Based solely on this premise, the ENV argues that the Planning Commission "must" dismiss the contested case or in the alternative, should stay it. *Id.* at 3, 4.

The ENV knew that its appeal to the supreme court was pending when it filed the Current Application. The ENV was not concerned about jurisdiction. Indeed, when KOCA moved to dismiss the Current Application on the ground that the appeal of Condition 14 had vested jurisdiction over SUP-2 in the Hawai'i Supreme Court, KOCA Motion at 4–10, the ENV responded that its Application had created a "new" proceeding over which the Planning Commission had "original jurisdiction," ENV Opp. at 6, 9, 11, 12. KOCA disagreed with the ENV's characterization of the Current Application. But when KOCA pointed out that "[t]here is no reason to spend public and private resources on a contested case proceeding" that may prove unnecessary, KOCA Motion at 20, the ENV insisted that "[t]his is, again, a new application. That is why we went under the jurisdiction of the Planning Commission as ordered by the Hawaii revised statutes Section 205-6 and articulated further in the rules of the Planning Commission," 12/7/11 Tr. at 13:16–20. And when KOCA asked Director Steinberger whether he knew what would happen to this proceeding "if the Hawaii Supreme Court deletes condition 14," the Director claimed "not [to]

have an opinion on that.” 1/11/12 Tr. at 25:14–18. KOCA’s motion to dismiss was denied.

Over KOCA’s objection, the contested case hearing went forward. The proceeding lasted five months. The Planning Commission received written direct testimony from eleven witnesses. Fifteen witnesses provided live testimony and were subject to cross-examination. More than 260 exhibits were admitted into evidence. The Commission heard opening statements and closing arguments by counsel. And proposed findings of fact and challenges to those findings have been filed. We cannot unwind the clock. But we can avoid wasting the parties’ and the Commission’s massive investment of time and resources in this contested case proceeding.

The Current Application is not moot because the ENV did not prevail before the Hawai’i Supreme Court. If the court had struck down Condition 14, as the ENV requested, mootness might be a concern. But the court took another path. The court vacated the entire 2009 Order and remanded the matter to the LUC for further proceedings. On remand, the LUC will consider when the Landfill should close, whether the ENV has acted with “reasonable diligence” in selecting a new landfill site and which additional conditions are necessary to protect the public from the harmful effects of the Landfill. These are the same issues under consideration before the Planning Commission. Because the issues before the Planning Commission and the LUC are identical, the court encouraged the LUC to consider the entire record developed before the Planning Commission.

Consistent with the court's encouragement, on May 21, 2012, the LUC passed a motion to send a letter to the Planning Commission asking the Commission to defer decision-making on the Current Application until the LUC can remand the ENV's December 3, 2008 Application ("**Original Application**") to the Commission. The LUC will ask the Planning Commission to consolidate the Original Application with the Current Application. The Planning Commission should not frustrate the court's and the LUC's express wishes by dismissing the contested case proceeding.

Nor should the Planning Commission enter a stay. Planning Commission Rule § 2-72 requires the Commission to render its decision within sixty days after the close of the contested case hearing, unless the parties agree to a longer period. Under the circumstances, the Commission should simply continue decision-making in this proceeding.⁵ With decision-making continued, the LUC will have an opportunity to remand consideration of SUP-2 so that the Original Application can be consolidated with Current Application for a decision on the new evidence. When the consolidated matter returns to the LUC, that body will have a complete record. This is the process contemplated by the supreme court and the LUC.

II. ARGUMENT

The case is not moot. The case should not be dismissed. And there is no reason to enter a stay.

⁵If decision-making must be delayed more than 60 days, the parties should agree to provide the Commission a longer period.

A. Dismissing the Case as Moot Would Be Wrong and Would Cause a Waste of Time and Resources.

Mootness is a narrow concept. A case only becomes moot when it “los[es] its character as a present, live controversy of the kind that must exist if courts are to avoid advisory opinions on abstract propositions of law.”⁶ *County of Hawai'i v. Ala Loop Homeowners*, 123 Hawai'i 39, 205, 235 P.3d 1103, 1117 (2010). The issues surrounding the closure of the Landfill and related matters remain very much alive.

There is presently no special use permit for the Landfill. The LUC will have to take up the proceedings on SUP-2 following remand from the supreme court. To make a reasoned decision, the LUC needs all the facts. For example, the LUC will need to know about the ENV's concession that by January 2, 2014, the Landfill should close to most forms of municipal solid waste. ENV's Proposed Findings of Fact, Conclusions of Law, and Decision and Order at 33 (¶ 1). The LUC will need to know that nearly three years after it issued the 2009 Order, the City still has not identified a potential alternative landfill site. Ex. K15 at 6 (10/22/09 LUC order); Ex. K256 (2/20/12 site selection committee agenda). And the LUC will need to know

⁶Mootness is not an absolute bar to justiciability. The “public interest exception” provides that “when the question involved affects the public interest and an authoritative determination is desirable for the guidance of public officials, a case will not be considered moot.” *Doe v. Doe*, 116 Hawai'i 323, 327, 172 P.3d 1067, 1071 (2007) (quotation marks omitted).

The issues in this case, including Landfill closure, replacement and remedial measures, obviously affect the public interest. An authoritative determination on these issues is necessary to guide the City. To make that authoritative decision, the LUC has been encouraged to consider the record developed before the Planning Commission. Thus, if mootness were a problem, the public interest exception would apply.

that the third boiler at H-POWER, which is scheduled to be operational in October or November 2012, has the ability to accept sewage sludge and medical waste. 1/11/12 Tr. at 71:7–10, 75:13–22, 90:3–20, 114:25–115:5, 123:23–24, 174:1–6, 203:25 (Steinberger); 4/11/12 Tr. at 163:12–16, 171:16–172:10, 176:7–10, 196:20–24, 211:12–15 (Steinberger).

The Planning Commission has already developed the record on these matters and many other issues. This is exactly why the Hawai'i Supreme Court encouraged the LUC to consider the record in this contested case. And this is exactly why the LUC will ask the Planning Commission to defer decision-making to allow for remand and consolidation of the proceedings.

There is a procedural avenue available to meet the court's and the LUC's expectations. Once the proceeding on the Original Application for SUP-2 has been remanded to the LUC, the LUC has the power to remand matter to the Planning Commission "for further proceedings." HAR § 15-15-96(a). Following remand from the LUC, the Planning Commission has the power to consolidate the Original Application and the Current Application.⁷ Rule § 2-61. With the proceedings consolidated, the Planning Commission may enter findings of fact, conclusions of law, and

⁷Planning Commission Rule 2-61 provides:

Consolidation. The commission, upon its own initiative or upon motion, may consolidate for hearing or for other purposes, or may contemporaneously consider two or more proceedings which involve substantially the same parties or issues which are the same or closely related if the commission finds that such consolidation or contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings.

decision and order, as it is presently prepared to do. The consolidated matter would then make its way back for the LUC for final decision.

B. A Stay Is Unwarranted.

In the alternative to dismissal, the ENV requests a stay of proceedings during the pendency of the remand to the LUC. The ENV suggests that a stay would avoid duplicative or potentially conflicting determinations. Motion at 4.

The ENV offers no authority for a stay. Planning Commission Rule § 2-72 requires the Commission to make a decision “within a period of not more than sixty (60) calendar days after the close of the hearing, unless a longer period of time is agreed upon by all parties.”

Rather than impose a stay, the Planning Commission should continue decision-making for up to sixty days following the close of evidence. The hearing closed on April 23. Accordingly, the Commission has until June 22 to make a decision. If additional time is needed, the parties should simply agree to a longer period.

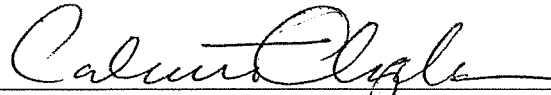
Continuing decision-making addresses the ENV’s desire to avoid duplicative or conflicting determinations. But unlike a stay, continuing the decision-making beyond May 25 is expressly authorized by the Rules and would not stop the entire case in its tracks. With decision-making continued, there will be time for the LUC to remand the Original Application to the Planning Commission so that it may be consolidated with the Current Application. We can then proceed to decision-making. No work will be wasted.

III. CONCLUSION

The ENV's Motion should be denied. The Planning Commission should continue decision-making on the Application (if necessary, with the agreement of the parties) to facilitate a remand from the LUC. When the Original Application has been remanded, the Planning Commission should consolidate the Original Application with the Current Application and enter findings of fact, conclusions of law, and decision and order on the new evidence.

DATED: Honolulu, Hawai'i, May 22, 2012.

CADES SCHUTTE
A Limited Liability Law Partnership



CALVERT G. CHIPCHASE
CHRISTOPHER T. GOODIN

Attorneys for Intervenors
KO OLINA COMMUNITY ASSOCIATION
and MAILE SHIMABUKURO

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU
STATE OF HAWAII

In the Matter of the Application of
DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

FILE NO. 2008/SUP-2

CERTIFICATE OF SERVICE

To delete Condition No. 14 of Special
Use Permit No. 2008/SUP-2 (also
referred to as Land Use Commission
Docket No. SP09-403) which states as
follows:

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

CERTIFICATE OF SERVICE

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

ROBERT CARSON GODBEY, ESQ.
Corporation Counsel
DANA VIOLA, ESQ.
ROBERT BRIAN BLACK, ESQ.
Deputies Corporation Counsel
City and County of Honolulu
530 South King Street, Room 110
Honolulu, Hawai'i 96813

(Hand Delivery)

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

DEPARTMENT OF ENVIRONMENTAL SERVICES (Certified Mail)
City and County of Honolulu
1000 Uluohia Street, Suite 308
Kapolei, Hawai'i 96707

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

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

Attorneys for Intervenor
SCHNITZER STEEL HAWAII CORP.

DATED: Honolulu, Hawai'i, May 22, 2012.

CADES SCHUTTE
A Limited Liability Law Partnership



CALVERT G. CHIPCHASE
CHRISTOPHER T. GOODIN

Attorneys for Intervenors
KO OLINA COMMUNITY ASSOCIATION
and MAILE SHIMABUKURO