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DEPT OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLULU

Attorney for Intervenor
COLLEEN HANABUSA

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

In the Matter of the Application of) FILE NO. 2008/SUP2
)
DEPARTMENT OF ENVIRONMENTAL) INTERVENOR COLLEEN HANABUSA'S
SERVICES, CITY AND COUNTY OF) OBJECTIONS AND EXCEPTIONS TO
HONOLULU) FINDINGS OF FACT, CONCLUSIONS OF
) LAW, AND DECISION AND ORDER, DATED
For a New Special Use Permit to Supersede) DECEMBER 6, 2017; and CERTIFICATE OF
Existing Special Use Permit to Allow a 92.5) SERVICE
Acre Expansion and Time Extension for)
Waimanalo Gulch Sanitary Landfill,)
Waimanalo Gulch, Oahu, Hawai'i, Tax Map)
Key: 9-2-03: 72 and 73)
)

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

after July 31, 2012.”

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INTERVENOR COLLEEN HANABUSA’S OBJECTIONS AND EXCEPTIONS
TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION
AND ORDER, DATED DECEMBER 6, 2017

COMES NOW Intervenor COLLEEN HANABUSA, by and through her counsel undersigned, and hereby submits her Objections and Exceptions to the City Planning Commission’s Findings of Facts, Conclusions of Law, Decision and Order, Dated December 6, 2017.

The summary of the proceedings as set forth in Department of Environmental Services, City and County of Honolulu v. Land Use Commission, State of Hawaii, 127 Hawai’i 5, 275 P.3d 809 (2012), included the following discussion of the procedural history in these matters (citations omitted).

The portion of the Waimanalo Gulch Sanitary Landfill (WGSL) property that operated as the City’s landfill from 1989 to 2009 was subject to SUP File No. 86/SUP-5 (SUP-5). On December 3, 2008, the City and County of Honolulu Department of Environmental Services (ENV) filed an application for SUP-2 (to supercede then-existing SUP-5), which sought the 92.5-acre expansion of WGSL. Following the intervention of Colleen Hanabusa and the other intervenors, the Planning Commission conducted a contested case hearing on June 22, 2009, June 24, 2009, July 1, 2009, July 2, 2009, and July 8, 2009. On July 31, 2009, the City Planning Commission recommended approval of SUP-2 subject to ten conditions. The Planning Commission further recommended approval of the withdrawal of SUP-5 and the conditions therein, upon SUP-2 taking effect. On August 4, 2009, the Planning Commission issued its Findings of Fact, Conclusions of Law, and Decision and Order.

In accordance with HRS Section 205-6(e), the complete record of proceedings before the Planning Commission was transmitted to the State Land Use Commission (LUC) on August 20, 2009. Following a hearing before the LUC on September 24, 2009, the LUC, on October 22, 2009, issued an Order Adopting the City and County of Honolulu Planning Commission’s Findings of Fact, Conclusions of Law, and Decision and Order with Modifications.

Significantly, the LUC's approval of SUP-2 was expressly given subject to the LUC's imposition of several conditions, including Condition 14, which provided:

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.

ENV subsequently appealed and specifically challenged LUC's Condition 14 as not being supported by the substantial evidence in the record, including the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order, which were adopted by the LUC with its modifications and conditions.

In its decision, the Hawaii Supreme Court found:

The LUC's approval of SUP-2 was given "subject to" the LUC's imposition of several conditions, including Condition 14. Based upon all of the evidence in the record, it would appear that Condition 14 was a material condition to the LUC's approval. Having held that Condition 14 cannot stand because it is inconsistent with the evidence shown in the record and not supported by substantial evidence, the LUC's approval of SUP-2 also cannot stand because Condition 14 was a material condition to the LUC's approval. Consequently, this matter must be remanded to the LUC for further hearings as the LUC deems appropriate.

127 Hawai'i at 17, 275 P.3d at 821.

The Hawaii Supreme Court again reiterated its holding in its decision:

In the present case, the relevant question is whether the LUC would have reached the same conclusion (approving SUP-2) without its imposition of Condition 14. Based on the record, we cannot so conclude. Thus, we remand to the LUC for further hearings as the LUC may deem appropriate.

127 Hawai'i at 18, 275 P.3d at 822.

Prior to the Hawaii Supreme Court's decision of May 4, 2012 and while the ENV's appeal was still pending in the appellate process, and as set forth in the City Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order, dated December 6, 2017 (Planning Commission's December 6, 2017 Decision), the ENV filed "an Application to Modify the Special Use Permit No. 2008/SUP-2 by modifying the Land Use Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications dated October

22, 2009...” (see Findings of Fact No. 2). The 2011 Application specifically sought the “the deletion of Condition No. 14 from the 2009 LUC Order.” Id.

The contested case proceedings went forward with Intervenor Ko Olina Community Association and Maile Shimabukuro filing a motion to be recognized as parties. Intervenor Colleen Hanabusa did not file such a motion as the appeal was still pending before the Hawaii Supreme Court. Intervenor Hanabusa did not make an appearance as a party in the second contested case hearing. Following the contested case hearing and prior to the issuance of Findings of Fact, Conclusions of Law, and Decision and Order on ENV’s Application to delete Condition No. 14 of Special Use Permit No. 2008/SUP-2 by the Planning Commission, the Hawaii Supreme Court issued its opinion in Department of Environmental Services, City and County of Honolulu v. Land Use Commission, State of Hawaii, 127 Hawai’i 5, 275 P.3d 809 (2012). While the LUC was waiting for receipt of the record from the Supreme Court, via the First Circuit Court, the record will reflect that a letter was written by the then LUC Chair to the then Planning Commission Chair and the then Planning Commission Chair responded, prior to any properly conducted hearing, about the requested handling of the record in the ENV’s second application to delete Condition No. 14. Intervenor Hanabusa again objects to what Intervenor Hanabusa submits was improper communications and the communications were done without a hearing, the correspondence was done without statutory and procedural authority, and the communications before a hearing was conducted also predisposed of the LUC’s handling of the record(s) on remand prior to any hearing.

Following the LUC’s receipt of the record of the ENV’s Application for a New SUP in File No. 2008/SUP-2 on appeal from the Hawaii Supreme Court, via the First Circuit, a hearing was held before the LUC and the LUC remanded the record to the City Planning Commission, over Intervenor Hanabusa’s objections (Intervenor Hanabusa’s objections are reasserted and incorporated herein), for consolidation of the records of the two contested case hearings, i.e. the record of the ENV’s Application for a New SUP in File No. 2008/SUP-2 and the record of the ENV’s Application to delete Condition No. 14 of Special Use Permit No. 2008/SUP-2. Intervenor Hanabusa also objected to the consolidation of the said records before the Planning Commission and the Planning Commission consolidated the two records over Intervenor

Hanabusa's objections. Intervenor again reasserts and incorporates herein those earlier objections.

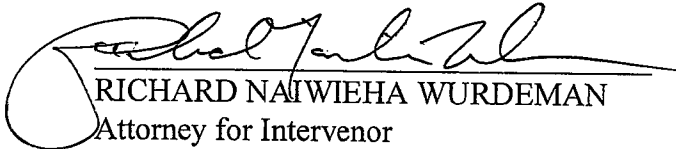
In the instant Findings of Fact, Conclusions of Law, and Decision and Order, dated December 6, 2017, the City Planning Commission states that the matter is "a consolidation of two contested case hearings before the Planning Commission, City and County of Honolulu[,]" but the Planning Commission then makes findings of fact and conclusions of law and bases its decision and order solely on the record from the second contested case hearing. The second contested case hearing was simply an Application to delete Condition No. 14 of Special Use Permit No. 2008/SUP-2. It was not for the Application for the SUP-2. The Planning Commission's complete disregard and any consideration of the record of the contested case hearing for ENV's Application for a New SUP in File No. 2008 SUP-2 in its entirety is clear reversible error and is in violation of constitutional or statutory provisions; in excess of the statutory authority or jurisdiction of the agency (the Planning Commission); made upon unlawful procedure; affected by other error of law; is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and is arbitrary, capricious, and characterized by abuse of discretion or clearly unwarranted exercise of discretion. See Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 136 Hawai'i 376, 388, 363 P.3d 224, 236 (2015). The Planning Commission even passed a motion at the hearing held on March 1, 2017 that it was not going to consider the Findings of Fact and Conclusions of Law and Decision and Order and that it was striking "anything" prior to 2011, "anything in there prior to 2011 would be removed." See Transcript of Proceedings of March 1, 2017 at 33-34. The objections set forth above are incorporated and reasserted once again. Furthermore, these actions of the Planning Commission were in complete disregard of the Land Use Commission's order on remand that were presumably made by the LUC, pursuant to the Hawaii Supreme Court's holding in Department of Environmental Services, City and County of Honolulu v. Land Use Commission, State of Hawaii, supra.

Furthermore, the City Planning Commission entered the Findings of Facts, Conclusions of Law, Decision and Order, Dated December 6, 2017, and the members signed off on the Planning Commission's December 6, 2017 Decision prior to the parties being allowed the

opportunity to file objections and exceptions and be heard, as required by the Planning Commission's own rules. The ENV also conceded the error when the Planning Commission's December 6, 2017 Decision was before the LUC prior to the most recent remand to the City Planning Commission by the LUC following the Intervenor's objections on the City Planning Commission's error. The City Planning Commission cannot now simply reissue the Planning Commission's December 6, 2017 Decision as it has already predisposed and pre-determined all of the findings of fact and conclusions of law by issuing its Planning Commission's December 6, 2017 Decision and has put the "cart before the horse." See Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 136 Hawai'i 376, 363 P.3d 224 (2015). Intervenor Hanabusa objects on these grounds as well.

Finally, Intervenor Hanabusa incorporates and reasserts all of her objections and arguments made in these proceedings to date. Intervenor Hanabusa, without waiving her objections and positions regarding the proceedings and the record in the second contested case hearing on ENV's Application to delete Condition No. 14, also objects and takes exception to the Findings of Fact and the Conclusions of Law set forth in City Planning Commission's Findings of Facts, Conclusions of Law, Decision and Order, Dated December 6, 2017, as being clearly erroneous and wrong.

DATED: Honolulu, Hawaii, February 5, 2018.


RICHARD NAIWIEHA WURDEMAN
Attorney for Intervenor
COLLEEN HANABUSA

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

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DEPARTMENT OF ENVIRONMENTAL) CERTIFICATE OF SERVICE
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date set forth below, a true and correct copy of the foregoing document was served on the following parties by depositing the same in the U.S. Mail, postage prepaid, addressed as follows:

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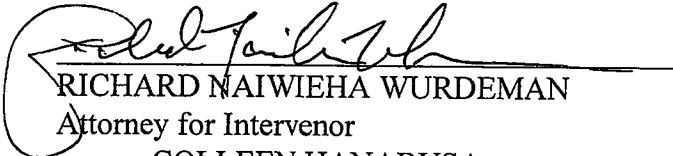
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DATED: Honolulu, Hawaii, February 5, 2018.


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