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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
SERVICES, CITY AND COUNTY OF) HANABUSA'S OBJECTIONS, EXCEPTIONS,
HONOLULU) AND POSITIONS RE: PROPOSED FINDINGS
) OF FACT, CONCLUSIONS OF LAW, AND
For a New Special Use Permit to Supersede) DECISION AND ORDER; DECLARATION OF
Existing Special Use Permit to Allow a 92.5) COUNSEL; EXHIBIT "1"; and CERTIFICATE
Acre Expansion and Time Extension for) OF SERVICE
Waimanalo Gulch Sanitary Landfill,)
Waimanalo Gulch, Oahu, Hawai'i, Tax Map)
Key: 9-2-03: 72 1nd 73)

In the Matter of the Application of) Hearing
) DATE: February 28, 2019
DEPARTMENT OF ENVIRONMENTAL) TIME: 1:30 p.m.
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.")
_____)

INTERVENOR COLLEEN HANABUSA'S OBJECTIONS, EXCEPTIONS, AND
POSITIONS RE: PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND DECISION AND ORDER

COMES NOW INTERVENOR COLLEEN HANABUSA, by and through counsel undersigned, and hereby submits her Objections, Exceptions and Positions RE: Proposed Findings of Fact, Conclusions of Law, and Decision and Order. Included as part of her exceptions and objections as to the state of the evidence and the state of the law, Intervenor Colleen Hanabusa continues to rely on Intervenor's Ko Olina Community Association, Colleen Hanabusa and Maile Shimabukuro Proposed Findings of Fact and Conclusions of Law and Decision and Order, filed on July 17, 2009, in File No. 2008/SUP-2(RY) and 86/SUP-5, and which is part of the record.¹ A copy of the said pleading is attached hereto as Exhibit "1" for the Planning Commission's convenience. It is already part of the record. Obviously, reference to Intervenor Hanabusa's position, exceptions and objections should exclude Intervenor's Ko Olina Community Association and Maile Shimabukuro as they have submitted their own submission through other counsel and they are making their own objections and exceptions through their new counsel. It should be construed only as the position as part of her objections and exceptions, of Colleen Hanabusa, as to what should be adopted as the Findings of Fact, Conclusions of Law and Decision and Order in this matter.

On August 17, 2016, Intervenor Colleen Hanabusa again raised her objections to the Planning Commission's consolidation of the two proceedings and the records therein. In the subsequent matter that was held before the Planning Commission, i.e. to Delete Condition No. 14 of Special Use Permit No. 2008/SUP-2 (also referred to as Land Use Commission Docket No. SP09-403), and the contested case hearing that was held therein, Intervenor Colleen Hanabusa was not a party. She respectfully submits once again that her due process rights have been substantially violated by this Honorable Commission in its consolidation of the two records. She also objects to the Planning Commission's reliance on only the record made in the subsequent proceeding, i.e. to Delete Condition No. 14 of Special Use Permit No. 2008/SUP-2 (also referred to as Land Use Commission Docket No. SP09-403), as being arbitrary and capricious, contrary to law, an abuse of discretion, and clearly erroneous and wrong. She raises once again these

¹ Finding of Fact ("FOF") 48 and the action described therein is also clearly erroneous and wrong, arbitrary and capricious and an abuse of discretion as the Planning Commission cannot strike a pleading that has been part of the record and filed on July 17, 2009 in these proceedings.

objections, and reasserts and reincorporates all other objections made by her in these proceedings since the remand, following the Hawaii Supreme Court's decision in Department of Environmental Services v. Land Use Commission, 127 Hawai'i 5 (2012), and once again objects to the request for the issuance of a Special Use Permit and asserts that the request for an SUP should be denied. She also incorporates and reasserts all of her objections, exceptions and positions made prior to the Planning Commission's adoption of its Findings of Fact, Conclusions of Law, an Decision and Order, dated on or about April 28, 2017 ("2017 Planning Commission Decision").

In addition, since this Commission has already ruled on the issuance of the Findings of Fact, Conclusions of Law, Decision and Order and the approval of the CDUP in this case through the 2017 Planning Commission Decision, and failed to previously follow the Rules of the Planning Commission Section 2-75, and is trying to now correct, once again, the Planning Commission's failure to follow its rules in asking for exceptions to the current Proposed Findings of Fact, Conclusions of Law, Decision and Order, the Planning Commission has placed "the cart before the horse" and has prejudged the decision. Please see Mauna Kea Anaina Hou v. Board of Land and Natural Resources, 136 Hawai'i 376, 363 P.3d 224 (2015). As a result, Intervenor Hanabusa hereby objects to all votes, other than from Commissioner Don Goo, assuming he meets the requirements of having reviewed all transcripts and evidence, as required under Section 2-76 of the Planning Commission rules.

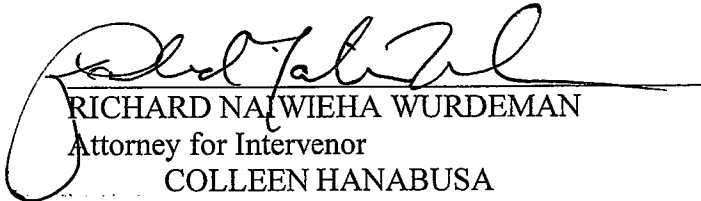
Further, Colleen Hanabusa, and without waiving her position and objections regarding the consolidation of the records and all of her other objections, exceptions, and positions, objects to the Planning Commission's Findings of Fact, Paragraphs 49-50, 67-82, and 122-135 and Conclusions of Law, Paragraphs 4-7, and the Decision and Order, as being clearly erroneous and wrong and against the reliable, probative and substantial evidence in the record. Further, the City should have had a landfill, at an alternative site, already up and running, with the Waimanalo Gulch Sanitary Landfill now being closed as the seven year period that was established through testimony of ENV representatives has long since passed. In addition, Intervenor Hanabusa objects to the Planning Commission's findings, conclusions and decision and order in that the Planning Commission lacks any authority to modify the Land Use Commission's Order, dated October 22, 2009 and deleting conditions that were imposed by the Land Use Commission and adding new conditions to the Land Use Commission's Decision and

Order. In addition, the reliance on the record in only the second proceeding, that was only for an application to delete Condition No. 14 of Special Use Permit No. 2008/SUP-2, after a consolidation was made of the two records, by the Planning Commission, over Intervenor Hanabusa's objections, is clearly erroneous, wrong, contrary to law, an abuse of discretion and is arbitrary and capricious.

Without waiving and objections, exceptions and positions, Intervenor Colleen Hanabusa also joins in with the Exceptions and Objections being submitted by Intervenors Ko Olina Community Association and Maile Shimabukuro.

Respectfully submitted.

DATED: Honolulu, Hawaii, February 7, 2019.



RICHARD NAIWIEHA WURDEMAN
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) DECLARATION OF COUNSEL
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, Hawai'i, Tax Map)
Key: 9-2-03: 72 1nd 73)

In the Matter of the Application of)
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DEPARTMENT OF ENVIRONMENTAL)
SERVICES, CITY AND COUNTY OF)
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To Delete Condition No. 14 of Special)
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"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.")

DECLARATION OF COUNSEL

I, RICHARD NAIWIEHA WURDEMAN, do declare as follows:

1. I am an attorney licensed to practice law in the State of Hawaii and I represent Intervenor Colleen Hanabusa in the above-entitled matter.

2. Attached hereto as Exhibit "1" is a true and correct copy of the filed-stamped Intervenor's Ko Olina Community Association, Colleen Hanabusa and Maile Shimabukuro

Proposed Findings of Fact and Conclusions of Law and Decision and Order, filed before the Planning Commission on July 17, 2009, in File NO. 2008/SUP-2 (RY) and 86/SUP-5.

3. I, RICHARD NAIWIEHA WURDEMAN, do declare under penalty of law that the foregoing is true and correct to the best of my knowledge.

DATED: Honolulu, Hawaii, February 7, 2019.


RICHARD NAIWIEHA WURDEMAN

EXHIBIT "1"

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,)
Tax Map Key-Nos. (1) 9-2-003:072 and 073)
)
_____)

FILE NO. 2008/SUP-2(RY) and 86/SUP-5

DEPT OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLULU

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INTERVENORS' KO OLINA COMMUNITY ASSOCIATION,
COLLEEN HANABUSA AND MAILE SHIMABUKURO
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND DECISION AND ORDER

CERTIFICATE OF SERVICE

COLLEEN HANABUSA
A Limited Liability Law Company

COLLEEN HANABUSA 2105-0
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Telephone: (808) 523-5777

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

EXHIBIT 44

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(RY) and 86/SUP-5
)
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,)
Tax Map Key Nos. (1) 9-2-003:072 and 073)
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INTERVENORS' KO OLINA COMMUNITY ASSOCIATION,
COLLEEN HANABUSA AND MAILE SHIMABUKURO
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND DECISION AND ORDER

COME NOW Intervenor Ko Olina Community Association ("KOCA"), Colleen Hanabusa ("Hanabusa") and Maile Shimabukuro ("Shimabukuro"), hereinafter collectively "Intervenors," by and through their attorney, Colleen Hanabusa, and hereby respectfully submit their Proposed Findings of Fact and Conclusions of Law and Decision and Order in the matter of the Application of the Department of Environmental Services, City and County of Honolulu, ("ENV") for a New Special Use Permit of 200.622 acres to supersede Existing Special Use Permit to allow a 92.5 acre Expansion and Time Extension for Waimanalo Gulch Sanitary Landfill, Tax map Key Nos. (1) 9-2-2003:072 and 073. The Intervenor in this matter oppose the ENV's request for a New Special Use Permit for 200.622 acres to supersede Existing Special

Use Permit to allow a 92.5 acre Expansion and Time Extension for Waimanalo Gulch Sanitary Landfill (“WGSL”).

PROPOSED FINDINGS OF FACT

Procedural History.

1. Sometime in December of 2008, ENV filed with the Department of Planning and Permitting of the City and County of Honolulu (“DPP”), an application which sought an SUP to “cover the entire 200.622 acre Property” (“Application”). (Planning Division Master Application Form at 1).¹

2. ENV seeks in its Request:

The construction and use of approximately 92.5 acres within the City’s Waimanalo Gulch Sanitary Landfill property for continued landfilling purposes. In addition, to the expansion of the area of landfilling, the proposed project will involve the development of landfill associated support infrastructure (e.g. drainage, access roadways, landfill gas & Leachate collection and monitoring systems, stockpile sites and other related features, a public drop-off center, and a landfill gas to energy (LFGTE) system. The Special Use Permit will cover the entire 200.622 acre Property.

Id.

3. On February 17, 2009, DPP accepted the SUP and published the Notice of Special Use Application and set as March 19, 2009 as the deadline for comments from the public.

4. On April 3, 2009, the Planning Commission (“Commission”) noticed the public hearing on the SUP identified as 2008/SUP-2(RY) and the Withdrawal of SUP 86/SUP-5(RY)

¹ It should be noted that ENV filed a Boundary Amendment (“DBA”) to reclassify the site from Agriculture to Urban which is pending before the State Land Use Commission (“LUC”). The DBA is for the total area of 200.622 acres. The DBA was filed at the LUC in December of 2008 as well.

contingent upon the approval of SUP 2008/SUP-2. Said Notice was published in the Honolulu Star Bulletin.

5. Notwithstanding the publication by the Commission, DPP HAD NOT accepted the Application until May 1, 2009.

6. The Notice of the Commission specifically referenced Rules §§ 2-40, 43, 44 and 49 of the Rules of the Planning Commission ("Rules") as part of the legal authority by which the public hearing was noted.

7. The Notice set May 6, 2009 as the date for the public hearing on 2008/SUP-2(RY) and the Withdrawal of SUP 86/SUP-5(RY). The Notice also set forth April 17, 2009 as the deadline by which any person who desires to intervene in the SUP proceeding to file their petition.

8. On April 16, 2009 the Intervenors above identified filed their Petition to Intervene.

9. On April 24, 2009, ENV filed its opposition to Intervenors' Petition.

10. On May 6, 2009, Intervenors through their attorney Colleen Hanabusa, raised an objection to the insufficient notice that their Petition would be heard on May 6, 2009.

11. The Commission determined that the Petition to Intervene of KOCA, Hanabusa and Shimabukuro would be heard on May 20, 2009.

12. Councilmember Todd K. Apo filed his Petition to Intervene on May 7, 2009.

13. On May 18, 2009, ENV filed its Memorandum in Opposition to Todd K. Apo's Petition to Intervene.

14. On May 20, 2009 Intervenors filed a Motion to Recuse Commissioner John

Kaopua from sitting and deciding on the matter of 2008/SUP-2 (RY). The basis of the motion was that the Land Use Commission of the State of Hawai'i ("LUC") began its contested case hearing on May 14, 2009 on ENV's Petition for District Boundary Amendment ("DBA") of the same 200.622 acres. Commissioner John Kaopua testified under oath during the public hearing portion of that proceeding on the DBA before the LUC. The LUC will make the ultimate decision on the New SUP after the Commission makes its ruling.

15. On May 20, 2009, the Commission granted Intervenors' Petition to Intervene but did not have the sufficient votes to grant or deny Councilmember Todd K. Apo's Petition to Intervene.

16. On June 10, 2009, Councilmember Todd K. Apo's Petition to Intervene was denied. At the same hearing, Commissioner Kaopua was recused from hearing and deciding 2008/SUP-2(RY).

17. By virtue granting the Petition to Intervene, this proceeding became a Contested Case in accordance with *Hawai'i Rev. Stat. §§91-1 et. seq.*

18. On June 22, 2009 at Kapolei Hale in Kapolei, the Contested Case Hearing commenced at 9:00am. ENV was represented by Corporation Counsels Gary Y. Takeuchi, Esq. and Jesse K. Souki, Esq., Intervenors were represented by Colleen Hanabusa, Esq. The Contested Case continued on the following days: June 24, 2009 at 2:30pm at the City Council Committee Room in Honolulu Hale, Honolulu; July 1, 2009 at 9:00 am at the City Council Committee Room in Honolulu Hale, Honolulu; July 2, 2009 at 9:00 am at City Council

Chambers in Honolulu Hale, Honolulu; and July 8, 2009 at 1:30pm at the City Council Committee Room in Honolulu Hale, Honolulu.²

19. ENV called 5 direct witnesses and one rebuttal witness; and Intervenors called 7 direct witnesses over the 5 days of hearings.

20. On June 29, 2009, Intervenors filed a Motion to Dismiss Application based on ENV's failure to comply with the requirement of submitting a proper Environmental Impact Statement ("EIS") for this Application (2008/SUP02(RY)).

21. On July 6, 2009 ENV filed its Memorandum in Opposition to Intervenors Motion to Dismiss Application.

22. On July 8, 2009, the Commission voted, with one dissenting vote, to deny the Motion to Dismiss.

Description of WGS� and Closure Date.

23. The WGS� is located at "southern terminus of the Waianae Mountain Range in Ewa, Oahu. Elevations at the existing landfill range from a low of 70 feet above mean sea level (msl) to 940 feet msl in the northern portion." The property is described as "the steep-sloped valley [that] contains dryland grasses and an abundance of rock outcrops." (Finding of Fact, Conclusions of Law, and Decision and Recommendation of David Tanoue, dated May 1, 2009, hereinafter "DPP Report" at 8). The soil type for the expansion area is primarily designated as rRk (Rock Land) and rSY (Stony Steep Land). (*Id.* at 9). The original permitted area has a soil type of LPE which is also called "Lualualei clay type soil." (*See*, Figure 5-2 in EIS at 5-8).

² In that the transcripts for each day begins with the number "1," references to the Transcript Record will be "22Tr." for June 22; "24Tr." for June 24; "1Tr." for July 1; "2Tr." for July 2; and "8Tr." for July 8.

24. The first SUP was approved on April 20, 1987 by the LUC (Exhibit "A14"); however, the City only requested a SUP on 60.5 acres and needed an additional 26 acres for the accessory uses. The 26 acres were approved on October 31, 1989 (Exhibit "A15.") On June 9, 2003 an Amended SUP for 21 additional acres of which 14.9 were to be used for the landfill expansion. (Exhibit "A17"). The Amended SUP contained a condition 12 which provided that:

Within 5 years from the date of this Special Use Permit Amendment approval or date of the Solid Waste Management Permit approval for this expansion, whichever occurs later but not beyond May 1, 2008, the 200-acre property shall be restricted from accepting any additional waste material be closed in accordance with an approved closure plan.

On March 14, 2008, the LUC ordered that the above stated condition 12 was amended to read: "The 200-acre Property shall be restricted from accepting any additional waste material and be closed in accordance with an approved closure plan by November 1, 2009, or until the approved area reaches its permitted capacity, whichever occurs first." (Exhibit "A24" at 18).

25. The prohibition of the 200-acre Property being restricted by accepting any additional waste material is the language of this Commission in its Findings of Fact, Conclusion and Decision of March 13, 2003. (Exhibit "A16" at 5).

26. The State land use designation of the subject parcel is Agricultural. The City's Zoning is AG-2 (General Agricultural District). The surrounding land use is the Hawaiian Electric Company's Kahe Power Plant and single family dwellings to the northwest boundary; the proposed Makaiwa Hills residential and commercial property to the southeastern boundary; Ko Olina Resort and its development across Farrington Highway; and Honokai Hale and Nanakai Gardens about 4,000 feet to the southeast. (Exhibit "A16" at 2).

Environmental Impact Statement (“EIS”)

27. On November 23, 2006 the Environmental Impact Statement Preparation Notice (“EISPN”) was published by the Office of Environmental Quality (“OEQC”) of the State of Hawai‘i. The Draft EIS was published of OEQC on May 23, 2008. The Draft EIS was entitled “Waimanalo Gulch Sanitary Landfill Lateral Expansion” and spoke to the “proposed expansion. (Exhibit “D” to Intervenor’s Motion to Dismiss referenced in ¶ 20 above).

28. Comments made by the public were addressed to the Lateral Expansion. (See generally the comments in Volume 1 of the EIS).

29. On October 10, 2008, ENV published the Final Environmental Impact Statement (“FEIS”) for the “Waimanalo Gulch Sanitary Landfill Lateral Expansion.” (FEIS).

30. The FEIS cost between \$600,000 to \$800,000 and was paid for equally by ENV (City and County of Honolulu) and Waste Management of Hawai‘i. (22Tr. 104).

31. An issue of concern is how the FEIS treated the concept of environmental justice. (22Tr. 176-177).

32. Though not given much consideration in the FEIS, Dan Banchiu testified that having the landfill in the “backyard” with its odor and aesthetics is no good for business at JW Marriott Ihilani. (2Tr. 101).

State DOH Violations and EPA Violations

33. On January 31, 2006, the Department of Health of the State of Hawaii (“DOH”) issued a Notice of Findings of Violation (“NOV”) and Order against WMI and the City and County of Honolulu. The NOV consists of 18 Counts (Violations). (Appendix A to the FEIS).

34. There was a settlement reached with the DOH on December 7, 2007. (*Id.*). The provisions are set forth in the Settlement Agreement; and the violations were reduced to \$1.5 million (with alternative payments) and corrective actions.

35. Notwithstanding, on April 5, 2006, the United States Environmental Protection Agency ("EPA") issued a press release the Waste Management Hawai'i ("WMH") and the City are in violation of the provisions of the Clean Air Act. Findings and Notice of Violations ("EPA NOV") was issued. There remains outstanding the issue of heightened temperatures at WGSL where it landfill gas wells record temperatures in excess of 131°F. This has not been resolved to date. (FSEIS at 11-3).

36. A concern raised in the NOV was the accumulation of leachate. In preparing the FEIS, no independent investigation was done as to the impact of or secondary impact of the leachate in the ocean after it was sent to the Waianae Sewage Treatment plant. (22Tr. 149).

37. In its letter to DPP, the State of Hawai'i Department of Health noted that the surface water management system is not constructed due to the fact that the design is outside the presently permitted area. (Exhibit "B2"). The surface water management system is a Count in DOH NOV.

38. It is important to note that Dr. Hari Sharma who was asked to do the safety calculations for the NOV stated that in opining on the impact of the leachate on the landfill, it is assumed that the leachate is not in the landfill for 2-3 years. (24Tr. 66).

Selection of WGSL as MSW Landfill

39. As set forth above, WGS� was promised to be closed on May 1, 2008; however it is argued the City has designated it as the MSW Landfill site for the City and County of Honolulu.
40. The Blue Ribbon Commission was told by R. M. Towill that WGS� had 20 years of capacity. (22Tr. 84).
41. An assumption in the selection of the sites for the Blue Ribbon Commission was that there would be no excavation. (Exhibit "B1").
42. In the Blue Ribbon Commission was told that the annual cost for WGS� would be \$156,500 but the FEIS has the annual cost calculated at almost \$6 million. (22Tr. 156).
43. There is no doubt that to expand WGS�, there is a need to excavate to create airspace which is the landfill expansion area. (22Tr. 91-92)
44. Both Cynthia Rezendes and Councilmember Todd Apo were members of the Blue Ribbon Commission. (2Tr. 139,). Both voted to remove WGS� from the list to be considered as the next landfill site. (2Tr. 132).
45. Councilmember Apo explained how the double blind process worked. (2Tr. 188).
46. Councilmember Apo objected to the present use of the ranking system of the Blue Ribbon Commission, in that it was not intended to be used for that purpose. (2Tr. 189).
47. The four members who resigned from the Blue Ribbon Commission were from the Windward side of the island. (2Tr. 270). The remaining nine members, voted unanimously to remove WGS� from the list. These members were: Michael Chun (Kamehameha Schools), George Yamamoto, Gary Slovin, Gary Tomita, Robert Tong, Cynthia Rezendes, Shad Kane, Ted Jung, and Todd Apo. (*Id.*).

Promises Made to the Community

48. Cynthia Rezendes testified that she has been involved in the landfill issues since 1999. She has been the Chair of the Waianae/Nanakuli Neighborhood Board and continues to sit as a member of the Nanakuli/Maili Neighborhood Board. (2Tr. 115-116).

49. Maeda Timson as the Chair of Makakilo Kapolei Honokai Hale Neighborhood Board testified that WGS� falls within its jurisdiction. The position of the Makakilo Kapolei Honokai Hale Neighborhood Board has consistently been in opposition to the expansion of the WGS�. (2Tr. 170-172). She testified that from the "Fasi years" the promise was that the WGS� would close. (2Tr. 171).

50. The promise made was that the WGS� would close on May 1, 2008. (2Tr. 123). Cynthia Rezendes said in 2001 or 2002, she was present at a meeting in Kapolei when Frank Fasi said he promised to close WGS� when he was Mayor. (2Tr. 120).

51. Due to this promise, the sentiment was we could live with the five year extension from 2003-2008. (2Tr. 124). Councilmember Apo wanted a shorter period but said he could live with it, too. (2Tr. 181).

52. Councilmember Apo brought to the Hearing and read specific testimony to the LUC on the questions and unequivocal promises to close WGS�. The transcript was made part of the record as Exhibit "B5." (2Tr. 185). He pointed to page 177 of "B5" where Frank Doyle was specifically asked if WGS� could be picked by the Blue Ribbon Commission and the answer was "No." He also referenced page 125 when Commissioner Bruce Cop[p]a asked if Mr. Doyle was sure the landfill would close; then, again on page 126 and 145 where the

commitment is made that the City will be out of WGSL. The testimony of Mr. Doyle is under oath before the LUC.

Expansion Construction Concerns at WGSL

53. The expansion of WGSL is to increase the active landfill area by 37 acres. (DPP Report at 2).

54. There are three stability berms at WGSL. One is for the ash monofill area and called the "toe berm." The others are the E-1 berm and the Western or Westside berm. The E-1 berm was constructed in late 2005 to 2006 and the West berm in 2006-2007. The E-1 and Westside berms were a function of the 14.9 acre expansion. (1Tr. 138). As well, testimony was received that the DOH wanted the berms for stability reasons. (1Tr. 145). The Westside berm will have to be extended for the expansion. (24Tr. 37-38).

55. The E-1 berm is the stability berm for the E-1 to E-4 expansion. (24Tr. 25).

56. The Westside berm acts as the stability berm for the east-west direction. (*Id.*)

57. There is no doubt that the berms also increases the capacity of the landfill. (*Id.*)

58. To expand the landfill, there will be 3 million cubic yards of exaction to create the subgrade, flatten and smooth the slopes. It is necessary to excavate so that the liner can be placed to ensure safety of the landfill. (24Tr. 31).

59. As the landfill expands up the mountain, there are issues with the percentage of slope. Brian Takeda testified that the slope is about 18%; but Hari Sharma, the Geosyntech Engineer said it is about 20%. (22Tr. 87, 24Tr. 50).

60. There will be impact from one cell upon the next. However, Dr. Sharma said there will be no impact on the first cell by E-11, the last cell. (24Tr. 33).

61. The geometry of the cell, the height of the fill, the slope of fill will affect the stability calculations. (24Tr. 33-34). It was also explained as the weight, slope and the need for resistance. (1Tr. 150).

62. The berms and the natural topography serve as the stability factors for the landfill. (24Tr. 49).

63. The final height of the WGS� will be at 800 feet msl. This is about 300 feet above current grade. (1Tr. 138-139).

Safety Factor.

64. Safety factor at WGS� is calculated at 1.5 as testified to by Mr. Von Pein. (1Tr. 150). The highest point of the landfill will be 800 feet msl to maintain the safety factor of 1.5. (*Id.*).

65. It was testified to that the safety factor was compromised by a wrong geo membrane. The textured membrane was to be used but instead a smooth membrane was used. (1Tr. 135).

66. Dr. Sharma testified the most important factors for the stability are the liner strength.

67. Dr. Sharma also testified that he is designing a different liner for stability because of the deeper slope. This is due to the fact that as you go up the slope, the gradient is different. (24Tr. 49).

68. In order the check on the stability of the landfill after the fact, it is based on review of documents and assumptions that the materials that were used were as specified. (24Tr. 16-17).

69. In order to create the airspace there will be blasting at WGSL. (22Tr. 139).

70. Appendix M was added to the FEIS to address the blasting issue. Appendix M is a two page document. (*Id.*).

Alternatives

71. In EIS preparation, the discussion on alternatives is very important. (22Tr. 122).

72. The alternatives discussed in the FEIS are: No action, delayed action, transshipment, alternative technologies, and alternative sites. (FEIS 1-2).

73. Cynthia Rezendes pointed out that many of the alternatives have been discussed for years with little progress. (2Tr. 139-140). She did and continues to object to expansion.

74. Doyle testified about the alternative of shipping waste out of the State. He said he is not a supporter of long term shipping but for the interim he could support the alternative. (Tr. 227-228).

Culturally Significant Findings at WGSL

75. In that the delay in the expansion request is attributed to the fact that the EIS could not be completed due to the discovery of a culturally significant outcropping. (22Tr. 111).

76. Two community leaders who are considered cultural practitioners testified in

opposition to the expansion of WGSL. They are Joshiah Hoohuli and William J. Aila, Jr. (2Tr. 57 and 68).

77. Uncle Black Hoohuli, born and raised in Nanakuli, stated that "the land is bust up, but I think enough, enough already, you know? Enough is enough. I think they should move out already." (2Tr. 64).

78. William Aila who has lived all of his life in Waianae is the Waianae harbor master and has been so for 23 years. (2Tr. 69).

79. He spoke to the three "pohakus" and stated that it represents the "arc of significance of those alignments." (2Tr. 73). He spoke of the Ahi Koa and the Opelu Koa and how the arc designates the boundaries. (2Tr. 73). He also spoke of the significance of Ahi fisheries or Ahi Koa to the chiefs. (2Tr. 77).

80. Mr. Aila gave the details of how the Waianae Coast has accepted rubbish for 100 years beginning in the time when the trains delivered the rubbish to what some call Yokohama. (2Tr. 81-83).

81. The Cultural significance of Waimanalo Gulch is that it was the favorite place of the Oahu chiefs. (2Tr. 85). He spoke of Kakuhehua's choice of a summer retreat was Waimanalo Gulch as did his predecessor, Mailekukahi. (2Tr. 76)

82. Mr. Aila spoke of the sense of self confidence for the children of Waianae and a instilling a sense of place. (2Tr. 85-86).

83. He believes by removing the stones, it will cause irreparable harm to the culture. (2Tr. 87).

Cost of Landfill Operation

84. Mr. Whelan testified that the current rate WMH charges the City and County of Honolulu is \$16.92 for MSW. It adjusted by 85% of the CPI. For Ash, they charge \$14.60 a ton. (1Tr. 52-53).

85. Mr. Doyle testified that the city charges a total of \$92 a ton for tipping fee. The City receives \$81 a ton with a 12% surcharge. The tipping fee for H Power is \$45 a ton. (1Tr. 231).

LUO Boundary

86. Councilmember Todd Apo testified that he had a concern about the New SUP being within 1500 feet of the zoned residential property. He explained the difference as though the LUO passed in 1999, this is now a new SUP and he believes the new SUP boundary brings the landfill project within 1500 of the zoned property boundary and as such violates the law. (2Tr. 262).

Position of the State Of Hawai'i

87. Abbey Mayer, the Director of the State Office of Planning testified the position of the State is to limit the SUP to a three year period without the expansion of the footprint. (Exhibit "B3" and 2Tr.17).

88. If the landfill will reach capacity by March 2010, Mr. Mayer said his position is to permit a "very small expansion area." (*Id.*)

89. Mr. Mayer testified that “business as usual” in relation to the landfill is the “worst-case scenario, that transshipment’s going to get delayed, recycling is going to get delayed, we are going to do business as usual, give us 15 years, we are going to fill it up and hopefully we will get some more years out of it.” (2Tr. 51).

PROPOSED CONCLUSIONS OF LAW

1. Intervenors were properly granted intervention under the provisions of Rule 2-55(c) which states that intervention shall be freely granted and denied only under two specific conditions.

2. Hawaii Rev. Stat. § 91-10(5) provides that:

the 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 burden of proof, producing evidence and of persuasion is upon the Applicant ENV.

3. The Commission must make its decision on the evidence before it and may not make a decision on unlawful procedure, that is arbitrary or capricious or characterized by an abuse of discretion. Hawaii Rev. Stat. §91-14(g). The Commission must make its decision based upon the record and cannot consider matters outside of the record. Hawaii Rev. Stat. §91-10(g).

4. An agency's jurisdictional power is strictly a statutory creation and an agency's authority is limited by the terms of its governing statute. *Morgan v. Planning Department, County of Kauai*, 104 Haw. 173, 184, 86 P.3d 982, 993 (2004); *TIG Insurance Company v.*

Kauhane, 101 Haw. 311, 327, 67 P.3d 810, 328 (2003); *Nihi Lewa, Inc. v. Department of Budget and Fiscal Services*, 103 Haw. 163, 170, 80 P.3d 984, 991 (2003) (*Acoba, J. dissenting*) citing to *Ogle County Bd. v. Pollution Control Bd.*, 272 Ill. App. 3d 184, 649 N.E.2d 545, 551, 208 Ill. Dec. 489 (Ill. App. Ct.), appeal denied, 163, Ill. 2d 563, 212 Ill. Dec. 424, 657 N.E.2d 625 (Ill. 1995).

5. The Hawaii Supreme Court has ruled on many occasions that when the Constitution, Statute and/or Rule are/is plain and unambiguous it shall be given its plain and ordinary meaning. *Blair v. Cayetano*, 73 Haw. 536, 836 P.2d 1066, reconsideration denied, 74 Haw. 650 (1992), *Emp. Ret. System v. Budget Dir. Ho*, 44 Haw. 159, 352 P.2d 861 (1960), *Spears v. Honda*, 55 Haw. 1, 449 P.2d 130 (1968).

6. At issue is the provisions of HRS §205-6 Special permit which provides:

Special permit. (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. Any person who desires to use the person's land within an agricultural or rural district other than for an agricultural or rural use, as the case may be, may petition the planning commission of the county within which the person's land is located for permission to use the person's land in the manner desired. Each county may establish the appropriate fee for processing the special permit petition. Copies of the special permit petition shall be forwarded to the land use commission, the office of planning, and the department of agriculture for their review and comment.

(b) The planning commission, upon consultation with the central coordinating agency, except in counties where the planning commission is advisory only in which case the central coordinating agency, shall establish by rule or regulation, the time within which the hearing and action on petition for special permit shall occur. The county planning commission shall notify the land use commission and such persons and agencies that may have an interest in the subject matter of the time and place of the hearing.

(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.

(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) A copy of the decision, together with the complete record of the proceeding before the county planning commission on all special permit requests involving a land area greater than fifteen acres or for lands designated as important agricultural lands, shall be transmitted to the land use commission within sixty days after the decision is rendered.

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 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.

(f) Land uses substantially involving or supporting educational ecotourism, related to the preservation of native Hawaiian endangered, threatened, proposed, and candidate species, that are allowed in an approved habitat conservation plan under section 195D-21 or safe harbor agreement under section 195D-22, which are not identified as permissible uses within the agricultural district under sections 205-2 and 205-4.5, may be permitted in the agricultural district by special permit under this section, on lands with soils classified by the land study bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U.

7. In that this Application will ignore the Order of the Land Use Commission that as of November 1, 2009 the landfill will close, it is important to note that the Supreme Court has also opined that:

The LUC's substantive authority to grant a special permit derives solely from the provisions of HRS Chapter 205 governing land use. The LUC may exercise only those powers granted to it by statute. *Stop H-3 Association v. State Department*

of Transportation, 68 Haw. 154, 706 P.2d 446 (1985), and may not grant a special permit unless the proposed use is permissible under Chapter 205. *Neighborhood Bd. No. 24 (Waianae Coast) v. State Land Use Comm'n*, 64 Haw. at 270-71, 639 P.2d at 1102.

Malama v. Land Use Commission, 71 Haw. 332, 336 (1990).

8. The Supreme Court has been very limiting as to the use of special use permits.

As set forth in the case of *Waianae Coast*, 64 Haw. at 271-272, 639 P.2d at 1102-1103:

The essential distinction between the special permit and district amendments as vehicles of land use change is reflected in the statutory provisions and Land Use District Regulations governing the administrative process for each. HRS §205-4 carefully details the procedural and substantive requirements for boundary amendment proceedings, requiring, inter alia, (a) opportunity for public hearing and notice thereof to enumerated parties in conformity with HRS § 91-9; (b) intervention by rights upon timely application by specified parties; (c) freely-granted intervention to all other interested parties; and (d) adoption of rules by the LUC pursuant to HRS ch. 91. . . .

By contrast, HRS §205-6 provides in general terms for an expedited review of special permit applications. The initial decision to grant or deny such an application is rendered at the country level by the planning commission, which is simply required to conduct a hearing on the petition and to notify interested parties and agencies with respect thereto. . . .

The procedural and substantive difference between the two techniques underscore the necessity for their proper application to the particular land use problems they were designed to address. As courts have repeatedly recognized, unlimited use of the special permit to effectuate essentially what amounts to a boundary change would undermine the protection from piecemeal changes to the zoning scheme guaranteed landowners by the more extensive procedural protections of boundary amendment statutes.

As such, this Planning Commission concludes that given the District Boundary Amendment Petition is on going with the LUC, that the LUC has the proper jurisdiction over the 200.622 acres.

9. As a matter of law, this Commission is a county agency, and mandated by

Hawai'i Const. Article XII, section 7, "to preserve and protect customary and traditional practices of Native Hawaiians." *Ka Pa`akai O Ka`Aina v. Land Use Comm'n*, 94 Haw. 31, 45 (2000). ENV has failed to meet its burden in addressing how this Application complies with the Constitution.

10. The *Revised Ordinances of the City and County of Honolulu* § 21-5.680 entitled "Waste disposal and processing" provides that "[n]o waste disposal and processing facility shall be located within 1,500 feet of any zoning lot in a country, residential, apartment, apartment mixed use or resort district." In that this is a New SUP, the Commission concludes that this provision of the laws of the City and County of Honolulu will be violated by the granting of this SUP.

11. Subchapter 4 of the Commission Rules sets forth the process for Applications for SUP. The test to be applied in the granting the SUP is found in Section 2-45 of the Rules. The criteria are:

1. The use shall not be contrary to the objections sought to be accomplished by the State Land Use Law and Regulations.

As set forth above, the New SUP which seeks to permit the use for landfilling over the 200.622 acres is contrary to the existing Resort of Ko Olina and the permitted residential mix use development of Makaiwa Hills. In addition it violates Section 21-5.680 of the Revised Ordinances of the City and County of Honolulu.

2. The desired use would not adversely affect surrounding property.

It would be error in that this is a New SUP to ignore the all ready permitted Resort development and soon to be built Makaiwa Hills development.

3. The use would not unreasonably burden public agencies.

The Commission cannot ignore the burden the operations of the landfill has all ready placed upon the State of Hawai'i Department of Health in the monitoring and the enforcement of the laws which resulted with the NOV and Settlement. As well, the outstanding violations of the Clean Air Act as raised by the EPA must also be addressed.

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

The Commission must take notice of the violations, concerns over stability, the blasting in light of the economic engine of the second City, Ko Olina and how the landfill will impact it. Makaiwa cannot be ignored as well. Notwithstanding, the cultural significance of the area and the obligations of this Commission under the Constitution require this Commission to note that the stone uprights are significant and requires preservation in place.

5. The land is unsuited for the uses permitted within the district.

ENV has failed to meet its burden in addressing this specific point.

Agricultural use is a broad classification and ENV only looked to crop production.

12. As a matter of law, the Commission rules that the ENV has failed to meet its burden of proof and of persuasion.

PROPOSED DECISION AND ORDER

Having duly considered the complete record before this Commission at the close of the hearing, the arguments presented, the Commission hereby denies the Application of the Department of Environmental Services of the City and County of Honolulu for a New Special

Use Permit of 200.622 acres to supersede Existing Special Use Permit to allow a 92.5 acre
Expansion and Time Extension for Waimanalo Gulch Sanitary Landfill, Tax map Key Nos. (1)
9-2-2003:072 and 073.

Dated: Honolulu, Hawaii, July 17, 2009.



COLLEEN HANABUSA
Attorney for Intervenors
Ko Olina Community Association
Maile Shimabukuro and 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/SUP-2 (RY) and 86/SUP-5
)
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,)
Tax Map Key Nos. (1) 9-2-003:072 and 073)
_____)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, a copy of the foregoing will be duly served upon the following parties at their respective addresses by the manner indicated thereto:

Delivery

Mail

CARRIE K.S. OKINAGA, ESQ.
GARY Y. TAKEUCHI, ESQ.
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City & County of Honolulu
530 South King Street, Room 110
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x

David Tanoue, Director
Planning Department
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x

TIMOTHY STEINBERGER, P.E., DIRECTOR x
Department of Environmental Services
City & County of Honolulu
1000 Uluohia Street, Suite 308
Kapolei, HI 96707

DATED: Honolulu, Hawai'i, July 17, 2009



COLLEEN HANABUSA
Attorney for Petitioners KOCA, Hanabusa
And Shimabukuro

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) CERTIFICATE OF SERVICE
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, Hawai'i, Tax Map)
Key: 9-2-03: 72 1nd 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.”)
)

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 leaving the same at the respective addresses set forth below:

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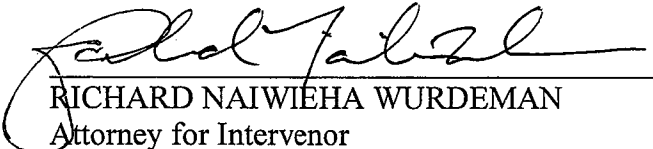
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DATED: Honolulu, Hawaii, February 7, 2019.


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COLLEEN HANABUSA