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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

For a New Special Use Permit to
Supersede Existing Special Use Permit
to Allow A 92.5-Acre Expansion and
Time Extension for Waimānalo Gulch
Sanitary Landfill, Waimānalo Gulch,
O'ahu, Hawai'i, Tax Map Key: 9-2-03: 72
And 73

FILE NO. 2008/SUP-2

**INTERVENORS KO OLINA
COMMUNITY ASSOCIATION AND
MAILE SHIMABUKURO'S
RESPONSE TO DEPARTMENT OF
ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF
HONOLULU'S MOTION FOR
LEAVE TO FILE SUPPLEMENTAL
BRIEF FILED MARCH 18, 2019
AND OBJECTION TO THE
DEPARTMENT'S MARCH 19, 2019
SUBMISSION**

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

To delete Condition No. 14 of Special

EXHIBIT A

CERTIFICATE OF SERVICE

R10

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.”

INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE SHIMABUKURO’S RESPONSE TO DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU’S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF FILED MARCH 18, 2019 AND OBJECTION TO THE DEPARTMENT’S MARCH 19, 2019 SUBMISSION

Intervenors Ko Olina Community Association (the “**Association**”) and Maile Shimabukuro (together, “**KOCA**”) oppose Applicant Department of Environmental Services, City and County of Honolulu’s (“**ENV**”) motion for leave to file supplemental brief (the “**Motion**”) filed on March 18, 2019 and objects to the ENV’s submission on March 19, 2019.

The ENV wants to file a 24-page supplemental brief arguing that the Planning Commission of the City and County of Honolulu (“**Commission**”) should not adopt KOCA’s proposed Condition 3. *See* Motion at Ex. 1. As explained below, the Commission has already provided the parties with several opportunities to address all positions and proposed conditions in writing and at hearings. Since all parties had a chance to present their respective positions, the City’s request to make a further unilateral filing is unnecessary and improper. Accordingly, the Motion should be denied.

The ENV also submitted a report on March 19, 2019. The report is not part of the record, no witness testified to the report, the statements in the report were not tested on cross-examination and KOCA had no opportunity to submit rebuttal evidence. Accordingly, the report cannot be considered.

I. RELEVANT FACTUAL BACKGROUND

This matter arises from the ENV's application for a special use permit ("SUP") to continue use of the Waimanalo Gulch Sanitary Landfill ("WGSL"). Under a prior SUP, the ENV was obligated to close the WGSL by the end of 2008. Disregarding that obligation and its many promises to the community and this Commission,¹ in December 2008 the ENV filed an application (the "**2008 Application**") for a new SUP for the WGSL seeking to expand the permitted size of the landfill. After the Commission recommended approval of the 2008 Application and the LUC granted the 2008 Application subject to, among other things, a condition prohibiting the ENV from disposing of Municipal solid waste at the WGSL after July 31, 2012 ("**Condition 14**"), the ENV appealed the decision to the circuit court and later the Hawai'i Supreme Court.

While the appeal was pending, on June 28, 2011, the ENV filed an application to modify the SUP by deleting Condition 14 (the "**2011 Application**") so that the City could use the WGSL until it reaches capacity. KOCA intervened. After evidence

¹ See, e.g., KOCA's Post Hearing Brief of Intervenors, filed herein on July 17, 2009; KOCA's Written Direct Testimony of Beverly Munson, filed herein on December 13, 2011; Testimony of Maeda Timson at 4/4/12 Contested Case Hearing (133:23-142:17); Testimony of Steinberger at 4/11/12 Contested Case Hearing (183:22-184:9).

closed, the parties submitted proposed findings of fact, conclusions of law and decisions and orders. KOCA's proposed findings of fact, conclusions of law and decision and order specifically addressed the time required to site and develop a new landfill and the closure of the WGSL. The parties presented argument at hearing. In those arguments, the ENV addressed the closure of the landfill. *See* 4/23/12 Contested Case Hearing Transcript at 50:5-56:24.

Before the Commission entered its decision on the 2011 Application, the Hawai'i Supreme Court reversed the LUC's decision on the 2008 Application and remanded the case to the LUC for further proceedings. The LUC remanded the 2008 Application to the Commission for consolidation with the 2011 Application.

Following remand and consolidation, the parties were given another opportunity to submit briefing. On January 27, 2017, the parties filed with the Commission proposed findings of fact, conclusions of law and decisions and orders. KOCA's proposed findings of fact, conclusions of law and decision and order again addressed the time required to site and develop a new landfill and the closure of the current landfill. On February 10, 2017, the parties filed responses to the respective submissions. ENV's responsive filing specifically addressed KOCA's proposed findings and conclusions regarding closure of the WGSL.

On March 1, 2017, the Commission held a hearing on the proposed findings of fact, conclusions of law and decisions and orders. The closure of the landfill was specifically addressed. *See* 3/1/17 Transcript of Contested Case Hearing at 14:8-21, 23:8-24:14.

On April 28, 2017, the Commission issued its Findings of Fact, Conclusions of Law and Decision and Order in 2008/SUP-2 (the “**2017 Decision**”). Upon the consideration of the 2017 Decision, the LUC remanded the proceeding to the Commission to, among other things, clarify the basis for the Commission’s condition setting a deadline for the selection of a new landfill.

On remand, in December 2017, the Commission filed its proposed findings of fact, conclusions of law, and decision and order. In February 2018, the parties again submitted exceptions to the same. At hearing, the ENV again addressed closure of the landfill. 3/7/18 Transcript of Contested Case Hearing at 10:12-11:5, 13:3-16:14.

In January 2019, following the recusal of a Commissioner and the appointment of Commissioner Good, the Commission issued another proposed findings of fact, conclusions of law, and decision and order. In February 2019, the parties again submitted exceptions to the same. The ENV again addressed closure of the landfill. See Dept. of Env. Servs., City & Cnty. of Honolulu’s Exceptions to Honolulu Planning Commission’s Proposed Findings of Fact, Conclusions of Law, and Decision and Order Served on January 15, 2019, filed herein on February 8, 2019 at 8.

On February 28, 2019, the Commission heard argument from the parties regarding its proposed findings of fact, conclusions of law, and decision and order. During that hearing, the ENV again addressed closure of the landfill. 2/28/19 Transcript of Contested Case Hearing at 10:6-19, 17:6-19:12.

After discussion, the Commission voted to continue the hearing to April 11, 2019 to allow the Commissioners the opportunity to conduct “further research **on their**

own to look back through testimony and documentation” 2/28/19 Transcript of Contested Case Hearing at 100:4-7 (emphasis added). Despite this specific order, the ENV seeks leave to file a supplemental brief.

II. ARGUMENT

In its proposed supplemental brief, the ENV addresses two supposedly “new issues”—the phased closure of the WGS� and the Commissioner’s “expressed concern regarding ENV’s efforts since 2012 to identify a new landfill site.” Motion at 3. Neither issue is new, and neither issue requires additional briefing.

A. The ENV’s Proposed Supplemental Brief Is Unnecessary and Inappropriate.

First, the proposed phased closure of the WGS� is not a “new” issue. Contrary to the ENV’s assertion, this issue did not arise at the Commission’s February 28, 2019 meeting. The closure of the landfill has been at issue since these proceedings began in 2008. *See supra* Section I. KOCA has repeatedly briefed and presented evidence about the phased closure of the landfill, and the ENV has been given every chance to make its arguments.

Second, the parties have briefed and argued the issues of siting and developing a new landfill and closing the WGS� on numerous occasions:

- In June 2009 at the contested case hearing on the 2008 Application;
- In April 2012 at the contested case hearing on the 2011 Application;
- In May 2012 in proposed findings of fact, conclusions of law, decisions and orders and responses to the same;

- In January 2017 in proposed findings of fact, conclusions of law, decisions and orders;
- In February 2017 in responses to the January 2017 submissions;
- In February 2018 in responses to the Commission’s proposed findings of fact, conclusions of law, decision and order;
- In March 2018 at the continued contested case hearing on the 2008 and 2011 Applications;
- In February 2019 in responses to the Commission’s proposed findings of fact, conclusions of law, decision and order; and
- In February 2019 at the continued contested case hearing on the 2008 and 2011 Applications.

See supra Section I.

Lastly, the Commission stated that the Commissioners would review the record on their own. The Commission did not indicate that further briefing was either necessary or permitted. Any further discussion may occur at the hearing April 11, 2019.

B. KOCA Agrees that the Commission Should Not Consider Evidence Outside of the Record.

The ENV asserts that the additional briefing is necessary to ensure that the Commission does not consider evidence not found within the existing record in this matter. Motion at 3-4. According to ENV, “the Planning Commission may not consider, evidence of ENV’s landfill siting efforts in deciding this contested case.” *Id.* at 4. KOCA agrees that the Commission may not consider additional evidence. The

Commission denied KOCA's motion to reopen the evidentiary proceeding. Accordingly, the Commission has determined that it will not consider any evidence outside the existing record.

Contradicting its expressed concern that the Commission not consider matters outside of the record, on March 19, 2019 the ENV submitted to the Commission a 73-page report that is not in the record and that purports to establish a 10-year time period for the closure of the WGSL. The ENV cannot have it both ways. The ENV's March 19 submission is not evidence in this matter and cannot be considered.

Had the Commission granted KOCA's motion to reopen the evidentiary proceeding, the ENV would have had the opportunity to introduce the report, and KOCA would have had an opportunity to test the statements in the report on cross-examination and submit rebuttal evidence, including expert testimony. KOCA would also have introduced evidence of the proposed consent decree regarding the WGSL, which the City Council, City and County of Honolulu, Committee on Executive Matters and Legal Affairs is scheduled to consider on March 25, 2019. *See Ex. A.* Since the record is closed, it would be unfair and improper to accept a new submission from the ENV.

III. CONCLUSION

In light of the foregoing, KOCA respectfully requests that the Commission deny the Motion and disregard the ENV's March 19, 2019 submission as it is not in the record and thus not properly before the Commission.

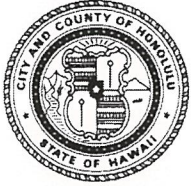
DATED: Honolulu, Hawai'i, March 25, 2019.

CADES SCHUTTE
A Limited Liability Law Partnership



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CITY COUNCIL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813-3077

**COMMITTEE ON EXECUTIVE
MATTERS AND LEGAL AFFAIRS**

Voting Members:

Ron Menor, Chair
Brandon J.C. Elefante, Vice-Chair
Ikaika Anderson
Michael Formby
Carol Fukunaga
Ann H. Kobayashi
Joey Manahan
Kymberly Marcos Pine
Heidi Tsuneyoshi

AGENDA

REGULAR MEETING
COMMITTEE MEETING ROOM
MONDAY, MARCH 25, 2019
1:00 P.M.

SPEAKER REGISTRATION

Persons wishing to testify are requested to register by 1:00 p.m. as follows:

- a. On-Line at <http://www.honolulu.gov/ccl-testimony-form.html>
- b. By faxing to 768-3826 your name, phone number and the agenda item;
- c. By filling out a registration form in person; or
- d. By calling 768-3815.

Persons who have not registered to testify will be given an opportunity to speak on an item following oral testimonies of the registered speakers.

Each speaker is limited to one-minute presentation.

WRITTEN TESTIMONY

Written testimony may be faxed to 768-3826 or transmitted via the internet at <http://www.honolulu.gov/ccl-testimony-form.html> for distribution at the meeting.

If submitted, written testimonies, including the testifier's address, e-mail address and phone number, may be posted by the City Clerk and available to the public on the City's DocuShare Website.

* * * * *

Accommodations are available upon request to persons with disabilities, please call 768-3815 or send an email to cnakazaki@honolulu.gov at least three working days prior to the meeting.

The meeting is viewable by: (1) internet live streaming through <http://olelo.granicus.com/MediaPlayer.php?publishid=92>; (2) televised live broadcast on Olelo TV Channel 54; or (3) after the meeting, viewable at <http://www.honolulu.citycouncil.tv/>. Copies of older meeting videos may be requested by calling the City Clerk's Office at 768-5822, charges may apply.

Committee on Executive Matters and Legal Affairs Agenda
Monday, March 25, 2019

FOR APPROVAL

MINUTES OF THE FEBRUARY 26, 2019, COMMITTEE ON EXECUTIVE
MATTERS AND LEGAL AFFAIRS MEETING

FOR ACTION

1. **RESOLUTION 19-51 – AMENDING RULES OF THE COUNCIL OF THE CITY AND COUNTY OF HONOLULU.** Approving amendments to the Council Rules governing its officers and employees, the organization of committees, and the transaction of business.

EXECUTIVE SESSION

The Committee anticipates going into Executive Session pursuant to Hawaii Revised Statutes Sections 92-4 and 92-5(a)(4), to consult in a closed meeting with the attorneys for the Council Executive Matters and Legal Affairs Committee on questions and issues pertaining to claims and other matters on the Council's powers, duties, privileges, immunities and/or liabilities.

2. Request to Enter into Waimanalo Gulch Sanitary Landfill Consent Decree
3. Resolution to request additional funds for Contract No. SC-COR-1900014 to continue the services of the Law Office of Cary T. Tanaka, as Special Counsel for the City and County of Honolulu on behalf of Defendant Katherine Kealoha in a legal action entitled Tracy T. Yoshimura et al. v. Keith m. Kaneshiro et al., Civil No. 18-00038-LEK-RLP (USDC)
4. Request for authorization to settle a case against the City and County of Honolulu entitled Karla Huff v. City and County of Honolulu, Civil No. 17-1-0798-05 JHA (Cir. Ct.)

RON MENOR, Chair
Committee on Executive Matters and
Legal Affairs

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

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
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to Allow A 92.5-Acre Expansion and
Time Extension for Waimānalo Gulch
Sanitary Landfill, Waimānalo Gulch,
O‘ahu, Hawai‘i, Tax Map Key: 9-2-03: 72
And 73

FILE NO. 2008/SUP-2

CERTIFICATE OF SERVICE

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
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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 by hand delivery:

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Attorneys for
OFFICE OF PLANNING, STATE OF HAWAI'I

DATED: Honolulu, Hawai'i, March 25, 2019.

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