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LAND USE COMMISSION
STATE OF HAWAII

2019 SEP 17 P 2:33

Attorneys for Intervenors
KO OLINA COMMUNITY ASSOCIATION
and MAILE SHIMABUKURO

BEFORE THE LAND USE COMMISSION

OF THE 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

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

To delete Condition No. 14 of Special

DOCKET NO. SP09-403

PLANNING COMMISSION FILE NO.
2008/SUP-2

**INTERVENORS KO OLINA
COMMUNITY ASSOCIATION AND
MAILE SHIMABUKURO'S
SUMMARY OF OBJECTIONS TO
THE PLANNING COMMISSION'S
FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER, DATED
JUNE 10, 2019**

CERTIFICATE OF SERVICE

Hearing:

Date: October 9, 2019

Time: 9:00 a.m.

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.”

INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE SHIMABUKURO’S SUMMARY OF OBJECTIONS TO THE PLANNING COMMISSION’S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER, DATED JUNE 10, 2019

Intervenors Ko Olina Community Association and Maile Shimabukuro (together with the Association, “**KOCA**”) submit this summary of their objections to the Honolulu Planning Commission’s (the “**Planning Commission**”) Findings of Fact, Conclusion of Law, and Decision and Order dated June 10, 2019 (“**2019 Decision**”), filed concurrently herewith (“**KOCA Objections**”). The Waimanalo Gulch Sanitary Landfill (the “**Landfill**” or “**WGS�**”) should have closed a long time ago. Yet it continues. While we recognize that the Landfill cannot close tomorrow, the questions are how long the Landfill should continue to operate and under what conditions. The 2019 Decision allows indefinite operation with no restrictions on waste and limited protections for the community. KOCA summarizes its objections to the 2019 Decision as follows:

(1) The Planning Commission did not follow the remand instructions. The last time we were here, the Land Use Commission (the “**LUC**”) remanded this matter to for the Planning Commission to “clarify whether the record needs to include updated information on the operation of the WGS�, the landfill site selection process, and the waste diversion efforts of the City and County of Honolulu.” On remand, the Planning Commission did not provide

clarification. Evidence closed in this matter in April 2012. Nothing in the 2019 Decision identifies evidence regarding the operation of the Landfill, the site selection process or the waste diversion efforts of the City over the last seven years or attempts to explain why such evidence would be not be relevant to the LUC's decision.

(2) The Planning Commission simply adopted the same decision that the LUC had previously remanded. Rather than provide clarification or take additional evidence, the Planning Commission just adopted what amounts to the same decision from 2017 while incorporating some findings from its prior 2009 decision.

(3) The weakness of the 2019 Decision is evident from the process that led to its adoption. At a February 28, 2019 hearing, four Commissioners were prepared to adopt several conditions requested by KOCA, including KOCA's proposed staged closure condition of the Landfill. KOCA's Objections Ex. 6 (2/28/19 Tr.) at 88:23-90:10, 92:14-94:3, 93:24-95:2, 97:19-98:3). One Commissioner was a hold out (Commissioner Hayashida), and the hearing was continued to allow the Commissioners time to review the record, *id.* at 99:21-100:7. Inexplicably, when the hearing reconvened on April 11, 2019, none of the protective conditions were adopted even though, as the Vice Chair put it, "there was **consensus** on [a number of] KOCA's condition[s] . . ." KOCA's Objections Ex. 7 (4/11/19 Tr.) at 17:5-6 (emphasis added) ("I believe there was consensus on KOCA's condition of le, 2c, 2d, 2e, 2g, 2i, 2j."); *see also id.* at 23:23-25 (Vice Chair: "I know looking at the list, le through 2j, and everything in between there we discussed the last time and feel relatively good about the evidence reflecting that.").

On the matter of closure, Commissioner McMurdo asked, "**Am I the only one [who] feels that there should be a timeline?**" to which Commissioner Hayashida asked, "Does the record support the time line decision?" *Id.* at 26:2-5 (emphasis added). Commissioner McMurdo said that she believed it did and Vice Chair Anderson agreed that there was support in the record. *Id.* at 26:6-23 ("[T]here's evidence that can be construed in either matter on both sides of the coin."). In the end, neither Commissioner Hayashida nor any of the other Commissioners gave a reason for not including a closure condition or the other protections that KOCA proposed. Yet that is the decision reached by the Commission.

(4) The Planning Commission's 2019 Decision allows the Landfill to stay open indefinitely without waste restrictions or basic protections for the community. Such a decision must be rejected because:

(a) The 2019 Decision ignores the Honolulu Department of Environmental Services ("ENV") own proposed condition in this proceeding to

limit the ability of the Landfill to accept municipal solid waste: “MSW, including sewage sludge under the control of the City, that can be disposed of other than by landfilling, shall be allowed at the WGSF up to January 1, 2014, provided HPOWER or other facility is capable of processing the MSW, including sewage sludge under the control of the City.” KOCA Objections Ex. 2. **The Planning Commission’s Decision does not include even this self-imposed restriction.**

(b) Absent a time limit, this is not a special use but rather a boundary amendment. The failure to include a temporal restriction violates the Land Use Commission’s (the “**Commission**”) rules requiring a “time limit for the duration of the particular [special] use.” HAR § 15-15-95(e). This requirement is compelled by Hawai’i Supreme Court precedent holding that “**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.” *Neighborhood Bd. No. 24 (Waianae Coast) v. State Land Use Comm’n*, 64 Haw. 265, 272, 639 P.2d 1097 (1982). Thus, the Planning Commission’s Decision runs afoul of the Commission’s rules and Hawai’i Supreme Court precedent. Absent a temporal limit, the Landfill is not an “unusual and reasonable use” as required for a special permit under HRS § 205-6.

(c) The LUC has already recognized that a specific time limit is necessary. As the LUC’s counsel explained in prior proceedings, “[I]f you gave the county the **unfettered, indefinite** use of a Special Use Permit for the refuse placement, what you would have done is what that *Neighborhood Board 24* decision says you cannot do. You cannot use a Special Use Permit process to get a boundary amendment because **the boundary amendment process is the more extensive public input process that’s required when you do something permanent and extensive like that.**” 7/14/2010 Tr. at 67-68 (Russell Suzuki) (emphasis added) “[Absent a closure condition], they have an **unfettered** Special Use Permit for an **indefinite** period of time, what you would have been doing or what the commission would have been doing would be to **violate the Chapter 205 because you would have given them a boundary amendment as opposed to a Special Use Permit.**” 7/14/2010 Tr. at 69 (Russell Suzuki) (emphasis added).

(d) The City should be held to its word. The City has repeatedly represented to the community and this Commission that the Landfill would be closed. See KOCA’s Objections Ex. 1 (KOCA’s Findings) at 37-41. The City must adhere to those representations. See HRS § 205-6(d) (“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.”); HAR § 15-15-96(a).

(5) The Landfill has harmed the community and is thus contrary to land use law and regulations for a special use permit. As the evidence in the record shows, the Landfill has harmed public health, safety and welfare. The Landfill has racked up more regulatory violations than any other landfill in the State and, as a result of poor planning, has released large amounts of waste and leachate into coastal waters. This use is contrary to state land use law and regulations, *see* HAR § 15-15-95(b), because it has “generat[ed] costly or irreparable environmental damage,” *see* HRS § 226-11(a), and it has “adversely affect[ed] surrounding property,” *see* HAR § 15-15-95(b). As noted above, none of KOCA’s proposed protective conditions were adopted despite the apparent “consensus.”

(6) The ENV must act with reasonable diligence so that the Landfill may close. Recognizing that the Landfill needs to close, the Planning Commission and this Commission have regularly imposed a condition on ENV that the City “identify and develop” a new landfill with “reasonable diligence.” 2011AP Ex. K12 (Planning Commission’s 2009 Decision) at 25; 2011 AP Ex. K15 (Land Use Commission’s 2009 Decision) at 6. Absent a closure condition, the ENV will not act with “reasonable diligence.”

In its proposed findings, KOCA has offered a conservative, staged closure process that would take place over a decade and gradually close the Landfill while giving ENV ample time to site and develop a new landfill. KOCA’s proposed Condition 3 sets forth the timeline as follows:

- a. From the date of the Commission’s order until March 1, 2024: MSW shall not be permitted at the WGS� unless it cannot be disposed of within the City by other means, with exceptions for (1) period of H-POWER scheduled maintenance, and (2) emergency circumstances.
- b. From March 2, 2024 until March 1, 2027: The WGS� shall be closed to use and all waste except (1) ash and residue from H-POWER and (2) automobile-shredder residue.
- c. From March 2, 2027: The WGS� shall be completely closed.

Until closure, we need protective conditions. “[P]rotective conditions” can and should be imposed to safeguard the community until the Landfill closes. HAR § 15-15-95(e). KOCA proposed a number of conditions that simply seek to protect the

community from the Landfill's ill effects, for example requiring a landscaping plan (Condition 2.f), plans to reduce truck traffic on the highway (Condition 2.h), and plans to reduce noise and odor emanating from the Landfill (Condition 2.h). There was no reason offered for rejecting KOCA's proposed protective conditions.

In accordance with the law governing special use permits and the record in this case and to protect the community's health, safety and welfare, the Applications should be denied unless the Commission imposes the closure and other conditions proposed in KOCA's findings.

DATED: Honolulu, Hawai'i, September 11, 2019.

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The undersigned certifies that on this day a copy of the foregoing document was
duly served on the following persons by hand delivery and email:

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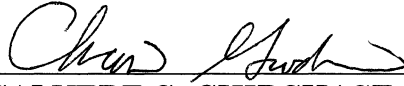
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DATED: Honolulu, Hawai'i, September 11, 2019.

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Handwritten signature in cursive script, appearing to read "Calvert G. Chipchase" and "Christopher T. Goodin".

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