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LAND USE COMMISSION  
STATE OF HAWAII

2019 SEP 24 A 11: 53

Attorney for Intervenor  
COLLEEN HANABUSA

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of ) DOCKET NO. SP09-403  
)  
DEPARTMENT OF ENVIRONMENTAL ) PLANNING COMMISSION NO. 2008/SUP-2  
SERVICES, CITY AND COUNTY OF )  
HONOLULU ) INTERVENOR COLLEEN HANABUSA'S  
) POSITION STATEMENT AND OBJECTIONS  
For a New Special Use Permit to Supersede ) TO THE PLANNING COMMISSION'S  
Existing Special Use Permit to Allow a 92.5 ) FINDINGS OF FACT AND CONCLUSIONS  
Acre Expansion and Time Extension for ) OF LAW, AND DECISION AND ORDER,  
Waimanalo Gulch Sanitary Landfill, ) DATED JUNE 10, 2019; and CERTIFICATE  
Waimanalo Gulch, Oahu, Hawai'i, Tax Map ) OF SERVICE  
Key: 9-2-03: 72 and 73 )  
)

In the Matter of the Application of ) Hearing  
) DATE: October 9, 2019  
DEPARTMENT OF ENVIRONMENTAL ) TIME: 9:00 a.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 POSITION STATEMENT  
AND OBJECTIONS TO THE PLANNING COMMISSION'S  
FINDINGS OF FACT AND CONCLUSIONS OF LAW, and DECISION  
AND ORDER, DATED JUNE 10, 2019

COMES NOW INTERVENOR COLLEEN HANABUSA, by and through counsel undersigned and hereby submits her Position Statement and Objections to the Honolulu Planning Commission's Findings of Fact and Conclusions of Law, and Decision and Order, Dated June 10, 2019.

On October 22, 2009, almost a full decade ago, the State of Hawaii Land Use Commission entered its Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications. At that time, Intervenor Colleen Hanabusa submitted that the record in Planning Commission File No. 2008/SUP-2 supported the closure of Waimanalo Gulch Sanitary Landfill and she submitted her objections and position statements at that time. The record also included her proposed Findings of Fact, Conclusions of Law and Decision and Order that was submitted to the City Planning Commission prior to its July 31, 2009 decision, filed on July 17, 2009. Intervenor Hanabusa's position has not changed since 2009. The Waimanalo Gulch Sanitary Landfill needs to close and the record supports the closure of the Waimanalo Gulch Sanitary Landfill.

The promises made to the community, during prior applications by the City and County of Honolulu to close the Waimanalo Gulch Sanitary Landfill, continue to be broken. Instead of closure, the City Department of Environmental Services seeks to continue to operate, and the Planning Commission supported such an open ended continued use until capacity. Very little has ever been done in the last ten years by the City to develop an alternative site, even though the

Land Use Commission in its 2009 Order also required that the City identify and develop a replacement site with reasonable diligence.

Following the State Land Use Commission's Order of October 22, 2009, the matter went before the Hawaii Supreme Court on appeal by the Department of Environmental Services, City and County of Honolulu in a challenge to Condition No. 14 of the Land Use Commission's 2009 Order, which provided:

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.

While the appeal was proceeding in Department of Environmental Services, City and County of Honolulu v. Land Use Commission, State of Hawaii, et al., *127 Hawai'i 5, 275 P. 3d 809 (2012)*, the Department of Environmental Services, City and County of Honolulu filed a second application: 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.

Intervenor Hanabusa was not a party to that second application and a contested case hearing was subsequently held in that matter.

The position of Colleen Hanabusa has been consistent in this consolidated proceedings. She has objected to the consolidation and states for the record that this proceeding violated

*Hawaii Revised Statutes* Chapter 91 (“*HAPA*”). Specifically the following provisions are called to everyone’s attentions

**§91-9 Contested cases; notice; hearing; records.** (a) Subject to section 91-8.5, in any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

...

(c) Opportunities shall be afforded all parties to present evidence and argument on all issues involved.

**(d) Any procedure in a contested case may be modified or waived by stipulation of the parties and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.**

The above provision was emphasized because there is no procedure which establishes the right to consolidate these actions without the stipulation or consent of the parties. Colleen Hanabusa has continually objected to the consolidation. Moreover due to the improper consolidation, she was not afforded the opportunity to present evidence and argument on all issues involved. A further violation of *HAPA*.

In this same light, the following provisions of *Hawa`i Rev. Stat.* §91-10 is also referenced:

**§91-10 Rules of evidence; official notice.** In contested cases:

(1) Except as provided in section 91-8.5, any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. The agencies shall give effect to the rules of privilege recognized by law;

(2) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available; provided that upon request parties shall be given an opportunity to compare the copy with the original;

**(3) Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence;**

...

The emphasis is placed on subsection 3 in that due to the consolidation, Colleen Hanabusa could not exercise that right in the action to which she was not a party; however now finds herself in consolidation with.

To violate Chapter 91 is a denial of her constitutional rights.

The *Constitution* provides at Article I Section 5:

No person shall be deprived of life, liberty and property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the persons civil rights or be discriminated against in the exercise thereof because of race, religion sex or ancestry.

In the recent case of *Mauna Kea Anaina Hou v. BLNR*, 136 Hawai`i 376, 388-389 (2015) (“*Mauna Kea*”), the Hawai`i Supreme Court has specifically addressed how this provision of the *Constitution* does require procedural protections of due process in administrative proceedings.

The failure to comply with *HAPA* has long been recognized by the Hawai`i Courts as a denial of due process rights.

*HAPA* was enacted as House Bill 5 in the 1961 Legislature of the State of Hawai`i. The purpose of the Bill is:

[T]o provide a uniform administrative procedure for all state and county boards, commissions, departments or offices which would encompass the procedure of rule making and the adjudication of contest cases. . . .

Secondly, your Committee is aware of the fact that there is need in the area of administrative procedure to have some form of uniform procedure whether in the area of rule making or the adjudication of contested cases whereby a person, once having acquired knowledge of certain basic

procedures, would be able to go to any agency and have the basic knowledge relating to the . . . adjudication of contested cases, thus resolving doubts concerning the preservation and protection of constitutional rights and due process requirements which a person is entitled to.

The Legislature by enacting House Bill 5, for most part adopted the Revised Model State Administrative Procedure Act of 1961. The original Model State Administrative Procedure Act (“MSAPA”) was adopted in 1946 by the Uniform State Law Commissioners.

The leading authority on the issue of rule-making is *Aguiar v. HHA*, 55 Hawaii 478, 489-490 (1974). The Hawai`i Supreme Court has made clear that it will not interpret the provisions of the *HAPA* to even give government the “appearance of being arbitrary and capricious.” Cases have held that an agency’s failure to comply with HAPA, will invalidate the action taken.

*Kepo`o v. Watson*, 87 Hawaii`i 91, 101 (1998).

A Rule means:

[E]ach agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, no does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.

*Aguiar*, 55 Hawaii`i at 482.

Rulemaking is to provide for the public to participate in matters of general applicability. *Aguiar*, 55 Hawaii at 487. This also means for public hearings. *Id.* In addition, the Guidance Memorandum was required to be enacted as a rule because like the tenant memos in *Aguiar*, it affected “the ‘private rights’ not only of those tenants actually living in public housing but also those member of the public at large who are interested in becoming tenants.” *Id.* at 489. The facts of *Aguiar* provide the legal basis as to why the Land Use Commission and the Planning

Commission must engage in rulemaking on this consolidation or alternatively must have the concurrence of all parties, which they do not.

It is also important to note that the inconvenience to the agency is never an excuse for the failure to comply with the due process rights of the State's citizens. *Id.* at 498.

The Supreme Court has stated time and again that the general principles of statutory construction is:

[f]irst, the fundamental starting point . . . is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, where there is doubt, doubleness of meaning or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists.

*Citizens Against Reckless Dev. v. Zoning Bd. of Honolulu*, 114 Hawai'i 184, 193 (2007) (“*CARD*”) (quoting *Peterson v. Hawaii Elec. Light Co., Inc.*, 85 Hawai'i 322, 327-28, 944 P.2d 1265, 1270-1271 (1997)). The general rules of statutory construction apply to charters, ordinances and administrative rules. *Kellberg v. Yuen*, 131 Hawai'i 513, 527 (2014); *Hoku Lele, LLC v. C & C of Honolulu*, 129 Hawai'i 164, 167 (ICA 2013); *Paul v. DOT*, 115 Hawai'i 416, 426 (2007).

In the case of *Shoreline Transp., Inc. v. Robert's*, 70 Hawai'i 585, 591-594 (1989), former Justice Nakamura discussed at length the two aspects of due process under *HAPA*. One is rulemaking and the other is adjudicatory. This decision provided to the Public Utility Commission the ability to satisfy a definition of a rule by adjudication. This concept of rulemaking through adjudicatory proceedings was reaffirmed by the Hawai'i Supreme Court in *Application of Hawaiian Elec. Co., Inc.*, 81 Hawai'i 459, 467-468 (1996). The discussion has turned on the distinction between “general or particular applicability.” *Hawai'i Rev. Stat.* § 91-1

(4); *Foster Village Community Ass'n. v. Hess*, 4 Hawai'i App. 463 (1983); *Application of Hawaiian Elec. Co., supra*; *Aguiar v. HHA, supra*; *Aluli v. Lewin*, 73 Hawai'i 56 (1992); *Ainoa v. Unemployment Insurance*, 62 Hawai'i 26 (1980).

Under both definitions of due process by proceeding as the agencies have, they have violated the constitutional due process rights of the objector.

Further, and as held by the Hawaii Supreme Court with respect to the Land Use Commission's October 22, 2009 Order and its Condition No. 14 imposed therein:

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 17-18, 275 P.3d at 821-822.*

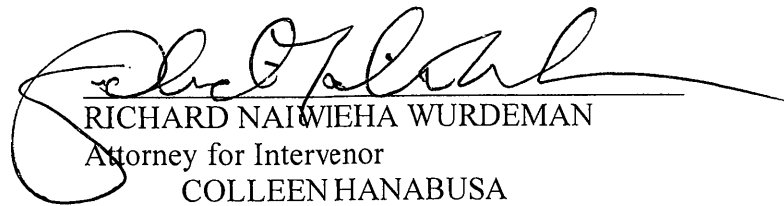
The fatal procedural flaw of the Land Use Commission in its October 22, 2009 Order was that it simply adopted the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order and then imposed conditions, including Condition No. 14, which was not supported, as the Hawaii Supreme Court found, by the Findings of Fact and Conclusions of Law that were simply adopted by the State Land Use Commission. What the State Land Use Commission should have done, was made its own Findings of Fact and Conclusions of Law when it approved the application with modification, pursuant to HRS Section 205-6. Nonetheless, and regardless of this fatal flaw of the Land Use Commission in its October 22, 2009 Order, Intervenor Hanabusa still maintains that the Application for a special use permit to operate Waimanalo Gulch Sanitary Landfill should be **DENIED**, which is permitted under HRS



Section 205-6, and the record supports such a finding. Further, as discussed above, the record from the proceedings in the second application should not be considered and Intervenor Hanabusa objects, once again.

Respectfully submitted.

Dated: Honolulu, Hawaii, September 24, 2019.



RICHARD NAIWIEHA WURDEMAN  
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COLLEEN HANABUSA

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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:

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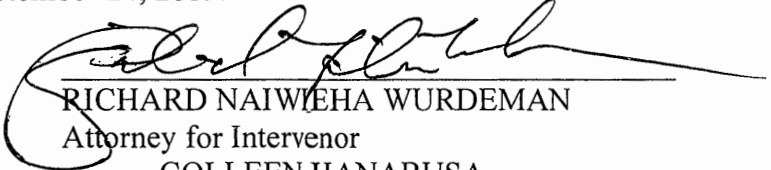
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DATED: Honolulu, Hawaii, September 24, 2019.

  
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