

DEPARTMENT OF THE CORPORATION COUNSEL
CITY AND COUNTY OF HONOLULU

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October 7, 2019

BY HAND DELIVERY

Daniel Orodener, Executive Officer
State of Hawaii Land Use Commission
State Office Tower
Leiopapa A Kamehameha Building
235 South Beretania Street, Room 406
Honolulu, HI 96813

Dear Mr. Orodener:

The Department of Environmental Services, City and County of Honolulu, hereby provides comments on the recommendations in the Office of Planning's ("OP") memorandum dated October 1, 2019 ("OP Memorandum").

The City and County of Honolulu is the owner of parcels identified as Tax Map Keys (1) 9-2-003:072 and 073 (collectively, the "Property"), which are located at 92-460 Farrington Highway in Kapolei, Hawaii. The Property is classified in the State agricultural district.

In accordance with Section 205-6 of the Hawaii Revised Statutes ("HRS"), ENV filed an application for a new special use permit ("SUP") for the expansion of Waimanalo Gulch Sanitary Landfill ("WGSL") on the property and the withdrawal of County Special Use Permit No. 86/SUP-5, dated December 3, 2008 ("2008 Application"). The 2008 Application was later consolidated with a second proceeding, which involves ENV's application to modify the Land Use Commission Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications dated October 22, 2009 ("2009 LUC Order") for County Special Use Permit No. 2008/SUP-2 for the sole purpose of deleting the July 31, 2012 deadline for the landfill to accept municipal solid waste ("MSW") ("2011 Application").

On April 11, 2019, the Planning Commission approved ENV's Application and concluded that ENV met its burden of proof with respect to the provisions set forth in Section 2-45 of the Rules of the Planning Commission ("RPC"), and determined it is a permissible "unusual and reasonable use" within an agricultural district. (2019 Planning Commission Decision, Conclusions of Law 4 and 5.)

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LAND USE COMMISSION
STATE OF HAWAII

OP's recommended amendment to the Planning Commission's Additional Condition 1 should not be adopted because the additional restrictions are not necessary or appropriate in granting approval of the application. (See HRS § 205-6(d); HAR § 15-15-96(a).)

OP recommends adding the following requirements to Additional Condition 1:

"Upon selection of the alternative site, the Applicant shall pursue site acquisition, the preparation of an Environmental Impact Statement, and land use permitting as may be required to assure use of the site as a replacement landfill when the WGS� reaches its capacity."

(OP Memorandum at 4.)

The requirement to pursue site acquisition, prepare an EIS, and obtain land use permits to assure use of the selected site as a replacement landfill when the WGS� reaches capacity bears no relationship to the SUP application at issue. In this consolidated proceeding, the issue is whether the proposed use – landfilling – is an unusual and reasonable use that may be permitted in the agricultural district.¹ The availability of a subsequent landfill site, which is to be used after the WGS� reaches its capacity, bears no relationship to the Property and the SUP at issue in this proceeding. The Planning Commission's Additional Condition 1 permits ENV to use the Property for landfilling until it reaches capacity. (See 2019 Planning Commission Decision at 65².) Accordingly, the duration of the SUP ends when the WGS� reaches capacity. Yet OP's proposed additional requirement requires ENV to expend public funds to acquire property that will be used after this SUP expires. The City respectfully submits that imposition of this requirement is outside of the LUC's purview in this matter. A subsequent landfill site that will be used by ENV to fulfill its responsibility to manage Oahu's solid waste might be the subject of a future application for a SUP, but it is not a proper subject of this proceeding.

It should also be noted that OP's recommendation is unsupported by the record. There is no evidence to support the requirement that the City acquire a replacement site and commence environmental review and permitting once the site is identified in December 2022, as that date bears no relation to when a replacement site may be needed. While OP acknowledges that "the extent of commencement is not described," there is no logical justification, and no basis in the

¹ Any person who desires to use the person's land within an agricultural district for a use other than agricultural may petition the county planning commission for permission to use the person's land in the manner desired. (HRS §205-6(a).) 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. (HRS § 205-6(c).) Special permits for land the area of which is greater than fifteen acres shall be subject to approval by the LUC. (HRS § 205-6(d).) The LUC may impose additional restrictions as may be necessary or appropriate in granting the approval, including the adherence to representations made by the applicant. (Id.; see also HAR § 15-15-96(a).)

² The Planning Commission's Additional Condition 1 states, in pertinent part: "On December 31, 2022, the Applicant shall identify an alternative landfill site that may be used upon WGS� reaching its capacity at a future date. This identification shall have no impact on the closure date for the WGS� because the WGS� shall continue to operate until it reaches capacity." (Emphasis added.)

record, to require “that the City initiate[] the work for a replacement landfill site,” likely decades in advance of when that site may be needed. To the contrary, permit approvals and environmental reviews may need to be redone due to the passage of time, or the City may accept a suboptimal site because of decisions and investments prematurely required.

OP also recommends adding a new condition, to be numbered Additional Condition 2, which states:

“2. When the estimated WGS� capacity for either MSW or ash reaches seven years or less, the Applicant shall initiate the detailed engineering studies needed to support the design and construction of the replacement landfill in preparation for the transfer of landfill operations when WGS� reaches capacity.”

(OP Memorandum at 5.)

OP’s proposed Additional Condition 2 is inconsistent with the evidence in the record and is not supported by substantial evidence. As OP acknowledges in its memorandum, it is difficult to determine a closure date because of ENV’s ongoing efforts to further divert MSW and ash from the landfill. (See OP Memorandum at 4.) There is nothing in the record to support a condition that requires detailed engineering studies to be initiated seven years prior to the WGS� reaching capacity. Rather, the evidence establishes that this activity should occur during the seven years prior to the WGS� reaching capacity. (See PC Tr. 1/11/12 37:1-38:12; 4/11/12 122:6-123:12.) Without substantial evidence in the record, this condition is not likely to withstand judicial review. (See Haw. Rev. Stat. Sec. 91-14(g)(5); Dep’t of Env’tl. Servs. v. Land Use Comm’n, 127 Haw. 5 (2012) (holding that a condition that is not supported by substantial evidence in the record cannot stand).

Finally, the reporting requirements in the Planning Commission’s Additional Condition 2 (which is renumbered Additional Condition 3 in the OP Memorandum) and the OP’s proposed additional reporting requirements, will provide the Planning Commission and LUC with periodic updates about the WGS�’s operations, including the amount of waste landfilled at WGS�, the landfill’s remaining capacity, the City’s progress in identifying and developing a new landfill site, and ENV’s efforts to further divert waste from the landfill. This additional information will help to provide the Planning Commission and LUC with a better understanding of the status of the WGS�.

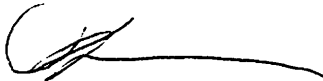
Daniel Orodener, Executive Officer

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ENV respectfully requests that the LUC approve the 2008 and 2011 Applications without OP's recommended amendment to Additional Condition 1 and new Additional Condition 2.

Very truly yours,



KAMILLA C.K. CHAN
Deputy Corporation Counsel

KCKC:mw

cc: State of Hawaii Office of Planning
State of Hawaii Department of Health, Solid and Hazardous Waste Branch
City and County of Honolulu, Department of Environmental Services
City and County of Honolulu, Department of Planning and Permitting
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