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LAND USE COMMISSION
STATE OF HAWAII

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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 REPLY
IN SUPPORT OF THEIR
OBJECTIONS TO 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 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 REPLY IN SUPPORT OF THEIR 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 reply in support 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**”).

I. ARGUMENT

A. The Planning Commission Was Prepared to Adopt a Number of KOCA’s Conditions.

Our summary of the recent Planning Commission proceedings was accurate. ENV accuses KOCA of misrepresenting the discussions at the February 28, 2019 and April 11, 2019 Planning Commission meetings. It is ENV’s selective recitation of the discussions that is inaccurate.

First, at the February 28, 2019 hearing, a majority of the Planning Commission was poised to adopt KOCA’s conditions 1c, 1d, 2c, 2d, 2e, 2g, 2i, 2j, 3a, 3b, and 3c. Ex. 6 (2/28/19 Tr.) at 88:23-90:10, 92:14-94:3, 93:24-95:2, 97:19-98:3.

As the Commissioners were discussing the conditions and whether to close the Landfill, Commissioner Hayashida stated that he needed time “to refresh [his] memory on the time of completion of the seven year before [he] ma[d]e that decision” *Id.* at 98:7-10. In other words, Commissioner Hayashida needed to review the record before deciding whether to close the landfill, which was presented in KOCA’s proposed condition 3. Vice Chair Anderson and Commissioner Hayashida discussed the matter as follows:

VICE CHAIR ANDERSON: Commissioner Hayashida, do you agree with, I guess the dialog back and forth that it be--

MEMBER HAYASHIDA: I’d have to refresh my memory on the time of completion of the seven year before I make that decision whether we’re going to put that into the record. So--

VICE CHAIR ANDERSON: Okay.

MEMBER HAYASHIDA: Shall we make the motion to continue this hearing on another date?

VICE CHAIR ANDERSON: Okay.

MEMBER GOO: This hearing or this subject?

VICE CHAIR ANDERSON: The hearing I believe.

MEMBER HAYASHIDA: We have a motion to--

VICE CHAIR ANDERSON: Well, technically I don’t believe there’s a motion--

MEMBER HAYASHIDA: We’re in discussion 3.a, b and c, and I guess we’re going to enter--So, we want to vote--People don’t feel like we have the information to vote on--

VICE CHAIR ANDERSON: **Well, for clarity we do have information but just not in front of us.**

MEMBER HAYASHIDA: Yeah.

VICE CHAIR ANDERSON: Fair enough. If that is the case, we have to look into dates to schedule a continuance hearing, because I believe with the bare quorum we need a unanimous vote, correct, to carry anything?

Ex. 6 (2/28/19 Tr.) at 98:4-99:5 (emphasis added). As Vice Chair Anderson confirmed at the end of the meeting, the **“one condition of them all that we’ve reviewed it appears that requires further research on our own to look back through testimony and documentation is that of 3.a, 3.b, and 3.c within KOCA’s [exceptions]”** *Id.* at 100:4-7 (emphasis added).

Second, we do not know what happened in the executive sessions, after which the Planning Commission decided not to include KOCA’s condition 3, because none of the Commissioners put on the record their reasons for changing positions, rejecting the conditions necessary to protect the community and voting to keep the landfill open indefinitely. As this same record shows, there was still consensus on a number of KOCA’s conditions at the April 11, 2019 meeting. Vice Chair Anderson explained, **“I believe there was consensus on KOCA’s condition of 1c, 2c, 2d, 2e, 2g, 2i, 2j.** And the three items that we’re looking into now are 3a, 3b, and 3c regarding the closure time line, which we can all agree is fairly critical.” Ex. 7 (4/11/19 Tr.) at 17:5-6 (emphasis added). There was no further discussion as to conditions 1c, 2c, 2d, 2e, 2g, 2i, and 2j. Inexplicably, however, these conditions were not adopted.

Third, the Commissioners acknowledged there was evidence to support KOCA’s proposed condition 3. Commissioner McMurdo stated that she believed the record supported imposing a closure condition. *Id.* at 26:2-6. Similarly, Commissioner Goo stated that although the timeline was established a long time ago, the timeline was

in the record. *Id.* at 26:9-10 (“Time line was a long time ago, but it’s in the records.”). Likewise, Vice Chair Anderson twice stated that there was evidence to support “both sides of the coin,” meaning that there was evidence in the record to support a closure condition. *Id.* at 18:9-14, 26:11-23. Thus, three of the five commissioners specifically announced that the record supported closure.

After the continued hearing and a lengthy executive session, the Planning Commission did not impose any closure deadline or adopt any conditions to protect the community. We can only guess at the reason because the discussions or deliberations that resulted in the Planning Commission rejecting all of KOCA’s proposed findings were not conducted publicly. This secrecy is contrary to the public policy of the State that “the discussions, deliberations, decisions, and action of governmental agencies . . . shall be conducted as openly as possible.” HRS § 92-1. As the Legislature succinctly explained:

In a democracy, the people are vested with the ultimate decision-making power. Governmental agencies exist to aid the people in the formation and conduct of public policy. Opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public’s interest.

Id. Transparency is particularly necessary where the same governmental entity is both the permittor and the permittee. Here, there was no such transparency.

B. The Planning Commission’s Decision Is Tantamount to a Boundary Amendment Because There Is Nothing in the Record That Identifies When the WGSL Will Close.

ENV cannot say how long the surrounding community must endure the Landfill, even though the LUC’s rules contemplate a “time limit for the duration of the particular [special] use.” HAR § 15-15-95(e). ENV and other parties argue that

allowing the WGS� to be used until it reaches capacity is a sufficient limit on the duration of the Landfill's operations. This is incorrect for two reasons.

First, nothing in the record establishes when the WGS� will reach capacity. As ENV points out, in December 2004, the City Council concluded that the WGS� "has at least 15 years of capacity left[.]" ENV Response at 13. It has been 15 years since then yet the WGS� has apparently still not reached capacity. It could be another 20 years, 50 years, or longer before the WGS� reaches capacity. Because nothing in the record establishes when the WGS� will reach capacity, and thus there is no foreseeable end to the use, allowing use of the WGS� until capacity is tantamount to a boundary amendment and the very type of "unlimited use" that the Hawai'i Supreme Court condemned in *Neighborhood Bd. No. 24 (Waianae Coast) v. State Land Use Comm'n*, 64 Haw. 265, 639 P.2d 1097 (1982).

As the LUC's counsel explained in prior proceedings, "**if 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.” *Id.* at 69 (Russell Suzuki) (emphasis added).

Second, the WGS� began operations in 1989 and thus has already been in use for 30 years. 2011AP Ex. K93 at 2 (9/08 ENV status report). Adding another 30 or 50 years on top of that would mean that the WGS� would have been in operation for 60 to 80 years. Allowing a use to continue for such a massive duration would be the equivalent of allowing a district boundary amendment and would “frustrate[] the effectiveness and objectives of Hawaii’s land use scheme.” *See Neighborhood Bd. No. 24*, 64 Haw. at 272, 639 P.2d at 1103.

C. KOCA’s Condition 3 Proposes a Reasonable Phased Closure of the WGS� that Complies with the LUC’s Rules, HRS Ch. 205, and Hawaii Supreme Court Precedent and Is Supported by the Evidence in the Record.

The LUC’s rules, HRS chapter 205, and Hawaii Supreme Court precedent require a temporal limitation on any special use. KOCA’s proposed condition 3 sets forth such a temporal limitation and the timeline proposed in the condition is supported by the evidence in the record.

KOCA’s proposed condition 3 sets forth a three-part phased closure of the WGS�. The first phase is based on a condition that ENV proposed in 2012. In the first phase, from the date of the Planning Commission’s order until March 1, 2024, MSW should not be allowed to be deposited at the WGS� unless it cannot be disposed of within the City by means other than landfilling; provided, however, that MSW to be processed at H-POWER may be disposed at WGS� during scheduled H-POWER maintenance and under emergency circumstances. This condition is based

on ENV's findings of fact filed May 2, 2012 and is consistent with the ENV's desire to have "maximum diversion" from the Landfill, *see* 2011AP 1/11/12 Tr. at 157:23-25 (Steinberger); 2011AP 4/11/12 Tr. at 94:7-9 (Steinberger). The substantial evidence demonstrates that, by March 1, 2024, ENV should have its new landfill identified and developed if it proceeds with reasonable diligence. *See* 2011AP 3/7/12 Tr. at 17:25-19:25, 199:24-201:24 (Miller); 2011AP Ex. K85 at 95:6-8, 100:23-25 (3/27/03 Tr. Doyle).

The second phase contemplates an orderly transition over three years. In the second phase, 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. Since ENV should have its new landfill identified and developed by this point, the second phase provides a transitional period to send H-POWER ash and residue and automobile shredder residue from the WGS� to the new landfill.

The third phase requires ENV to deliver on its promises of closure. The third phase is the complete closure of WGS� in March 2027. ENV has stated that it only wants one landfill to accept all waste streams that require landfilling. 2011AP 4/4/12 Tr. at 72:13-24 (Marsters); 2011AP Ex. K27 at 2 (1/20/11 SSC group memory). With a new site developed and operational, ENV will no longer need the WGS�.

D. ENV Has Shown that Without a Closure Deadline It Will Not Proceed with Siting and Developing Another Landfill Site.

ENV argues "[a]llowing ENV to use WGS� to capacity does not preclude ENV from concurrently moving with reasonable diligence to site and develop a new

landfill.” ENV Response at 14. Yet, in the very next paragraph, ENV states that “[t]here is nothing in the record to justify closing WGS� before it reaches capacity and incurring the otherwise avoidable costs of establishing a landfill elsewhere” *Id.* It is clear that ENV sees no need to diligently site and develop another landfill site because it intends to use the WGS� until it reaches capacity, however long that may be. A closure condition is needed to ensure that ENV proceeds with reasonable diligence and does not just continue to kick the can down the road.¹

As discussed *supra*, the record supports the phased closure proposed in KOCA’s condition 3. *See supra* Section I.C. As ENV admits, “[t]he record . . . establishes that it will take more than seven years to identify and develop a landfill site.” ENV Response at 16. The site selection process began in January 2011. 2011AP 4/4/12 Tr. at 54:14-16 (Marsters). Accordingly, establishing a March 2024 closure date will

¹ ENV suggests that the LUC’s remand order precluded the Planning Commission from imposing additional conditions. *See* ENV Response at 9. ENV’s position is absurd. The LUC did not handcuff the Planning Commission on remand. ENV did not previously suggest that the Planning Commission could not impose conditions. The Planning Commission did not state that it was unable to impose conditions. And chapter 205 and the Planning Commission rules expressly empower the Planning Commission to adopt conditions. It would be reversible error on its face to have attempted to preclude the Planning Commission from exercising its statutory powers.

The LUC did no such thing. The LUC simply remanded the Applications to the Planning Commission to resolve certain deficiencies. The LUC did not limit the Planning Commission. On the contrary, the LUC directed the Planning Commission to consider whether additional evidence should be taken. *See* LUC’s Order Granting in Part Intervenor Ko Olina Community Association and Maile Shimabukuro’s Motion to Deny and Remand, entered June 6, 2017 (“**6/6/17 LUC Order**”) at 4 (ordering 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”).

give ENV more than thirteen years to site and develop a new landfill site—nearly twice the amount of time established in the record. Thus, the closure date proposed in KOCA’s condition 3 is reasonable and necessary to ensure that ENV proceeds with reasonable diligence.

Nor will the proposed March 2024 closure date jeopardize City operations or the health and safety of the people of the City and County of Honolulu as ENV will have another landfill site operational by that date, as long as it proceeds with reasonable diligence.

E. The City Council’s Reselection of the WGS� Did Not Satisfy the LUC’s Order to Select Another Landfill Site and Did Not Negate the Promises the City Made to the Community that the WGS� Would Close.

No matter how ENV spins it, the Landfill is not “new.” ENV’s contention that the reselection of the WGS� as the City’s landfill in 2004 satisfied the order of the LUC and the promises the City made to the community to close the WGS� is disingenuous. *See* ENV Response at 13-14; 2011AP Ex. K2 at 7 (¶ 1), 9 (¶ 112), 10 (¶ 15) (6/9/03 LUC Order). In 2003, ENV represented to the LUC that the site selection committee would not be able to select the WGS� as the “new” landfill: “CHAIRPERSON ING: . . . **The proposed Blue Ribbon committee, could they come out with a recommendation that this Waimanalo Gulch landfill be expanded? MR. DOYLE: No.**” 2011AP Ex. K85 at 177:22-25 (3/27/03 Tr.: Doyle) (emphasis added).

At the same time, the City promised the community that the WGS� would close. *See, e.g.*, 2011AP Ex. K85 at 145:21-146:2 (3/27/03 Tr.) (“MR. DOYLE: . . . The City

has committed and Planning Commission has certified that we will be out of that site, that's a condition, **we will be out of that site in five years.**" (emphasis added)); *see also* Ex. 1 to Objections (KOCA's Findings) at 37-41. Specifically, Director Doyle "stated to the community that, if the community allowed some expansion of the Landfill [in 2003], the ENV would commit to close the [WGSL] in 2008." 2011AP Rezendes Written Direct Testimony at 4 (¶ 12). Relying upon the City's promise, in the 2003 proceedings before the LUC, the community made no request for intervention and no contested case hearing was held. 2011AP Ex. K2 (6/9/03 LUC Order). Accordingly, at the conclusion of the 2003 proceedings, the LUC directed the Honolulu City Council to select a new site by June 1, 2004 and to close the Landfill by May 1, 2008. *Id.* at 7 (¶ 1), 9 (¶ 12), 10 (¶ 15).

Despite the City's representation to the LUC, its promises to the community, and the site selection committee's recommendation of another site, the City Council passed a resolution to select the existing WGSL as the "new" landfill. 2011AP 1/11/12 Tr. at 52:6-15 (Steinberger). The reselection of the WGSL did not comply with the LUC's order. Indeed, in its 2009 order, to prevent further gamesmanship, the LUC explicitly ordered ENV to "identify and develop one or more landfill sites that shall either replace or supplement the WGSL." 2011AP Ex. K12 at 25 (2009 decision). Likewise, the reselection of the WGSL did not fulfill the promises made to the community. The City promised that the WGSL would close, *see supra*, not that the WGSL would close unless reselected by the City.

F. KOCA's Objections to the Planning Commission's Findings of Fact.

For the reasons set forth in KOCA's Objections, the findings of fact and conclusions of law identified in KOCA's Objections are not supported by the record in this case and are erroneous. Instead of reiterating those reasons, this section addresses a few of ENV's responses to highlight to absurdity of ENV's position.

Finding of Fact 53 (release of waste and leachate). ENV's contention that the evidence in the record does not show that waste and leachate was released from the Landfill in January 2011, ENV Response at 18, is beyond the pale. In addition to Mr. Williams's testimony that the waste and leachate released from the Landfill washed up in Ko Olina's lagoons, 2011AP Williams Written Direct Testimony at 18 (¶¶ 43, 44), there was news coverage of the incident, 2011AP Ex. K133b (1/14/11 KHKON 2 video), and photographs of the medical waste that washed up on the shore:



1/16/2011 13:11:02

EXHIBIT K105 at 7



1/16/2011 13:09:26

EXHIBIT K108 at 13



1/18/2011 15:31:32

EXHIBIT K108 at 20

Finding of Fact 70 to 74 and 259 (explosive gas). ENV contends that because a subsurface fire did not actually occur, the falsification of gas readings did

not pose “an actual threat to public health and safety.” ENV Response at 19-20. This ignores the facts that a Waste Management employee had falsified explosive gas readings from mid-2010 to August 2011, 2011 AP Steinberger Written Direct Testimony at 27 (¶ 82), and that “one of the reasons you monitor subsurface well-head gas is because of a concern for subsurface fire,” 2011AP 1/11/12 Tr. at 91:1-92:3, 93:3-6 (Steinberger), facts that ENV does not dispute. We got lucky this time. But the fact remains that the Landfill’s operator falsified explosive gas readings. And that misconduct posed a serious and needless risk to health and safety.

Finding of Fact 209 to 221 and 216 (site selection process). ENV argues that Ms. Marsters’s testimony that the site selection committee (“SSC”) was not “happy with the process that had happened” does not mean that the SSC “was not happy with the entire process.” ENV Response at 26-27. Although it is not clear what distinction ENV is trying to draw, Ms. Marsters did testify that the SSC was not happy with the consultant’s imposition of screens that the SSC had neither discussed nor previously authorized. 2011AP 4/4/12 Tr. at 104:20-23. The flawed process was not reasonable or diligent.

Finding of Fact 222, 223 and 274 (amount of time needed to site and develop new landfill). ENV’s contention that the evidence “establishe[s] that a minimum of seven years—more likely longer—is required to take a landfill from selection to operation,” ENV Response at 28-29, is incorrect. Mr. Miller, the only expert in landfill siting to testify in this proceeding, testified that it would take three to five years to identify and develop a landfill. 2011AP 3/7/12 Tr. at 202:20-24

(Miller). This is consistent with ENV Director Doyle's statements in 2003 that it will only take three to five years to identify and develop a new landfill. 2011AP Ex. K85 at 95:6-8, 100:23-25 (3/27/03 Tr.: Doyle). ENV's claims that it will take more than seven years **after** site selection are neither credible nor supported.

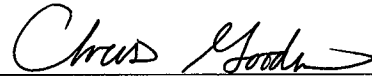
Finding of Fact 256 (landfill mismanagement). ENV's contention that Finding of Fact 256 is not materially incomplete is baseless. While WMH was in the process of completing construction of the Western Surface Drainage System, this ignores the facts that (1) the drainage systems was designed to be in place **before** Cell E6 was filled with waste, 2011AP 4/11/12 Tr. at 66:7-9, 66:15-17 (Sharma), (2) the permitting and processing delays were foreseeable, 2011Ap 4/11/12 Tr. at 145:22-23 (Steinberger); 2011AP 4/11/12 Tr. at 145:24-146:14, 149:3-5 (Steinberger); 2011AP Ex. K2 (6/5/03 LUC order); 2011AP Ex. K155 at 3 (¶¶ 5-8) (3/14/08 LUC order); 2011AP Ex. K85 at 125:7-11, 128:2-5, 145:21-146:2 (3/27/03 Tr.: Doyle), and (3) it was inadequate planning that caused the Landfill to run out of safely useable space before the diversion channel was completed, 2011AP 3/7/12 Tr. at 186:4-21 (Miller). The omission of the obvious mismanagement of the Landfill renders Finding of Fact 256 materially incomplete.

II. CONCLUSION

In light of the foregoing, KOCA respectfully requests that the Land Use Commission deny the Applications unless it imposes the additional conditions in KOCA's Findings.

DATED: Honolulu, Hawai'i, October 2, 2019.

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A handwritten signature in cursive script, appearing to read "Chris Goodin", written over a horizontal line.

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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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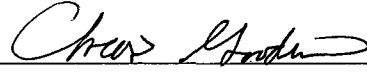
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DATED: Honolulu, Hawai'i, October 2, 2019.

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