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LAND USE COMMISSION
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July 1, 2020

To: Daniel Orodener, Executive Officer
Land Use Commission

From: Mary Alice Evans, Director · *Mary Alice Evans*
Office of Planning

Subject: Amend State Special Permit (SP97-390)
Proposed Central Maui Landfill Facilities Expansion Project
TMK: (2) 3-8-003: 019 (Por.) and 3-8-003: 020
Puunene, Maui, Hawaii

The Office of Planning ("OP") recommends approval for amending the Department of Environmental Management's ("Petitioner") Special Permit Application, SP97-390, with additional conditions, as transmitted by the County of Maui Planning Commission's approval letter dated February 6, 2020. OP provides the following in support of this recommendation.

Factual and Procedural Background

The Petitioner submitted a Special Use Permit application to the County's Department of Planning for the expansion of the existing Central Maui Landfill ("CML"). OP commented on this application by letter dated April 18, 2018 to the Department of Planning. OP also commented on the Draft Environmental Assessment by letter dated April 6, 2018. This letter is included within the Department of Planning's Exhibit 30, which was transmitted to the Land Use Commission ("LUC").

Proposed Use

The uses proposed for the expansion area include offices, an abandoned vehicle area, metals processing area, open construction and demolition material recovery area, household hazardous waste and electronic waste processing and storage area, warehouse building and storage area, refuse collection office, truck parking, maintenance area, drainage basins, and associated infrastructure.

The existing landfill was established in 1986 by a State Special Permit on a 55-acre site by SP86-359. The activities listed for this Special Permit include landfill activities, weigh

station, special waste, and green waste composting. There is no time limit for the use on this Special Permit.

In 1997, the County of Maui expanded the landfill via a second State Special Permit (SP97-390) with an additional 29.340 acres. The County requested three amendments to this Special Permit for various improvements, an extension of time for the permit, and an expansion of 41.2 acres. The current permit is valid until October 31, 2018. The combined land area for the entire existing landfill and appurtenant uses is approximately 125.54 acres.

Special Permit Guidelines

The guidelines for Special Permits (SP) are contained within Hawaii Administrative Rules (HAR) § 15-15-95 which allow certain “unusual and reasonable” uses within Agricultural and Rural Districts other than those for which the district is classified. HAR § 15-15-95 lists six (6) guidelines for determining whether a proposed use is “unusual and reasonable.” The following assesses the proposed project relative to the Special Permit guidelines:

1. The use shall not be contrary to the objectives sought to be accomplished by Chapters 205 and 205A, HRS, and the rules of the Commission.

Hawaii Revised Statutes (HRS) Chapter 205 seeks to protect agricultural lands and ensure their continued availability for agricultural use.

It provides that the Agricultural District shall include lands with a high capacity for agricultural production, grazing, or other agricultural uses. Chapter 205 also recognizes, however, that some lands in the Agricultural District may not be suitable for the uses permitted in the Agricultural District and, therefore, other uses may be allowed with a Special Permit. Typically, landfills have been permitted by Special Permits. However, OP has concerns regarding a 22-acre portion of the 40.8-acre proposed expansion area.

The proposed expansion area is classified as “A” lands by the Land Study Bureau. Also, as noted in the Final Environmental Assessment (FEA) on pages 23-25, approximately 22 acres of the proposed 40.8-acre expansion area were designated as Important Agricultural Lands (IAL) by the Land Use Commission (LUC) in DR09-38 Alexander & Baldwin, Inc.

The objective sought for IAL lands is to preserve and protect good agricultural lands, and stems from Article XI, Section 3 of the Hawaii State Constitution, which states in part:

The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands.

The LUC approved DR09-38 and designated 22 acres of this proposed expansion as IAL. Notably, a landfill was not contemplated by the LUC as a potential or planned use of the petition area as part of the IAL declaratory order record or process of DR 09-38. Under HRS § 205-42(a), "Important agricultural lands" is defined as lands that:

- (1) Are capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology;
- (2) Contribute to the State's economic base and produce agricultural commodities for export or local consumption; or
- (3) Are needed to promote the expansion of agricultural activities and income for the future, even if currently not in production.

While a landfill provides an important and necessary service to the County and its residents, its location within the IAL-designated area conflicts with the definition of IAL, and differs from the uses originally contemplated in the IAL declaratory order. A landfill would not be capable of producing sustained high agricultural yields, it would not contribute to the State's economic base and produce agricultural commodities for export or local consumption, and it could not be used to promote the expansion of agricultural activities and income for the future, even if currently not in production.

Thus, OP is concerned that allowing IAL-designated lands for use as a landfill would be contrary to the objectives sought to be accomplished by HRS Chapter 205, and perhaps more importantly, Article XI, Sec. 3 of the Hawaii State Constitution. To allow a landfill on IAL-designated lands would set a bad precedent for other similar uses allowed by special permit in the future.

According to the FEA, an Archaeological Inventory Survey was completed and no historic and archaeological resources were found. The State Historic Preservation Division (SHPD), commented by letter dated, March 15, 2018, that they accept the Archaeological Assessment as a final document, and indicated that a monitoring plan is not required.

The FEA also contains information on Cultural Resources (page 32-46), which indicates that no significant adverse impacts are anticipated to occur on the Petition Area. An interviewee of the cultural study indicated that there may be cultural finds in the area. As a mitigation measure, the FEA proposed that the personnel be informed of the history and

possibility of discovering funerary objects and burials during construction, in a pre-construction meeting. Further, should burials be found, the FEA indicates that the County Department of Environmental Management should consult with cultural and lineal descendants of the area to develop a reinternment plan and cultural preservation plan for proper cultural protocol, curation, and long-term maintenance.

The FEA also indicates that there are no wetlands or streams in the expansion area.

2. The desired use would not adversely affect surrounding property.

According to the application, the proposed project is not anticipated to directly or indirectly affect adjacent uses. The areas immediately surrounding the project site are in agricultural use, quarry or are undeveloped, and may be used in the future for diversified agriculture.

However, we note that the site is within two miles of the Air Operations Area of the Kahului Airport, and is subject to the State of Hawaii, Office of Planning, Technical Assistance Memorandum, as indicated by State Department of Transportation letter, dated April 10, 2018, cited as Exhibit 26 of the County's Department of Planning's recommendations to the Planning Commission, Exhibit 6.

3. The use would not unreasonably burden public agencies to provide streets, sewers, water, drainage, schools, fire, and police resources.

According to the application, the proposed project would not require infrastructure support from public agencies due to the following:

- A letter from the State Department of Transportation, dated April 10, 2018, indicates that no traffic impacts are anticipated.
- New individual wastewater systems would be provided on-site, in accordance with State and County regulations.
- Water would be provided via an existing State water well. Appropriate conservation measures would be incorporated.
- Drainage improvements in the form of retention basins and best management practices would be incorporated.

4. Unusual conditions, trends, and needs have arisen since the district boundaries and rules were established.

OP recognizes the State interest in consolidating solid waste and other similar uses as proposed by the County. OP also recognizes the State interest in conserving the State's agricultural land resource base and assuring the long-term availability of agricultural lands for agricultural use.

5. The land upon which the proposed use is sought is unsuited for the uses permitted within the district.

The land upon which the proposed use is sought is suitable for the uses permitted within the district. As noted above, the project would be located on approximately 40.8 acres of Class A land as rated by the LSB productivity rating system. Under the ALISH system, the soils on the subject property are classified as Prime. While the proposed use is suitable for the uses permitted within the district, again, it is unsuited for the 22 acres designated as IAL.

State Issues and Concerns

OP also offers the following comments on other matters of concern.

1. The FEA includes the Special Permit 97-390 FY 2017 Annual Report. All conditions are currently being met. OP believes that if the proposed expansion is approved, these conditions should also apply to the expansion area.
2. OP does not object to the request for an extension of time for the Special Permit as it coincides with the time limit for the County's Conditional Use Permit, and it would continue current LUC practice for a time extension for similar uses. However, we note that it is unlikely that the land would ever revert back to agricultural uses.
3. Ka Paakai considerations. The FEA indicates that there should be no impacts to cultural resources, and proposes conditions which should mitigate any adverse impacts. However, the final decision letter from the County Planning Commission does not include the proposed measure offered by the FEA document to mitigate the inadvertent findings of funerary objects and burials during construction of the proposed project. The approval letter includes the standard condition offered by the SHPD, but does not include the additional mitigation measure
4. Concerns remain with regard to the 22 acres within the Petition Area that are designated IAL. Allowing this area to be incorporated into the existing County

landfill site while still maintaining its IAL designation may set a bad precedent of allowing uses within IAL areas that are contrary to the purposes and definition of IAL without adequate redress by the applicant. OP recommends that if the amendment for the SP is approved, the Petitioner or County should submit a declaratory petition to the LUC requesting withdrawal of the IAL designation from the 22 acres currently designated IAL. As shown below, as provided in HRS § 205-50:

“Standards and criteria for the reclassification or rezoning of important agricultural lands. (g) A farmer or landowner with qualifying lands may also petition the land use commission to remove the "important agricultural lands" designation from lands if a sufficient supply of water is no longer available to allow profitable farming of the land due to governmental actions, acts of God, or other causes beyond the farmer's or landowner's reasonable control. If the "important agricultural lands" were designated by a declaratory order in combination with the reclassification of land in the agricultural district to the rural, urban, or conservation district pursuant to section 205-45, the commission shall not remove the designation unless the legislature provides prior authorization by adoption of a concurrent resolution in accordance with section 205-45. [L 2005, c 183, pt of §2; am L 2008, c 233, §20]”

While the reason for the withdrawal differs from that specified in the law, a process for withdrawal by petition is provided. The County could file a petition for declaratory order for the removal of the lands from IAL under HAR § 15-15-98(a), which provides, “On petition of any interested person, the commission may issue a declaratory order as to the applicability of any... order of the commission to a specific factual situation.” The County could petition the Commission for a declaratory order that the original IAL declaratory order DR09-38, shall no longer apply to the 22 acres because the 22 acres will be used as a landfill in conflict with the purposes and definition of IAL.

Recommendation

Having reviewed the application and applied the available information to the applicable Special Permit guidelines, OP supports the amendment to the State Special Permit application to expand the landfill area and other proposed uses, subject to the inclusion of additional conditions for the IAL lands, and for cultural resources, as follows.

Mr. Daniel Orodener, Executive Officer

July 1, 2020

Page 7

1. Petitioner shall submit a petition for Declaratory Ruling to the Land Use Commission to withdraw the 22-acres of Important Agricultural Land (IAL) from the IAL designation, within one year of the LUC Decision and Order for this SP.
2. Petitioner shall instruct the construction employees during the pre-construction meeting or similar circumstance, of the possibility of discovering funerary objects and burials during construction. Further, should burials be found, the Petitioner shall consult with the State Historic Preservation Division, and cultural and lineal descendants of the area, to develop a reinternment plan and cultural preservation plan for proper cultural protocol, curation, and long-term maintenance.