

CLARE E. CONNORS 7936
Attorney General of Hawai'i

DAWN T. APUNA 7855
Deputy Attorneys General
Department of the Attorney General
425 Queen Street
Honolulu, Hawai'i 96813
Telephone: (808) 586-1180
Facsimile: (808) 586-1205



Attorneys for OFFICE OF PLANNING,
STATE OF HAWAI'I

BEFORE THE LAND USE COMMISSION
OF THE STATE OF HAWAI'I

In the Matter of the Application of the:)	DOCKET NO. SP97-390
)	
COUNTY OF MAUI DEPARTMENT OF	)	OFFICE OF PLANNING'S MOTION
ENVIRONMENTAL MANAGEMENT	)	FOR RECONSIDERATION OF THE
	)	FINDINGS OF FACT, CONCLUSIONS
To Obtain A Fourth Amendment To Land Use	)	OF LAW, AND DECISION AND ORDER
Commission Special Permit To (1) Extend the	)	APPROVING WITH MODIFICATIONS
Time for the Special Permit to October 31, 2028,	)	THE RECOMMENDATION OF THE
For the Central Maui Landfill; (2) Delete	)	COUNTY OF MAUI PLANNING
Approximately 16.841 Acres of Land From The	)	COMMISSION TO APPROVE A
Special Permit; And (3) Include Approximately	)	FOURTH AMENDMENT TO THE
39.573 Acres of Land Within The Special Permit)	)	LAND USE COMMISSION SPECIAL
For The Development Of Recycling And	)	PERMIT
Diversion Facilities)	
	)	CERTIFICATE OF SERVICE
)	

**OFFICE OF PLANNING'S MOTION FOR RECONSIDERATION OF
THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER
APPROVING WITH MODIFICATIONS THE RECOMMENDATION
OF THE COUNTY OF MAUI PLANNING COMMISSION
TO APPROVE A FOURTH AMENDMENT
TO THE LAND USE COMMISSION SPECIAL PERMIT**

THE OFFICE OF PLANNING, STATE OF HAWAI'I ("OP"), hereby respectfully
submits to the Land Use Commission ("LUC"/"Commission") this Motion for Reconsideration

of the Findings of Fact, Conclusions of Law, and Decision and Order Approving With Modifications the Recommendation of the County of Maui Planning Commission to Approve A Fourth Amendment to the Land Use Commission Special Permit ("Motion"), pursuant to Hawaii Administrative Rules ("HAR") § 15-15-84.

OP requests that the Commission reconsider Condition No. 23 of the Findings of Fact, Conclusions of Law, and Decision and Order Approving With Modifications the Recommendation of the County of Maui Planning Commission to Approve A Fourth Amendment to the Land Use Commission Special Permit ("D&O"), to clarify whether the Department of Environmental Management, County of Maui ("DEM") is required to seek a district boundary amendment ("DBA") with the LUC for "the approximately 22 acres of [Important Agricultural Lands]" as stated by Condition No. 23, or for the entire Special Permit Area of approximately 95.659 acres, or some other specific acreage of the Special Permit Area.

I. D&O Condition No. 23 Unreasonably and Likely Erroneously Requires DEM to Seek a DBA of 22 Acres of IAL Rather than the Entire Special Permit Area

During deliberations at the subject Special Permit hearing held on July 9, 2020, Commissioner Cabral made a motion to grant the Central Maui Landfill Special Use Permit subject to two conditions¹. *Pg. 109, lines 19-25 to pg. 110, lines 1-9, Hearing Transcript 7/9/2020*. Commissioner Giovanni added an amendment to Commissioner Cabral's motion, by stating, "I support the motion with an amendment subject to further condition. So, I would like to amend the motion to add a condition in which the Petitioner will seek a district boundary amendment from the Land Use Commission within five years." *Pg. 111, lines 13-16, Hearing*

¹ (1) Within one year of approval, the County shall identify County owned Agricultural property of similar land properties and equivalent acreage on Maui and submit a request to have it designated as IAL to compensate for the loss of the 22 acres of IAL land associated with the facilities project; and (2) upon restoration of closed phases, the CML, and where safe and practicable to do so, and if still designated as Agriculture at the time, the County shall seek to make such plan available for future appropriate agricultural use in accordance with applicable state and federal guidelines and requirements.

Transcript, 7/9/2020. Based on Commissioner Giovanni's amendment and the Commission's approval and adoption of Commissioner Cabral's motion, Condition No. 23 was written into the D&O as follows:

That the Applicant shall commence the process to seek a district boundary amendment with the LUC for the approximately 22 acres of IAL within five years of the LUC's Decision and Order for the Applicant's Fourth Amendment Request.

Emphasis added.

HAR § 15-15-84(b) provides that a “motion for reconsideration shall state specifically the grounds on which the movant considers the decision or order unreasonable, unlawful, or erroneous.” OP believes D&O Condition No. 23 is unreasonable and likely erroneous. While there is nothing in the record to clearly support a condition requiring DEM to seek a DBA for *only* the 22 acres of Important Agricultural lands (“IAL”), there is indication in the transcript that the Commission may have intended that DEM seek a DBA for the full Special Permit Area of approximately 95.659 acres. It is important that the Commission make clear its intention with regard to the specific area and acreage that should be subject to a DBA, and that Condition No. 23 accurately reflect the intent of the Commission, as there is a substantial 73 acres that would or would not be subject to the required DBA.

The Commissioners did not specifically state during the hearing whether the DBA shall apply to either the 22 acres of IAL or the entire Special Permit Area of approximately 95.659 acres. However, there was extensive discussion and comments made by Commissioners and others throughout the hearings that the appropriate vehicle for the landfill expansion should be a DBA in place of the Special Permit.

Commissioner Okuda asked Deputy Corporation Counsel Jennifer Oana, “Can you please point to any explanation in the record why the County did not proceed by way of a boundary amendment instead of using the special permit or in place of using a special permit procedure? . .

. . But you already anticipate that this parcel that you're seeking a special permit for, that you are really going to impose on the parcel urban uses, correct?" Deputy Corporation Counsel Oana replied, "Right." *Emphases added. Pg. 142, lines 1-5 and pg. 144, lines 3-7, Hearing Transcript, 7/8/2020.*

Commissioner Giovanni clarified, "As such, I think time is of the essence to allow this project to move forward. And if not for the fact that there's a lot of confusion about whether it's permanent or not permanent, whether it's better suited for a dba or an endless series of permit amendments, I think that it's just time is of the essence. So, I would prefer that it would be a district boundary amendment today."

Throughout all of these discussions and comments on a DBA, there was no indication that the DBA should apply specifically or be limited to the 22 acres of IAL.

Commissioner Ohigashi expressed concern that the 40-acre expansion area of the Special Permit for the Central Maui Landfill facilities, which includes the 22 acres of IAL, amounted to "industrial uses" or an "industrial park", which "the landfill itself is not going to take place on that site," and therefore "should follow the requirements of the district boundary [amendment]..." *Pg. 72, lines 15-24 and pg. 119, lines 12-19, Hearing Transcript, 7/9/2020.*

Based on Commissioner Ohigashi's comments, arguably the DBA may have been intended for the 40-acre expansion area. However, Commissioner Giovanni did not specify that the DBA should apply to the 40-acre expansion area.

Moreover, there appears to be no apparent reason why the 22-acres of IAL would be more suitable for a DBA than the 40-acre expansion area or the entire 95.659-acre Special Permit Area. The record included testimony by OP and the County Planning Department clarifying that IAL may be used for special permit uses, and that the only reason to withdraw the 22-acres from IAL designation "is that as a landfill, it no longer would serve the purposes of IAL. However,

the landfill is not necessarily required to be reclassified to the urban district through a DBA.”

Pg. 23, lines 1-6, Hearing Transcript, 7/9/2020.

Based on the foregoing, without a clear indication in the hearing transcripts of the specific acreage for which DEM shall seek a DBA, but some discussion that the DBA generally replace the entire special permit or be made for the 40-acre expansion area, and no apparent reason to limit the DBA to the 22-acres of IAL, OP believes that the Commission did not intend that DEM seek a DBA for only the 22-acre IAL. Therefore, D&O Condition No. 23 is not reasonable and possibly erroneous. OP respectfully requests that the Commission reconsider its intentions under D&O Condition No. 23 to determine the appropriate acreage for which DEM must seek a DBA within five years and modify Condition No. 23 accordingly.

II. OP Believes Landfills Are Generally Better Suited Under A Special Permit Rather Than Reclassification to the State Urban District Through a DBA

OP fully respects the Commission's decision to require DEM to seek a DBA for the Central Maui Landfill or some portion of it, particularly in light of DEM's statements that some of the proposed uses and structures will be permanent and agricultural uses are not anticipated to return to the area. However, OP wishes to express its general position that, as a matter of land use planning and policy, landfills are better suited under a special permit rather than reclassification to the State Urban District through a DBA. OP explained, “the landfill is not necessarily required to be reclassified to the Urban District through a district boundary amendment as mentioned yesterday. Why a special permit rather than a district boundary amendment for this landfill? A special permit, as opposed to a district boundary amendment, is more appropriate for several reasons...” *Pg. 23, lines 4-10, Hearing Transcript, 7/9/2020.*

Section 205-6, HRS, allows the issuance of special permits for “certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified.” A landfill is generally an “unusual and reasonable” use within the agricultural

district because it is a temporary, nonagricultural use that is better suited to areas removed from areas of higher populations of where people work and live. A DBA to the State Urban District is appropriate for permanent uses of city-like character that are compatible with and proximate to places of higher populations of where people work and live.

For special permits, HAR § 15-15-95(f) states that “[t]he county planning commission shall establish, among other conditions, a reasonable time limit suited to establishing the particular use proposed, and if appropriate, a time limit for the duration of the proposed use, which shall be a condition of the special permit; provided, however, that the commission for good cause shown, may specify or change the time period of the special permit.” A special permit is therefore intended to allow a use for a finite or time specific duration.

A landfill is appropriate under a special permit because it is a temporary use of land, consistent with HAR § 15-15-95(f). A landfill has an “active life”² and at some point, in the foreseeable future, it will reach its capacity and its owner/operator is required under State law to complete cover installation and conduct post-closure care. *Hawaii Revised Statutes (“HRS”) § 342H-53*. Notably, the final cover system must be comprised of, among other things, an erosion layer “that contains a minimum six inches of earthen material that is capable of sustaining native plant growth” to minimize erosion. *HAR § 11-58.1-17(a)*. Therefore, following the active life and closure of a landfill within the State Agricultural District, the landfill should be capable of sustaining plant growth, and to some extent could be used for farming and other agricultural activities.

The eventual return of the landfill to potential agricultural use helps the State to “assure the availability of agriculturally suitable lands” consistent with Article XI, Section 3 of the

² HAR § 11-58.1-03 defines the “active life” of a landfill as “the period of operation beginning with the initial receipt of solid waste and ending at completion of closure activities in accordance with section 11-58.1-17(a).”

Hawaii State Constitution. However, requiring a DBA to the State Urban District for a landfill would foreclose the use of the land for agricultural use in dereliction of Article XI, Section 3 of the Hawaii State Constitution.

A DBA may be more efficient than a special permit in terms of the number of administrative procedures and hearings required, but perhaps at a greater cost to the State Agricultural District. Not only does it permanently change the classification to urban, but it could potentially create urban spot zoning within agricultural areas inconsistent with county plans and to the detriment of surrounding agricultural properties. Additionally, the incremental nature of the special permitting process allows for flexibility in the implementation of technological and policy advancements in sustainable waste disposal as they evolve, and for landfills to close and geographically expand as needed.

Commissioners characterized the accessory uses and structures on the 40-acre expansion area of the Maui Central Landfill as amounting to an “industrial park” that should be reclassified to the State Urban District rather than be part of the special permit. However, the accessory uses and structures of a landfill are part and parcel to the landfill. HRS § 342G-1 defines a “solid waste reduction facility” as “all contiguous land, including buffer zones, structures, appurtenances, and improvements on the land used for solid waste handling.” The accessory landfill uses and structures are similar to a farm with accessory agricultural buildings, processing facilities, etc. Yet, agricultural land with accessory uses are not intended or required to be reclassified through a DBA into the State Urban District. Accordingly, accessory landfill uses and structures should be viewed as integral and not separate from the landfill under a special permit.

For these reasons, unless it is certain that a landfill is somehow permanent and cannot be used for agriculture in the future, a special permit, rather than a DBA, is the more appropriate mechanism for its permitting in the State Agricultural District.

III. Conclusion

In conclusion, OP respectfully requests that the Commission reconsider D&O Condition No. 23 to determine the specific acreage that DEM is required to seek a DBA. Preferably, however, OP respectfully requests that the Commission delete Condition No. 23 altogether, thus re-establishing that as a general policy, a special permit is a more appropriate mechanism than a DBA for the permitting of a landfill in the State Agricultural District.

DATED: Honolulu, Hawai'i, August 31, 2020.



DAWN T. APUNA, Deputy Attorney General
Counsel for the Office of Planning, State of Hawai'i

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_____)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was duly served on this date on the below-named parties by U.S. Mail, postage prepaid:

ERIC NAKAGAWA, Director
County of Maui
Department of Environmental Management
200 South High Street, Room 322
Wailuku, Hawaii 96793

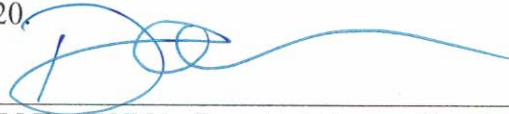
JENNIFER OANA
Deputy Corporation Counsel
County of Maui
200 South High Street
Wailuku, Hawaii 96793
Attorney for Environmental Management Director

MICHELE MCLEAN
Planning Director
County of Maui
Michele.mclean@co.maui.hi.us

MICHAEL J. HOPPER, ESQ.
Deputy Corporation Counsel

County of Maui
Michael.hopper@co.maui.hi.us
Attorney for Planning Director

Dated: Honolulu, Hawai'i, August 31, 2020.

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke extending to the right.

DAWN T. APUNA, Deputy Attorney General
Counsel for the Office of Planning, State of Hawaii