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October 6, 2020



Mr. Jonathan Scheuer, Chair
and Commissioners
Land Use Commission
State of Hawaii
Department of Business, Economic Development & Tourism
P.O. Box 2359
Honolulu, Hawaii 96804-2359

RE: Office of Planning's Comments on the October 8, 2020 Land Use Commission Meeting Agenda Item IX. on SP 97-390 COUNTY OF MAUI (CENTRAL MAUI LANDFILL) to Consider LUC Staff request to issue errata to LUC Order for Fourth Amendment to State Special Permit for the Proposed Central Maui Landfill Facilities, dated August 13, 2020 to correct the number of acres subject to condition 23 and related findings of fact

Dear Chair Scheuer and Commissioners:

This is in response to Action Item IX. of the October 8, 2020 Land Use Commission ("Commission"/"LUC") Meeting Agenda. The Office of Planning ("OP") believes there are procedural errors with Action Item IX. and with the dismissal of OP's Motion for Reconsideration, filed August 31, 2020, from which it stems, that conflict with basic rules and principles of administrative procedure.

I. Background.

The County of Maui Department of Environmental Management's ("DEM's") request to amend¹ the Central Maui Landfill ("CML") Special Permit ("SP") was heard by the Commission on July 8 and 9, 2020. During the hearing, DEM, the County of Maui Department of Planning

¹ DEM's request to amend the CML SP to: (1) extend the time for the existing SP to October 31, 2028; (2) delete approximately 16.841 acres of land from the SP; and (3) include approximately 39.573 acres of land within the SP for the development of recycling and diversion facilities for the purpose of reducing the amount of waste entering the CML.

("DP"), and OP, each responded in opposition to the Commissioners' theoretical suggestions that a district boundary amendment ("DBA") is a more appropriate permitting vehicle than a SP for a landfill in the State Agricultural District.

Following closure of the evidentiary portion of the hearing, during the Commission's deliberations on the SP amendment, Commissioner Giovanni put forth a condition of approval of the SP amendment that DEM seek a DBA within five years of the SP Amendment approval.

On August 13, 2020, the Commission filed its *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"), that adopted Commissioner Giovanni's proposed condition as Condition No. 23, which states:

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.

On August 31, 2020, OP filed a Motion for Reconsideration of D&O Condition No. 23 ("Motion for Reconsideration") asking the Commission to: (1) clarify the specific acreage of the required DBA as either 22 acres, 95.659 acres or some other specific acreage; and (2) delete Condition No. 23 based on additional argument and evidence presented by OP that a SP is a more appropriate permitting vehicle than a DBA for landfills in the State Agricultural District.

On September 17, 2020, DEM filed its Joinder to OP's Motion for Reconsideration, specifically supporting OP's request that the Commission delete Condition No. 23 altogether. On September 18, 2020, DP filed its Joinder to OP's Motion for Reconsideration requesting the same.

The Commission began to hear OP's Motion for Reconsideration on September 24, 2020. OP made its arguments and was subject to questioning by the Commissioners. Following an executive session by the Commission, a motion was made by the Commission to dismiss OP's Motion for Reconsideration, for lack of jurisdiction due to untimeliness of its filing, pursuant to Hawaii Administrative Rules ("HAR") § 15-15-84(a) and (c)², as to the portion of the Motion relating to OP's request for the deletion of Condition No. 23 and arguments supporting a SP over a DBA for landfills in the State Agricultural District.

As to OP's request for clarification on the specific acreage of the Condition No. 23 requirement for a DBA, the Executive Officer explained that the request was an issue to be resolved by a LUC staff request to the Commission for an "errata". During the Commission's deliberations on the motion for dismissal, DEM and DP attempted to ask the basis for the motion

² HAR § 15-15-84(a) states in pertinent part, "A motion for reconsideration shall be filed with the commission within seven calendar days after issuance of the commission's written decision and order..."

HAR § 15-15-84(c) states, "In no event will the commission consider any motion for reconsideration on any petition after the period within which the commission is required to act on the petition."

and to allow for modification pursuant to HAR provisions. OP asked to make a motion to amend their Motion for Reconsideration as a motion to amend pursuant to HAR § 15-15-70 but was told that such a motion would require separate public notice, and therefore OP's motion was denied.

The Commission voted to approve the Motion for Dismissal of OP's Motion for Reconsideration. The hearing was closed, and DEM and DP were not provided opportunity to present their arguments on the Motion for Reconsideration.

Action Item IX. of this October 8, 2020 meeting agenda instructs the Commission to "Consider LUC Staff request to issue errata to LUC order for Fourth Amendment to State Special Permit (SP97-390) for the Proposed Central Maui Landfill Facilities dated August 13, 2020 to correct the number of acres subject to condition 23 and related findings of fact."

II. Arguments.

First, notwithstanding OP's untimely filing of its Motion for Reconsideration, the Commission did not provide any time within which a person or party could file a motion for reconsideration. The basis for the Commission's dismissal of OP's Motion for Reconsideration was HAR § 15-15-84(c), which prevents the Commission from considering any motion for reconsideration on any petition after the period within which the Commission is required to act on the petition. The period within which the Commission is required to act on a SP, pursuant to HAR § 15-15-96(a), is forty-five (45) days from receipt of the county planning commission's decision and the complete record of the proceeding that took place before the county planning commission, as determined by the Executive Officer.

Here, the Commission was in receipt of the Maui County Planning Commission decision and the complete record of the proceeding on June 29, 2020³. The Commission was therefore required to act on the SP no later than August 13, 2020, or forty-five days from June 29, 2020. However, the Commission filed the SP D&O on August 13, 2020, the forty-fifth or last day upon which the Commission could act on the SP, leaving no time within which a motion for reconsideration could be considered by the Commission in conflict with HAR § 15-15-84(a). The Commission should have filed the SP D&O at least seven days prior to August 13, 2020, to allow any interested person or party to file a motion for reconsideration. Additionally, the Commission may want to consider providing a draft of the D&O to the parties so that parties can help identify possible errors prior to the Commission's official filing of the D&O, and to minimize any need for errata or reconsideration.

Secondly, OP's verbal motion to amend its Motion for Reconsideration as a motion to amend was improperly denied by the Commission. HAR § 15-15-70 states that "Any party may make motions before, during, or after the close of hearing." (Emphasis added.) The HAR do not require notice of the verbal motion prior to the Commission hearing it. OP's proposed motion to amend its Motion for Reconsideration was substantively the same as its Motion for Reconsideration, and therefore its contents were properly noticed to the public such that it is improbable that a party or the public could successfully challenge OP's verbal motion as lacking proper notice.

³ Finding of Fact No. 6 of the SP D&O.

Thirdly, the Commission's withdrawal of the specific DBA acreage issue from the Motion for Reconsideration to be resolved with an LUC staff request to the Commission to issue an "errata" to the D&O is improper. An "errata" or "erratum" suggests an error in printing or writing such as a typo. The specific DBA acreage was not simply a typo. Via August 19, 2020 email, OP brought to the LUC staff's attention that OP believed the Condition No. 23 did not apply to the 22 IAL acres, but LUC staff disagreed. If it were simply a typo, the LUC staff should have requested the issuance of the errata prior to or in lieu of scheduling the hearing on the Motion for Reconsideration.

More importantly, based on comments made by Commissioners at the Motion for Reconsideration hearing, the determination of the specific DBA acreage of Condition No. 23 is more than a simple clerical error. It now involves substantive reconsideration of the specific acreage. In his questioning of OP during the Motion for Reconsideration hearing, Commissioner Okuda stated that he may have reevaluated his prior decision on the DBA condition to the SP due to State Constitutional concerns. And Commissioner Giovanni stated that he would "consider" OP's request of requiring the DBA only for the industrial area of the SP and not necessarily the landfill area of the SP.

Whether the Commission intends no acreage, 22 acres, 40 acres or 95.659 acres to be subject to a DBA, there is a considerable amount of land and cost involved that cannot be determined by an errata. Therefore, the Commission should deny LUC Staff's request to issue an errata to the Order, to allow appropriate opportunity for arguments by the SP applicant DEM and DP, for a full and complete record upon which the Commission can make its determination of the specific DBA acreage.

Thank you for the opportunity to provide comments on this Agenda Item IV.

Sincerely,



Dawn Takeuchi Apuna
Deputy Attorney General