

LAND USE COMMISSION  
STATE OF HAWAI'I

Hearing held on September 24, 2020  
Commencing at 9:00 a.m.

Held via ZOOM by Interactive Conference Technology

VI. Call to Order

VII. Continued Hearing and Action (If Necessary)  
A17-804 Hawaiian Memorial Life Plan (O'ahu)  
Petition for district boundary amendment  
Consider Petition to Amend the Conservation  
Land Use District Boundary into the Urban Land  
Use District for Approximately 53.449 acres of  
Land at Kane'ohe, Island of O'ahu, State of  
Hawaii TMK (1)4-5-033:por.001

VIII. ACTION

SP97-390 County of Maui (Central Maui Landfill)  
Consider Motion for Reconsideration of Order  
for Fourth Amendment to State Special Permit  
(SP97-390) for the Proposed Central Maui  
Landfill Facilities project at TMK  
(2)3-8-003:019(por) and 020, Pu'unene, Maui,  
Hawai'i

IX. Adjournment

BEFORE: Jean Marie McManus, CSR #156

## 1 APPEARANCES:

2 JONATHAN SCHEUER, Chair (O'ahu)  
NANCY CABRAL, Vice Chair (Hawai'i Island)  
3 EDMUND ACZON Vice Chair (O'ahu)  
GARY OKUDA (O'ahu)  
4 ARNOLD WONG (O'ahu)  
DAN GIOVANNI (Kaua'i)  
5 DAWN CHANG (O'ahu)  
LEE OHIGASHI (Mau'i)

6

STAFF:

7 LINDA CHOW, ESQ.  
Deputy Attorney General

8

DANIEL ORODENKER, Executive Officer  
9 RILEY K. HAKODA, Planner/Chief Clerk  
SCOTT DERRICKSON, AICP/Planner  
10 BERT SARUWATARI, Planner

11 DAWN APUNA, ESQ.  
Deputy Attorney General  
12 LORENE MAKI, Planner  
State of Hawaii, Office of Planning

13

MICHAEL HOPPER, ESQ.  
14 Deputy Corporation Counsel  
JORDAN HART, Deputy Director  
15 KURT WOLLENHAUPT, Planner  
Maui County Planning Department

16

RICHELLE THOMPSON, ESQ.  
17 ERIC NAKAGAWA, Director of DEM  
ELAINE BAKER, Civil Engineer, DEM  
18 Department of Environmental Management  
County of Maui

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CHAIRPERSON SCHEUER: Aloha mai kakou, and good morning.

This is the September 24, 2020 Land Use Commission meeting which is being held using interactive conference technology linking videoconference participants and other interested individuals of the public via the "ZOOM" internet conferencing program in order to comply with State and County official operational directives during the COVID-19 pandemic. Members of the public are viewing the meeting via the "ZOOM" webinar platform.

For all meeting participants, I would like to stress to everyone the importance of speaking slowly, clearly and directly into your microphone and that before speaking, that you please state your name and identify yourself for the record. Also please be aware that all meeting participants are being recorded on the digital record of this "ZOOM" meeting. Your continued participation is your implied consent to be part of the public record of this event. If you do not wish to be part of the public record, please exit this meeting now.

The "ZOOM" conferencing technology allows

1 the Parties and each participating Commissioner  
2 individual remote access to the meeting proceedings  
3 via their personal digital devices.

4 Also please note that due to matters  
5 entirely outside of our control, occasional  
6 disruptions to connectivity may occur for one or more  
7 members of the meeting at any given time. If such  
8 disruptions occur, please let us know, and be patient  
9 as we try to restore the audio/visual signals to  
10 effectively conduct business during the pandemic.

11 My name is Jonathan Likeke Scheuer, and I  
12 currently serve as the LUC Chair. Along with me,  
13 Commissioners Aczon, Chang, Okuda, and Wong, our LUC  
14 Executive Officer Daniel Orodener, LUC Chief Planner  
15 Scott Derrickson, Chief Clerk Riley Hakoda, our  
16 Deputy Attorney General -- you are not Cindy Young --  
17 Linda Chow, you switched roles or bodies. I'm going  
18 to just say you switched assignments, along with our  
19 Court Reporter, Jean McManus are all on O'ahu.  
20 Commissioner Cabral is on the Big Island,  
21 Commissioner Ohigashi is on Maui and Commissioner  
22 Giovanni is on Kauai.

23 We currently have eight seated  
24 Commissioners of a possible nine and all are in  
25 attendance today.

1           Our next order of business is the Office of  
2 Planning's Motion for Reconsideration of the Order  
3 for the Fourth Amendment to State Special Permit  
4 (SP97-390) for the Proposed Central Maui Landfill  
5 Facilities project at TMK (2)3-8-003:019 (por) and  
6 020, Pu'unene, Maui, Hawai'i.

7           Will the Parties for Docket SP97-390 please  
8 identify yourselves for the record. You might need  
9 to unmute.

10           MS. APUNA: Deputy Attorney General Dawn  
11 Apuna on behalf of the Office of Planning.

12           CHAIRPERSON SCHEUER: Good morning, Ms.  
13 Apuna.

14  
15           MR. HOPPER: Michael Hopper, Deputy  
16 Corporation Counsel representing the Maui County  
17 Department of Planning, with me is current Deputy  
18 Director Jordan Hart and planner Kurt Wollenhaupt.

19           CHAIRPERSON SCHEUER: Good morning, Mr.  
20 Hopper.

21           Let me update the record.

22           On August 13, 2020, the Commission mailed  
23 its Decision and Order in this matter.

24           On August 28, 2020 the Commission received  
25 OP's Motion for Reconsideration.

1           On September 14th, the Commission mailed  
2 the September 23rd and 24, 2020 Notice of Agenda to  
3 the Parties to the Statewide, Oahu and Maui regular  
4 and email mailing lists.

5           On September 17th, 2020, the Commissioner  
6 received the Department of Environmental Management,  
7 County of Maui's Joinder to OP's Motion for  
8 Reconsideration.

9           Let me go over our procedures for today  
10 now.

11           I will first recognize any written  
12 testimony submitted on this matter.

13           I will then call for anybody wishing to  
14 provide oral testimony on this docket. If there any  
15 people, I will admit them in turn into the meeting  
16 room, swear them in, give them three minutes to  
17 provide testimony, and following their testimony,  
18 they will be available for questioning by the Parties  
19 and Commissioners.

20           After all registered testifiers complete  
21 their testimony and all other testifiers complete  
22 their testimony, we will proceed with OP presenting  
23 its case.

24           After OP has completed its presentation, it  
25 will be followed by the County of Maui.

1           From time to time, approximately every ten  
2 minutes every hour, I will be calling for short  
3 breaks.

4           Are there any questions on our procedures  
5 for today?

6           MR. HOPPER: No, Mr. Chair. I think County  
7 of Maui Department of Environmental Management is  
8 also present.

9           CHAIRPERSON SCHEUER: I waited for an intro  
10 and didn't hear it. Please identify yourself at this  
11 time.

12           MS. THOMPSON: I apologize for that.  
13 Richelle Thompson for County of Maui, and with me is  
14 Eric Nakagawa, he's the Director of the Department of  
15 Environmental Management and Elaine Baker, the Civil  
16 Engineer who works with Department of Environmental  
17 Management.

18           CHAIRPERSON SCHEUER: Thank you very much.  
19 Commissioner Ohigashi.

20           COMMISSIONER OHIGASHI: Just to be clear,  
21 because Mr. Hopper, I'm not sure, Ms. Baker, there  
22 are two representatives from the County of Maui.  
23 When you mentioned that the County of Maui goes next,  
24 I was just wondering which one of them would be the  
25 lead counsel in this matter so that we have only one.

1 CHAIRPERSON SCHEUER: Mr. Hopper?

2 MR. HOPPER: I want to note that I think we  
3 represent separate parties. We represent the  
4 Department of Planning, generally an automatic party,  
5 and EM is the actual Applicant in this case represent  
6 the Department of Environmental Maintenance, as the  
7 applicant. So that's what we did the last time.

8 CHAIRPERSON SCHEUER: Mr. Orodener or Ms.  
9 Chow, my inclination is to then allow Mr. Hopper  
10 followed by EM to comment on OP's motion.

11 MS. CHOW: I believe that would be  
12 appropriate.

13 CHAIRPERSON SCHEUER: Thank you.

14 Mr. Derrickson or Mr. Hakoda, has anybody  
15 provided written testimony on this matter?

16 CHIEF CLERK: Chair, this is Riley Hakoda.  
17 I did not receive any public testimony.

18 CHAIRPERSON SCHEUER: Thank you.

19 There are six attendees in the attendee  
20 section of this meeting. If any of you wish to  
21 provide public testimony in this matter, please use  
22 the raise-hand function on ZOOM, and raise your hand  
23 at this time, if you want to give public testimony.  
24 If you do, I will let you in.

25 Seeing none. There is no public testimony



1 on this matter. OP, you may proceed with the  
2 presentation of your argument.

3 MS. APUNA: Thank you, Chair, kind of nice  
4 to go first for once.

5 CHAIRPERSON SCHEUER: We're always meaner  
6 to the people who go first, so don't treasure it too  
7 much.

8 MS. APUNA: No, I understand that.

9 So thank you, Chair and Commissioners. We  
10 appreciate this opportunity to present this Motion  
11 for Reconsideration and thank you to the Maui County  
12 Departments of Environmental Management, Planning and  
13 Corporation Counsel for joinders to our Motion.

14 Two issues are before you. First,  
15 Condition 23 of the Central Maui Landfill's Special  
16 Permit Decision and Order requires the County to  
17 commence the district boundary amendment process for  
18 the 22 acres of IAL land. OP thought the DBA was for  
19 the entire 95.659 acres. The hearing transcripts are  
20 not clear or conclusive as to the appropriate acreage  
21 and the SP area.

22 We ask that the Commission to provide the  
23 intended acreage or area for the required DBA. It's  
24 either the 22 acres of IAL, the entire 95.659 acre SP  
25 area, or some other acreage.

1           The second issue is whether a DBA to urban  
2 is a more appropriate permitting vehicle than a  
3 Special Permit for landfill in the Agricultural  
4 District.

5           OP understands that in deciding landfill  
6 Special Permits, the Commissioners are put in a tough  
7 spot having to weigh among competing factors of: An  
8 essential public service, community interests,  
9 evolving waste management technologies and policies,  
10 and sometimes unfulfilled commitments.

11           While a Special Permit may not be a perfect  
12 process, OP believes it is the appropriate vehicle to  
13 permit a landfill in the Agricultural District for  
14 several reasons.

15           First, a landfill is an unusual and  
16 reasonable use. A landfill generally should meet the  
17 five guidelines of Hawaii Revised Statute Section  
18 15-15-95(c) as follows:

19           Unless a landfill is displacing active  
20 agriculture or endangering land with a high capacity  
21 for intensive cultivation, it is unlikely to be  
22 contrary to the objectives of the Land Use law. And  
23 the eventual return of the use to agriculture,  
24 following the temporary landfill use, would be  
25 consistent with the agricultural preservation and

1 conservation objectives sought to be accomplished by  
2 Chapter 205.

3 Certainly, there is the potential for a  
4 landfill to adversely affect surrounding property,  
5 but proper mitigation measures could lessen a  
6 landfill's adverse effects on surrounding properties.

7 As an essential public service, a landfill  
8 would not unreasonably burden public agencies.

9 Since the district boundaries and rule were  
10 established, landfills have become a more accepted  
11 and regulated waste disposal.

12 And depending on the proposed landfill  
13 site, which is case in fact specific, the site could  
14 be unsuited for the uses permitted within the  
15 Agricultural District.

16 While these are merely guidelines that are  
17 not strictly required to be satisfied, none of the  
18 five guidelines are necessarily unattainable that a  
19 landfill cannot be considered an unusual and  
20 reasonable use and, therefore, can and should be  
21 considered under a special permit.

22 On the other hand, a district boundary  
23 amendment is the proper permitting mechanism when a  
24 use simply does not fit in its current use district  
25 of either conservation, agricultural, rural or urban,

1 and is better suited in one of the other three  
2 districts.

3 A DBA is not proper because a landfill in  
4 the Agricultural District is actually more suitable  
5 in the Agricultural District than in the Urban  
6 District. A landfill to many is an unwelcome use but  
7 it is not necessarily an urban use. As a classic  
8 NIMBY land use, many do not want to live, work or  
9 play near a landfill.

10 The places we generally live, work, and  
11 play in, however, are in the Urban District. The  
12 Urban Districts are areas of higher density and  
13 closer proximity to other uses and neighbors.

14 The Agricultural District is a better  
15 location for a landfill because it provides expanse  
16 of open space as buffers and away from housing,  
17 schools, offices, et cetera. And, in case of fire,  
18 flood or other emergency, there is less potential  
19 threat to health and safety than in the denser urban  
20 areas.

21 In examining the bases for determining  
22 whether a SP or a DBA should be pursued, that is  
23 either the five guidelines for an unusual and  
24 reasonable use, or whether the use simply does not  
25 fit in its current district but fits in another of

1 the four districts, one looks at the proposed use,  
2 not at the preferred procedural requirements of  
3 either the SP or DBA.

4 Even if the procedural requirements were  
5 the determining basis for whether a SP or DBA should  
6 be pursued, the procedural requirements are not so  
7 different or necessarily better or worse than the  
8 other. Both provide public notice, opportunity for  
9 intervention, and conditions of approval.

10 It is understandably frustrating that these  
11 landfill SPs are piecemeal in nature. And perhaps  
12 some believe a DBA in one shot can address all the  
13 issues that are presented over years and various  
14 amendments and hearings back and forth at the LUC and  
15 the County through a SP. but a DBA may not be able  
16 to remedy the piecemeal nature.

17 The reason the counties come in for  
18 additional amendments for SP landfills is generally  
19 because they need two things: More time and more  
20 capacity or space. And the need for more time and  
21 more capacity simply cannot be determined from the  
22 outset. Whether it's a SP or a DBA, the advancements  
23 in waste management technologies that can provide  
24 additional or greater capacity of alternative waste  
25 streams or disposal methods that divert waste away

1 from landfills, and the associated policies of  
2 alternative landfill siting are most likely going to  
3 affect the original closure date or fill capacity of  
4 a landfill. I would think the Commission would  
5 include in its DBA conditions a closure date in a DBA  
6 just as it would in a SP, so there is the same  
7 potential for a county to come back for future DBA  
8 amendments, not unlike SP amendments.

9           Secondly, unlike an amusement park, a  
10 landfill is a temporary use with a finite lifespan.  
11 Once a landfill is filled to capacity, it can no  
12 longer serve as a landfill. A special permit is  
13 ideal for a landfill because a special permit  
14 requires a reasonable time limit for the  
15 establishment and duration of the proposed use  
16 pursuant to HAR 15-15-95(f). In contrast, a DBA is  
17 more appropriate for a permanent use of an indefinite  
18 lifespan.

19           At the end of the landfill's useful or  
20 active life, the landfill is subject to closure  
21 requirements pursuant to Subtitle D of the Federal  
22 Resource Conservation and Recovery Act, which is  
23 adopted under HRS Chapter 342H and implemented by the  
24 Department of Health. Subtitle D requires a written  
25 closure plan, the installation of a final cover

1 system to minimize infiltration and erosion, which  
2 includes a specific permeability, an infiltration  
3 layer with a minimum of 18 inches earthen material,  
4 and an erosion layer a minimum of 6 inches of  
5 post-closure care is required, which includes  
6 maintaining the integrity and effectiveness of the  
7 final cover, maintaining and operating the leachate  
8 collection system, groundwater monitoring, and  
9 monitoring and operating a gas monitoring system.

10           Following closure of the landfill, the site  
11 can be used for other purposes. The future use of a  
12 landfill following its closure should not be  
13 overlooked and more importantly should not be  
14 redetermined as limited and necessarily an urban use.

15           The EPA encourages localities to consider  
16 closed landfill sites as potential community assets  
17 for future community uses. While there are  
18 challenges to the use of closed landfill sites that  
19 include landfill gas and waste settlement, there is  
20 opportunity to create treasure out of trash, so to  
21 speak.

22           According to the EPA, there are a variety  
23 of options for closed landfill sites, including  
24 agricultural uses, community parks, nature preserves,  
25 structures and buildings, energy generation such as

1 solar, wind, and LFG or landfill gas projects, and  
2 landfill reclamation. While perhaps community parks  
3 and structures and buildings could be considered  
4 urban uses, all of the other listed options are uses  
5 generally outside of the Urban District.

6 The County's Department of Planning did a  
7 great job of listing in their brief the agricultural  
8 uses currently permitted under HRS 205-2 that could  
9 potentially be developed over a closed landfill.

10 So unless it is certain that the future use  
11 of a closed landfill will be an urban use, the  
12 counties should not be limited by a DBA to Urban. In  
13 this case, the County of Maui is uncertain of what it  
14 will develop over the landfill upon its closure.  
15 Therefore, it's premature to foreclose the County's  
16 options with a District Boundary Amendment  
17 reclassifying the land to Urban.

18 Lastly, by changing the trajectory of  
19 landfills from SP process to DBA process, the  
20 Commission may effectively be endangering the  
21 Agricultural District.

22 Under Article 11, Section 3 of the Hawaii  
23 State Constitution, the State, including the LUC, has  
24 the duty to "conserve and protect agricultural lands,  
25 promote diversified agriculture, increase



1 agricultural self-sufficiency and assure the  
2 availability of agriculturally suitable lands."

3 By requiring DBA reclassification of  
4 landfill areas to Urban, the Commission will have  
5 eliminated rather than conserved Agricultural lands.  
6 A special permit temporarily allows the landfill use  
7 but provides that the land should eventually return  
8 to agricultural use.

9 Also, a landfill area reclassified as Urban  
10 could potentially result in spot zoning. That is  
11 where you have a spot or puka of Urban in a larger  
12 Agricultural area. The spot zoning would be  
13 inconsistent with County General Community Plans that  
14 strive to keep area uses contiguous, and could  
15 initiate areas of scattered urban development that  
16 intrude on surrounding Agricultural areas. Urban  
17 classified or zoned areas are often used to justify  
18 the urban reclassification or rezoning of neighboring  
19 properties, thereby contributing to the growth or  
20 sprawl of an urban spot zone. Urban spot zoning  
21 could therefore endanger the Agricultural District.

22 For these reasons and those provided in our  
23 written Motion, OP believes that a landfill should be  
24 permitted under a Special Permit, not a DBA.  
25 Accordingly, OP respectfully requests that Condition

1 No. 23 be deleted in its entirety.

2 Thank you for your consideration.

3 CHAIRPERSON SCHEUER: Thank you, Ms. Apuna.

4 Commissioners, questions for Ms. Apuna  
5 starting with Commissioner Ohigashi.

6 COMMISSIONER OHIGASHI: I have a question  
7 for you, Ms. Apuna.

8 If we do a DBA into Urban for this  
9 particular parcel, is there anything to prevent the  
10 County of Maui from zoning it agriculture without --  
11 I was reading the code, and it says that they have an  
12 agricultural zone.

13 So my question is, is there any prohibition  
14 against them zoning it agriculture -- and by the way,  
15 I just wanted to add -- by the way, I think the  
16 County of Maui zoning permits landfills specifically  
17 as a special permitted use.

18 MS. APUNA: So you're asking whether once  
19 it's reclassified to Urban by a DBA, whether the  
20 County can zone it as agriculture?

21 COMMISSIONER OHIGASHI: And issue SP for  
22 the landfill portion?

23 MS. APUNA: I'm not too familiar with the  
24 County. I would defer to the County as far as their  
25 zoning, but I think that you could have agricultural

1 uses within that Urban District.

2 COMMISSIONER OHIGASHI: And so the other  
3 question that I have, Dawn, do you agree that the  
4 40-acre expansion is essentially an industrial park?

5 MS. APUNA: No. I actually disagree with  
6 that. I mean, I understand that there's -- it sounds  
7 like industrial uses, but they are basically uses  
8 with accessory to the landfill. And so they are  
9 symbiotic, you need a landfill in order to have those  
10 different facilities and structures and you wouldn't  
11 have them separately.

12 It's like a farm dwelling -- I'm sorry,  
13 farm dwelling or other farm with accessory uses and  
14 structures that come along with the farm.

15 COMMISSIONER OHIGASHI: So you would be  
16 disagreeing with the County of Maui, indicates on  
17 page five of their memorandum that they filed that  
18 requiring the DBA will create a pocket industrial  
19 park.

20 So what they're saying is that if we  
21 require a DBA, we'll be creating a pocket industrial  
22 park.

23 So the County has defined the use of that,  
24 pocket industrial park, would that be correct?

25 MS. APUNA: Actually I read that -- I think

1 they said industrial, quote/unquote, industrial park,  
2 and that may be --

3 COMMISSIONER OHIGASHI: They didn't mean  
4 it.

5 MS. APUNA: Yeah, they didn't mean it.  
6 Also they're referring (both speakers talking at  
7 once) -- I think they're referring to what you had  
8 characterized it as an industrial park, I believe,  
9 Commissioner, that you had characterized it that way  
10 and believed those 40 acres were --

11 COMMISSIONER OHIGASHI: I don't see my name  
12 in there. That's why I said that they said it's  
13 industrial park.

14 Would you agree though that the uses that  
15 they are proposing normally is an industrial area?

16 MS. APUNA: Yeah, you could find certain --  
17 (indecipherable) structures in an industrial-zoned  
18 area.

19 COMMISSIONER OHIGASHI: In fact, I was  
20 reading about this. There is some kinds of use  
21 about vehicles that would involve in them taking them  
22 apart or wrecked vehicles, and I was just perusing  
23 County of Maui ordinance, which identifies heavy  
24 industrial M2 Districts as being the place where such  
25 activity should occur.

1 MS. APUNA: Yeah. I mean, I think that's  
2 possible that you do have those uses to be in  
3 industrially zoned area, but they --

4 COMMISSIONER OHIGASHI: Well, what I'm  
5 trying to get at is, so what you're saying is,  
6 because it's attached to a landfill, it's not really  
7 industrial use, it's really an upper tenant use, and  
8 we shouldn't look at it as what it's actually doing  
9 and try to fit it into a category?

10 MS. APUNA: You should look at what it's  
11 doing, how it is connected, and is it necessary or it  
12 requires that there be a landfill for those purposes,  
13 and it's an entire campus that supports the landfill  
14 use.

15 And I think that's different than just  
16 being able to separate those two. They're not going  
17 to be separated. They can be an industrial area if  
18 you're going -- maybe have warehouse or something --  
19 but these uses are with accessory and necessary to  
20 the landfill use.

21 COMMISSIONER OHIGASHI: And I appreciate  
22 your comment, a theme park and all that, because I  
23 guess it refers back to Mr. Okuda's most famous  
24 comments regarding Neighborhood Board versus Land Use  
25 Commission; is that what you're referring to?

1 MS. APUNA: Yes.

2 COMMISSIONER OHIGASHI: I have a quote that  
3 I have a hard time getting over from that case. And  
4 it's on page 273, and it says that:

5 We do not believe that the legislature  
6 envisioned the special use technique to use as a  
7 method of circumventing district boundary amendment  
8 procedures to allow the ad hoc infusion of major  
9 urban uses into Agricultural District.

10 And I just read that with you because  
11 that's -- although we have a lot of guidance from the  
12 EPA and made those statements.

13 And I'm reading this to say that, hey,  
14 Supreme Court is telling us, cannot have incremental  
15 use permit, we have to devise a system, and a system  
16 that we have to review these cases seems to be the  
17 DBA system for landfills arguably, one thing, but for  
18 an area that was designated or requested expansion  
19 area, strictly industrial uses, perhaps the procedure  
20 is important, it provides additional voting measures,  
21 additional person voting, people voting against. It  
22 may not have past a DBA, but it also requires not  
23 only that, but it may require more extensive  
24 environmental review, given the nature of the  
25 industrial use over there.

1           So that's where I'm getting hard time  
2 making your practicality argument, the lawsuit.

3           MS. APUNA: I understand, and I think when  
4 you're talking about the incremental infusion of  
5 urban uses with these industrial with accessory uses,  
6 at some point when the landfill is closed, the entire  
7 campus must close, including those industrial uses.  
8 I can't see how the landfill can be closed and those  
9 uses continue. They require a landfill in order to  
10 operate, and I think that all of those uses must also  
11 close and come down accordingly.

12           So it's not -- those uses might be included  
13 at some point, but they should be taken down or  
14 repurposed. If they are, then it serves industrial  
15 use separate from the landfill, then there should be  
16 maybe a DBA in that case. But as far as purposes  
17 where it's connected an accessory to the landfill,  
18 it's a complete component.

19           COMMISSIONER OHIGASHI: Well, your  
20 recommendation would be that there will be a strict  
21 finding that upon closure of the landfill premises  
22 itself where we dump the rubble, that the  
23 opportun -- uses be closed down and it be reverted  
24 back to its original use?

25           MS. APUNA: Yes, agricultural, I think.

1           COMMISSIONER OHIGASHI: In other words, we  
2 would have to require the County of Maui to reclaim  
3 the land, bulldoze everything down?

4           MS. APUNA: Either -- well, I think they're  
5 saying they only need those uses if there is a  
6 landfill. So if you close the landfill, they do not  
7 need those uses any longer.

8           However, if they decide that the future use  
9 after the closure of landfill will be some type of  
10 industrial use, then they should come in for DBA,  
11 then they should change the zoning accordingly.

12           COMMISSIONER OHIGASHI: My last question is  
13 about who -- if we have a DBA and there is  
14 substantial compliance and they build this industrial  
15 area, we don't have -- LUC doesn't have any say, and  
16 it's always enforced by the County of Maui itself.  
17 In a special permit situation, who enforces that?

18           MS. APUNA: Enforces -- I think there's a  
19 little bit -- and that's a big point you're making.

20           I think that with a special permit the  
21 Commission continues to have more of a voice in  
22 authority, amendment after amendment, as you did in  
23 Waimanalo Gulch, as opposed to, yes, like the DBA, at  
24 some point you may be relinquishing your enforcement  
25 powers over a special permit.



1           And I know there were issues about how a  
2 County applicant can go into a County Planning  
3 Commission for the decision.

4           So if you take out the LUC, it's just going  
5 to be County enforcing it. At least the State LUC  
6 can put some checks on these County applications,  
7 County permitting.

8           COMMISSIONER OHIGASHI: Who would bring up  
9 a violation of the special permit? Would your office  
10 be the one, or would it be County of Maui?

11          MS. APUNA: I think it could be -- you  
12 know, there is a recognition of some type of  
13 violation. I think it would be either, depending on  
14 what the violation is.

15          COMMISSIONER OHIGASHI: I'm just curious  
16 how the violations work under a special permit for  
17 the County of Maui. If the County of Maui is the one  
18 monitoring themselves, then that's the answer.

19          If you're telling me that the Commission  
20 gets to monitor, that's the answer. But we don't  
21 have anybody going out there to run around and take a  
22 look at what's going on, you know.

23          MS. APUNA: But you have the community too.

24          COMMISSIONER OHIGASHI: That's my question.  
25 Do we have sua sponte enforcement powers to require

1 them to come in and give us a report every month?  
2 What is our nature of our power under the special  
3 permit?

4 MS. APUNA: You have the power to require  
5 conditions in addition to or different from the  
6 County, so if you want status report --

7 COMMISSIONER OHIGASHI: I'm curious for  
8 enforcement purposes, just curious.

9 MS. APUNA: I think if they're in violation  
10 of their permit under the -- you know, I think that  
11 potentially that the Commission could say come back  
12 in here and tell us why you're violating this and how  
13 you are alleviating the situation.

14 COMMISSIONER OHIGASHI: That was just on my  
15 mind this morning when I work up. Who does the --  
16 who watches the watchers? That's all I have.

17 CHAIRPERSON SCHEUER: Thank you,  
18 Commissioner Ohigashi. I think you might have more  
19 energy than the rest of us who lived through  
20 yesterday.

21 Commissioner Chang.

22 COMMISSIONER CHANG: Thank you, Mr. Chair.

23 Ms. Apuna, mine is just more of a  
24 procedural question. And I may be reading this  
25 wrong, but you've filed this under 15-15-84. And it

1 says: A Motion for Reconsideration shall be filed  
2 with the Commission within seven calendar days after  
3 the issuance.

4 And then Section 84(c) says, in no event  
5 will the Commission consider any motion for  
6 reconsideration on any petition after the period  
7 within which the Commission is required to act.

8 So I'm trying to understand, is this Motion  
9 for Reconsideration even -- should we even be  
10 considering it because it appears to be untimely?

11 MS. APUNA: Thank you.

12 Yes, Commissioner, and OP apologizes for  
13 the late filing of this motion. Part of it was once  
14 we got the Decision and Order that we needed to get  
15 the transcript, and we went through it, and we had  
16 some discussion with the staff trying to understand  
17 what was happening here.

18 And it did take some time to file that  
19 motion which we apologize for. As far as --

20 COMMISSIONER CHANG: But do we have any  
21 discretion, because it says "in no event". So it  
22 appears as if -- even so I know you're apologetic,  
23 but I'm looking at (c) and reading it that we have no  
24 discretion. If it's filed late, we cannot consider  
25 it.

1           And, I'm sorry, Mr. Okuda probably has read  
2 the case law in this area and is probably much more  
3 akamai than I am, because I don't have the case law,  
4 but I read this as we do not have discretion.

5           MS. APUNA: I know it says "in no event",  
6 but I know that there is a rule that allows for a  
7 change in what the rules require if there is good  
8 cause, or if it is reasonable to allow a change in  
9 the rules.

10           And as far as within which this Commission  
11 is required to act on the Petition, I'm not sure if  
12 that necessarily within that period -- I need to  
13 think about that, because I think I did read this and  
14 I came up with a different conclusion but --

15           COMMISSIONER CHANG: I'm going to let  
16 Commissioner Okuda, because I suspect, like I said,  
17 he probably has the case law behind him.

18           But the other question I have is, I  
19 understand your argument about what was the intent of  
20 the Commission, was it 22 or was it the 90. That to  
21 me is perhaps maybe erroneous, so that seems to fit  
22 under one of the reasons for reconsideration.

23           But the discussion whether a DBA is  
24 appropriate or not, wasn't the opportunity to raise  
25 that -- and my recollection is that was discussed at

1 the hearing -- so it doesn't appear to be an  
2 appropriate reason, grounds for the reconsideration  
3 to reopen the discussion on whether the DBA or the  
4 SUP is appropriate.

5 MS. APUNA: Yeah, I understand that. We  
6 did make arguments. The parties did make arguments.  
7 I personally feel that OP could have presented more  
8 information on that argument, because at the hearing  
9 it was when we realized that it was a very  
10 important -- obviously a very important issue to the  
11 Commission, because it became a condition itself.

12 But I think that, if anything, if we're not  
13 able to delete Condition 23, I think we just wanted  
14 to reiterate what we believe is the direction that we  
15 think the Commission should understand, or at least  
16 consider when other landfills come before you.

17 This is an important issue that we really  
18 don't want to see this to be a trend for landfills.

19 COMMISSIONER CHANG: And my recollection,  
20 when we did the Waimanalo Gulch this was an issue  
21 that came up and the Commission raised the same  
22 issue, the same argument.

23 So I know it's not a new position. If  
24 there is a trend, the trend is probably to require a  
25 DBA rather than a SUP.

1           Let me just ask you one factual question.

2           Are you aware of any landfills in Hawaii  
3 that the zoning is Ag, but they have a SUP, that  
4 after the end of the landfill, it's reconverted back  
5 to Ag?

6           MS. APUNA: I'm sorry, I don't have that  
7 information with me right now.

8           COMMISSIONER CHANG: Because I'm not aware  
9 of any landfill that's gone back to Ag use. So I  
10 understand your argument as a temporary use, but  
11 factually, they don't -- they don't appear to be  
12 going back to Ag use.

13           So in my view, your argument about it being  
14 it could revert back, that's not consistent, at least  
15 with what's the status in Hawaii.

16           So those are my issues that I'm having, the  
17 trouble that I'm having with the Motion for  
18 Reconsideration. It's a legal question as well as  
19 what the appropriate --

20           So with that, Mr. Chair, I don't have any  
21 more questions, but like I said, I'm sure Mr. Okuda,  
22 Commissioner Okuda has more legal authority than I  
23 do.

24           MS. APUNA: Commissioner, can I just  
25 respond shortly to --

1 COMMISSIONER CHANG: Oh, I'm sorry.

2 MS. APUNA: As far as there being, you  
3 know, in Hawaii landfill sites that have closed and  
4 have reverted to Ag, I can't speak to that.

5 But understanding what the EPA has said  
6 since maybe 2014 and then promoting uses after the  
7 closure of landfills including agricultural uses. It  
8 seems to be a trend on the mainland. There were in  
9 1984 something like 8,000 landfills, and now there's  
10 3,000. So many of them -- a portion of them are  
11 being reused.

12 And this behind me is a solar farm that is  
13 in Vermont that was built over a closed landfill, so  
14 maybe it's not happening here yet, but it seems to be  
15 a trend on the mainland to repurpose landfills that  
16 have closed.

17 COMMISSIONER CHANG: And I think my comment  
18 to that is, I would suspect on the continent where  
19 maybe landfills -- there's a lot more land, and so  
20 now with urbanization, I mean Maui has been a little  
21 different than Waimanalo Gulch. We have not had the  
22 public opposition.

23 But one of the rationales used by the  
24 County, it's a temporary use. But then we have them  
25 coming back in for an extension.

1           So for the communities, there's an  
2           expectation it's temporary, but the inconvenience,  
3           the damage, the adverse impact, lasts a lot longer.

4           So the realities in Hawaii, in my view, are  
5           a little different than what may be occurring on the  
6           mainland. I'm hoping so, but I don't know how  
7           analogous that is to Hawaii. Thank you.

8           MS. APUNA: Thank you.

9           CHAIRPERSON SCHEUER: Commissioner Giovanni  
10          followed by Commissioner Okuda and Wong.

11          COMMISSIONER GIOVANNI: Thank you, Chair.  
12          I would defer to Commissioner Okuda, if he would like  
13          to followup on Commissioner Chang's inquiry.

14          CHAIRPERSON SCHEUER: Commissioner Okuda,  
15          did you want to -- I don't know where your  
16          questioning was going, but I think you are being  
17          asked to share your thoughts regarding the timeliness  
18          of the filing of the motion.

19          COMMISSIONER OKUDA: Yes, and it will be  
20          short, and I'll defer back to Commissioner Giovanni.

21          No, I don't have any case law. Sorry to  
22          disappoint Commissioner Chang. And if I did,  
23          remember the old saying, you know, my legal advice is  
24          worth exactly how much you pay for it, which is  
25          nothing.



1           But on that line, not knowing what the  
2 answer is, and maybe this is something that we have  
3 to look at down the road.

4           But, Ms. Apuna, isn't it true that certain  
5 types of time deadlines are just absolute? For  
6 example, notices of appeal, it's an absolute  
7 deadline. The statute of limitations, unless you  
8 have some equitable tolling reasons, that's an  
9 absolute deadline.

10           But there are other types of deadlines  
11 where there may be discretion to extend the deadline.  
12 I mean, is that a fair statement of the two different  
13 types of deadlines? I mean, some deadlines are  
14 drop-dead deadlines, and other deadlines might not be  
15 drop dead?

16           MS. APUNA: Yes, I think that's correct.

17           COMMISSIONER OKUDA: But do you know of any  
18 authority -- because I haven't tried to look it up,  
19 by the way -- do you know of any authority which  
20 indicates whether or not the language -- because I do  
21 agree with Commissioner Chang, that language seems  
22 pretty definitive whether or not the language in the  
23 administrative rule is a drop-dead deadline, or  
24 whether it's the other type of deadline where there  
25 might be discretion to extend the deadline?

1 MS. APUNA: Well, I would hope there would  
2 be discretion to extend the deadline, particularly in  
3 this case, because it's a matter of 22 acres versus  
4 95 acres, and that's a huge amount of land of the  
5 County, you know, to have to convert or change.

6 So just clarity seems to weigh in, in being  
7 able to, you know, find out what was intended by the  
8 Commission.

9 COMMISSIONER OKUDA: And let me say this.  
10 I think you changed my thinking on some of the  
11 things. I came into this hearing being dead set on  
12 that, you know, if it looks like -- the old cliché --  
13 if it looks like a duck, quacks like a duck, it's got  
14 to be in an Urban zone.

15 And I've listened to your argument about  
16 spot zoning, but how the requirements of the Hawaii  
17 Constitution have to be taken into account; and my  
18 own personal view is I think you've made a tremendous  
19 pretty good argument where I've got to reconsider  
20 what I was thinking before.

21 But can I ask you this? Would you agree  
22 that there may be certain types of landfill  
23 situations or requests where the appropriate response  
24 by the Land Use Commission is to make a ruling that  
25 the Applicant must go by way of boundary amendment

1 and not special permit, but there might be other  
2 landfill situations where it would be not appropriate  
3 to go by boundary amendment.

4 It's a case by case basis?

5 MS. APUNA: It is. I think we are  
6 concerned that the Commission is directing everything  
7 towards a district boundary amendment. But you are  
8 correct, I think even when it is currently under SP  
9 and it just seems that it must -- that there is no  
10 end, and that it will continue to be Urban even after  
11 the closure of the landfill, then, yes, perhaps a DBA  
12 should be required in that situation.

13 But generally speaking for landfills, we  
14 should continue to keep it in the Agricultural  
15 District, and hopefully be able to return it to  
16 agricultural or some use other than Urban so as not  
17 to take away land from the Agricultural District.

18 COMMISSIONER OKUDA: Final question, and

19 If you believe that you don't have enough  
20 information at this point in time, because the  
21 question is speculative, then that's okay if you tell  
22 me that.

23 But what is your view if, for example, the  
24 adjoining landfill is closed, but the County were to  
25 open a landfill at some other location, and say that

1 the facilities that were built now should remain  
2 because these facilities are still going to be used,  
3 but accessories to a landfill located somewhere else  
4 in the County of Maui?

5 MS. APUNA: That's a very interesting  
6 question, because I see that there is still the  
7 connection with the landfill and with accessory use,  
8 but they are now spatially separate. So maybe it  
9 could go under industrial or urban use, those uses,  
10 but I don't know. I would need more information and  
11 be able to look into that.

12 COMMISSIONER OKUDA: Thank you very much,  
13 Ms. Apuna. Thank you, Mr. Chair. I'm sorry, I'm not  
14 prepared to answer Commissioner Chang's question.

15 CHAIRPERSON SCHEUER: Thank you,  
16 Commissioner Okuda.

17 Commissioner Giovanni followed by  
18 Commissioner Wong.

19 COMMISSIONER GIOVANNI: Thank you, Chair;  
20 thank you, Ms. Apuna.

21 First of all, I want to thank Commissioner  
22 Ohigashi and Commissioner Chang and Commissioner  
23 Okuda, because I heartedly agree with their line of  
24 questioning and positions that I -- that they imply,  
25 or that I have felt that they represent.

1           Now, I'll go onto my own line of  
2 questioning.

3           Ms. Apuna, we are -- looking back at the  
4 record on this case, if you recall in our questioning  
5 of Maui County, there was reference to a Solid Waste  
6 Management Plan, but there was no plan that was made  
7 as part of the record specifically. So we had to go  
8 on representations that were generally made, that  
9 called out a reference to that plan, but we never got  
10 to see the plan itself.

11           Do you recall that discussion at all?

12           MS. APUNA: I think I do, yes.

13           COMMISSIONER GIOVANNI: So along those  
14 lines of questioning, one of the questions that I  
15 asked was: Is the industrial activity that would be  
16 on the 40 acres that is envisioned by Maui County,  
17 does it have to be connected or co-located next to  
18 the landfill?

19           Because similar technology, like for  
20 example, on Oahu you have H-Power, which is several  
21 miles away from the landfill, and in essence, it's  
22 processing waste in an industrial way, and then the  
23 residual from that industrial activity is trucked  
24 miles to the landfill.

25           Do you recall that line of questioning?

1 MS. APUNA: Yes, I do.

2 COMMISSIONER GIOVANNI: And they  
3 specifically said that it does not need to be  
4 connected, in fact, it's a matter of convenience or  
5 of optimal design.

6 Do you recall that?

7 MS. APUNA: Yes.

8 COMMISSIONER GIOVANNI: So I think that is  
9 in direct conflict with your testimony today, which  
10 represented that the industrial activities that would  
11 be envisioned -- and I very much see these as  
12 industrial activities on the new 40 acres -- are not  
13 symbiotic in terms of spatial connection to the  
14 landfill itself. They could be located anywhere on  
15 Maui, and the residual product from those industrial  
16 activities could be trucked to this existing  
17 landfill.

18 So I think that's in conflict with what  
19 your position was. Would you still be in conflict  
20 with that, with what I'm saying and hold to your  
21 position, or would you go back to what was on the  
22 record from Maui County?

23 MS. APUNA: So I can't speak for the  
24 County. I think what we are looking at as far as  
25 the -- or what I think OP has looked at for today's

1 discussion, is where it is located adjacent to -- the  
2 industrial uses are located adjacent to the landfill.

3           So I haven't given much thought to that. I  
4 think that's a good question as far as the spatial  
5 separation, so I don't really think I have an answer  
6 for you at this time on that, but I will take note of  
7 it and discuss it with OP.

8           COMMISSIONER GIOVANNI: Thank you for that.

9           But I want the record to show that in my  
10 mind, I go back to what's on the record, and it's  
11 spatially located there as matter of convenience, and  
12 perhaps optimal design and efficiency, but it's not a  
13 required technological requirement to be co-located  
14 adjacent to the landfill.

15           I also agree with Commissioner Ohigashi,  
16 that it's very much industrialized activity, and it's  
17 clear that the way that solid waste management is  
18 evolving in this day and age is more to the direction  
19 of diversion and processing of waste, where you  
20 separate waste streams, you take each of the  
21 separated waste streams, for example, plastic,  
22 metals, whatever, and you process those individually  
23 and try to make reusable products of those, so that  
24 what actually ends up as a residual and goes into a  
25 landfill is a much smaller volume.

1           Would you agree that that's a fair  
2 characterization of the evolution of the technology  
3 that is going forward?

4           MS. APUNA: Yes.

5           COMMISSIONER GIOVANNI: So that really  
6 means that -- and the reason I emphasize that is that  
7 under the moniker of a landfill, oftentimes these  
8 industrial processes are mischaracterized as a  
9 landfill requirement, or as a landfill activity, and  
10 they are not.

11           They are specific industrialized processes  
12 that could be located anywhere on this island, on any  
13 island, for purposes of separating, sorting and  
14 processing waste for reuse.

15           It's only unfortunately that in the event  
16 that you can't recycle 100 percent, and you end up  
17 with a residual product, and it's that residual  
18 product that ends up in a landfill.

19           Does that make sense to you?

20           MS. APUNA: Yes.

21           COMMISSIONER GIOVANNI: So as a consequence  
22 of that, landfills that were designed and envisioned  
23 in the solid waste management plans five, ten, 20  
24 years ago by counties were much larger and much more  
25 difficult to site, because they took a multitude of



1 waste, and a much higher volume of waste.

2 So fortunately, today landfills on islands  
3 are hopefully a little more easier to locate because  
4 they don't need to be as big, and they don't need to  
5 take so much of the waste. So that's what's going  
6 on.

7 So recognizing all of that, I go back to  
8 what your motion is. I think very clearly -- and  
9 I'll take the two parts.

10 I, for one, hope that we could take your  
11 motion under consideration to clarify the 22 versus  
12 the 95 acres, because I do think that the intent  
13 was -- at least my personal intent in support of the  
14 order at the time, was that it be for the entire  
15 parcel.

16 Because I see it as an industrial activity,  
17 and I see that as the choice that Maui is making.  
18 Because they don't need to put that industrial  
19 activity there, but they're choosing do it.

20 As difficult as it is even on islands to  
21 get these technologies sited, and these operations  
22 sited, I think it's highly speculative to say it's  
23 temporary. I think they're pretty much, in my view,  
24 semi-permanent, and it's more appropriate to be  
25 recognized it as semi-permanent or permanent

1 industrial use, and it's well-suited to be in the  
2 Urban District. And that's why I support that we do  
3 not alter the Condition No. 23 for this order.

4 Does that make sense to you, my position?

5 MS. APUNA: It does.

6 But I would ask if you do, you strongly  
7 believe that the accessory industrial uses should be  
8 urbanized, then why not just limit that DBA to those  
9 industrial uses, but allow the landfill itself to  
10 continue in Ag for the potential of possibly  
11 returning it back to an Agricultural use?

12 COMMISSIONER GIOVANNI: I would consider  
13 that. My problem is that I think that, again, in the  
14 absence of having access to the Solid Waste  
15 Management Plan, which I think is going to be an  
16 evolving thing, I'm trying to look out for the  
17 County.

18 I think if the County had a DBA for Urban  
19 use for the entire parcel, 95 acres, it will  
20 probably, you know, 20, 30, 40 years from now, there  
21 might be a whole new host of technologies that come  
22 into play, and they might want to repurpose that  
23 whole land in an industrial basis. They may want to  
24 put industrial things on top of the existing  
25 landfill.

1           I think that if the whole parcel is  
2 categorized as Urban, it gives the County a lot more  
3 flexibility to do what's in the best interest of the  
4 people in terms of solid waste management on a  
5 long-term view basis. That's why I would support it.

6           I think a notion of a landfill in the  
7 context of the 1960s or 1970s just doesn't fit to  
8 today's perspective of how landfills fit into the mix  
9 for solid waste management on islands.

10           MS. APUNA: I see that.

11           I just worry that if we urbanize this area,  
12 that there is a potential for the outer-lying areas  
13 or adjacent areas to also therefore be urbanized,  
14 because once you have Urban, people are going to  
15 justify further urbanization based on that one spot.

16           COMMISSIONER GIOVANNI: That's a valid  
17 point, and I will take that into consideration. So  
18 thank you for making that point.

19           Nothing further, Chair.

20           CHAIRPERSON SCHEUER: Thank you,  
21 Commissioner Giovanni.

22           Just immediately prior to calling on  
23 Commissioner Wong, Ms. Apuna, I would like you to  
24 confirm at some point today where the nearest urban  
25 parcel is to this area.

1 Commissioner Wong.

2 COMMISSIONER WONG: Yes, Chair, thank you.

3 Going back to Commissioner Chang's line of  
4 questioning to the OP, I would like to make a motion  
5 for executive session regarding our duties,  
6 responsibilities, meeting with our Attorney General  
7 and staff about this issue of validating the validity  
8 of the timeliness of this motion.

9 VICE CHAIR ACZON: Second the motion, Mr.  
10 Chair. This is Commissioner Aczon.

11 CHAIRPERSON SCHEUER: A motion has been  
12 made by Commissioner Wong and seconded by  
13 Commissioner Aczon with a near third by Commissioner  
14 Ohigashi.

15 If we go into executive session, Mr.  
16 Orodenker will send out a separate meeting room  
17 notice. You will log out of this meeting room, go  
18 into that other meeting room, and then we will come  
19 back into this meeting room when we're done with  
20 executive session if the motion prevails.

21 Any discussion on the motion? Seeing none,  
22 Mr. Orodenker -- Mr. Hopper.

23 MR. HOPPER: Don't know if you want to hear  
24 at all from the parties on that particular issue. I  
25 did have a reading of the rule that I wanted to -- if

1 you just want to go to executive session, that's  
2 fine.

3 CHAIRPERSON SCHEUER: I think the request  
4 was -- I'm going to assume at this point that  
5 Commissioner Wong knew we might hear from other  
6 parties after the executive session, but thank you  
7 for the offer.

8 We are in discussion on the motion. Any  
9 discussion? If not, Mr. Orodenker, will you please  
10 roll call the Commission on the motion to go into  
11 executive session?

12 EXECUTIVE OFFICER: Thank you, Mr. Chair.  
13 Commissioner Wong?

14 COMMISSIONER WONG: Aye.

15 EXECUTIVE OFFICER: Commissioner Giovanni?

16 COMMISSIONER GIOVANNI: Aye.

17 EXECUTIVE OFFICER: Commissioner Ohigashi?

18 COMMISSIONER OHIGASHI: Aye.

19 EXECUTIVE OFFICER: Commissioner Okuda?

20 COMMISSIONER OKUDA: Yes.

21 EXECUTIVE OFFICER: Commissioner Cabral?

22 VICE CHAIR CABRAL: Yes.

23 EXECUTIVE OFFICER: Commissioner Chang?

24 COMMISSIONER CHANG: Yes.

25 EXECUTIVE OFFICER: Commissioner Aczon?

1 VICE CHAIR ACZON: Aye.

2 EXECUTIVE OFFICER: Chair Scheuer?

3 CHAIRPERSON SCHEUER: Aye.

4 EXECUTIVE OFFICER: It's unanimous, Mr.  
5 Chair.

6 CHAIRPERSON SCHEUER: Thank you.

7 The Commission will move into executive  
8 session right now into a separate ZOOM meeting room.  
9 This ZOOM meeting room will remain open, and akin to  
10 the physical world, you'll have to kind of cool your  
11 heels while we are in executive session, and then  
12 we'll come back into this room when we're ready.

13 Commissioner Ohigashi.

14 COMMISSIONER OHIGASHI: Can we stay logged  
15 onto this one?

16 CHAIRPERSON SCHEUER: You log out of this  
17 one, log into the link that will be sent or has been  
18 sent by Executive Officer Orodener.

19 COMMISSIONER OHIGASHI: Thank you.

20 (Executive session.)

21 CHAIRPERSON SCHEUER: It's 10:54. We left  
22 executive session, but there was a request since we  
23 have not had a break at all, that the Commissioners  
24 be given a ten-minute break. So we're going to  
25 reconvene at 11:05.

1 (Recess taken.)

2 CHAIRPERSON SCHEUER: It's 11:04. We're  
3 back on the record. Thank you for everyone's  
4 patience.

5 I'm just going to note, to start us back,  
6 we were procedurally questioning the OP after their  
7 presentation on their motion, and an issue was raised  
8 and subsequently discussed, raised by Commissioner  
9 Chang, and subsequently discussed by many of the  
10 Commissioners over the applicability of Hawaii  
11 Administrative Rule 15-15-84 regarding the timeliness  
12 of filing motions for consideration.

13 Mr. Orodenker, would you like to speak to  
14 this rule?

15 EXECUTIVE OFFICER: Thank you, Mr. Chair.

16 Yeah, as Commissioner Chang pointed out,  
17 the time for filing a motion for reconsideration has  
18 passed. It does not appear to be discretionary.  
19 15-15-80 -- I believe it's 89 -- provides that a  
20 motion for reconsideration --

21 CHAIRPERSON SCHEUER: 84.

22 EXECUTIVE OFFICER: -- 84, will be filed in  
23 a timely manner, and if it is not, then the  
24 Commission may not take up the matter.

25 The Motion for Reconsideration was actually

1 filed by OP, was filed with two issues.

2 The primary one, the staff recognized was  
3 the error that staff had made with regard to the  
4 condition requiring the County to institute DBA  
5 proceedings, environmental proceedings on the  
6 landfill.

7 Staff had mistakenly believed that the  
8 motion was to cover only the additional acreage,  
9 rather than the entire acreage of the landfill. And  
10 in that regard, it was staff's opinion that the  
11 Motion for Reconsideration was actually Motion for  
12 Clarification.

13 With regard to the second item that OP  
14 raised, or second issue that OP raised with regard to  
15 whether or not the condition was appropriate at all,  
16 that is clearly a Motion for Reconsideration, and  
17 fell outside of Commission's jurisdiction, given the  
18 date on which the memo was filed.

19 CHAIRPERSON SCHEUER: Thank you, Mr.  
20 Orodénker.

21 As Chair, I would entertain a motion that  
22 based on 15-15-84 we should stop consideration of the  
23 motion because it was filed untimely. I will note  
24 that if such a motion is made and prevails, I would  
25 direct the staff to put on our next agenda a



1 clarification of what was meant by our previous order  
2 in this case.

3 Commissioner Ohigashi.

4 COMMISSIONER OHIGASHI: I move.

5 CHAIRPERSON SCHEUER: Is there a second?

6 CHAIRPERSON SCHEUER: Seconded by

7 Commissioner Chang.

8 A motion has been made by Commissioner  
9 Ohigashi and seconded by Commissioner Chang to cease  
10 consideration of the motion by OP because it was  
11 untimely.

12 Commissioner Ohigashi, followed by Okuda.

13 COMMISSIONER OHIGASHI: No comment, Mr.  
14 Chair.

15 CHAIRPERSON SCHEUER: Commissioner Okuda.

16 COMMISSIONER OKUDA: Thank you very much,  
17 Mr. Chair.

18 The reason why I am speaking in favor of  
19 the motion is -- it doesn't mean any disrespect to  
20 any of the parties, especially to the Office of  
21 Planning, which I believe has raised a very important  
22 and items that I, you know, really need to think of  
23 in the future.

24 But the motion that has been filed  
25 implicates the rule which Commissioner Chang raised,

1 and that rule seems, in my view, related to whether  
2 or not the time for appeal can be tolled. And these  
3 types of tolling motions, especially when it's  
4 related to when a deadline is to file a notice of  
5 appeal, it becomes an issue of subject matter  
6 jurisdiction.

7 And so when it's a subject matter  
8 jurisdiction type of rule, time-limit rule, and if  
9 that time passes, then even if we think it's a  
10 really, really good idea to do something, if we don't  
11 have subject matter jurisdiction, as we all know, we  
12 can't proceed.

13 And, in fact, if there's a lack of subject  
14 matter jurisdiction, even if we were to proceed, a  
15 court later, like an appellate court, can on its own  
16 sua sponte raise the lack of subject matter  
17 jurisdiction.

18 So that's basically the reason why I'm  
19 speaking in favor of the motion. It's no reflection  
20 on the substantive arguments that the Office of  
21 Planning was raising, but in this format right now, I  
22 believe the motion is not only untimely, but there is  
23 no discretionary ability to extend a type of tolling  
24 motion when it may toll the deadline to file a notice  
25 of appeal.

1 Thank you, Mr. Chair.

2 CHAIRPERSON SCHEUER: Commissioner Chang.

3 COMMISSIONER CHANG: Thank you, Mr. Chair.

4 I too am obviously going to vote in favor  
5 of the motion, and I see this as a procedural matter.  
6 It has nothing to do with the merits of the  
7 arguments, although, one, I think that there are  
8 appropriate remedies to address the issues that have  
9 been raised by the Office of Planning.

10 One, as I understand from Mr. Orodener,  
11 the staff is going to -- there may have been an error  
12 on the part of staff in the acreage. And that seems  
13 like that we're going to that up at the next meeting  
14 and staff will come forward with that matter, and it  
15 will be properly agendized.

16 I think the other issues that OP is  
17 raising, like Commissioner Okuda, while they may have  
18 merits, one, I think those were raised in the  
19 original hearing; and two, that issue can always be  
20 brought up in another, a more appropriate motion  
21 before the Planning Commission, and then ultimately  
22 to the Land Use Commission.

23 So for those reasons, I'm going to vote in  
24 favor of this motion. Thank you.

25 CHAIRPERSON SCHEUER: I'm going to -- we

1 are in debate on a motion before the Commission, so  
2 normally just the Commissioners would vote. But I'm  
3 going to briefly recognize Mr. Hopper, then followed  
4 by Environmental Management.

5 MR. HOPPER: Thank you, Mr. Chair, and  
6 thanks for letting me speak.

7 I understand you're in deliberations.

8 I just wanted for our own purposes some  
9 clarification. The rule does say that a motion for  
10 reconsideration has to be brought within seven  
11 calendar days after the issuance of the D&O.

12 And then it says: In no event will the  
13 Commission consider any motion for reconsideration on  
14 any petition after the period within which the  
15 Commission is required to act on the petition.

16 And I wasn't clear on what that timeframe  
17 is, the period upon which you're required to act on  
18 the petition.

19 I think my reading is that you have 45 days  
20 after receipt of the full record under 15-15-96(a).

21 I would have thought that period -- I don't  
22 know if you made your original decision within that  
23 period or not. I had kind of assumed that that  
24 timeframe was tolled, based on the Governor's  
25 proclamation, because we know that there was a COVID

1 delay for hearing this petition. We would want that  
2 clarification as to -- it doesn't say that you can't  
3 consider beyond the seven day timeframe. It says  
4 that you can't reconsider after the period in which  
5 the Commission is required to act on the petition.

6 So that clarification I think would help.

7 Also if it's a jurisdictional issue and the  
8 timeframe for appeal is the issue, then I'm not sure  
9 how you can make a clarification through your D&O  
10 beyond that period. I don't see how that's  
11 different.

12 So just some clarification. Or you can't  
13 give it or don't believe it's appropriate now, then  
14 that's up to you. But we would, I think, also want  
15 to raise this as an objection based on those issues  
16 without having those items clarified.

17 Because in reading the rules, those are a  
18 couple of the questions that I have had, and you may  
19 have addressed them in executive session with your  
20 AG. But I did just did not have that information.

21 CHAIRPERSON SCHEUER: I'm not going to -- I  
22 don't think any of us are going to speak to what we  
23 discussed with our AG in executive session.

24 MR. HOPPER: Of course not.

25 CHAIRPERSON SCHEUER: Environmental

1 Management.

2 MS. THOMPSON: Thank you for the  
3 opportunity.

4 Just briefly, wanted to -- Michael Hopper  
5 and I were in separate rooms, so we didn't have the  
6 opportunity to talk independent about this, but we do  
7 agree with him, and would like the Commission's  
8 clarification on that.

9 An alternative -- perhaps an alternative  
10 way of viewing this Petition would be a Petition to  
11 modify a condition, or delete a condition under  
12 15-15-94, which may address some of the timeliness  
13 issues.

14 So I don't know if the Commission would  
15 consider OP's petition in the alternative as being  
16 brought under 15-15-94.

17 CHAIRPERSON SCHEUER: I think 15-15-96.1,  
18 if I have that correctly at my grasp, is the vehicle  
19 for a motion for modification of a special permit  
20 condition.

21 Counselor, do I have that correct?

22 MS. CHOW: That is correct.

23 CHAIRPERSON SCHEUER: So, you know, there's  
24 nothing about the motion that is before the Land Use  
25 Commission today that prevents the County from

1 appealing the original decision that we made.  
2 There's nothing that prevents you from going through  
3 under 15-15-96.1 through your Planning Commission,  
4 and then bringing a motion to try and remove the  
5 condition which you find objectionable.

6 But that's not what OP filed.

7 Ms. Apuna.

8 MS. APUNA: Thank you, Chair.

9 I'm wondering if OP can make a motion at  
10 this moment under 15-15-70 to modify or to amend the  
11 special permit.

12 CHAIRPERSON SCHEUER: Under 15-15-70?

13 MS. APUNA: Yes, I think it allows a verbal  
14 motion by any party during the hearing.

15 CHAIRPERSON SCHEUER: So one of the issues  
16 that will arise -- I don't think that it's allowed --  
17 is because this is actually the consideration of a  
18 special permit in which there's not technically  
19 opposing parties involved. So I'm not sure that  
20 15-15-70 can be applied in this instance.

21 MS. APUNA: Well, we are a party to this  
22 motion.

23 CHAIRPERSON SCHEUER: But there is nothing  
24 also that would prevent you from recharacterizing --  
25 refiling and recharacterizing -- how did you say that

1 you wanted to recharacterize your motion?

2 MS. APUNA: To a motion to modify or amend.

3 CHAIRPERSON SCHEUER: Okay. So then I  
4 believe that, as I said before, 96.1 would be the  
5 appropriate administrative rule which covers motions  
6 to amend conditions on the special permit, which  
7 would originate with the Planning Commission.

8 But this actually goes more towards the  
9 second point of your argument which you presented,  
10 which I want to refer to as the Funakoshi argument,  
11 that somehow this should not be allowed at all,  
12 rather than whether or not the Decision and Order  
13 properly reflected what the Commission decided.

14 Commissioner Chang.

15 COMMISSIONER CHANG: Ms. Apuna, you know, I  
16 too thought maybe we could make an oral motion, but I  
17 think the issue, the legal problem that we may have  
18 is just Sunshine. So I think that's why looking at  
19 this, it seemed to be the most appropriate vehicle is  
20 that -- is that staff, they've acknowledged the  
21 acreage issue may not accurately reflect what the  
22 decision -- what the LUC's decision was.

23 So they will agenda that at the next  
24 meeting, but I think that that's the problem with  
25 making a motion orally without properly providing



1 Sunshine notice for it.

2 CHAIRPERSON SCHEUER: Commissioner Aczon.

3 VICE CHAIR ACZON: Mr. Chair, I believe we  
4 have a motion on the floor.

5 CHAIRPERSON SCHEUER: We do have a motion  
6 on the floor.

7 VICE CHAIR ACZON: And if there is any  
8 motion, if any should be taken after this motion?

9 CHAIRPERSON SCHEUER: Yes. I just wanted  
10 to sort of err on the side of not having any of the  
11 County, two County agencies or OP feel that they were  
12 excluded from any, you know, opportunity to speak to  
13 this when they were raising their hand.

14 We do have a motion in front of us. And if  
15 I may speak to it.

16 I believe there's gratitude that the  
17 difference between the conversation that was had  
18 during the hearing, and then the D&O was brought up,  
19 and that's why I do want to direct the Executive  
20 Officer to place this on the next agenda for  
21 attention, but to do so in a way that we believe is  
22 appropriate under our rules.

23 Is there any further discussion on the  
24 motion? If not, Mr. Orodener, will you please poll  
25 the Commission?

1 EXECUTIVE OFFICER: Thank you, Mr. Chair.

2 The motion is to dismiss this matter for  
3 lack of jurisdiction as it was untimely.

4 Commissioner Ohigashi?

5 COMMISSIONER OHIGASHI: Aye.

6 EXECUTIVE OFFICER: Commissioner Chang?

7 COMMISSIONER CHANG: Aye.

8 EXECUTIVE OFFICER: Commissioner Aczon?

9 VICE CHAIR ACZON: Yes.

10 EXECUTIVE OFFICER: Commissioner Cabral?

11 VICE CHAIR CABRAL: Yes.

12 EXECUTIVE OFFICER: Commissioner Giovanni?

13 COMMISSIONER GIOVANNI: Aye.

14 EXECUTIVE OFFICER: Commissioner Okuda?

15 COMMISSIONER OKUDA: Yes.

16 EXECUTIVE OFFICER: Commissioner Wong?

17 COMMISSIONER WONG: Aye.

18 EXECUTIVE OFFICER: Commissioner Scheuer?

19 CHAIRPERSON SCHEUER: Aye.

20 EXECUTIVE OFFICER: Thank you, Mr. Chair.

21 The motion passes unanimously.

22 CHAIRPERSON SCHEUER: Just to be really

23 clear, Mr. Orodenker, I would like you to place the

24 clarification needed regarding the Decision and Order

25 onto our next agenda.

1 EXECUTIVE OFFICER: Thank you, Mr. Chair.

2 We will do so.

3 CHAIRPERSON SCHEUER: And obviously keep in  
4 touch with the interested parties as is appropriate  
5 and necessary.

6 There being no further business to conduct,  
7 unless anybody has something else, I'm going to  
8 declare this meeting adjourned.

9 (The proceedings were adjourned at 11:22  
10 a.m.)

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