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Ref. No. P-12764

September 22, 2009

Mr. Ransom Piltz, Chair
State Land Use Commission
P.O. Box 2359
Honolulu, Hawaii 96804

Dear Chair Piltz:

Subject: Testimony of the Office of Planning on the Application for a Special Use Permit for an Expansion and Time Extension for the Waimanalo Gulch Sanitary Landfill 2008/SUP-02 and 86/SUP-5 92-460 Farrington Highway, Kapolei, Hawaii
TMK: 9-2-3: 72 and 73

The Office of Planning ("OP") recommends that the 2008/SUP-02 be denied. OP also recommends that the request to withdraw 86/SUP-05 be denied, and that 86/SUP-05 instead be extended for three years, with additional expansion space of one cell for ash and two cells for Municipal Solid Waste ("MSW"). Further, the Petitioner should be required to complete an inclusive, transparent, public site-selection process (like the Blue Ribbon Committee previously formed) within twelve months of the date of the Decision and Order, followed by the City Council being required to select a site(s) based on the forwarded recommendations within an additional six months, with an automatic expiration of the Permit if this condition is violated. If the Land Use Commission believes that 86/SUP-05 cannot be extended, OP then recommends that all applicable conditions in 86/SUP-05 be included in 2008/SUP-02, along with the above-discussed requirements.

Alternatively, the OP recommends that the Land Use Commission (LUC) should remand the entire docket back to the City and County of Honolulu Planning Commission.

The LUC has 45 days from August 20, 2009 to approve, disapprove or modify the City Planning Commission's ("CPC") Decision and Order ("D/O").

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LAND USE COMMISSION
STATE OF HAWAII

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The State Office of Planning offers the following comments for your consideration:

Background: Summary of the Record and the Reasons for the Decision

The CPC has approved the City Department of Environmental Services' (ENV) application for a new SUP for expansion of the existing Waimanalo Gulch Sanitary Landfill from approximately 107 acres to a total of 200 acres until capacity is reached, as allowed by the State Department of Health, without time limit, subject to ten conditions. The Planning Commission has approved on a contingent basis the withdrawal of 86/SUP-05 upon 2008/SUP-02 taking effect and that all conditions previously placed on the property under 86/SUP-05 shall be null and void.

In summary, the City Planning Commission placed the following conditions on 2008/SUP-02:

- 1) On or before November 1, 2010, ENV shall begin to identify and develop one or more new landfill sites to either replace or supplement Waimanalo Gulch Sanitary Landfill.
- 2) ENV shall continue its efforts to use alternative technologies to provide a comprehensive waste stream management program that includes H-POWER, plasma arc, plasma gasification, reuse of stabilized, dewatered sewage sludge, and recycling.
- 3) ENV shall provide annual reports to the Planning Commission on June 1 of each year.
- 4) Closure of existing cells must be completed by December 31, 2012.
- 5) WGSL shall be operational only from 7:00 A.M. to 4:30 P.M. daily, except that ash and residue may be accepted 24 hours a day.
- 6) ENV shall coordinate with HECO to ensure safety of overhead power lines.
- 7) WGSL will be operated in compliance with City Ordinance 21-5.680 and any and all applicable rules and regulations of the State Department of Health.
- 8) The Planning Commission may at any time impose additional conditions.

9) Enforcement of the conditions of 2008/SUP-02 may include an order to show cause why 2008/SUP-02 should not be revoked if the Commission has reason to believe there is a failure to perform the conditions.

10) ENV shall notify the Planning Commission of termination of the use of the property as a landfill for appropriate action or disposition of 2008/SUP-02.

It is significant to note that the CPC provided no condition containing an expiration date for this SUP. Commissioner Komatsubara explained his decision to craft the draft D/O without an expiration date at the CPC hearing for Decision-Making on July 31, 2009:

“To me, clearly simply having a specified end date certain on the previous SUPs has not resulted in the closure of Waimanalo Gulch. We have been down this road many times. I think it’s been extended three or four times. In my opinion, simply putting on a new closure date to this new SUP will not lead to the closure of Waimanalo Gulch Sanitary Landfill. I believe that the focus should not be on picking a date. The focus should be on how do we get the City to select a new site because you are not going to close this landfill until you find another site....how do you get the City to select a new site? That’s the.....big question here.” (Exhibit 71, Tr. 7/31/09, p. 3-4)

Commissioner Komatsubara went on to explain the limits of the CPC’s powers, as he views them:

“The only power we really have is the power to revoke under our rules. But then we come back to the same question. If our only power is to revoke, how meaningful is it when everyone knows that we still need this landfill because, you know, we’re not going to throw the baby out with the bath water. That’s the biggest problem.” (Exhibit 71, Tr. 7/31/09, p. 4)

“This, in essence is our attempt to keep the applicant true to its representation in the hearing that it will begin in 2010 its effort to identify and develop a supplemental landfill site on Oahu. The problem still remains how to enforce this condition, how to enforce this promise.....I don’t know if

there is every going to be a simple answer, but I think going down the old path of just putting a date in there has not worked. We put it down three or four times before and every time we came to that date, it was extended further and further. I can understand why people feel they have been deceived because this keeps on being extended.”
(Exhibit 71, Tr. 7/31/09, p.4)

Later in the same Decision-Making discussion, Commissioner Komatsubara concluded:

“It becomes incumbent on us as to whether we enforce that commitment or not. It is kind of a game of chicken, however, because at the same time we really don’t want to close this landfill [by revoking the permit]. I asked myself the question, I said, “Would you, Kerry, really be willing to close the Waimanalo Gulch?” And the answer is no”
(Exhibit 71, Tr. 7/31/09, p. 7)

After additional discussion, Commissioner Gaynor voiced her concerns about issuing an SUP without a deadline for closure of the landfill:

“I felt strongly about how the community was misled, and I don’t have a lot of confidence that ENV can get the job done and that they’re getting the political leadership and willpower especially if we lead everyone to believe that this landfill could go on indefinitely. I like every single condition in here. The only thing I would like to see is a deadline. This landfill will close, then let them come and report every year.” (Exhibit 71, Tr. 7/31/09, p. 12)

Following these comments, Commissioner Dawson immediately attempted to propose an amendment to the draft D/O, but was told by Chair Holma that she could not propose any amendment without the motion first being voted on.

The CPC then voted (6 in favor, 2 opposed, 1 recused) to approve the draft Findings of Fact, Conclusions of Law, and Decision and Order (D/O), as drafted, without amendment.

The Office of Planning has several procedural, technical, legal and policy concerns with the CPC’s D/O and the accompanying record, as transmitted to the LUC.

Procedural, Technical and Legal Issues

1. Motion to Amend

During discussion of the Motion to Approve the draft D/O, Commissioner Beadie Dawson stated her intention to propose an amendment. Chair Karen Holma immediately interjected, improperly ruled that amendments to motions were not allowed, and then cut off further discussion by calling for a vote on the motion. Chair Holma's actions were an abuse of discretion, requiring remand of 2008/SUP-02 and 86/SUP-02.

Dawson: We could talk about this item for item, but I'd like to propose an amendment.

HOLMA: Well, you can't do that right now.

DAWSON: I can't?

HOLMA: No.

DAWSON: We have to vote it up or down?

HOLMA: Yes. We have the motion.

DAWSON: Because I think Vicki has given perhaps a good out for us.

HOLMA: I'm going to call for a vote on the motion.
(Exhibit 71, Tr. 7/31/09, p. 12).

Under normal rules of parliamentary procedure, motions can be amended by majority vote. Even if there is disagreement, each commissioner has the right to make a motion to amend. Furthermore, Chair Holma cut off any further discussion by calling for the question, but failed to ask for a majority vote to cut off any further debate. The Chair's refusal to allow Commissioner Dawson to even frame her motion for amendment and then to immediately and unilaterally cut off further discussion was a violation of the rules of order and an abuse of discretion requiring that 2008/SUP-02 and 86/SUP-02 be remanded back to the CPC.

2. City and County of Honolulu, Land Use Ordinance, Sec. 21-5.680, Waste disposal and processing.

Approval of a new SUP will violate section 21-5.680 of the City and County of Honolulu's ordinances. Section 21-5.680 states as follows:

“No waste disposal and processing facility shall be located within 1,500 feet of any zoning lot in a country, residential, apartment, apartment, mixed use or resort district. When it can be determined that potential impacts will be adequately mitigated due to prevailing winds, terrain, technology or similar considerations, this distance may be reduced, provided that at no time shall the distance be less than 500 feet. (Added by Ord. 99-12)”

On September 24, 2008, the Makaiwa Hill subdivision was re-zoned from its previous Agricultural (AG-2) zoning to a mix of residential, commercial and preservation zoning districts by the Honolulu City Council. According to the GIS analysis provided in OP's attachment, the Low-Density Apartment Zoning in Makaiwa Hills subdivision is from 100 feet to 150 feet away from the existing landfill cells, in clear violation of LOU Sec. 21-5.680. (See also Testimony of Todd Apo, Exhibit 54, Transcript 7/2/09, p. 222, line 24 to p. 223, line 3). A new SUP, therefore, would locate a waste disposal and processing facility within 500 feet of a residential lot.

ENV may argue that only the closed cells of the waste disposal and processing facility are within 500 feet of the residential lots. But the closed cells are still part of the Waimanalo Gulch Sanitary Landfill, and are therefore a part of a waste disposal and processing facility. Furthermore the closed cells present a risk to the future residents of Makaiwa Hills through the emission of gases, the potential malfunction of the gas collection system, runoff, and possible contaminants.

A new SUP, therefore, should not be approved and issued in violation of the City and County's own ordinance. Additionally, if either the old SUP is extended or the new SUP approved, a condition requiring the City and County to correct any violations (through e.g. variance, grandfathering or zoning change) of its own Ordinances, specifically Section 21-5.680, should be included in the final D/O.

3. Motion to Withdraw 86/SUP-5

86/SUP-05 should be extended, not withdrawn, and ENV should be required to comply with the applicable requirements.

Pursuant to the Decision and Order issued on August 4, 2009, the CPC allowed ENV to escape the conditions of 86/SUP-05. It reads:

“IT IS ALSO the Decision and Order of the Planning Commission to APPROVE the withdrawal of the Special Use Permit File No. 86/SUP-5 upon 2008/SUP-2 taking effect and that all conditions previously placed on the Property under Special Use Permit File No. 86/SUP-5 shall be null and void.”(D/O p. 27)

86/SUP-5 has been amended at least three times in the past, most significantly in 1998, 2003 and 2008. These three amendments have both expanded the footprint of the landfill and extended the time limit for operations. Clearly, ENV could have followed prior practice and asked for an extension and expansion of 86/SUP-05. Instead, ENV presents a new factual record to the Commission, one which does not include the various representations, commitments, and conditions contained in 86/SUP-05.

But the factual record of 86/SUP-05 is essential in analyzing the appropriateness of an SUP for the Waimanalo Gulch Sanitary Landfill. Most significantly, the City and County of Honolulu’s representations to close the Waimanalo Gulch Sanitary Landfill cannot be simply ignored. Even if, or perhaps especially if, the City and County of Honolulu intends to renege on its former promises and to instead operate the Waimanalo Gulch Sanitary Landfill as long as additional space can be found for the deposition of waste, the facts contained in the prior record must be confronted and acknowledged. Accordingly, prior practice should be followed, and the amendment of 86/SUP-05 (considering the prior record) should be evaluated rather than a new SUP based on an entirely new factual record.

For all of these reasons, the OP believes the new 2008/SUP-2 should be denied and the 86/SUP-5 reinstated, as discussed in depth, below, or in the alternative the entire matter should be remanded back to the CPC.

4. Special Use Permit or District Boundary Amendment

The CPC’s decision to grant an SUP without any time limit may cross the line between an SUP and a district boundary amendment. ENV asked for a fifteen (15) year SUP. CPC, however, gave more than was requested by eliminating all time limits whatsoever.

In Neighborhood Board No. 24 v. State Land Use Commission, 64 Haw. 265, 639 P.2d 1097 (1982), the Hawaii Supreme Court found that a special permit to allow 103 acres within an agricultural district for an amusement park, consisting of cultural theme rides, restaurants, fast food shops, retail stores, exhibits, theaters, amphitheater, bank, nurseries, twelve acres of parking, sewage treatment plant, and other related support services was not an “unusual and reasonable use” qualified for a special permit, and was more properly the subject of a district boundary amendment. In that case, the Court stated that the “unlimited use of the special permit to effectuate essentially what amounts to a boundary change would undermine the protection from piecemeal changes to the zoning scheme guaranteed landowners by the more extensive procedural protections of boundary amendment statutes.” Id. at 272.

In this case, although the type of use is limited, the duration of use is not. The issuance of a limited-term SUP for a landfill is an appropriate use of the SUP process. The issuance of an SUP with an unlimited term identically resembles the intended outcome of the district boundary amendment petition (A08-780) filed by the ENV and currently being heard by the LUC. The OP believes the CPC has overstepped the bounds of its authority in issuing a SUP without a firm time limit for operations.

Policy Issues

1. Keeping One’s Word

In 2003, the ENV committed unequivocally to selecting a new landfill site and to closing the Waimanalo Gulch Sanitary Landfill. The 2003 transcripts are replete with these representations. For example:

“COMMISSIONER COPPA: My next question is to ask you to be as honest as you can to me because I think I’m trying to see what it’s going to look like, whether it’s two years from now or five years from now.

Do you honestly think that we will have a site, another site picked for a landfill? And if so do you think that you could commit that without a doubt that this landfill will close?

MR. DOYLE: We have made the commitment, yes.”

(Exhibit 68, Tr. 3/27/03, page 125, lines 3-11).

In accordance with the representations made by the City and County of Honolulu, Condition 1 was placed on the 2003 Amended 86/SUP-5 to convene a Blue Ribbon Advisory Committee charged with recommending a new landfill site, and to require the City Council to select a new site by June 1, 2004. A six-month extension to the time limit was later issued, making the deadline for selection of the new landfill site by the City Council Dec. 1, 2004. Significantly, this same Condition 1 provided for an automatic expiration of the SUP if either of these deadlines were not met.

The Blue Ribbon Committee convened and worked in a double-blind process to rank sites. Consensus was reached on the naming of the five best sites (Maili, Makaiwa, Nanakuli B, Ameron Quarry and Waimanalo Gulch). The Blue Ribbon Committee was intended to be subject to the sunshine laws.

“MR. TSUJI: I assume being that it’s an advisory committee it will be complying with whatever sunshine laws, whatever open record laws are available.

MR. DOYLE: Yes.”

(Exhibit 68, Tr. 3/27/03, page 159, line 23 to page 160, line 1).

Unfortunately, after the elimination of one of those five sites (Waimanalo Gulch), the Office of Information Practices determined on January 13, 2004, that the Blue Ribbon Committee had violated the Sunshine Law, and the final report was deemed void. Accordingly, the Blue Ribbon Committee never completed its assignment.

By Resolution No. 04-348, the City Council then selected Waimanalo Gulch as the site of its “new landfill.” ENV now seeks to continue the operation of the Waimanalo Gulch Sanitary Landfill, and to be excused from the site selection process previously required and never completed.

Many people believe that the selection of the Waimanalo Gulch was a violation of the City and County of Honolulu’s original promise. The ENV argues that the new Administration that took office in December 2003 simply changed its mind, and this may be true. But the argument ignores the simple but compelling truth that petitioners should keep their word, and conditions on permits run with the land, regardless of the owner, lessee, developer.

The OP has consistently argued that it is in the best interests of the State for past conditions to be adhered to. As in other recent dockets before the LUC (e.g., Ko Olina Boat Ramp and Bridge Aina Lea), the OP has argued that significant time and effort by

the public and the parties to petitions are placed into the development of conditions appropriate to each project. Amending conditions, or enforcing conditions in cases of non-compliance, must be done with extreme sensitivity and rigor. The practice of allowing Petitioners to simply amend or eliminate conditions when they become too onerous to comply with risks undermining the meaning and integrity of our land use entitlement processes, and with it, the public trust in government.

In fact, the Petitioner's EIS acknowledges the issue of eroding public trust in government as a real impact of this application. FEIS, p. 1-15, and Appendix J, page 2. The issues of public trust in government are magnified in this case, because the Applicant is itself a government agency. Holding government agencies to their commitments, and enforcing the law and previously imposed conditions on other government agencies is of primary importance in this case. We have witnessed throughout history that when governments fail to abide by their own laws – or when governments fail to enforce their own laws upon themselves – to varying degrees civilizations tend to deteriorate. At the very least, in this case, the OP recommends that the LUC correct the entitlement record for the WGSJ by limiting the term of the SUP and re-imposing the applicable requirements that have been violated for so long, and in so doing, help to rebuild public trust in Hawaii's land use entitlement processes.

2. Essential Conditions

a. The Blue Ribbon Committee.

ENV should be required to convene a Blue Ribbon Committee to recommend an appropriate landfill site

A Blue Ribbon Committee allows for an opportunity to provide an inclusive process whereby public participation can be encouraged far more than in the normal public hearings. An inclusive public participatory process before a neutral third-party is especially essential to avoid the cynicism which is likely to occur if ENV has the unilateral task of recommending an appropriate landfill site.

A Blue Ribbon Committee should also be required because that was the requirement under 86/SUP-05. Whatever the reasons were for not fulfilling this requirement in the past, the City and County of Honolulu should be required to complete the process now. A promise was made. That promise should be kept.

The Blue Ribbon Committee should be transparent. Early in the process, it must be determined how many sites the Committee will ultimately recommend to the Council, whether Waimanalo Gulch will be eligible to be considered as a potential site, and if the

Committee will eliminate potential sites by consensus only or by majority vote.¹ These parameters must be established early to avoid the suspicion that the process is being manipulated in order to reach a particular conclusion.

Additionally, the County Council should again be required to select a site(s) for a new landfill(s) within a limited and reasonable amount of time, with failure to do so resulting in the automatic expiration of the Permit.

b. Selection of Site

As previously required by 86/SUP-02, a site must be selected by a particular date. If a site is not selected by that date, the SUP should be automatically terminated.

The City Council can only make an informed decision after the open, inclusive, and transparent public process is completed and a recommendation is made. Any other process invites cynicism and suspicion. A requirement for site selection is necessary to ensure that the City and County of Honolulu completes the process, and does not merely delay and then provide no alternatives to the Planning Commission and Land Use Commission.

c. A deadline.

Based upon Commissioner Komatsubara's statements, it appears that the CPC has surrendered its obligation to regulate the City and County of Honolulu by removing any time limit on the SUP. He stated the problem as follows:

"The problem still remains how to enforce this condition, how to enforce this promise....I don't know if there is ever going to be a simple answer, but I think going down the old path of just putting a date in there has not worked. We put it down three or four times before and every time we came to that date, it was extended further and further. I can understand why people feel they have been deceived

¹ In 86/SUP-05, the LUC previously deferred to the City and County of Honolulu as to whether the Waimanalo Gulch may be selected as the "new" landfill site. Just as Petitioners should be held to the conditions previously imposed, so should the LUC be held to its past determinations. In retrospect, that decision (which was also supported by OP) to defer to the City and County of Honolulu may have been incorrect, inasmuch as the decision to extend the SUP in 2003 was based on the City's commitment to close the WGS. Nevertheless, respecting the integrity of the process means that in this case we must respect prior decisions, both the requirement for a Blue Ribbon Committee process with an automatic expiration date as well as the deferral to the City and County as to the consideration of the Waimanalo Gulch location.

because this keeps on being extended.” (Exhibit 71, Tr. 7/31/09, p.4)

Having correctly stated the problem with enforcement, Commissioner Komatsubara concluded that the CPC could not enforce a time deadline. He stated:

“It becomes incumbent on us as to whether we enforce that commitment or not. It is kind of a game of chicken, however, because at the same time we really don’t want to close this landfill [by revoking the permit]. I asked myself the question, I said, “Would you, Kerry, really be willing to close the Waimanalo Gulch?” And the answer is no.”
(Exhibit 71, Tr. 7/31/09, p. 7)

Commissioner Komatsubara, however, is wrong. He tries to resolve the problem of enforcing the time deadline by eliminating the time deadline. But this merely surrenders the CPC’s obligation to impose appropriate conditions. The solution actually lies in setting clear requirements with clear deadlines, and an automatic expiration if these requirements are not met. It is then up to the City and County of Honolulu to follow through. If the City and County of Honolulu wants to avoid the early expiration of the SUP, it will be forced to conduct a site selection process, make a selection, and come back to the Planning Commission and the LUC with that decision and information about the alternatives considered.

d. Automatic expiration

The CPC’s new Condition 1 on the 2008/SUP-2 only calls for the Applicant to “begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGSLL.” This condition, which is so loosely constructed, easy to fulfill and so unenforceable so as to render it meaningless, is further stripped of its meaning by the CPC’s own admission that it was unwilling to enforce a condition anyway.

The LUC should look to the language of the 2003 Amended 86/SUP-5, Condition 1. In 2003, the LUC eased much of the very real burden of having to enforce critical conditions against the County by adding a provision for an automatic expiration of the Permit. Although there continued to be problems with compliance, the County Council and Administration did take affirmative action in convening the Blue Ribbon Committee and passing a Resolution to choose a site.

In this case, if the Blue Ribbon Committee fails to complete its process within twelve months or the City Council fails to make a site selection six months thereafter, the SUP should automatically expire.

e. Other Conditions.

Certainly, if the third boiler at H-Power is completed, curbside recycling and transshipment continued, then the City & County can reduce the MSW stream to minimal amounts. These practices should significantly alter the County's need for additional MSW landfill space. The SUP condition involving the County's pursuit of landfilling alternatives should be more tightly constructed, providing measurable and enforceable benchmarks whose failure to obtain would result in the automatic expiration of the Permit. In keeping with the OP's original recommendations, an extension of the 86/SUP-05 for a short timeframe of no more than three years could be granted for the entire SUP, which will allow regulators and policymakers to reassess the actual success of these three new and developing programs in the context of a new site selection process.

A condition requiring the City and County of Honolulu to correct any violations (through e.g. variance, grandfathering or zoning change) of its own Ordinances, specifically Section 21-5.680, should be included.

A community benefits package as approved by the City Council should be given for each fiscal year in which the SUP is valid.

Annual Reports should be provided to the Department of Planning and Permitting and the Land Use Commission, not just the Planning Commission.

The Department of Planning and Permitting as well as the Land Use Commission should be allowed to impose additional conditions, not just the Planning Commission.

Conclusions

For all these reasons, OP recommends that the 2008/SUP-02 be denied. OP also recommends that the request to withdraw 86/SUP-05 be denied, and that 86/SUP-05 instead be extended for a maximum of three years, with additional expansion space for a maximum of one cell for ash and two cells for MSW. Further, the Petitioner should be required to complete an inclusive, transparent, public, site-selection process (like the Blue Ribbon Committee previously formed) within twelve months, with an automatic expiration if this condition is violated. Subsequently, the City Council should be required to select a site(s) based on the forwarded recommendations within an additional six months (or 18 months from the date of the Decision and Order), again with an automatic

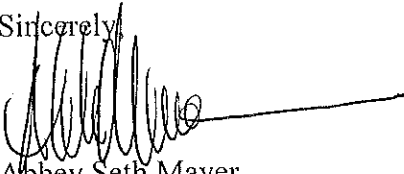
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expiration of the Permit if this condition is violated. If the Land Use Commission believes that 86/SUP-05 cannot be extended, OP then recommends that all applicable conditions in 86/SUP-05 be included in 2008/SUP-02, along with the above-discussed requirements.

Alternately, the OP recommends that the entire Application be remanded back to the CPC in order to correct procedural errors and conflicts with the County's Land Use Ordinances.

Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Abbey Seth Mayer", with a long horizontal line extending to the right from the end of the signature.

Abbey Seth Mayer
Director

Encl: Map