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LAND USE COMMISSION  
STATE OF HAWAII

2019 OCT 28 P 2:15

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KO OLINA COMMUNITY ASSOCIATION

and MAILE SHIMABUKURO

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF  
HONOLULU

For a New Special Use Permit to  
Supersede Existing Special Use Permit  
to Allow A 92.5-Acre Expansion and  
Time Extension for Waimānalo Gulch  
Sanitary Landfill, Waimānalo Gulch,  
O'ahu, Hawai'i, Tax Map Key: 9-2-03: 72  
And 73

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF  
HONOLULU

To delete Condition No. 14 of Special

DOCKET NO. SP09-403

PLANNING COMMISSION FILE NO.  
2008/SUP-2

**INTERVENORS KO OLINA  
COMMUNITY ASSOCIATION AND  
MAILE SHIMABUKURO'S  
OBJECTIONS TO APPLICANT'S  
PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
DECISION AND ORDER  
APPROVING THE  
RECOMMENDATION OF THE  
CITY AND COUNTY OF  
HONOLULU PLANNING  
COMMISSION TO APPROVE THE  
STATE SPECIAL USE PERMIT  
APPLICATION WITH  
MODIFICATIONS, AS MODIFIED  
BY THE LAND USE COMMISSION  
ON OCTOBER 10, 2019;**

## CERTIFICATE OF SERVICE

Use Permit No. 2008/SUP-2 (also referred to as Land Use Commission Docket No. SP09-403) which states as follows:

“14. Municipal solid waste shall be allowed at the WGS� up to July 31, 2012, provided that only ash and residue from H-POWER shall be allowed at the WGS� after July 31, 2012.”

**INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE SHIMABUKURO’S OBJECTIONS TO APPLICANT’S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER APPROVING THE RECOMMENDATION OF THE CITY AND COUNTY OF HONOLULU PLANNING COMMISSION TO APPROVE THE STATE SPECIAL USE PERMIT APPLICATION WITH MODIFICATIONS, AS MODIFIED BY THE LAND USE COMMISSION ON OCTOBER 10, 2019**

Intervenors Ko Olina Community Association (the “**Association**”) and Maile Shimabukuro (together, “**KOCA**”) submit their objections to Applicant Department of Environmental Services’ Proposed Findings of Fact, Conclusions of Law, and Decision and Order Approving the Recommendation of the City and County of Honolulu Planning Commission to Approve the State Special Use Permit Application with Modifications, as Modified by the Land Use Commission (“**LUC**”) on October 10, 2019, filed on October 18, 2019 (“**ENV’s Proposed Decision**”).

**1. ENV’s Proposed Decision Does Not Include a Closure Condition in the D&O.** The LUC adopted a closure condition during the October 10, 2019 hearing. See ENV’s Proposed Decision at 83-86. ENV’s Proposed Decision acknowledges that



that a motion was passed to “**approve the Applications with modifications, which requires the WGS� to close on March 2, 2028.**” ENV’s Proposed Decision at 28 (emphasis added). Yet the closure condition is **omitted** from ENV’s proposed decision and order. See ENV’s Proposed Decision at 83-86. Instead, the closure requirement is noted in Conclusion of Law 3, which states that the LUC “requires the WGS� to stop accepting all waste on or before March 2, 2028.” ENV’s Proposed Decision at 82. It makes no sense to “require[]” closure as a legal conclusion, but not include that requirement in the decision and order.

ENV’s approach is not faithful to the decision made by the LUC. The decision made at the October 10 hearing was to close the Landfill by 2028. That decision must be included in the LUC’s decision and order.

**2. ENV’s Proposed Decision Improperly Includes a New “Capacity” Figure that Is Not Supported by the Record.** Finding of Fact 269 reports that “as of April 22, 2011,” the Waimanalo Gulch Sanitary Landfill (“WGS�” or the “Landfill”) was expected to reach capacity in August 2040, citing Exhibits A-2 and A-3. Conclusion of Law 3 repeats this estimate. The August 2040 estimate is based on Exhibit A-3, which is an unsworn document created by the Landfill’s operator (Waste Management) as of April 22, 2011.

Two months later, ENV provided an estimate to the Planning Commission under penalty of perjury in its 2011 Application dated June 28, 2011. In the Application, ENV represented that, “[b]ased upon typical rates of disposal at WGS�, that **remaining capacity is estimated to be approximately fifteen years**” or until

2026. Ex. K161 (6/28/11 letter from ENV Director Steinberger at 12). This estimate was supported by a declaration by ENV's Director made under penalty of perjury. Ex. K161 (Steinberger Decl. ¶ 22) ("Based upon typical rates of disposal at WGS, the remaining capacity in the permitted area is estimated to be approximately fifteen years."). Statements made in an application are binding on the applicant. See Hawai'i Administrative Rules § 15-15-96(a) ("The commission may impose additional restrictions as may be necessary or appropriate in granting the approval, including the **adherence to representations made by the petitioner.**") (emphasis added). ENV Director Steinberger's estimate is conclusive.

**3. ENV's Proposed Decision Tries to Invite Reversal by Purposefully Failing to Include Findings in Support of Closure.** ENV's Proposed Decision includes no findings of fact or conclusions of law that support or explain the basis for the closure condition. By omitting findings and conclusions that would support closure, ENV betters its chances on appeal.

By contrast, KOCA's proposed decision includes findings and conclusions that fully support and explain the basis for the LUC's closure condition, such as the 15-year capacity estimate that ENV provided in its 2011 Application, ENV's prior promises and representations to close the Landfill, the adverse impact the Landfill has had on the surrounding community, the length of time the Landfill has already been in operation and the time to site and develop a new landfill.

**4. Other Objections.** ENV's Proposed Decision largely cuts and pastes from the Honolulu Planning Commission's 2019 findings, which the LUC did not adopt at its



October 10 meeting and which allowed the Landfill to operate to capacity. Portions of those findings are inconsistent with the record and the LUC's decision to impose a closure condition by 2028.

Given the similarity between the findings in the Planning Commission's 2019 decision and ENV's Proposed Decision, KOCA incorporates its objections to the Planning Commission's 2019 findings by reference based on the following correlation table.

<b>Subject</b>	<b>Planning Commission's 2019 decision</b>	<b>ENV's Proposed Decision</b>
Procedural matters	FOF 1- 26	FOF 1-26
2008 Application Proceeding - Exhibits and Witnesses	FOF 27-34	FOF 47-54
Post-hearing submissions by the parties	FOF 35-38	FOF 27-30
Proposal for Special Use Permit	FOF 40-45	FOF 160-165
Surrounding Uses	FOF 46-54	FOF 174-182
Stability, Controlled Blasting and Berms	FOF 55-65	FOF 183-193
Storm water and leachate	FOF 66-69	FOF 194-197
Gas collection, control system, and EPA notice of violation	FOF 70-74	FOF 198-202
Traffic	FOF 75-76	FOF 205-206
Archeological and cultural resources	FOF 77-81	FOF 207-211
Purpose and need	FOF 82	FOF 268
	FOF 84	FOF 270
	FOF 87-90	FOF 271-274
	FOF 93-94	FOF 275-278
State and County Land Use Law and Regulations	FOF 96	FOF 292
	FOF 97-102	FOF 286-291

Subject	Planning Commission's 2019 decision	ENV's Proposed Decision
2009 Decision and Order	FOF 103-116	FOF 32-45
2011 Application	FOF 117-143	FOF 55-81
Hawaii Supreme Court Decision	FOF 144-145	FOF 82-83
Consolidation of proceedings	FOF 146-207	FOF 84-145
Landfill Siting	FOF 208-223	FOF 212-227
Waste Diversion	FOF 224-249	FOF 228-253
Landfill Design and Operations	FOF 250-262	FOF 254-264
Purpose and need	FOF 263-269	FOF 271-277
	FOF 270-276	FOF 279-285

One new Finding of Fact in ENV's Proposed Decision is **Finding of Fact 293**, which appears to be a summary of the preceding findings to establish that the Applications "**generally**" meet the SUP guidelines. ENV's Proposed Decision at 71 (emphasis added). The use of the word "generally" implies that there are at least some guidelines that are not met by the Applications.

KOCA incorporates its objections to this summary finding by reference based on its objections to the Planning Commission's 2019 decision. KOCA further objects and responds to Finding of Fact 293 as follows:

**First**, as set forth in KOCA's proposed decision, the Applications cannot meet those guidelines unless a closure condition is imposed.

**Second**, the use is contrary to the objectives sought to be accomplished by Hawai'i land use law and regulations. See ENV's Proposed Decision at 72. Specifically, the state plan contemplates "manag[ing] natural resources and environs to encourage their beneficial and multiple use without generating costly or irreparable



environmental damage,” HRS § 226-11(a), and “[r]educing the threat to life and property from erosion, flooding, . . . or man-induced hazards and disasters,” HRS § 226-13(b). Among other things, the proposed use does not meet the standards because, as a result of poor planning, rainfall events caused the Landfill to release waste and leachate into the surrounding shoreline.

**Third**, the proposed use has adversely affected surrounding property. *See* ENV’s Proposed Decision at 73. Finding of Fact 293 does not disclose that the Landfill has been cited repeatedly for violating state laws or that the Landfill has harmed the health and safety of the surrounding community. For example, an employee at the Landfill falsified explosive gas readings from mid-2010 to August 2011. The failure to monitor gas readings was a threat to public health and safety. The Landfill has a long track record of adversely affecting the surrounding community by releasing waste and leachate and by causing odors, noise, dust, blasting, visual blight, truck traffic and flying litter.

**Fourth**, Finding of Fact 293 includes a number of representations by ENV. Until the Landfill closes in 2028, ENV must “adhere[] to [these] representations.” *See* HRS § 205-6(d); HAR § 15-15-96(a). Specifically, ENV must abide by the following representations:

- **Dust.** “To reduce and mitigate the potential for the release of fugitive dust from the site, preventative measures will be practiced by the operator in accordance with the provisions of HAR, Chapter 11-60.1-33, Fugitive Dust.” ENV’s Proposed Decision at 73.
- **Vehicles.** “Vehicular Odors and Exhausts - Exhaust emissions are mitigated by commercial and private vehicle operators’ compliance with HAR



Chapter 60-1, Air Pollution Control, Subpart 1.34, Motor Vehicles. The site operator will also ensure that all vehicles and equipment associated with landfill operations are properly muffled and maintained in good operating condition." *Id.* at 74.

- **Odor.** "On site odor management will involve: (1) refuse vehicle processing and control, (2) limiting the size of the daily disposal area; and (3) use of an odor neutralizing system." *Id.* "Landfill Gas Associated Odor - The generation of landfill gas is controlled by use of a landfill gas collection and control system (GCCS) that was installed in 2005. The system is operating in accordance with requirements and no adverse effects from the performance of the system to address landfill gas associated odor are anticipated." *Id.*
- **Gases.** "Landfill Associated Gases - Landfill gases at WGS� are monitored in compliance with RCRA Subtitle D regulations, HAR Chapter 11-58, and the Landfill's Solid Waste Permit." *Id.* at 74-75.
- **Litter.** "Measures to mitigate the potential for windblown litter include the use of permanent, temporary, and portable litter fences. Waste is and will continue to be processed and covered with cover material as soon as practicable. In addition, on-call or standby work crews are deployed concurrent with the acceptance of refuse at WGS�. Applicant will enforce existing rules, regulations and procedural practices to reduce the incidence of windblown litter. WMH also enforces the rule requiring all loads entering the Landfill to be secured by the use of a tarp, cover or enclosure." *Id.* at 75.
- **Groundwater Contamination.** "There is potential for leachate from the Landfill entering brackish groundwater in the area of the Landfill. Mitigation to address this issue is currently provided through the existing Leachate Collection and Removal System ('LCRS') design. As required, the LCRS system design will be modified to ensure against the potential for adverse effects to groundwater and hydrogeological resources of the site." *Id.* at 76.
- **Visual Impacts.** Portions of the existing area of work are visible from various locations along Farrington Highway and the Ko Olina Resort. Mitigation involves: (1) the location of the planned area of expansion further mauka and within the Waimanalo Gulch to minimize views into active areas of landfilling; and (2) the use of landscaping with trees and vegetative cover." *Id.* at 76.



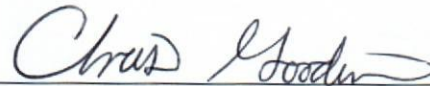
**Fifth**, unusual conditions, trends, and needs have not arisen since the district boundaries and rules were established. Finding of Fact 293 does not explain at all what has changed since the district boundaries were established.

**Sixth**, there is no evidence that the land is unsuited for uses permitted within the agricultural district. Although the land could not be farmed at this point, there is no evidence that the land would be unsuited for other permissible uses within the agricultural district, including open area recreation, wind energy facilities or solar energy facilities. *See* HRS § 205-4.5(a).

**5. Conclusion.** Based on the foregoing, the LUC should reject ENV's Proposed Decision. KOCA requests that the LUC adopt its proposed Findings of Fact, Conclusions of Law and Decision and Order adopting with Modifications the City and County of Honolulu Planning Commission's Recommendation to Approve Special Use Permit Applications submitted on October 18, 2019.

DATED: Honolulu, Hawai'i, October 28, 2019.

CADES SCHUTTE  
A Limited Liability Law Partnership



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The undersigned certifies that on this day a copy of the foregoing document was  
duly served on the following persons by hand delivery and email:



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