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HONOLULU

2023 JUN 19 PM 2:07  
DEPT. OF PLANNING  
AND PERMITTING  
CITY & COUNTY OF HONOLULU



BEFORE THE PLANNING COMMISSION  
OF THE CITY AND COUNTY OF HONOLULU  
STATE OF HAWAII

In the Matter of Application of

DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF  
HONOLULU

Application to Modify SUP No. 2008/SUP-2  
(SP09-403) by Modifying Condition No. 1 of the  
Planning Commission's Findings of Fact,  
Conclusions of Law, and Decision and Order,  
dated June 10, 2019, and (2) Condition No. 5 of  
the LUC's Findings of Fact, Conclusions of Law,  
and Decision and Order Approving with  
Modifications the City and County of Honolulu's  
Planning Commission's Recommendation to  
Approve Special Use Permit, certified on  
November 1, 2019

FILE NOS. 2008/SUP-2  
2023/SUP-2

DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF  
HONOLULU'S RESPONSE TO  
INTERVENORS KO OLINA  
COMMUNITY ASSOCIATION AND  
MAILE SHIMABUKURO'S OBJECTION  
TO NOTICE OF HEARING, DATED  
JUNE 8, 2023; CERTIFICATE OF  
SERVICE

**DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF  
HONOLULU'S RESPONSE TO INTERVENORS KO OLINA  
COMMUNITY ASSOCIATION AND MAILE SHIMABUKURO'S  
OBJECTION TO NOTICE OF HEARING, DATED JUNE 8, 2023**

Comes now Applicant DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU ("ENV"), by and through its undersigned counsel, and hereby submits its Response to KO OLINA COMMUNITY ASSOCIATION and MAILE SHIMABUKURO'S (collectively, "KOCA") Objection to Notice of Hearing, dated June 8, 2023. ENV contends that the Honolulu Planning Commission's public hearing notice (the "Notice") (see Exhibit "1" of KOCA's Objection to Notice of Hearing) is proper and provides notice that a contested case hearing may be held if a person or agency's petition to intervene is granted.

Previously, the Planning Commission held contested case hearings on two applications filed by the City and County of Honolulu, Department of Environmental Services: (1) an application for a new special use permit ("SUP"), the expansion of the WGSL and the withdrawal of County Special Use Permit NO. 86/SUP-5 ("2008 Application"), and (2) an application to modify the LUC Order Adopting the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications dated October 22, 2009 ("2009 LUC Order") for County Special Use Permit No. 2008/SUP-2 for the sole purpose of deleting the July 31, 2012 deadline for the landfill to accept municipal solid waste ("MSW") ("2011 Application"). The Planning Commission ordered the consolidation of County Special Use Permit File No. 2008/SUP-2 and the proceedings on ENV's 2011 Application and issued and transmitted a single, consolidated Findings of Fact, Conclusions of Law, and Decision and Order dated June 10, 2019 ("Planning Commission's 2019 Decision") to the State of Hawaii Land Use

Commission (“LUC”). The LUC considered the consolidated record of the proceedings, the Planning Commission’s 2019 Decision, the oral arguments of the parties and the records and files relating to the 2008 and 2011 Applications and issued its Findings of Fact, Conclusions of Law, and Decision and Order Approving with Modifications the City and County of Honolulu Planning Commission’s Recommendation to Approve Special Use Permit, certified on November 1, 2019 (“LUC’s 2019 Decision”). The LUC’s 2019 Decision was not appealed by any party.

On December 23, 2022, ENV submitted to the Planning Commission its Application to Modify SUP No. 2008/SUP-2 (SP09-403) by Modifying (1) Condition No. 1 of the Planning Commission’s 2019 Decision and (2) Condition No. 5 of the LUC’s 2019 Decision (“2022 Application”).

The Rules of the Planning Commission (“RPC”) requires notice of public hearings before the commission on petitions for special use permits be published in a newspaper of general circulation in the county at least 30 calendar days prior to the scheduled hearing. See §§ 2-43(a) and 2-12(b) of the RPC. Notices of public hearings must include, at a minimum, a statement of:

- (1) The date, time, place, and nature of hearing;
- (2) The legal authority under which the hearing is to be held;
- (3) The particular sections of the statutes and rules involved;
- (4) An explicit statement in plain language of the issues involved;
- (5) The fact that parties may retain counsel if they so desire, and an individual may appear on his own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust, or association;
- (6) Any person or agency wishing to intervene as a party shall file a petition with the commission within fourteen (14) days after the date of notice by newspaper publication;

- (7) The petition must conform to the requirements of the adopted rules of the planning commission.
- (8) Public testimony will be taken at the hearing.

Section 2-43(c) of the Rules of the Planning Commission.

In accordance with the above-stated rules, the Planning Commission caused notice of the June 28, 2023 public hearing to be published in the Honolulu Star-Advertiser on May 29, 2023 (the “Notice”). The Notice contains all information required by Section 2-43(c) of the RPC, including notification that:

Any person or agency wishing to intervene as a party in the proceeding shall file a petition with the Commission within fourteen (14) days after this notice is published in the Honolulu Star-Advertiser. The petition must conform to the requirements of Subchapter 5 of the Rules of the Planning Commission, which are available at the Department of Planning and Permitting. A contested case hearing may be held on the matter pursuant to action by the Planning Commission to grant the petition.

Id. at page 2.<sup>1</sup>

KOCA’s objection to the notice of hearing stems from their position that this new proceeding is already a contested case in which they are parties. But KOCA’s argument is based on their participation in the prior contested case hearings, which ended with the entry of the Planning Commission’s 2019 Decision. See HRS § 91-1 (“‘Contested case’ means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.”); E & J Lounge Operating Co. v. Liquor Comm'n of City & Cty. of Honolulu, 118 Hawai‘i 320,

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<sup>1</sup> On the second page of the Notice, there is a typographical error: “The issue involved relates to whether to grant a Special Use Permit pursuant to Section 205-6, Hawaii Revised Statutes, to modify an existing condition to the State Special Use Permit (SUP) to extend the deadline to December 31, 2023 [sic] for identifying an alternative landfill site.” ENV’s request is for an extension until December 31, 2024, not 2023.

335 n.22, 189 P.3d 432, 447 (2008) (finding that a contested case includes “all acts and events between the time of commencement and the entry of judgment”). Again, the Planning Commission’s 2019 Decision (the “entry of judgment”) marks the end of the contested case in front of the Planning Commission.

Although some or all of the same agencies and/or persons may likely petition to intervene in this new proceeding, that fact does not make this a continuation of the previous contested case.<sup>2</sup> The current proceeding will be processed as a contested case after the Planning Commission publishes the notice of a public hearing (see RPC §§ 2-12(b), 2-43), interested persons or agencies petition to intervene within fourteen days of the date of newspaper publication of the Planning Commission’s notice (see RPC § 2-53(a)), the Planning Commission holds a hearing on the petition to intervene (see RPC § 2-55), and the Planning Commission grants the petition to intervene. See RPC § 2-56(c) (“If a petition to intervene is granted, the special use permit will be processed as a contested case under the provisions of this subchapter.”). Therefore, the Notice is proper as-is given the current status of ENV’s 2022 Application and the fact that KOCA’s Petition to Intervene has not been granted yet.

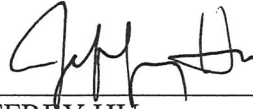
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<sup>2</sup> While ENV served KOCA and others named in its Certificate of Service given their historical participation in these Waimanalo Gulch Sanitary Landfill proceedings, ENV does not believe that some of these persons or agencies are parties to the instant proceeding until the Planning Commission has granted their petitions to intervene. See RPC § 1-5(j). For example, KOCA had previously petitioned to intervene twice in prior proceedings concerning ENV’s 2008 Application and 2011 Application (both granted). See Exhibits “4” and “5” of KOCA’s (1) Motion to Recognize Them as Existing Parties or in the Alternative (2) Petition to Intervene.

Based on the foregoing, ENV contends that the Planning Commission's Notice is proper and requests that it proceed with the public hearing on June 28, 2023, as stated in the notice published in the Honolulu Star-Advertiser on May 29, 2023.

DATED: Honolulu, Hawaii, June 19, 2023.

Respectfully submitted,



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DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF  
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FILE NOS. 2008/SUP-2  
2023/SUP-2

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A COPY OF THE DEPARTMENT OF  
ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S  
RESPONSE TO INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND  
MAILE SHIMABUKURO'S OBJECTION TO NOTICE OF HEARING was duly served  
by hand-delivery to the following on the date below, addressed as follows:

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DATED: Honolulu, Hawai'i, June 19, 2023.

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By   
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