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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 PROPOSED FINDINGS
OF FACT, CONCLUSIONS OF LAW, AND
DECISION AND ORDER;
CERTIFICATE OF SERVICE

**DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF
HONOLULU’S RESPONSE TO INTERVENORS KO OLINA COMMUNITY
ASSOCIATION AND MAILE SHIMABUKURO’S PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER**

COMES NOW Applicant DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU (“Applicant” or “ENV”), by and through its attorneys, JEFFREY HU and KAMILLA C. K. CHAN, Deputies Corporation Counsel, and respectfully submits its Response to Intervenor Ko Olina Community Association’s and Maile Shimabukuro’s (collectively referred to as “KOCA”) Proposed Findings of Fact, Conclusions of Law, and Decision and Order, filed on December 22, 2023 (“KOCA’s Proposed Order”), pursuant to the Rules of the Planning Commission (“RPC”) § 2-74.

I. STANDARD OF REVIEW FOR REVERSAL OR MODIFICATION OF ADMINISTRATIVE FINDINGS, CONCLUSIONS, DECISIONS, OR ORDERS

To prevent judicial reversal or modification of administrative findings of fact under § 91-14(g), Hawaii Revised Statutes (“HRS”), the Planning Commission (“Planning Commission”) should, upon review of the record, reverse or modify findings that are “[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record.” In re Gray Line Hawaii Ltd., 93 Hawai‘i 45 (2000). A finding of fact is clearly erroneous when: (1) the record lacks substantial evidence to support the finding or determination, or (2) despite substantial evidence to support the finding or determination, the Planning Commission is left with the definite and firm conviction that a mistake has been made. See Kienker v. Bauer, 110 Hawai‘i 97, 105 (2006).

Similarly, conclusions of law should be reversed or modified where the Planning Commission finds they are in violation of constitutional or statutory provisions, in excess of the statutory authority or jurisdiction of the Commission, or affected by other error of law. Id.

II. DISCUSSION

Applicant's specific exceptions to KOCA's Proposed Order are detailed in the paragraphs below.

A. **OBJECTIONS TO CERTAIN OF KOCA'S FINDINGS OF FACT**

FOF Paragraph 5:

5. The Applicant failed to meet those conditions because it did not identify an alternative landfill site by December 31, 2022.

While Applicant did not identify an alternative landfill site by December 31, 2022, Applicant objects to the statement that it "failed to meet those conditions". Prior to the December 31, 2022 deadline, Applicant located six potential Act 73 (2020) compliant sites, and was set on identifying one of them prior to the deadline. But BWS' November 16, 2022 official position of disapproval of all six potential sites (due in part to Red Hill, see Application's Exhibit "C" at 3 and 4) caused Applicant to pause and reconsider. Applicant filed its 2022 Application to modify the December 31, 2022 condition once Applicant realized that more time would be needed to locate a more viable site.

Furthermore, Applicant filed its Application prior to the December 31, 2022 deadline, and is following the applicable legal process to seek an extension of time in regard to that single condition.

FOF Paragraphs 20-34, generally:

[Not copied here due to length, please see KOCA's Proposed FOF at 7-9.]

Not relevant to the Applicant's current need for an extension of time to identify a new landfill site, given reasons as explained in the 2022 Application.

FOF Paragraphs 20, 21:

20. Although the Modification Application only concerns the site selection deadline, ENV does not write on a blank slate. The 2019 LUC Order details the history of the WGSL from initial permitting in 1987 to 2019, and the Modification Application must be viewed in that context. 2019 LUC Order at FOF 1–262; 274–93.

21. In the history of the WGSL, the City and County of Honolulu (“City”) has promised the West O‘ahu community several times that the WGSL will close. It has failed to keep those promises. 2019 LUC Order at FOF 282–85.

These paragraphs contain statements that are argumentative (e.g., “ENV does not write on a blank slate” and “the Modification Application must be viewed in that context”), and not factual. The conclusion that the City “failed to keep those promises” disregards the various nuances, such as extensions that were legally granted and valid reasons for the extensions, in the WGSL’s permit history.

FOF Paragraph 34:

34. The Applicant did not know why it took five years for the consultant to issue a report, nor could the Applicant explain why it had not selected a new site between receipt of the consultant’s report in 2017 and 2020. Tr. 10/18/23 (Babcock) at 58:25–59:14.

KOCA asked ENV Director Roger Babcock (“Director Babcock”) to speculate on an irrelevant report issued a couple administrations ago. The current administration had made it known that a new search was necessary. See, e.g., Exhibit “A9” (ENV’s Third Semi-Annual Report to the LUC dated 7/14/21) at 4 (“An initial review of the available sites in Fall 2020 reduced the number of potential future landfill sites to four ... based on sites short-listed in the 2017 landfill siting report. However, additional review in January 2021 determined that a more thorough review and evaluation of new locations island-wide with respect to Act 73 is warranted. The City is currently engaged in completing a review of available locations and is developing a new Mayor’s Advisory Committee on Landfill Site Selection.”).

As detailed in Applicant's 2022 Application, the current administration appointed a Landfill Advisory Committee in 2021 to evaluate and score six potential sites that were Act 73 (2020) compliant, but none of those sites were recommended given the sites' proximity to the BWS' No Pass Zone and the heightened awareness and sensibility to protecting O'ahu's water aquifer as a result of the recent Red Hill incident (2021).

FOF Paragraph 41:

41. ENV briefed the BWS on October 24, 2022 on the status of landfill site selection, then followed up with a letter on November 3, 2022 asking for the BWS's official position. The BWS responded on November 16, 2022 that it was opposed to any of the six landfill sites considered by the LAC because of their placement within the no-pass zone. 10/18/23 Tr. (Babcock) at 35:17–27:19 [sic].

The BWS' November 16, 2022 letter (and contents) would be a more appropriate and detailed source. See Application's Exhibit "C". The BWS also cited to Red Hill as an issue in its November 16, 2022 letter. See 10/18/23 Tr. (Babcock) at 37:20-38:6; Application's Exhibit "C" at 3 and 4 (e.g., "As you know, the people of Oahu are still coping with what the Hawaii Department of Health aptly described as 'a humanitarian and environmental disaster' caused by fuel releases from the U.S. Navy's Red Hill Bulk Fuel Storage Facility that resulted in the contamination of Oahu's drinking water supply and the pollution of this island's irreplaceable sole-source groundwater aquifer.").

FOF Paragraph 42:

42. However, the Applicant has been aware of the no-pass zone as a landfill siting consideration since at least 2003. 10/18/23 Tr. (Babcock) at 60:14–17.

Applicant's awareness of the No Pass Zone since at least 2003 is not relevant. As stated in Paragraph 41 above, and in the 2022 Application, on November 16, 2022 the BWS, for the very first time, provided its official position of disapproving all six potential sites. Again, the

Application also discusses the recent 2021 Red Hill incident that has heightened public awareness of protecting O‘ahu’s freshwater aquifer.

FOF Paragraphs 43, 44, 45, 46, 47:

- 43. Although the WGS� serves the whole island, its neighbors in the West O‘ahu community bear the brunt of the landfill’s harms.
- 44. Since the WGS� opened in 1989, its neighbors have coped with environmental impacts including odor, litter, dust, visual blight, and traffic. Tr. 11/01/23 (Williams) at 19:11–14.
- 45. The community has also experienced the worst-case scenario when it comes to being neighbor to a landfill. In 2011, the WGS�’s operator prematurely opened a cell before necessary drainage systems were installed. After a severe storm, waste from that cell entered the stormwater drainage system, causing garbage—including medical waste, blood samples, and sharps—to drain into the ocean and onto the beaches of the westside, all the way from Pokai Bay to White Plains Beach. The community was forced to clean up the dangerous waste itself. Tr. 11/01/23 (Williams) at 20:7–22:22; 2019 LUC Order at FOF 336–44.
- 46. The Planning Commission received numerous letters from West O‘ahu community members opposing further extensions to the landfill’s operations and encouraging the Planning Commission to impose more oversight over ENV and hold it accountable for moving on its obligations. *See Exs. K266–K355.*
- 47. The community situated nearest the landfill has been adversely affected by the landfill’s continued operations and continues to be impacted by living near an active landfill, notwithstanding the Applicant’s numerous promises to the community over the years that it will close the WGS�.

Not relevant to the 2022 Application.

FOF Paragraphs 48-63, generally:

[Not copied here due to length, please see KOCA’s Proposed FOF at 12-15.]

KOCA cites to the historical 2009 Planning Commission Findings of Fact, Conclusions of Law, and Decision and Order’s condition to “begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGS�. The Applicant’s effort to identify

and develop such sites shall be performed with reasonable diligence ...” However, the more recent and applicable 2019 LUC Decision and Order contains no such permit condition or requirement of “reasonable diligence”. See Application’s Exhibit “B” at 102-107. ENV’s Application is based on modifying a single condition in the 2019 LUC Decision and Order (and not the 2009 [sic] Planning Commission’s Decision and Order), and KOCA’s entire argument about “no reasonable diligence” should be disregarded as irrelevant.

To be clear, ENV is not suggesting that it did not act with reasonable diligence during the recent site selection process. Rather, it is stating that such duty to act with reasonable diligence was not expressed/imposed in the 2019 LUC Decision and Order, which sets forth the actual permit conditions on pages 103-107.

Furthermore, KOCA provides no information about the impact of Act 73’s (2020) new restrictions, the BWS’ official disapproval of all six potential sites, and the Red Hill fuel leak anywhere in this section. These are critical issues presented in ENV’s Application and Director Babcock’s testimony that must be weighed, should the Planning Commission consider whether ENV acted with “reasonable diligence”.

FOF Paragraphs 63, 64:

63. Because the Applicant has failed to act with reasonable diligence since the 2019 Order, the Planning Commission finds that it is necessary and appropriate to impose additional conditions on the extension sought in these proceedings in order to ensure that the Applicant is accountable in meeting its deadlines.

64. The reporting conditions imposed below were requested by KOCA. ENV did not object to the reporting conditions. Tr. 10/18/23 (Babcock) at 63:4–7; Tr. 11/01/23 (Williams) at 26:18–23.

Again, “reasonable diligence” is irrelevant because it is not a condition imposed by the LUC in its 2019 Decision and Order. But ENV disagrees with KOCA’s conclusion that it failed

to act with reasonable diligence since the 2019 Order, and again, points to the events leading up to the December 2022 deadline as detailed in the Application and Director Babcock’s testimony. However, ENV does not object if the Planning Commission wishes to impose the additional in-person reporting condition.

Furthermore, the Planning Commission may impose a mutually agreed upon additional reporting condition without making a finding as to “reasonable diligence”.

B. OBJECTIONS TO KOCA’S CONCLUSIONS OF LAW

COL Paragraph 5:

5. The Applicant did not identify an alternative landfill site by December 31, 2022 and is therefore out of compliance with its special use permit.

Applicant disagrees that it is “out of compliance with its special use permit”. Applicant timely filed its Application to modify the permit condition at issue, and is going through the applicable and proper legal process.

COL Paragraph 6:

6. Further, the Applicant has been under an obligation to identify a new landfill with “reasonable diligence” since at least October 22, 2009.

Argumentative and not a conclusion of law. The applicable permit condition that details ENV’s obligation to identify a new landfill site is found in condition no. 5 of the 2019 LUC Decision and Order certified on November 1, 2019 (see Application’s Exhibit “B”), and it contains no mention of “reasonable diligence”:

5. By no later than December, the Applicant shall identify an alternative landfill site that may be used upon closure of WGS�. Upon identification of the alternative landfill site, the Applicant shall provide written notice to the Planning Commission and the LUC.

COL Paragraph 7:

7. The Applicant has not performed its site selection obligations with reasonable diligence.

Applicant objects and disagrees with this COL. This COL does not take into account the findings and rulings made by the Planning Commission and LUC since 2009, as well as the issues presented in the current Application. Again, the applicable permit condition no. 5 from the 2019 LUC Decision and Order does not impose a duty on Applicant to perform its site selection obligations with “reasonable diligence.” See Application’s Exhibit “B” at 102-107.

COL Paragraphs 10, 11:

10. Moreover, given the Applicant’s history of failing to meet deadlines, additional oversight by the Planning Commission is necessary and appropriate to ensure that the Applicant proceeds with “reasonable diligence” and is held accountable for meeting the siting deadline and complying with all other conditions in its special use permit.

11. Requiring the Applicant to report at least quarterly, in person, to the Planning Commission to report the efforts it has taken and plans to take to identify an alternative landfill site by December 31, 2024; to explain how its landfill siting efforts have been reasonably diligent; and to answer questions from the Commission and the community; is a necessary and appropriate condition to ensure that the extended siting deadline is met.

Applicant objects to the mischaracterization of “history of failing to meet deadlines”, particularly when Applicant has consistently gone through the applicable legal process to seek extensions, good cause was/were found, and extensions were granted.

In regard to landfill siting efforts, Applicant currently provides semi-annual reports to the Planning Commission and LUC and quarterly in-person public meetings in accordance with the current SUP permit conditions. But Applicant does not object to an additional quarterly in-person report to the Planning Commission, if the Planning Commission deems it necessary.

Lastly, there is no “reasonable diligence” requirement in the current applicable permit, which is the 2019 LUC Decision and Order. See Application’s Exhibit “B” at 102-107.

C. OBJECTION TO KOCA’S PROPOSED DECISION AND ORDER

DO Paragraph 1:

Applicant prefers its proposed conditions in its own Proposed Findings of Fact, Conclusions of Law, and Decision and Order, which modifies the date and does not completely reword the Planning Commission’s original condition no. 1.

DO Paragraph 2:

2. The Applicant shall report quarterly to the Planning Commission, in-person, to report the efforts it has taken and plans to take to identify an alternative landfill site by December 31, 2024; to explain how its landfill siting efforts have been reasonably diligent; and to answer questions from the Commission and the community.

Applicant objects to this condition, which contains improper and unnecessary requirements. The Planning Commission does not need to make a finding of reasonable diligence because reasonable diligence was not a permit requirement, nor should the Planning Commission now create such an imposition on ENV “to explain how its landfill siting efforts have been reasonably diligent”. As the evidence presented by ENV has shown, ENV was on track to select one of its six potential sites before the December 31, 2022 deadline, before the issues with the Red Hill incident (2021) and the BWS’ disapproval of all six potential sites caused ENV to pause and reconsider any other potential sites, including federal lands.

III. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that KOCA’s Proposed Order be rejected to the extent that it conflicts with Applicant’s Proposed Findings of Fact, Conclusions

of Law, Decision and Order filed on December 22, 2023 (“Applicant’s Proposed Order”) and to the extent that it inserts improper statements (as discussed herein), and requests that Applicant’s Proposed Order be adopted.

DATED: Honolulu, Hawai‘i, January 9, 2024.

DANA M.O. VIOLA
Corporation Counsel

By  _____
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KAMILLA C. K. CHAN
Deputies Corporation Counsel

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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 PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER** was duly served by hand-delivery, to the following on the date below, addressed as follows:

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