

LAND USE COMMISSION
MEETING MINUTES

October 10, 2019 – 9:00 a.m.
Airport Conference Center
400 Rodgers Blvd. Suite 700, Room #3
(In Hawaiian Airlines Terminal Building)
Honolulu, Hawaii 96819

COMMISSIONERS PRESENT: Edmund Aczon
Nancy Cabral
Dan Giovanni
Gary Okuda
Jonathan Scheuer
Dawn N. S. Chang
Arnold Wong
Lee Ohigashi

COMMISSIONERS EXCUSED: None
(8 seated Commissioners as of 10/1/19)

STAFF PRESENT: Daniel Orodener, Executive Officer
Lori Tanigawa, Deputy Attorney General
Bert Saruwatari, Staff Planner
Riley Hakoda, Staff Planner/Chief Clerk

COURT REPORTER: Jean McManus

CALL TO ORDER

Chair Scheuer called the meeting to order at 9:00 a.m.

**SP09-403 DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY
OF HONOLULU (WAIMANĀLO GULCH SANITARY LANDFILL- “WGSL”),
(O`ahu)**

APPEARANCES

Kamilla Chan, Esq., represented City and County of Honolulu, Department of Environmental Services (ENV)

Calvert Chipchase, Esq. and Chris Goodin, Esq., represented Intervenor-the Ko Olina Community Association and Senator Maile Shimabukuro (KOCA)
Richard Wurdeman, Esq., represented Intervenor Hanabusa (HNB)
Ian Sandison, Esq. represented Schnitzer Steel (SCHN)
Bryan Yee, Esq., represented State Office of Planning (OP)
Mary Alice Evans, Director, OP
Aaron Setogawa, Planner, OP
Dina Wong, City and County of Honolulu, Department of Planning and Permitting (DPP)

Chair Scheuer summarized the state of the proceedings and resumed the questioning of OP.

Chair Scheuer and Commissioners Okuda, Chang and Aczon requested clarification on OP's position on KOCA's proposed amendments, the validity of the past permit issued by the LUC, the relevancy of the permit to continued operations, the legal authorities that might apply to the issue, and where in the record a restoration requirement might be located. Mr. Yee stated that OP had no position on KOCA's proposed amendments and argued why there was evidence to support OP's position and how the consequences of OP's position statement were analyzed and assessed.

There were no further questions for Mr. Yee. Chair Scheuer called for the Parties to provide their rebuttals.

REBUTTAL

ENV

Ms. Chan described the consequences that she thought the Commission should consider if the application was denied and recapped the history of the Special Permit Application; and argued why allowing the site to continue to operate was important and how Intervenor KOCA's objections needed to be considered.

Commissioners Aczon, Chang, Ohigashi, Wong, Cabral and Chair Scheuer requested clarification on what Conditions should be considered, what the

consequences of denying the application would be, why a DBA was not pursued by ENV, what community engagement had been performed, what details were contained in the record about the landfill's remaining useful life and capacity, why date and time limits for the landfill's permit were not applicable, how capacity was measured and calculated, why certain records in the record were unreliable, why additional information from ENV contained in the record should be located and provided to the Commission, and why a DBA was not appropriate for the landfill.

Ms. Chan shared her knowledge of what had occurred during the permitting process and assessment of the landfill capacity. Chair Scheuer requested that additional information from the record also be provided to respond to Commissioner Ohigashi's question on whether mention of a 15-year lifespan had been captured in the record. Ms. Chan acknowledged the request.

There were no further questions for ENV.

Chair Scheuer declared a recess at 10:01 a.m. reconvened the meeting at 10:11 a.m. and called for Schnitzer Steel to make its final comments.

INTERVENOR SCHNITZER STEEL (SCHN)

Mr. Sandison shared his observations of the Commission's discussion with ENV and described his concerns with how closure of the landfill would affect his client, how information about the capacity and life-span timelines could need updating, how a remand to the Planning Commission, if done, needed to have specific instructions to obtain the information that the Commission was seeking, and how a denial of the application might result in an emergency proclamation or further legal actions.

Commissioners Okuda, , Cabral, Chang, Aczon, Ohigashi and Chair Scheuer requested clarification on SCHN's position on what happened during the Planning Commission proceedings and decision-making, the adequacy of evidence and the record to support the remand or denial of the requested Special Permit, the adequacy of evidence and the record to support seeking a DBA, what SCHN considered to be an expeditious solution to the situation, and how SCHN perceived the landfill lifespan references in the record.

Mr. Sandison described why SCHN preferred that the Commission remand the application to the Planning Commission and argued how SCHN did not see a basis for denying the permit or seeking a DBA, how allowing the continued operation would prevent harm to his client, and why further review of the record needed to be done to respond to certain capacity/lifespan/deadline questions posed by the Commission.

There were no further questions for Mr. Sandison.

Chair Scheuer called for Mr. Chipchase to make final comments.

INTERVENOR KOCA/SHIMABUKURO (KOCA)

Mr. Chipchase reviewed the standards and procedural guidelines that he felt the Commission should consider in its assessment of the Special Permit application and argued why the Commission should require a lifespan deadline for the landfill; and why a remand was not applicable, why granting of the permit should not be done, and why a denial of the permit was KOCA's preference. Mr. Chipchase added that if the Commission did grant the permit, KOCA would like a set date to end operations with Conditions supporting that decision.

Commissioners Okuda, Aczon, Chang, Giovanni requested clarification of KOCA's comments on why a remand was harmful, how continued landfill operations were being conducted, why no valid permit date existed, what possible remedies and agency jurisdictions might be involved, what type of Conditions KOCA would like to have included if the Commission granted the application with a set closure date, what legal considerations the KOCA would like the Commission to include in its decision-making, what community benefits could be used as incentives, and what logistical/quantitative considerations needed to be made and studied to describe the residual remaining capacity, timelines, and lifespan of the landfill if the permit was granted.

Chair Scheuer declared a recess at 11:11 a.m., reconvened the meeting at 11:21 a.m. and resumed allowing the Commission to question Mr. Chipchase.

Commissioners Ohigashi, Chang and Chair Scheuer requested clarification on community benefits for allowing the landfill, the landfill capacity issue, why a DBA was not pursued for the landfill, what resolution to the landfill permitting situation was possible under the current circumstances with the information contained in the record, and what monitoring/reporting systems had been used in the past.

Mr. Chipchase described why a DBA should have continued to be pursued by ENV, how the Planning Commission was unable to timely process the remand order, why efforts to establish closure date/time limits had failed, what possible remedies and benefits might occur if the Commission adopted KOCA's proposal, and how the community continued to be harmed by the landfill operation.

There were no further questions for Mr. Chipchase. Chair Scheuer called on Intervenor Hanabusa to make its comments.

INTERVENOR HANABUSA (HNB)

Mr. Wurdeman stated that he had summarized HNB's position yesterday and reminded the Commission of why HNB opposed a remand and argued why the Commission should not accept the Planning Commission's application.

Commissioners Giovanni, Okuda, Chang, Aczon and Chair Scheuer requested clarification on how a permit application denial would force the City to seek a DBA and what might happen if the Department of Health became involved, whether ENV had a lawful landfill operation, and what HNB's reaction would be to and LUC remand or granting the application might be.

Mr. Wurdeman described why HNB opposed the remand and would like the permit denied and how the LUC would need to rely on its own Findings of Fact, Conclusions of Law, Decision and Order rather than on the Planning Commission's or others. Mr. Wurdeman stated that he would need to consult with his client on how to react to a situation where the LUC denied the application and OP sought enforcement action from DOH and summarized why a denial was inappropriate.

Commissioner Ohigashi inquired how the Chair would manage the remaining meeting schedule since he was considering requesting an Executive Session to consult with the Board's attorney.

Commissioner Cabral commented that she would prefer to hear OP's comments first.

Chair Scheuer assessed the amount of time that OP needed and called on OP to make its comments.

OP

Mr. Yee restated OP's position and described how the joint stipulation between OP and ENV that had been presented to the LUC was developed and agreed upon.

Commissioners Aczon, Okuda, Chang and Chair Scheuer requested clarification on how OP thought the Planning Commission and KOCA might react to various decisions made by the LUC, whether a remand action could get new evidence admitted into the record, and how the KOCA proposed D&O might compare to the OP & ENV stipulation expectations. Mr. Yee provided his opinion on how the OP and ENV stipulation might be received, how new information might be acquired if a remand was ordered, and on how various KOCA proposed conditions would be considered.

Chair Scheuer commented that the LUC should remain focused on the landfill permit and not be distracted by the site selection process and suggested that the Commission take a "working lunch" during the requested Executive Session to expedite the proceedings. There were no objections to Chair Scheuer's suggestion.

Commissioner Ohigashi moved for an Executive Session to consult with the Board's attorney on the Board's powers, duties, privileges, immunities and liabilities regarding his concerns about the consistencies of the Findings of Fact, Conclusions of Law, Decision and Order and a remand action. Commissioner Cabral seconded the Motion. There was no discussion and by a voice vote, the Commission unanimously agreed to enter Executive Session at 12:27 p.m. and exited at 1:01 p.m.

Chair Scheuer reconvened the meeting at 1:09 p.m. and called for responses to Commissioner Ohigashi's request for information regarding whether a mention of a 15-year lifespan had been captured in the record.

Mr. Chipchase stated that his associate, Mr. Goodin, had located mention of the time to capacity in a 2011 statement from ENV's Mr. Timothy Steinberger. Commissioner Ohigashi thanked KOCA for its efforts.

FINAL COMMISSIONER QUESTIONS

Commissioner Wong asked if the Parties agreed that the record was complete. All parties agreed that the Planning Commission record was complete. Ms. Chan noted that the record supported the Planning Commission's decision, Mr. Sandison commented on how a modified closure date could be helpful, and Ms. Apuna described how the ENV record was complete, but that the LUC could use more information to make its decision.

Commissioner Cabral questioned whether the County would move forward with legal proceedings in this matter. Ms. Chan responded that ENV had not discussed taking legal action.

There were no further questions. Chair Scheuer stated that formal deliberations would begin and asked if the Commissioners were prepared to deliberate. All Commissioners indicated that they were.

DELIBERATIONS

Chair Scheuer sought the pleasure of the Commission. (There were several motions made and they are separately listed in the order they were considered).

Motion to Deny the Application

Commissioner Okuda moved to deny the application. Commissioner Ohigashi seconded the Motion.

Discussion

Commissioner Okuda described why he was in favor of the motion and how the applicant had failed to provide sufficient burden of proof, evidence and persuasion to convince him.

Commissioners Aczon, Chang, Cabral and Giovanni shared why they opposed the motion.

Commissioners Ohigashi, Wong and Scheuer voiced why they were in favor of the motion.

There was no further discussion. Chair Scheuer called for Mr. Orodener to poll the Commission.

The Commissioners voted as follows:

Ayes:

Commissioners Okuda, Ohigashi, Wong and Chair Scheuer

Nays:

Commissioners Aczon, Chang, Cabral and Giovanni

The motion failed 4-4-0 (8 sitting Commissioners).

Chair Scheuer sought the pleasure of the Commission again.

Motion to Grant in Part/Deny in Part

Commissioner Ohigashi moved to grant in part and deny in part the motion—denying the increase in acreage and granting the Special Permit with conditions to have time deadlines in accordance with the record, and that the Parties prepare Findings of Fact, Conclusions of Law and Decision and Order to support the order. Commissioner Giovanni seconded the motion and requested clarification on the details of the motion.

Discussion ensued to determine proper procedure on handling the initial motion. Chair Scheuer suggested that the second be withdrawn and that the original motion be re-stated more specifically. Commissioner Giovanni accepted Chair Scheuer's suggestion and withdrew his second.

Commissioner Ohigashi moved, as a new motion, to deny the requested expansion of the landfill and grant the Petition using the KOCA Condition 3.c timeline of March 2, 2027. Commissioner Giovanni seconded the motion.

Discussion

Commissioner Ohigashi spoke in favor of the motion saying there was no evidence to support the expansion and determine how long the landfill should remain in operation.

Commissioners Chang and Chair Scheuer described why they opposed the motion.

Commissioners Giovanni, Cabral and Okuda described why they were in favor of the motion.

Discussion ensued to question whether it was possible to grant in part and deny in part the motion (as a hybrid motion).

Chair Scheuer declared a recess at 2:04 p.m. and reconvened the meeting at 2:08 p.m.

FRIENDLY AMENDMENT ATTEMPTS TO Motion to Grant in Part/Deny in Part

Commissioner Okuda added additional reasons why he opposed the motion and stated that he had a friendly amendment. Chair Scheuer shared why he felt the record was incomplete and why a remand would not accomplish anything.

Discussion then ensued on whether Commissioner Okuda's friendly amendment to the motion which deleted the restriction on the landfill expansion and maintained the closing date of the WGS� would be considered. Commissioner Okuda described why he thought the friendly amendment was worthy and Commissioners Ohigashi and Giovanni accepted the friendly amendment.

Commissioner Aczon stated that he reluctantly supported the motion and shared his concerns about OP's recommendation about Condition 2.

Chair Scheuer confirmed that Commissioner Aczon was referencing OP's October 8, 2019 letter addressing Conditions 2 and 4. Discussion ensued to clarify what LUC conditions were being addressed (as opposed to the Planning Commission's).

Commissioner Okuda then made a motion to amend the now amended initial motion to include OP's proposed Condition No. 2 outlining the steps to be taken by the Applicant no less than seven years before the WGSL is estimated to reach its capacity for either municipal solid waste or ash as well as OP's Condition No. 4 relating to public health and safety as stated in its October 8, 2019, letter. (It was pointed out that OP's proposed Condition No. 4 was renumbered Planning Commission's Condition No. 3 and therefore was already in their decision). It was also noted that OP's proposed Condition No. 2 was in conflict because it was based on capacity and not on a firm date of closure.

Based on this discussion, Commissioner Okuda adjusted his motion to include the date of March 2, 2020, as to when the Applicant shall initiate detailed engineering studies for the design and construction for the replacement landfill. There being no second to this motion, it failed.

Further Discussion on
Amended Motion to Grant in Part/Deny in Part

Commissioner Ohigashi shared his concerns about what date should be established for ceasing operations.

Commissioner Wong described why he was against the motion.

There was no further discussion. Chair Scheuer called for Mr. Orodener to poll the Commission.

The Commissioners voted as follows:

Ayes:

Commissioners Ohigashi, Giovanni, Cabral and Okuda

Nays:

Commissioners Chang, Aczon, Wong and Chair Scheuer

The motion failed 4-4-0 (8 sitting Commissioners).

Chair Scheuer sought the pleasure of the Commission again.

Commissioner Cabral requested clarification on the dates used in the motion. Mr. Orodener stated that the timeframe was not supported by the record.

Commissioner Wong commented that he agreed that the timeframe was not supported by the record.

Motion to Remand

Commissioner Chang moved to remand the application with specific instructions from the LUC describing what needed to be included in the application and why the Planning Commission needed to re-open taking evidence to enhance and update the record. Commissioner Wong seconded the motion.

Discussion

Commissioners Cabral, Giovanni and Okuda commented on why they were against the motion.

There was no further discussion. Chair Scheuer called for Mr. Orodener to poll the Commission.

The Commissioners voted as follows:

Ayes:

Commissioners Wong and Chang

Nays:

Commissioners Aczon, Ohigashi, Okuda Cabral, Giovanni and Chair Scheuer

The motion failed 2-6-0 (8 sitting Commissioners).

Chair Scheuer sought the pleasure of the Commission again.

Motion to Grant Application with condition of a closure date

A motion was made by Commissioner Giovanni and seconded by Commissioner Cabral to grant the Applicant's 2008 and 2011 Applications with the condition of a

closure date of March 2, 2027, for the WGS� but may be subject to revision upon review by the LUC of proposed findings of fact submitted by the parties.

Discussion and Friendly Amendment

Commissioner Aczon requested clarification on the “date certain” to be used. It was determined that March 2, 2027 would serve as the “date certain”.

Following discussion, Commissioner Okuda made a friendly amendment to the motion to delete the LUC’s review of the parties’ findings of fact and to incorporate a closure date for the WGS� of March 2, 2028. Both Commissioners Giovanni and Cabral accepted this friendly amendment.

Chair Wong requested and was granted a brief recess by Chair Scheuer at 2:39 p.m. Chair Scheuer reconvened the meeting at 2:43 p.m. and had the motion as amended motion re-stated.

Commissioner Chang and Chair Scheuer commented on why they were voting against the motion.

Commissioners Giovanni, Cabral, Wong, Aczon, Ohigashi and Okuda shared why they were voting for the motion.

There was no further discussion. Chair Scheuer called for Mr. Orodener to poll the Commission.

The Commissioners voted as follows:

Ayes:

Commissioners Giovanni, Cabral, Wong, Aczon, Ohigashi and Okuda

Nays:

Commissioners Chang and Chair Scheuer

There being a vote tally of 6 ayes and 2 nays, the motion passed (6-2-0 with 8 seated Commissioners).

Chair Scheuer requested that no later than October 18, 2019, that Intervenors KOCA/Shimabukuro, Intervenor Schnitzer, Intervenor Hanabusa, and OP provide the LUC with proposed findings of fact and conclusions of law consistent with the LUC's decision on this matter.

Discussion ensued to clarify which Party needed to submit material to the Commission. Mr. Yee requested that ENV and KOCA be tasked with making a submittal. Commissioner Okuda commented on how helpful it would be if everyone submitted a form of the order. Mr. Wurdeman noted his objection to Chair's request and was advised that he could submit a statement instead. Mr. Sandison noted that he would need access to the transcripts and inquired when they would be available. Chair Scheuer acknowledged the comments and advised that the Parties should stay in contact with LUC staff to complete their assignment.

Chair Scheuer stated that since there was no further business to address he declared the meeting adjourned at 3:03 p.m.