Colleen Hanabusa

August 13, 2011

Mr. David K. Tanoue, Director
Department of Planning and Permitting
City and County of Honolulu
650 South King Street, 7th Floor
Honolulu, Hawai`i 96813
Via email: info@honoluludpp.org

Re: 2011/GEN-8 Amendment of SUP 2008/SUP-2

Dear Mr. Tanoue:

I write in opposition to the application of the City's Department of Environmental Services' (ENV) request to delete the July 31, 2011 deadline as set forth in condition no. 14 in the October 22, 2009 Decision and Order of the Land Use Commission, State of Hawai`i (LUC).

As you are aware, in two prior proceedings, I was permitted Intervenor status in the proceeding before your Planning Commission which then automatically became a contested case hearing. The LUC then granted me Intervenor status.

Though I no longer represent the 21st Senatorial District which includes the Waimanalo Gulch Sanitary Landfill (WGSL), I have over 10 years of institutional knowledge about it. This is why I now write in opposition to yet another application by ENV to continue the operation of WGSL. I do so with the awareness that you will probably approve it over my and others objections. This has, after all, been the pattern.

The Application is flawed

Notwithstanding, I wish to call your attention to the fact that ENV now refers to the 2008/SUP-2 as one for a 92.5 acre expansion. The SUP in question was really for 200.622 acres and I object to this inaccurate depiction. The significance is that the prior SUP's have now been withdrawn. This new SUP covered the entire 200 acres. To ignore this fact means that the original sites are not covered by any orders or permits.

Specifically, in December 2008, the then Director of ENV, Eric S. Takamura filed a NEW Special Use Permit ("NEW SUP") with your Department of Planning and Permitting (DPP) to permit use of the total area of 200.622 acres of what is known as Waimanalo gulch as the site for a landfill. He requested permission for:

> The construction and use of approximately 92.5 acres within the City's Waimanalo Gulch Sanitary Landfill property for continued landfilling

EXHIBIT K46

> purposes. In addition, to the expansion of the area of landfilling, the proposed project will involve the development of landfill associated support infrastructure (e.g. drainage, access roadways, landfill gas & Leachate collection and monitoring systems, stockpile sites and other related features, a public drop-off center, and a landfill gas to energy (LFGTE system. **The Special Use Permit will cover the entire 200.622 acre Property.** [emphasis added.]

In the interest of full disclosure, I believe this is due to the fact, that there remains pending at the Intermediate Court of Appeals, an appeal on the sufficiency and adequacy of the Final Environmental Impact Statement (FEIS) which was finalized on only the 92.5 acres and not on the entire 200.622 acre property.

To accept this Application in its present form, you need to address whether you have properly permitted the project; or alternatively, if a permit exists for the underlying 107.5 acres. As well, the objection continues as to whether there has been an environmental impact statement prepared as required for a landfill project.

This Application Is Without Authority

It is important to note that ENV appears uncertain as to whether it can seek modification from the Planning Commission which requires the preliminary step of seeking approval from DPP. At page 2 of Mr. Steinberger's letter of June 28, 2011, he states:

> . . . in light of the lack of specificity in the applicable rules, enabling both the Planning Commission and the LUC to consider Applicant's request will reduce the possibility of a procedural challenge. Finally, if the Planning Commission determines that it does not have the authority to consider this request, it may so conclude and direct Applicant to seek consideration from the LUC.

This application for modification is brought pursuant to Section 2-49 of the Rules of the Planning Commission, which provides:

> (a) A Petitioner who desires a modification or deletion of a condition imposed by the commission shall make such a request to the commission in writing. This request shall be processed in the same manner as the original petition for a SUP. A public hearing on the request shall be held prior to any commission action. . . .

It is clear that the rule cited is applicable only to "a modification or deletion of a condition imposed by the commission." The commission referred to is the Planning Commission. The Hawaii Supreme Court has ruled on many occasions that when the Constitution, Statute and/or Rule are/is plain and unambiguous it shall be given its plain and ordinary meaning. ***Blair v. Cayetano**, 73 Haw. 536, 836 P.2d 1066, reconsideration denied, 74 Haw. 650 (1992), **Emp. Ret.***

***System v. Budget Dir. Ho**, 44 Haw. 159, 352 P.2d 861 (1960), **Spears v. Honda,** 55 Haw. 1, 449 P.2d 130 (1968).*

> When interpreting administrative rules, it is a well established that:
> The general principles of construction which apply to statutes also apply to administrative rules. As in statutory construction, courts look first at an administrative rule's language. If an administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule's plain meaning.

Cases relied upon are: ***International Bhd. Of Elec. Workers, Local 1357 v. Hawaiian Tel. Co.,** 68 Haw. 316, 323, 713 P.2d 943, 950 (1986); **Allstate Ins. Co. v. Ponce,** 105 Hawai'i 445, 454, 99 P.3d 96. 105 (2004).*

The Planning Commission did not impose Condition 14, it was the LUC. As stated in Mr. Steinberger's letter at 8, "[n]otably, the 2009 Planning Commission Decision does not contain any expiration date." Therefore under Hawai'i case law, the Planning Commission (and therefore DPP as well) is without jurisdiction over this modification and/or deletion.

It is important to note that in 2008, the facts were different. There the Planning Commission did arguably have the authority to modify its Decision and Order of 2003 because it contained the deadline of May 1, 2008. (Steinberger letter at 6-7).

ENV and the City has got to be accountable

The finding of an alternative site and the time needed is truly an tired argument. WGSL epitomizes arrogance, the lack of political will, and NIMBYism. It also shows how decision makers can shrug their shoulders and extend the life of the landfill under the guise that there is just not enough time to site an alternative.

What is even more troubling is that this Application is devoid of a thorough discussion of how this landfill has plagued the surrounding community and has been mismanaged.

Take for example the impact of the rains experienced early this year. There is no excuse for the release of the waste into the ocean. Clearly it should not have happened IF the City and its operator, Waste Management (WMI) did what they promised and were ordered to do.

Let us review the characteristics of Waimanalo Gulch. As deceptive as the name "Waimanalo" because it is in the Kapolei/Nanakuli area, so is the word "Gulch." Many must believe that there is an indentation in the land which the City is filling for its landfill. Waimanalo Gulch is about 200 acres and is described by the City's experts as "steep," "narrow," "steeply sloping." It is at its widest point 1000 feet, and at its narrowest, 500 feet, about 1 ½ football fields. It starts at 70 feet mean sea level (msl) then extends up the mountain to 940 msl. It extends about 4500 feet up the side of a mountain. The gulch portion was filled up a long time ago. That is why the landfill is going up the side of mountain.

The total rain fall we just experienced in January was estimated at 9 inches. WGSL is required to control run-on and run-off from a 25 year storm. This means 24 hours 9.2 inches of rain. So why were we faced with a "lake" of water which had to be discharged into the ocean along with all of the waste that it had allegedly dislodged?

Because, logic tells us that water flows very quickly and strongly off the side of steep narrow land mass such as Waimanalo Gulch. Remember it is not a gulch anymore.

Logic also tells us that because there is a stream albeit, ephemeral, it is a natural flow to the ocean over the landfill. One can also assume that in heavy rains, water flows as it has in the past. The stream is on the eastern slope and the concrete culvert intending to capture the water is on the western slope. There are drainage ditches on the eastern side. These inadequate drainage systems were to take the water to a sedimentation pond which drains into three large culverts under Farrington Highway, then dumps into the ocean in front of Ko Olina. I do not believe the EPA would give the City a permit to dump sediment and waste into the ocean.

Logic further tells us that when you interfere with the flow of water, there will be problems; especially if you cover up parts of the culvert. The City did exactly that.

Because when you excavate our native soil then build us a mountain of opala, there will be stability issues. To address this, the City constructed three stability berms at WGSL. One is for the ash monofill area and is called the "toe berm." The others are the E-1 berm and the Western or Westside berm. The E-1 berm was constructed in late 2005 to 2006 and the West berm in 2006-2007. The E-1 and Westside berms were a function of the 14.9 acre expansion which was the first extension for 5 years after which the landfill was to close. Since there is no gulch to fill, there are stability issues for a landfill being built up a steeply sloped mountain. With each expansion of the landfill, a berm will also have to be extended.

What is most frightening is that the City's expert said critical to stability of the landfill is the liner. This is why surface water control plans are critical to a landfill. Imagine what water seeping through the landfill unto the liner does to its integrity. The City had messed up on a liner earlier and that also required the construction of a berm.

We do know that the State was aware that the City had not paid attention to the issue of storm water run-on and run-off. Count XV of the Notice of Violation filed in 2006 against the City said it failed to monitor and update a surface water management plan. The State had not received any update since 2003. The City was required to show how they complied with the Clean Water Act and to show a storm water pollution plan. The City's excuse is it couldn't find the updates, could you give the same excuse to the City when it requires you to do something?

So, where are we on the storm water run-off and run-on control issue? Nowhere, because according to the City--who has no problem exceeding the heights, having a notice of violation of 18 Counts, then again fined last year for $424,000 for again, the wrong liner and building the west berm too high. To add insult to injury, the City states it could not proceed to build the necessary surface water management system because it is allegedly outside the permitted footprint. When has a condition of a permit stopped the City before? The irony is that a high berm will allow the City to justify giving us yet a higher mountain of opala.

Permit me to summarize the violations and to bring your attention to others. First, City has ignored its obligations are that on January 31, 2006, the Department of Health of the State of Hawaii ("DOH") issued a Notice of Findings of Violation ("NOV") and Order against WMI and the City and County of Honolulu. The NOV consists of 18 Counts (Violations). There was a settlement reached with the DOH on December 7, 2007. The provisions are set forth in the Settlement Agreement; and the violations were reduced to $1.5 million (with alternative payments) and corrective actions. Then, on April 5, 2006, the United States Environmental Protection Agency ("EPA") issued a press release the Waste Management Hawai'i ("WMH") and the City are in violation of the provisions of the Clean Air Act. Findings and Notice of Violations ("EPA NOV") was issued. There remains outstanding the issue of heightened temperatures at WGSL where it landfill gas wells record temperatures in excess of 131°F. This has not been resolved to the best of my knowledge. In addition, there remains the concern raised as to leachate and its disposal in the Waianae Sewage Treatment plant. Last year, the DOH fined the City another $424,000 for again the wrong liner and failing to build the water control system.

Conclusion

It is very difficult for me to watch yet another Application be approved by DPP when you have got to be aware of the violations and the blatant disregard for public health and welfare on the part of WMI, ENV and others in the City. This particular Application, however, affords you as the Director of DPP, the right to deny it on a clear procedural matter. The Planning Commission is without jurisdiction under its Rules to modify an Order that it did not issue. In fact, the Order itself remains under challenge by the City before the Hawai'i Supreme Court and there is no record of the Planning Commission accepting the LUC's Decision and Order. Under the rulings of the Supreme Court referenced above, this Application must be denied.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

/s/ Colleen Hanabusa

Colleen Hanabusa

EXHIBIT K46