

**ORIGINAL**

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FIRST CIRCUIT COURT  
STATE OF HAWAII  
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CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF  
HONOLULU,

Appellant,

vs.

LAND USE COMMISSION, STATE OF  
HAWAI'I; COLLEEN HANABUSA, MAILE  
SHIMABUKURO, AND KO OLINA  
COMMUNITY ASSOCIATION,

Appellees.

CIVIL NO. 09-1-2719-11  
(Agency Appeal)

APPELLEE STATE OF HAWAI'I, LAND  
USE COMMISSION'S ANSWERING  
BRIEF; CERTIFICATE OF SERVICE

Hearing: July 14, 2010  
Time: 8:30 A.M.  
Judge: The Honorable Rhonda  
A. Nishimura

City Council is encouraged to work cooperatively with the Applicant's effort to select a new landfill site on Oahu. Upon the selection of a new landfill site or sites on Oahu, the Applicant shall provide written notice to the Planning Commission. After receipt of such written notice, the Planning Commission shall hold a public hearing to reevaluate 2008/SUP-2(SP09-403) and shall determine whether modification or revocation of 2008/SUP-2(SP09-403) is appropriate at that time. The Planning Commission shall make a recommendation to the Land Use Commission.

(ROA 0166.)

Clearly ENV is required by condition No. 4 to identify and develop a new landfill site or sites.

**1. ENV is Not Precluded from Requesting Relief from the Conditions in the Future.**

Although ENV may claim that Condition No. 14 does not provide adequate time to identify and develop a new landfill, ENV has been on notice for years in prior special permit proceedings relating to WGSJ that it was required to do so. Indeed, the special permit for the existing landfill required closure of WGSJ in 2008 and was extended to November 2009. ENV has had years to begin the process of identifying a new landfill site or sites. Further, there is nothing to preclude ENV from requesting an extension of the 2012 date if it is unable, using reasonable diligence as required in Condition No. 4, to identify and develop a new landfill site. In the prior special permit, as noted above, ENV requested and was given extensions of time because the City was unable to identify a new site. Even the Planning Commission and ENV's witness recognized this:

GAYNOR: I'm not sure if you're gonna be comfortable answering this so if you're not, I'll get it answered later on, but one of the exhibits that we have is the 2005 Planning Commission Findings of Fact and Decision

and Order, and one of the conditions is that within five years from the date of the SUP approval, the solid waste management permit approval for the expansion, whichever occurs later, but will not beyond May 1<sup>st</sup>, 2008, the 200-acre property shall be restricted from accepting any additional waste material and be closed in accordance with an approved closure plan.

So my experience has been typically in a process like this where you have a condition, you're required to meet it. And if for some reason you don't feel that you can, you can go back to the decision-making body and have that condition removed. Am I correct?

A: That is correct.

(ROA 2478, lines 16-25.)

**2. There Has Been No Threat of Sanction for Failure to Comply with the Conditions.**

The conditions that ENV complains of require future action. There have been no allegations that ENV has not complied with the conditions. There have been no threats of sanctions. The sanction that would be applied is set forth in Condition No. 12 of the LUC's Decision and Order, which was originally adopted by the Planning Commission and is not challenged by ENV. That Condition stated:

Enforcement of the conditions to the Planning Commission's approval of 2008/SUP-2(SP09-403) shall be pursuant to the Rules of the Planning Commission, including the issuance of an order to show cause why 2008/SUP-2 (SP09-403) should not be revoked if the Planning Commission has reason to believe that there has been a failure to perform the conditions herein imposed by the Decision and Order.

(ROA 0168.)

Enforcement, then, in the first instance would be by the Planning Commission, not the LUC.

**B. Condition No. 14 Is Reasonable and Supported by the Record.**

Condition No. 14 provides:

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

(ROA 0168.)

ENV complains that this condition is unreasonable or arbitrary and capricious because there are other types of municipal solid waste that cannot be disposed of by alternative means, such as mass burning (H-POWER) or transshipment. Such waste, contends ENV, includes special waste such as dead animals, sludge and food waste, and waste generated by natural disasters.

ENV argues that WGSL is a "critical" part of the County's overall solid waste management strategy, and that the ability to deposit certain waste in WGSL is a requirement of various permits for, example, transshipment of municipal waste.

As ENV points out, the Planning Commission's order, which was adopted by the LUC with modifications, recognizes that WGSL is a critical part of the City's overall integrated solid waste management efforts. (ROA 3935, paragraph 91) Nevertheless, even the Planning Commission recognized that WGSL will not always be available to the City. Indeed, the Planning Commission imposed Condition No. 4, which was adopted by the LUC and not challenged by ENV, requiring ENV to find another landfill site or sites to either replace or supplement WGSL. Furthermore, the Planning Commission imposed Condition No. 5, which was adopted by the LUC and not challenged by ENV. Condition No. 5 provides:

The Applicant shall continue its efforts to use alternative technologies to provide a comprehensive waste system management program that includes H-POWER, plasma arc, plasma gasification, and recycling technologies, as appropriate. The Applicant shall also continue its efforts to seek beneficial reuse of stabilized, dewatered sewage sludge.

(ROA 0166.)

The LUC recognized the need for a place to deposit ash and residue from H-POWER and allowed WGS� to receive that after July 31, 2012. However, recognizing that pursuant to Condition No. 4 ENV must identify and develop new landfill site or sites, and pursuant to Condition No. 5, ENV must continue alternative technologies, the LUC restricted WGS� from accepting other waste. That waste must go to the new site or sites. Further, as noted by ENV, the City has made a number of advances in reducing the waste stream going into WGS�. It described its curbside recycling, the third boiler at H-POWER, transshipment of waste to the mainland. Frank Doyle also indicated: "We have a program that we are going to be going out for in September [2009] for a new green waste recycling facility. And, in that facility we are also going to include food waste and sewage sludge." (ROA 2809, line 22.)

Although there is a finding of fact that indicates there will always be a need for a landfill, the intent of Condition No. 5 is to reduce the need for a landfill for the standard ordinary municipal solid waste.

The record before the LUC indicates that with the completion of H-POWER a landfill as we know it should not be needed:

When H-Power is complete, which according to Kobanto, will be by the end of 2011, we should really be able to not need a daily operating landfill.

(ROA 3092, lines 5-7.)

Upon further questioning, Councilmember Apo testified:

If I had the chance to make the decision – a question is, what's the solution? What can we get to aside from a complete expansion of the entire 200 acres of Waimanalo Gulch?

I believe that the city can get to solutions by the end of 2011. The big-ticket item in all of that is the expansion of H-Power, going from 600,000 tons to 300,000 [sic] tons.<sup>4</sup> Kobanto has made the statement that they will be operational by the end of 2011. And the mayor confirmed that in his press conference this past Tuesday.

I agree, we are always going to need an emergency site, and for now, we're always going to need a landfill for ash; but, I truly believe we do not need a daily operating landfill site by the end of 2011.

I have made that statement publicly, in committee, to the media, to the mayor directly, to his department, probably at least for the last two year.

Because, if there is a reason why it can't be done, then I want to hear back from them, and let's have that discussion. They have not given me a reason why that's not possible.

(ROA 3104-3105.)

Assuming that H-POWER comes on line it would have capacity to burn an additional 300,000 tons of municipal solid waste. The Planning Commission was told:

. . . I am not advocating you should do nothing and let it [WGSL] close in November. I am also saying you can't, as this body, say, have the 200 acres, have 15-plus years, and just go at it. Because, the other reality is, it's not 15-plus years, you're talking about capacities, and once we start up H-Power, that 337,000 tons per year shrinks down to 100,000 tons and this community is stuck with that, not for 15-plus years, but forever. And, again, that's what's unfair.

(ROA 3136, lines 9-17.)

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<sup>4</sup> The testimony was subsequently corrected, that the expansion would increase capacity by 300,000, so it would go from 600,000 tons to 900,000 tons. (ROA 3108.)

With respect to disaster debris, if a disaster were to strike after July 31, 2012, and WGS� is prevented from accepting disaster debris, the Governor and civil defense are authorized to designate a site or sites to accept disaster debris.

C. **Conditions No. 15 and 16 Are Reasonable and Supported by the Record.**

Conditions 15 and 16 of the LUC order provide:

15. The Honolulu City Council through the City Administration shall report to the public every three months on the efforts of the City Council and the City Administration in regards to the continued use of WGS�, including any funding arrangements that are being considered by the City Council and the City Administration.
16. The City Council and the City Administration shall have public hearing every three months to report on the status of their efforts to either reduce or continue the use of WGS�.

(ROA 0169.)

These conditions are not opposed to, but are in furtherance of Condition No. 6, which was imposed by the Planning Commission and is not challenged by ENV. Condition No. 6 only requires annual reports to be given to the Planning Commission and the LUC on June 1 of each year subsequent to the date of the Decision and Order. Although the annual reports, when filed with the Planning Commission and the LUC, will become public records, no action need be taken by either of those bodies with respect to the annual reports, so there is no guarantee that the public will receive any information. Hence, the additional conditions requiring that the public be given information. It should be noted that the method of implementing these conditions is not detailed, leaving discretion to ENV as to how to comply with these conditions.

The source of Conditions No. 15 and 16 is a discussion between Commissioner Wong and counsel for ENV: