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LAND USE COMMISSION
STATE OF HAWAII
2012 JUL 18 P 3:43

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAI'I

In The Matter Of The Application Of The DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU For A New Special Use Permit To Supersede Existing Special Use Permit To Allow A 92.5-Acre Expansion And Time Extension For Waimānalo Gulch Sanitary Landfill, Waimānalo Gulch, O'ahu, Hawai'i, Tax Map Key: 9-2-03:72 And 73	DOCKET NO. SP09-403 SCHNITZER STEEL HAWAII CORP.'S POSITION STATEMENT RE PROCEDURAL ISSUES AND NEXT STEPS IN LIGHT OF THE HAWAII STATE SUPREME COURT DECISION IN *DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU V. LAND USE COMMISSION, STATE OF HAWAII*; CERTIFICATE OF SERVICE

SCHNITZER STEEL HAWAII CORP.'S POSITION STATEMENT RE PROCEDURAL ISSUES AND NEXT STEPS IN LIGHT OF THE HAWAII STATE SUPREME COURT DECISION IN *DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU V. LAND USE COMMISSION, STATE OF HAWAII*

SCHNITZER STEEL HAWAII CORP. ("Schnitzer"), by and through its attorneys, Carlsmith Ball LLP, hereby submits its Position Statement in response to the Land Use Commission's ("LUC") request for briefing regarding procedural issues and next steps in light of the Hawaii State Supreme Court decision in *Department of Environmental Services, City and*

County of Honolulu v. Land Use Commission, State of Hawai'i, 127 Hawai'i 5, 275 P.3d 809 (2012) ("*DES*").

I. INTRODUCTION

Before the LUC is *In the Matter of the Application of the Department of Environmental Services, City and County of Honolulu For a New Special Use Permit to Supersede Existing Special Use Permit to Allow a 92.5-Acre Expansion and Time Extension for Waimanalo Gulch Sanitary Landfill, Waimanalo Gulch, O'ahu, Hawai'i, Tax Map Key: 9-2-03:72 and 73*, File No. 2008/SUP-2, LUC Docket NO. SP09-403, filed on December 3, 2008 ("2008 Matter"). Before the Planning Commission, City and County of Honolulu ("Planning Commission") is *In the Matter of the Application of the Department of Environmental Services, City and County of Honolulu to Modify SUP No. 2008/SUP-2 by Modifying the State Land Use Commission's Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law and Decision and Order with Modifications, Dated October 22, 2009*, File No. 2008/SUP-2, LUC Docket No. SP09-403, filed on June 28, 2011 ("2011 Matter"). The 2008 Matter and the 2011 Matter relate to the same thing: a new Special Use Permit ("SUP") for Waimanalo Gulch Sanitary Landfill ("WGSL"). Because they relate to the same thing, they should be considered together. The LUC should remand the 2008 Matter to the Planning Commission for consolidation and consideration along with the 2011 Matter. Remand for consolidation and consideration by the Planning Commission is the most efficient, fair and prudent course of action. It would also be consistent with the Court's decision in the *DES* case.

II. BACKGROUND

A. THE 2008 MATTER

The WGSL is a landfill of approximately 200 acres located 92-460 Farrington Highway, Ewa, Oahu. *See DES*, 127 Hawaii at --, 275 P.3d at 810. The WGSL has been in operation since

1989. *See id.* It is the "only public landfill on Oahu permitted to receive municipal solid waste (MSW), and the only permitted repository for the ash and residue produced by the City's H–POWER waste-to-energy facility." *DES*, 127 Hawai'i at --, 275 P.3d at 810 (footnotes omitted).

In December 2008, the Department of Environmental Services of the City and County of Honolulu ("ENV") filed an application for a new SUP to supersede the existing SUP (State Special Use Permit No. 86/SUP-5) that would authorize ENV to use an additional 92.5 acres of the site and operate WGSL to capacity. *See id.* at --, 275 P.3d at 811. The Planning Commission conducted a contested case hearing on this application. *See id.* The opponents in the contested case hearing were Ko Olina Community Association, Maile Shimabukuro and Colleen Hanabusa. Schnitzer was not a party to those contested case proceedings. *See id.*

On July 31, 2009, the Planning Commission recommended approval of the application subject to ten conditions. *See id.* In its 2009 decision, the Planning Commission made the following findings:

> 33. [Chief of the City Department of Environmental Services, Refuse Division] Mr. Doyle testified that [PES] will begin in 2010 efforts to identify and develop a new landfill site to supplement WGSL.
>
> 34. Mr. Doyle also testified that it would take more than seven years to identify and develop a new landfill site.
>
> ...
>
> 89. According to Joseph Whelan, as of March 16, 2009, there was approximately 12 month [sic] of landfill airspace capacity remaining in the municipal solid waste ("MSW") portion of the current SUP area, and approximately 24 months of landfill airspace capacity remaining in the ash portion of the current SUP area. See Tr. 6/24/09, 81:22–82:6, 83:1–14.
>
> 90. On December 1, 2004, the City Council adopted Resolution No. 04–349, CD1, FD1, which selected the Property as the site for the City's landfill. See Exhibit "A20."

91. The proposed expansion of the landfill within the Property is needed because WGSL is a critical part of the City's overall integrated solid waste management efforts.

92. Continued availability of WGSL is required as a permit condition to operate H–POWER and to engage in interim shipping of waste, for cleanup in the event of a natural disaster, and because there is material that cannot be combusted, recycled, reused, or shipped.

93. Therefore, a landfill is currently necessary for proper solid waste management, the lack of which would potentially create serious health and safety issues for the residents of Oahu.

94. WGSL is the only permitted public [municipal solid waste] facility on the island of Oahu and the only permitted repository for the ash produced by H–POWER.

95. WGSL is a critical portion of the City's overall Integrated Solid Waste Management Plan ("ISWMP"), which looks at all of the factors that make up solid waste management, including reuse and recycling, the H–POWER facility, and landfilling for material that cannot be recycled or burned for energy. The ISWMP is required by State law and approved by [the Department of Health] after public comments. One theme of the ISWMP is to minimize landfill disposal.

96. Currently, approximately 1.8 million tons of waste is produced on Oahu per year. This does not include material deposited at the PVT Landfill. Approximately, 340,000 tons of MSW in 2006, and approximately 280,000 tons of MSW in 2008, were landfilled at WGSL. These amounts fluctuate based on such things as recycling and the economy. Approximately 170,000 to 180,000 tons of ash from the H–POWER facility is deposited at WGSL each year.

97. Other items that cannot be recycled or burned at H–POWER are deposited at WGSL, such as screenings and sludge from sewage treatment plants, animal carcasses, tank bottom sludge, contaminated food waste that cannot be recycled, and contaminated soil that is below certain toxicity levels.

...

101. By 2012, when H–POWER's third boiler is expected to be operational, the City, through its various solid waste management programs, expects to divert eighty (80) percent of the waste stream, with the remaining twenty (20) percent being landfilled at WGSL.

...

> 107. The project is consistent with the City's general plan. WGSL is an important public facility that will provide a necessary facility to meet future population needs and accommodate growth in the region; WGSL's eventual closure will allow the Property to be reclaimed for other public uses; and WGSL is needed in the event of a natural disaster. See Tr. 5/22/09, 71:8–25; 72:1–25; Exhibit "A1" at pp. 8–25 through 8–28.

See id. at --, 275 P.3d at 811-12 (emphases omitted). The Planning Commission's conclusions of law included:

> [T]he Applicant's request for a new State Special Use Permit (a) is not contrary to the objectives sought to be accomplished by the state land use law and regulations; (b) would not adversely affect surrounding property as long as operated in accordance with governmental approvals and requirements, and mitigation measures are implemented in accordance with the Applicant's representations as documented in the 2008 FEIS; and (c) would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvements, or police and fire protection. The Planning Commission further concludes that the same unusual conditions, trends, and needs that existed at the time the original Special Use Permit was granted continue to exist and that the land on which the WGSL is located continues to be unsuited for agricultural purposes.

See id. at --, 275 P.3d at 812.

In its 2009 decision, the Planning Commission did not impose an expiration date for the SUP or any deadline for the acceptance of waste at WGSL; instead, Commissioner Kerry Komatsubara emphasized that "[t]he term or the length of [SUP–2] shall be until the Waimanalo Gulch landfill reaches its capacity as compared to a definite time period of 'X' number of years." Id. at --, 275 P.3d at 813. The Planning Commission, however, did impose several conditions to monitor the City's progress toward finding a new landfill site, including "to (1) identify and develop with reasonable diligence—on or before November 1, 2010—one or more new landfill sites to either replace or supplement WGSL and, upon selection, provide written notice to the

Planning Commission for determination of whether SUP–2 should be modified or revoked; and (2) continue to use alternative waste disposal technologies in its effort to reduce the City's dependence on WGSL." *Id.*

On October 22, 2009, the LUC issued its written Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications ("2009 LUC Decision"). *See id.* at --, 275 P.3d at 814. Despite adopting the Planning Commission's findings, including that it would take more than seven years to identify and develop a new landfill site, the LUC issued the SUP subject to the following condition:

> 14. 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.

See id. On October 29, 2009, ENV filed a motion for reconsideration requesting, *inter alia*, a modification of Condition 14, and the LUC denied the motion for reconsideration on December 1, 2009. *See id.*

On November 19, 2009, ENV filed an appeal in the Circuit Court of the First Circuit. *See* id. at --, 275 P.3d at 814-15. Among the issues appealed was the LUC's imposition of Condition No. 14. *See id.* On September 21, 2010, the Circuit Court affirmed Condition No. 14 of the LUC decision. *See id.* at --, 275 P.3d at 815.

On November 12, 2010, ENV filed a Notice of Appeal to the Hawaii Intermediate Court of Appeals. *See id.* On July 14, 2011, ENV moved to transfer the appeal to the Hawaii Supreme Court, which was granted by the Supreme Court on August 1, 2011. *See id.*

B. THE 2011 MATTER AND THE *DES* DECISION

While awaiting the results of the appeal on the 2008 Matter, ENV filed a new SUP application for WGSL on June 28, 2011. The new application sought deletion of Condition No. 14 of the 2009 LUC Decision. No other changes were proposed in the application filed in 2011.

On September 16, 2011, Schnitzer filed a Petition to Intervene in the proceedings relating to the 2011 application. Also on September 16, 2011, Intervenors Ko Olina Community Association and Maile Shimabukuro (collectively, "KOCA") filed a Motion to Recognize Ko Olina Community Association and Maile Shimabukuro as Parties or in the Alternative Motion to Intervene. On October 5, 2011, the Planning Commission granted Schnitzer's Petition to Intervene and denied KOCA's Motion to Recognize Ko Olina Community Association and Maile Shimabukuro as Parties, but granted KOCA's Motion to Intervene as joint intervenors.

The Planning Commission held a contested case hearing on the Application that stretched over five months from December 7, 2011 to May 1, 2012. The Planning Commission heard opening and closing statements by the parties. Fifteen witnesses provided live testimony and were cross-examined before the Planning Commission, and more that 250 exhibits were admitted into evidence. The Planning Commission also received written direct testimony from eleven witnesses.

After the contested case hearing concluded, the parties filed their proposed findings of fact and conclusions of law. They also filed challenges to each other's findings of fact and conclusions of law. The Planning Commission was set to announce its decision at its May 25, 2012 hearing.

However, before the Planning Commission could render its decision, on May 4, 2012, the Hawaii State Supreme Court handed down its *DES* decision. *See id.* at --, 275 P.3d at 809. The Court held that the LUC's action in imposing Condition 14 was not supported by substantial evidence, vacated the SUP, and ordered the action be remanded to the LUC for further consideration. *See id.* at --, 275 P.3d at 821-23. The decision included a footnote at its end which reads:

> We have been informed in pleadings filed by the LUC that on June 28, 2011, DES filed a "[r]equest for modification of condition 14 of SUP file No. 2008/SUP–2" with the Planning Commission, and that a contested case hearing is ongoing in that proceeding. On remand, we encourage the LUC to consider any new testimony developed before the Planning Commission in that case.

Id. at -- n.16, 275 P.3d at 823 n.16.

Based on the *DES* decision, on May 21, 2012, the LUC passed a motion to send a letter to the Planning Commission asking it to defer decision-making on the 2011 Matter until it could remand the 2008 Matter back to the Planning Commission. Then-Chair Normand Lezy sent such a letter a day later.

The Planning Commission proceeded to have its scheduled hearing on May 25, 2012. At that hearing, the Planning Commission did not render a decision on the 2011 Matter, but instead issued a six-month stay of the proceedings. The Planning Commission members also expressed frustration about the potential for having the 2008 Matter remanded back to them.

On May 29, 2012, Planning Commission Chair Gayle Pingree sent a letter to the LUC in response to Chair Lezy's May 22, 2012 letter. In the response, Chair Pingree stated that there was no necessity to remand the original application back to the Planning Commission as there had been no request to modify the Planning Commission's original order dated August 10, 2009.

III. ARGUMENT

Now that the 2008 Matter has been remanded to the LUC per the instructions of the *DES* court, the LUC has four options with regards to the SUP: (1) it can approve the permit as it was originally issued by the Planning Commission; (2) it can approve the permit with modification; (3) it can deny the permit in full; or (4) it can remand the application back to the Planning Commission for further proceedings. *See* Haw. Admin. R. § 15-15-96(a). If the 2008 Matter is remanded, the Planning Commission may consolidate it with the 2011 Matter. *See* City & Cnty.

of Honolulu Planning Comm'n R. § 2-61. The LUC should remand the 2008 Matter to the Planning Commission with a request that it be consolidated with the 2011 Matter.

A. REMAND FOR CONSOLIDATION WOULD BE CONSISTENT WITH THE *DES* DECISION AND WOULD BE THE MOST EFFICIENT COURSE OF ACTION

The Supreme Court expects the LUC to render a decision based on a record that includes the information from the 2011 Matter. In the *DES* decision, the Court noted as follows:

> We have been informed in pleadings filed by the LUC that on June 28, 2011, DES filed a "[r]equest for modification of condition 14 of SUP file No. 2008/SUP–2" with the Planning Commission, and that a contested case hearing is ongoing in that proceeding. On remand, we encourage the LUC to consider any new testimony developed before the Planning Commission in that case.

Id. at -- n.16, 275 P.3d at 823 n.16. The only way that the LUC can consider the testimony developed at the Planning Commission level is for the Planning Commission to send up that record. ENV has argued that the Planning Commission can send up that record to the LUC to be considered as public testimony. However, such a route implies that the Planning Commission can simply send up the record without having rendered a decision on the 2011 Matter, which is still pending. This would be inconsistent with the Planning Commission rules. The rules require the Planning Commission to issue a written decision and order in the 2011 Matter that includes "separate findings of fact and conclusions of law[.]" City & Cnty. of Honolulu Planning Comm'n R. § 2-46(d). The Planning Commission cannot simply wash its hands of the 2011 Matter.

Moreover, having the Planning Commission render its findings of fact and conclusions of law would be beneficial to the LUC as it renders its own decision. The Planning Commission was the one that heard live testimony in connection with the 2011 Matter, and it is the Planning Commission that is in a better position to make evaluations of witness credibility and weigh

conflicting testimony. If the LUC were to merely consider the testimony before the Planning Commission as public testimony, it would be deprived of such valuable insight by the Planning Commission.

The more efficient course of action, which is consistent with the *DES* decision, is for the LUC to remand the 2008 Matter to the Planning Commission for consolidation and consideration along with the 2011 Matter. Under its rules, the Planning Commission has the power to consolidate proceedings as follows:

> The commission, upon its own initiative or upon motion, may consolidate for hearing or for other purposes, or may contemporaneously consider two or more proceedings which involve substantially the same parties or issues which are the same or closely related if the commission finds that such consolidation or contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings.

City & Cnty. of Honolulu Planning Comm'n R. § 2-61.

Here, there is no doubt that the 2008 Matter and the 2011 Matter relate to the same issue: a SUP for WGSL. They even have the same file and docket number. In addition, except for the presence of Schnitzer, the two matters essentially involve the same parties. Consolidation of the two matters is thus proper. It would avoid having two inconsistent decisions before two different commissions. It would also avoid needless delays as the Planning Commission has already heard all the evidence and was already prepared to render a decision on May 25, 2012. Consolidation of the two matters by the Planning Commission would allow the Planning Commission to enter findings of fact and conclusions of law on a single matter, which would then come back before the LUC for a final decision. Consolidation by the Planning Commission is the most efficient course of action, and it would be consistent with the Supreme Court's decision in the *DES* case.

B. REMAND FOR CONSOLIDATION IS THE FAIREST COURSE OF ACTION.

Considerations of fairness favor remand in this case. Schnitzer is not a party to the 2008 matter, but is a party to the 2011 Matter. Therefore, if the 2008 Matter is not remanded for consolidation with the 2011 Matter, Schnitzer will be prejudiced because it will be unable to appear before the LUC as a party.

The fact that Schnitzer has an important interest in these matters has been recognized by the Planning Commission. As the largest recycler in the State, Schnitzer depends on the continued acceptance of recycling residue by the WGSL. It should continue to have a voice in these proceedings. Remanding the 2008 Matter to the Planning Commission for consolidation with the 2011 Matter would ensure that Schnitzer continues to be a party in the consolidated matter.

C. THE LUC'S DECISION IN THE 2008 MATTER WILL BE MORE VULNERABLE ON APPEAL IF IT DOES NOT REMAND THE 2008 MATTER TO THE PLANNING COMMISSION.

A failure to remand the 2008 Matter for consolidation with the 2011 Matter will likely render any LUC decision in the 2008 Matter more vulnerable on appeal because the deference typically afforded to an agency's findings of facts may not apply where that trier of fact bases its decision on testimony developed by a separate administrative body.

Typically, a court reviewing an administrative decision affords great deference to an agency's findings of fact. *See Application of Akina Bus Serv., Ltd.*, 9 Haw. App. 240, 244, 833 P.2d 93, 95 (1992) ("An administrative agency's findings of fact are governed by the clearly erroneous standard of review; however, its conclusions of law are freely reviewable. The agency's findings of fact are presumptively correct and cannot be set aside on appeal unless shown to be clearly erroneous in light of the reliable, probative and substantial evidence on the

record as a whole."). Consequently, courts "decline to consider the weight of the evidence to ascertain whether it weighs in favor of the administrative findings, or to review the agency's findings of fact by passing upon the credibility of witnesses or conflicts in testimony, especially the findings of an expert agency dealing with a specialized field." *Application of Kaanapali Water Corp.*, 5 Haw. App. 71, 78, 678 P.2d 584, 589 (1984) (citing *In re Hawaii Electric Light Co.*, 60 Haw. 625, 594 P.2d 612 (1979); *In re Kauai Electric*, 60 Haw. 166, 590 P.2d 524 (1978); 2 Am. Jur. 2d *Administrative Law* § 680 (1962)).

The deference given an agency is based in large part on the deciding agency's role as the primary fact finder and trier of fact, especially in the context of agency decisions about the credibility of witnesses. *See, e.g., Application of Kauai Elec. Div. of Citizens Utilities Co.*, 60 Haw. 166, 188, 590 P.2d 524, 539 (1978) ("As we said in *Mitchell v. BWK Joint Venture*, 57 Haw. 535, 549, 560 P.2d 1292, 1300 (1977), the issue of credibility is within the primary responsibility of the state agency as fact finder, and its determinations will not be disturbed lightly."). Where credibility determinations are required, the law in general strongly favors that decisions be made by the trier of fact who heard live testimony. For instance, under Rule 63 of the Federal Rules of Civil Procedure, when a judge in hearing or nonjury trial is unable to proceed, "the successor judge ***must***, at a party's request, ***recall any witness whose testimony is material and disputed*** and who is available to testify again without undue burden." Fed. R. Civ. P. 63 (emphasis added). A successor judge "would . . . risk error to determine the credibility of a witness not seen or heard who is available to be recalled." Fed. R. Civ. P. 63, cmt. to 1991 Amendment (citing *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985); *Marshall v. Jerrico Inc.*, 446 U.S. 238, 242 (1980); *United States v. Radatz*, 447 U.S. 667 (1980)); *see also Mergentime Corp. v. Washington Metropolitan Area Transit Authority*, 166 F.3d 1257, 1262

(D.C. Cir. 1999) ("Balancing efficiency and fairness, the [post-1991 version of Rule 63] thus allows successor judges to avoid retrial, but only to the extent they ensure that they can stand in the shoes of the predecessor by determining that 'the case may be completed without prejudice to the parties.'").

The policy supporting deferential review of an agency's findings of fact falls away where that agency bases its findings on evidence developed through live testimony before a completely separate administrative body that never makes credibility determinations or weighs conflicting evidence in the first instance. *Cf., e.g., Villagomez v. Rockwood Specialties, Inc.*, 210 S.W.3d 720, 726-27 (Tex. App. 2006) (criticizing the abuse of discretion standard as it applies to review of a trial court's findings of fact where that trial court "heard no live testimony" but instead decided a special appearance by reviewing a "cold record" of "deposition testimony, affidavits, and other evidence" because it is "unclear why the trial court's findings should be given any special deference in [such] circumstances"); *Sullivan v. Kanarek*, 79 So.3d 900, 903 -904 (Fla. App. 2012):

> We first address the abuse of discretion standard discussed in *Murphy* [*v. International Robotic Systems, Inc.*, 766 So.2d 1010 (Fla.2000)]. *Murphy*'s holding that an abuse of discretion standard should be applied to the trial court's ruling on the motion for new trial is based on the presumption that the trial judge ruling on the motion for new trial was the one who presided over the case and is therefore in the best position to determine the propriety and potential impact of the conduct. But the presiding judge in this case was not able to rule on the motion for new trial, and as this court pointed out in *Sullivan* [*v. Kanarek*, 34 So.3d 808 (Fla. App. 2010)], the successor judge in this case was not in as good of a position to assess the issue as the judge who presided over the case. *See Wolkowsky v. Goodkind*, 153 Fla. 267, 14 So.2d 398, 402 (1943) (en banc) ("[W]hen a judge who did not try the case acts upon a motion for new trial, he has to rely upon the written record, just as much so as the appellate court which later has his ruling under review, and the latter court, with the same record before it, is in just as good a position to determine the question of

> the weight and legal effect of the evidence and its sufficiency to sustain the verdict as was the judge of the lower court who granted or denied the motion."); [*National Healthcorp Ltd. Partnership v.*] *Cascio*, 725 So.2d [1190, 1193 (Fla. App. 1998)] (holding that a successor judge's ruling on a motion for new trial "is not entitled to the same deference on appeal as the ruling of a presiding judge"). Therefore, we do not afford the successor judge the same deference we would afford if he had presided over the trial.

Thus, a reviewing court might accord far less deference to an agency's findings of fact made under such circumstances.

Here, if the LUC decides the 2008 Matter without remanding it for consolidation with the 2011 matter, it will needlessly risk error because it cannot stand in the shoes of the Planning Commission without recalling the witnesses who testified in the 2011 Matter. Whereas the Planning Commission has heard live testimony in connection with the 2011 Matter, and, therefore, is positioned to make evaluations of witness credibility and weigh conflicting testimony, the LUC has not and, thus, would be in no better position than a reviewing court to do either. Moreover, until the Planning Commission makes its credibility determinations and weighs in on conflicting testimony, the testimony developed in the 2011 Matter remains simply conflicting accounts and assertions that cannot plausibly be used to increase the substantiality of the evidence supporting whatever decision the LUC reaches in the 2008 Matter.

If the 2008 Matter is not remanded so that the Planning Commission may enter a decision on the consolidated case, anyone challenging the LUC's decision and order in the 2008 Matter would be able to argue effectively (1) that the reviewing court owes less deference to the LUC's findings of fact regarding testimony developed in the 2011 matter; and (2) that facts gleaned from that testimony add little to no additional support for the LUC's decision in the 2008 Matter. Therefore, the LUC should remand the 2008 Matter to the Planning Commission with a request that it be consolidated with the 2011 Matter.

IV. CONCLUSION

For the reasons stated above, it is Schnitzer's position that the LUC should remand the 2008 Matter to the Planning Commission where it can be consolidated and considered along with the 2011 Matter.

DATED: Honolulu, Hawai'i, July 18, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that, on the date and by the method of service noted below, a true and correct copy of the foregoing document was duly served upon the following at their last known address:

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