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KO OLINA COMMUNITY ASSOCIATION

and MAILE SHIMABUKURO

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Application of

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

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF  
HONOLULU

To delete Condition No. 14 of Special

DOCKET NO. SP09-403

PLANNING COMMISSION FILE NO.  
2008/SUP-2

**INTERVENORS KO OLINA  
COMMUNITY ASSOCIATION AND  
MAILE SHIMABUKURO'S  
MOTION TO DENY AND REMAND**

**DECLARATION OF  
CHRISTOPHER T. GOODIN**

**EXHIBITS A - D**

**CERTIFICATE OF SERVICE**

**Hearing:**

**Date:** \_\_\_\_\_

**Time:** \_\_\_\_\_

**Place:** \_\_\_\_\_

Use Permit No. 2008/SUP-2 (also referred to as Land Use Commission Docket No. SP09-403) which states as follows:

“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.”

### **INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE SHIMABUKURO’S MOTION TO DENY AND REMAND**

Pursuant to Hawai‘i Administrative Rules (“**HAR**”) § 15-15-70, Intervenor Ko Olina Community Association (the “**Association**”) and Maile Shimabukuro (“**Ms. Shimabukuro**,” and together with the Association, “**KOCA**”) move to deny the Application filed December 3, 2008 (the “**2008 Application**”) and the Application filed June 28, 2011 (the “**2011 Application**” and together with the 2008 Application, the “**Applications**”) and remand the Applications to the Honolulu Planning Commission (“**Planning Commission**”) for further proceedings.

In adopting its Findings of Fact, Conclusion of Law, and Decision and Order dated April 28, 2017 (the “**2017 Decision**”), the Commission committed the following procedural errors, each of which requires remanding to the Commission:

1. In violation of Section 2-75 of the Rules of the Planning Commission, a written proposed form of the Decision was not provided to the parties before it was adopted, and the parties were not given an opportunity to file exceptions and make oral argument in response to the written proposed form before it was adopted.

2. Planning Commission Chair Dean I. Hazama's participation in the proceeding, including his vote on the Decision, violated KOCA's right to due process and an impartial decision-maker under the Hawai'i Constitution.
3. Contrary to the Land Use Commission's October 8, 2012 remand order, the Planning Commission failed to "issue and transmit a single, consolidated Findings of Fact, Conclusions of Law, and Decision and Order" on the consolidated 2008 and 2011 Applications.

This motion is made pursuant to HAR § 15-15-70 and supported by the attached memorandum, declaration and exhibits and the records and files herein. KOCA respectfully requests a hearing on this motion.

DATED: Honolulu, Hawai'i, May 12, 2017.

CADES SCHUTTE  
A Limited Liability Law Partnership



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KO OLINA COMMUNITY ASSOCIATION  
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**MEMORANDUM IN SUPPORT OF  
MOTION**

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL  
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**MEMORANDUM IN SUPPORT OF MOTION**

## I. INTRODUCTION

At the March 1, 2017 hearing in this matter, the Honolulu Planning Commission (the “**Planning Commission**”) adopted findings of fact, conclusions of law, and decision and order (the “**Decision**”). The Decision drew from various sources and was not served the parties, who were not given any opportunity to file written exceptions to the Decision and present oral argument as required by Planning Commission Rules § 2-75.<sup>1</sup> Because Planning Commission failed to follow the procedural requirements, the Application filed December 3, 2008 (the “**2008 Application**”) and the Application filed June 28, 2011 (the “**2011 Application**” and together with the 2008 Application, the “**Applications**”) must be denied and the Decision must be remanded. See Hawai‘i Revised Statutes (“**HRS**”) § 91-14 (an agency’s decision may be reversed or modified where it is “[m]ade upon unlawful

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<sup>1</sup> See Planning Commission Rules § 2-75 (“Whenever commission members who are to render the final decision have not **heard and examined** all of the evidence, the decision, if adverse to a party to the proceeding, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file written exceptions and present oral argument to the commission members who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties. Submission of a proposed decision is required whether a single commissioner or a majority of the commissioners have not heard the evidence. For the purposes of these rules, the report and recommendation of the director of the department of land utilization may be adopted as the commission's proposal for decision.”) (emphasis added). Here, while the Commissioners stated at the March 1 hearing that they had reviewed all of the evidence, it is undisputed that no Commissioner was present to hear all of the evidence during the evidentiary hearings in 2009 and 2012. Accordingly, the procedural protections of section 2-75 are applicable in this case.

procedure,” “[a]ffected by other error of law,” or “[a]rbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion”).

The Applications must be denied and the Decision remanded for the independent reason that Planning Commission Chair Dean Hazama should not have voted on the Decision or otherwise participated in the hearing. Instead, the Chair should have recused himself based on comments that he made to the Star-Advertiser and on the record during a hearing in August 2016. Specifically, during the August 15, 2016 hearing, the Chair expressed his prejudgment of the matter by stating that “the overbearing matter of importance is the fact that we need to get the City’s SUP,” “the City needs a SUP” and “I think the first step is the City needs to get this SUP approved.” Ex. “A” at 26:3-5, 26:10, 28:2-3. Similarly, in interview with the Star-Advertiser printed on August 19, 2016, the Chair was quoted as saying that “he expects the commission will recommend the LUC grant the [C]ity’s request for extended use of the landfill,” “we have to have an operating landfill. I think it is unreasonable to expect the [C]ity to just close it down” and “[t]hat’s my hope, that we can move this along so that at least the [C]ity will have a valid permit that will allow it to operate it.” Ex. “B.”

As these statements show, the Chair prejudged key issues in this case concerning the continued use of the Waimanalo Gulch Sanitary Landfill (the “**Landfill**” or **WGSL**”) and the requests that it be closed. “In an adjudicatory proceeding before an administrative agency, due process of law generally prohibits decisionmakers from being biased, and more specifically, prohibits decisionmakers from prejudging

matters and the appearance of having prejudged matters.” *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai’i 376, 389, 363 P.3d 224, 237 (2015). By participating in this matter and voting in the Decision, the Chair violated KOCA’s due process rights and, as such, the Decision cannot stand. *See* HRS § 91-14 (an agency’s decision may be reversed or modified where it is “in violation of constitutional or statutory provisions”).

Finally, the written decision the Planning Commission entered does not make any findings, conclusions or decision on the 2008 Application. The Land Use Commission previously remanded the 2008 Application to the Planning Commission for the express purpose of consolidating the 2008 Application proceeding with the 2011 Application proceeding and entering a single, consolidated findings, conclusion, and decision. The Planning Commission consolidated the two proceedings, but then entered findings, conclusions, and a decision on **only** the 2011 Application. For this reason as well, the Land Use Commission should deny the Applications and remand to the Planning Commission to enter a single, consolidated findings, conclusion, and decision.

For these reasons, the Applications should be denied and remanded to the Planning Commission for further hearings on proposed findings of fact, conclusions of law, and decision and order.

## II. BACKGROUND

On December 3, 2008, Applicant Department of Environmental Services of the City and County of Honolulu (the “ENV”) filed an application (the “**2008 Application**”) for a new special use permit (“SUP”) for the WGSL.

After the Planning Commission recommended approval of the 2008 Application, in 2009 the Land Use Commission (“LUC”) granted the 2008 Application with certain conditions (“LUC’s **2009 Decision**”), including a condition prohibiting the ENV from disposing of municipal solid waste at the Landfill after July 31, 2012 (“**Condition 14**”). The ENV appealed the decision to the circuit court and later to the Hawai‘i Supreme Court.

While the appeal of the 2008 Application was proceeding, the ENV filed an application on June 28, 2011 to modify the SUP by deleting the LUC’s Condition 14 (the “**2011 Application**”) so that the City could use the Landfill to capacity. After eight hearing days, the parties submitted proposed findings of fact, conclusions of law, and decisions and orders.

Shortly thereafter, the Hawai‘i Supreme Court ruled that Condition 14 in the LUC’s 2009 Decision could not stand and vacated the LUC’s entire decision because Condition 14 was a material condition to the approval. The supreme court remanded the case to the LUC for further proceedings. The LUC remanded the 2008 Application to the Commission for consolidation with the 2011 Application and for entry of a single, consolidated findings, conclusions, and decision.

In a hearing on August 17, 2016, the Planning Commission consolidated the 2008 Application and 2011 Application proceedings.

On January 27, 2017, the parties filed proposed findings of fact, conclusions of law, and decisions and orders. On February 10, 2017, the parties filed responses.



On March 1, 2017, the Planning Commission held a hearing regarding the proposed findings of fact, conclusions of law and decisions and orders (“**March 1 Hearing**”). Ex. “C” (draft transcript). At the March 1 Hearing, the Planning Commission refused to allow the parties to present oral argument on the submissions. *See id.* Instead, the Planning Commission immediately moved to adopt ENV’s proposed findings of fact, conclusions of law and decision and order, along with two conditions proposed by KOCA and one condition proposed during the hearing by Commissioner Cord Anderson. *See id.* at 13:2-14:23.

Counsel for KOCA requested an opportunity to present oral argument regarding the proposed findings of fact, conclusions of law and decisions and orders. *Id.* at 15:2-21. Counsel for Intervenor Colleen Hanabusa renewed his prior written objection to the Chair’s participation based upon his comments to the Star-Advertiser in August 2016. *Id.* at 16:9-18:7, 18:19-21. The Planning Commission then went into executive session. *Id.* at 18:22-19:5.

Upon returning from executive session, the Chair refused to recuse himself, stating that his comments reflected his “personal opinions taken out of context in regards to the news article.” *Id.* at 19:19-20:7. Counsel for Hanabusa moved to call as a witness the Star-Advertiser reporter, Gordon Pang, who had written the article. *Id.* at 20:16-17. Mr. Pang was sitting in the audience. *Id.* The Chair denied the request. *Id.* at 20:18. KOCA joined in Hanabusa’s request for the Chair to recuse himself from the proceedings. *Id.* at 22:5-6. The Chair refused.

The Chair also denied KOCA's request for oral argument. *Id.* at 20:18-21. Counsel for KOCA further objected, pointing out that the motion to accept ENV's proposed findings of fact, conclusions of law and decision and order was made without any discussion, raising the inference that decisions in this matter were not made open and publicly. *Id.* at 20:25-22:5. Hanabusa joined in the objection. *Id.* at 22:7-8. Neither party, however, was permitted to present oral argument. *Id.* at 22:9.

After further discussion, the Planning Commission voted to adopt (1) ENV's findings of fact and conclusions of law except for any findings predating 2011, (2) the decision and order and conditions from the LUC's 2009 Decision except for Condition 14, (3) two conditions proposed by KOCA and (4) a new condition setting a deadline for the selection of a new landfill. *Id.* at 32:6-35:1.

The Planning Commission entered a written Findings of Fact, Conclusions of Law, and Decision and Order dated April 28, 2017 (the "**2017 Written Decision**").

### III. DISCUSSION

In light of the procedural defects in the March 1 Hearing, including the Chair's failure to recuse himself from the proceedings, KOCA respectfully requests that the Land Use Commission deny the Applications and them to the Planning Commission for further proceedings.<sup>2</sup> In Section A below, KOCA explains why the Planning Commission's failure to comply with its own Rules renders the Decision invalid. In

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<sup>2</sup> The LUC may "approve, approve with modification, or deny the petition," "impose additional restrictions as may be necessary or appropriate in granting the approval" or remand to the county planning commission for further proceedings." HAR § 15-15-96; *accord* HRS § 205-6(e).

Section B, KOCA explains why the Chair's failure to recuse himself violates due process. In Section C, KOCA explains that the Planning Commission's 2017 Written Decision failed to follow the Land Use Commission's remand order because the decision does not make any findings, conclusions, or decision on the 2008 Application.

**A. The Planning Commission's Decision Rests Upon Procedural Errors.**

The Planning Commission must follow its own rules. "It has become axiomatic that an agency is bound by its own regulations. . . . The decision of an administrative agency may be reversed 'if the substantial rights of the petitioner have been prejudiced because the administrative findings . . . are . . . made upon unlawful procedure.'" *Stueart v. Ark. State Police Comm'n*, 945 S.W.2d 377, 379 (Ark. 1997) (first ellipsis added) (citation omitted); accord *Nakamine v. Bd. of Trustees of the Employees' Retirement Sys.*, 65 Haw. 251, 255, 649 P.2d 1162, 1165 (1982) ("Where an administrative agency, by the failure to follow its rules, prejudices the substantial rights of a party before it, it may be necessary for the court, under the power to modify the decision and order of the agency, to fashion relief appropriately remedying the prejudice.").<sup>3</sup> "[A] procedure is 'unlawful' when an agency fails to follow that which it has prescribed." *Stueart*, 945 S.W. 2d at 379; see also *R.K. Black, Inc. v. Okla. Tax Comm'n*, 39 P.3d 814, 816-17 (Okla. Civ. App. 2001) ("When an administrative agency promulgates rules to govern its proceedings these rules must be

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<sup>3</sup> "Administrative rules, like statutes, have the force and effect of law." *French v. Hawaii Pizza Hut, Inc.*, 105 Hawai'i 462, 479 n.1, 99 P.3d 1046, 1063 n.1 (2004)

carefully observed. An agency's failure to obey its own procedural rules will negate such actions where prejudice results.").

As explained below, the Planning Commission violated its own Rules resulting in prejudice to KOCA. For those reasons, the Decision cannot stand.

*1. The Planning Commission violated its Rules.*

Section 2-75 of the Planning Commission Rules governs the commissioners' examination of evidence where, as here, the commission members who are to render a final decision did not participate in the evidentiary hearings. The section provides in relevant part as follows:

Whenever commission members who are to render the final decision have not heard **and** examined all of the evidence, the decision, if adverse to a party to the proceeding, shall not be made until **a proposal for decision** containing a statement of reasons and including the determination of each issue of fact or law necessary to the proposed decision **has been served upon the parties**, and an opportunity has been afforded to each party adversely affected to **file written exceptions and present oral argument** to the commission members who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties. Submission of a proposed decision is required whether a single commissioner or a majority of the commissioners have not heard the evidence.

Planning Commission Rules § 2-75 (emphases added).

Section 2-75 applies because none of the Commissioners were present for all of the hearing days during the 2009 and 2012 proceedings. Although the Commissioners confirmed that they had each reviewed the record, *see* Ex. "C" at 19:6-18, it is undisputed that the Commissioners had not "heard" all the evidence. None of the Commissioners were members of the Planning Commission during the evidentiary hearings in 2009. *See* Ex. K-12 at 27-28 (2009 Planning Commission decision). Of the Commissioners present during the March 1, 2017 hearing, only Commissioners

Anderson and Young were members of the Planning Commission during the evidentiary hearings in 2012. *See* hearing transcripts from 2012. Thus, the Commissioners who voted at the March 1, 2017 hearing had not “heard **and** examined all of the evidence.” *See* Planning Commission Rules § 2-75 (emphasis added).

In such a situation, under section 2-75, the Planning Commission was required to serve upon the parties “a proposal for decision containing a statement of reasons including the determination of each issue of fact or law necessary to the proposed decision” and provide the parties with an opportunity to “file written exceptions **and** present oral argument.” *See id.* (emphasis added). The Planning Commission did not provide the parties with a written proposal for its decision. The Planning Commission did not provide the parties with an opportunity to file written responses to such a proposal. And the Planning Commission did not provide the parties the opportunity to present oral argument, despite KOCA’s multiple requests during the hearing.

2. *KOCA’s substantial rights were prejudiced by the Planning Commission’s failure to comply with its own Rules.*

As a result of the Planning Commission’s failure to comply with section 2-75, KOCA was denied the opportunity to object to the Decision, both in writing and through oral argument. Courts have reversed agency decisions in similar situations.

For example, in *Izzi v. W.C.A.B.*, the Worker’s Compensation Appeal Board denied the petitioner’s disability claim without advising the petitioner of a change in the referee or providing the petitioner with an opportunity to object to the change, which was required under the Board’s rules. 654 A.2d 176, 178 (Pa. Commw. Ct.

1995). The petitioner argued that he was prejudiced by the Board's failure to comply with its rules because, if he been given the opportunity, he would have objected to the referee due to the referee's inexperience and failure to consider the record as a whole. *Id.* The court concluded that the Board's "failure to follow its rules and procedures precluded Claimant from raising his objections to the second referee substitution in accordance with the law," and reversed the Board's order. *Id.* at 179.

As in *Izzi*, in contravention of its Rules the Planning Commission denied KOCA the opportunity to object to a proposed written form of the Decision in writing and oral argument. As a result, KOCA was precluded from presenting its arguments and objections. To correct the error, the Applications should be remanded to the Planning Commission for further proceedings in accordance with the Planning Commission Rules.

**B. KOCA Was Denied Due Process Because the Chair Failed to Recuse Himself.**

The Applications should be remanded because the Chair failed to recuse himself from the proceedings. "In an adjudicatory proceeding before an administrative agency, due process of law generally prohibits decisionmakers from being biased, and more specifically, prohibits decisionmakers from prejudging matters and the appearance of having prejudged matters." *Mauna Kea*, 136 Hawai'i at 389, 363 P.3d at 237; *see also 1616 Second Ave. Restaurant, Inc. v. N.Y. State Liquor Authority*, 550 N.E.2d 910, 911 (N.Y. 1990) ("It is beyond dispute that an impartial decision maker is a core guarantee of due process, fully applicable to adjudicatory proceed-

ings before administrative agencies.”).<sup>4</sup> “[T]he standard for evaluating the existence of improper prejudgment in an adjudicative context is whether a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.” *Mauna Kea Anaina Hou*, 136 Hawai‘i at 389-90, 363 P.3d at 237-38 (citing *Cinderella Career & Finishing Schs., Inc. v. F.T.C.*, 425 F.2d 583, 591 (D.C. Cir. 1970)); *Cinderella*, 425 F.2d at 590 (vacating agency decision on ground that FTC Chair should have recused himself based on comments he made during a public speech regarding issues involved in the pending administrative case). “[I]f there exists any reasonable doubt about the adjudicator’s impartiality at the outset of a case, provision of the most elaborate procedural safeguards will not avail to create [an] appearance of justice.” *Mauna Kea Anaina Hou*, 136 Hawai‘i at 390, 363 P.3d at 238.

Applying this standard, courts have held that, where “an administrative official has made public comments concerning a specific dispute that is to come before him in his adjudicatory capacity, he will be disqualified on the ground of prejudgment if a disinterested observer may conclude that he has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.” *1616 Second Ave. Restaurant*, 550 N.E.2d at 912 (quotations omitted). For example, in *1616 Second Ave. Restaurant*, the State Liquor Authority was investigating allegations

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<sup>4</sup> All City Officials are required to take the following oath under the Honolulu Charter: “I solemnly swear (or affirm) that I will faithfully support the Constitution and laws of the United States of America, the Constitution and laws of the State of Hawaii and the Charter and laws of the City and County of Honolulu, and conscientiously and **impartially** discharge my duties as \_\_\_\_\_ of the City and County of Honolulu.” Charter 13-118 (emphasis added).

that a restaurant had been serving alcohol to minors. *Id.* at 160-61. While the investigation was pending and prior to a final decision on the charges, the chairman of the State Liquor Authority testified before the state senate stating, among other things, that he was “going to bring Dorian’s to justice.” *Id.* at 163-64. On review, the court held that the chairman’s testimony “could only be regarded by a disinterested observer as evidencing [the chairman’s] belief that petitioner had in fact violated the law regarding the sale of alcohol to minors and his commitment to establishing that fact in the SLA proceeding,” thus the chairman was obligated to recuse himself from the proceedings. *Id.* at 164, 165. The court noted that

public statements that indicate prejudgment are especially problematic. . . . Such statements ‘may have the effect of entrenching [the official] in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record.’ . . . In effect, to find petitioner innocent would require a public confession of error by the Chairman. That is an impermissible burden to place on petitioner.

*Id.* at 162 (brackets in original) (citation omitted).

Similarly, in *Woodlawn Heights Taxpayers & Community Ass’n v. N.Y. State Liquor Authority*, the State Liquor Authority considered an application to modify an existing liquor license that was strongly opposed by neighboring residents. 307 A.D.2d 826, 827 (N.Y. App. Div. 2003). At a public meeting, one of the commissioners “stated his opinion that the area actually needed more establishments like [the applicant], and that contrary to [the community’s] position, the area was not oversaturated with such establishments.” *Id.* Despite these comments, the commissioner refused to recuse himself. *Id.* On appeal, the court found that “[t]hese comments which are at the core of the issue concerning the alteration, were offered in a public



forum, before any vote was taken, and clearly indicate a preconceived bias on the part of that commissioner.” *Id.* The court thus vacated the decision granting the modification and remanded the case for reconsideration without the participation of the commissioner. *Id.*

Like decisionmakers in the foregoing cases, the Chair made public statements indicating he had predetermined that the ENV’s application must be approved. On record during the proceeding held on August 15, 2016, Chair Hazama stated that “the overbearing matter of importance is the fact that we need to get the City’s SUP,” “the City needs a SUP” and “I think the first step is the City needs to get this SUP approved.” Ex. “A” at 26:3-5, 26:10, 28:2-3.

Similarly, in an interview with the Honolulu Star-Advertiser published on August 19, 2016, the Chair was quoted as saying:

- “[H]e expects the commission will recommend the LUC grant the [C]ity’s request for extended use of the landfill[;]”
- “[W]e have to have an operating landfill. I think it is unreasonable to expect the [C]ity to just close it down[;]” and
- “That’s my hope, that we can move this along so that at least the [C]ity will have a valid permit that will allow it to operate it.”

Ex. “B” (8/19/16 Honolulu Star-Advertiser article).

The Chair made these public statements **prior to** the submission of the parties’ proposed findings of fact, conclusions of law and decisions and orders and **before** the Planning Commission had voted on the ENV’s applications. The statements addressed the core issue of whether the ENV was entitled to a SUP, “were offered in a public forum, before any vote was taken, and clearly indicate a preconceived bias

on the part of [Chair Hazama].” *Woodlawn Heights Taxpayers & Cmty. Ass’n*, 307 A.D.2d at 827.

Under the circumstances, the Chair’s statements “could only be regarded by a disinterested observer as evidencing” his belief that ENV’s application should be approved. *1616 Second Av. Restaurant, Inc.*, 550 N.E.2d at 164; *see also Mauna Kea*, 136 Hawai’i at 389, 363 P.3d at 237. Confirming that the disinterested observer would be correct, the Chair echoed his earlier comments when he voted to approve the ENV’s permit application at the March 1 Hearing:

- “[W]e have really no other choice in my opinion but we have to have an operating landfill.” Ex. “C” at 24:10-11.
- “[I]n reality of the matter is that we need a landfill.” *Id.* at 24:13-14.
- “[W]e need a landfill” as “[w]e just can’t put it in somebody’s backyard.” *Id.* at 24:24-25.

The Chair was obligated to recuse himself from the proceedings because he had prejudged the issues. The Chair’s failure to recuse himself denied KOCA the right to an impartial decisionmaker and rendered the Planning Commission’s Decision invalid. *See, e.g., Marris v. City of Cedarburg*, 498 N.W.2d 842, 847 (Wisc. 1993) (“A clear statement ‘suggesting that a decision has already been reached, or prejudged, should suffice to invalidate a decision.’”). To correct the error, the Applications should be remanded to the Planning Commission for further proceedings without the participation of Chair Hazama.

**C. The Planning Commission's 2017 Decision Fails to Comply with the Land Use Commission's October 8, 2012 Remand Order.**

The Planning Commission's 2017 Decision does not make any findings, conclusion or decision regarding the ENV's 2008 Application. The ENV's 2008 Application was approved by the Planning Commission in its 2009 Decision. The Planning Commission's Decision was adopted by the Land Use Commission with modifications in 2009, including a closure condition. The Land Use Commission's Decision was thereafter vacated by the Hawai'i Supreme Court. *Dep't of Envtl. Servs. v. Land Use Comm'n*, 127 Hawai'i 5, 17, 275 P.3d 809, 821 (2012).

On remand from court, the Land Use Commission remanded the 2008 Application proceeding to the Planning Commission so that the 2008 Application proceeding could be consolidated with the 2011 Application proceeding and the Planning Commission could then "issue and transmit a **single, consolidated** Findings of Fact, Conclusions of Law, and Decision and Order on the matter to the LUC . . . ." Ex. "D" (10/8/12 order) at 3-4 (emphasis added). The Planning Commission consolidated the two proceedings, but in its 2017 Decision failed to make any findings, conclusions, or decision on the 2008 Application.

Contrary to the Land Use Commission's order filed October 8, 2012, the Planning Commission's has not entered a single, consolidated decision. Additionally, because the Land Use Commission's Decision was vacated on appeal, the Planning Commission was indeed required to enter a new decision with respect to the 2008 Application.

The Applications should be denied and this matter should be remanded pursuant to HAR § 15-15-96 for the Planning Commission to enter a single, consolidated decision that reviews and reconciles the evidence from the 2009 Application and 2011 Application proceedings. The following are examples of findings of fact in the 2009 Decision that cannot stand particularly in light of the record from the 2011 Application proceeding:

- **Findings of Fact 53 to 61** identify the uses surrounding the Landfill, including Ko Olina and Makaiwa Hills development. This finding clearly erroneous because it does not address the distance of Makaiwa Hills from the Landfill. Todd Apo testified that Makaiwa Hills was within 1,500 feet of the Landfill expansion area. 2008AP 7/2/09 Tr. at 262:16-18. Under Revised Ordinances of Honolulu § 21-5.680, “No waste disposal and processing facility shall be located within 1,500 feet of any zoning lot in a country, residential, apartment, apartment mixed use or resort district. When it can be determined that potential impacts will be adequately mitigated due to prevailing winds, terrain, technology or similar considerations, this distance may be reduced, provided that at no time shall the distance be less than 500 feet.” Given the serious health and safety issues the Landfill has created for the surrounding community over the years, the Landfill’s potential impacts have not been adequately mitigated.
- **Finding of Fact 60** states that Waste Management responded to complaints regarding the Landfill in 2007, 2008 and 2009 and that in 2009 the

General Manager of Ihilani Hotel at Ko Olina testified that he had not submitted any complaints to Waste Management regarding the Landfill in 2009. This finding is clearly erroneous because the evidence in the 2011 Application Proceeding showed that in January 2011 the Landfill released waste and leachate into the coastal waters, *see* 2011AP Williams Written Direct Testimony at 18 (¶ 43); 2011AP Ex. K52 at 2 (12/23/10 DOH investigation report); that the waste washed up in Ko Olina's lagoons, *see* 2011AP Williams Written Direct Testimony at 18 (¶ 44); and that Waste Management sent workers for only one day to assist in the cleanup efforts, even though waste continued to wash ashore in the area, 2011AP Ex. K133b (1/14/11 KHON 2 video); 2011AP 4/23/12 Tr. at 41:13–15 (Belluomini); 2011AP 2/8/12 Tr. at 94:24–95:2 (Hospodar). The evidence from 2011 Application Proceeding also showed that Ko Olina's residents, workers and visitors have expressed concerns regarding the odors, noise, dust, blasting, visual blight, truck traffic and flying litter from the Landfill. 2011AP Williams Written Direct Testimony at 9 (¶ 29).

- **Finding of Fact 75** states that “[l]eachate does not come into contact with storm water.” This finding based on evidence from the 2008 Application Proceeding is no longer accurate, given that storm water plainly came into contact with leachate during the discharges from the Landfill that occurred in December 2010 and January 2011. *See* Ex. 1 (KOCA's Findings) at 50-56 (¶¶ 290-301). For example, in the January 2011 incident, the Landfill's

drainage system failed and allowed storm water to flow “like a waterfall” into Cell E6. 2011AP Ex. K97 (1/11/11 DOH inspection report at 5).

- **Findings of Fact 77 to 81** discuss the Landfill’s gas collection and control system and a Notice of Violation issued by the U.S. Environmental Protection Agency on April 4, 2006. These findings are based solely on the 2008 Application Proceeding. The evidence in the 2011 Application Proceeding established that on September 5, 2008, DOH sent a warning letter to Waste Management and the ENV identifying three potential violations, including the failure to submit written notification of the exceedance and verification of methane gas monitoring results. 2011AP Ex. K82 at 2 (9/5/08 warning letter). Further, in 2011, the ENV disclosed that a Waste Management employee had falsified explosive gas readings from mid-2010 to August 2011. 2011AP Steinberger Written Direct Testimony at 27 (§ 82). The failure to monitor gas readings was a threat to public health and safety. 2011AP 3/7/12 Tr. at 131:23–132:10 (Miller); 2011AP 1/11/12 Tr. at 91:1–92:3, 93:3–6 (Steinberger: affirming that “one of the reasons you monitor subsurface wellhead gas is because of a concern for subsurface fire”).
- **Finding of Fact 90** states that the City Council “selected” the WGSL as the “new” landfill. The statement is false and contrary to the reliable, probative and substantial evidence in the record. City Council passed a non-binding resolution to designating the existing site as the “new” landfill. 2011AP 1/11/12 Tr. at 52:6–15 (Steinberger); 2011AP 4/4/12 Tr. at 138:23–

139:1 (Timson). The resolution was not binding on the City. *Wemple v. Dahman*, 103 Hawai'i 385, 396 n.13, 83 P.3d 100, 111 n.13 (2004) ("We also note that County Council Resolution No. 81-252 is a resolution, not an ordinance, and therefore does not have the binding effect of an ordinance . . . .").

- **Finding of Fact 101** states in part, "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 WGSF." This finding is contrary to the reliable, probative and substantial evidence in the record. The ENV has publicly stated that when the third boiler is operational, the landfill diversion will be 90%. 2011AP Ex. K251 at 1-2 (5/5/11 ENV press release).
- **Findings of Fact 103 to 110** purport to explain the Landfill's compliance with state and county land use law and regulations. The findings are clearly erroneous. First, as explained above, the record shows that the Landfill does not comply with Revised Ordinances of Honolulu § 21-5.680, because the Landfill is located within 1,500 feet of a zoning lot in a country, residential, apartment, apartment mixed use or resort district. Findings of Fact 103 to 110 fail to discuss this provision.

- Second, while the findings purport to summarize state regulations, they fail to mention the letter submitted by the State Office of Planning in the 2008 Application Proceeding, which read in part (2011AP Ex. K6 at 2):

A commitment was made by the City and County of Honolulu to the State Land use Commission in 2003 to close the Waimanalo Gulch Landfill by 2008. Because the time limit on this commitment has passed, an immediate and far greater effort is needed to reduce the necessity for landfill space and fulfill this commitment as soon as possible.

In the meantime, the Planning Commission should review the current conditions in 86/SUP-5 and impose those that they deem necessary to mitigate adverse impacts of the landfill on the environment and adjacent communities.

- Third, the findings fail to mention the Landfill's violations of the state law. DOH Branch Chief Chang testified that of the 13 landfills in the State, 9 to 11 of which accept MSW, the WGSL probably has more regulatory violations than any other landfill for the period of 2006 to 2011. 2011AP 1/25/12 Tr. at 15:25–16:13, 39:24–40:3 (Chang).
- **Finding of Fact 103** states that “[t]he Project complies with the guidelines as established by the Planning Commission.” This finding is materially incomplete and contrary to the reliable, probative and substantial evidence in the record. For the use of the Landfill to comply with the Planning Commission’s and the Land Use Commission’s guidelines, the Planning Commission should impose condition “necessary to mitigate adverse impacts of the landfill on the environment and the adjacent community,” and to ensure that City “fulfill[s] [its] commitment [to close the Landfill] as soon as possible,” as the Office of Planning recommended and based on the evi-



dence in this contested case. The evidence confirms the City's commitment to close the Landfill. The evidence also demonstrates that the Landfill has posed serious problems for public health and safety.

These points illustrate the need to review and reconcile the evidence from the 2008 Application proceeding and the 2011 Application proceeding. Accordingly, the Applications should be denied and this matter should be remanded to the Planning Commission to enter a single, consolidated findings, conclusion, and decision and order.

#### IV. CONCLUSION

For the foregoing reasons, KOCA respectfully requests that the Commission deny the Applications and remand the Applications for further proceedings pursuant to HAR § 15-15-96(a).

DATED: Honolulu, Hawai'i, May 12, 2017.

CADES SCHUTTE  
A Limited Liability Law Partnership



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CALVERT G. CHIPCHASE  
CHRISTOPHER T. GOODIN

Attorneys for Intervenors  
KO OLINA COMMUNITY ASSOCIATION  
and MAILE SHIMABUKURO

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of

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

PLANNING COMMISSION FILE NO.  
2008/SUP-2

**DECLARATION OF CHRISTOPHER  
T. GOODIN**

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF  
HONOLULU

To delete Condition No. 14 of Special

Use Permit No. 2008/SUP-2 (also  
referred to as Land Use Commission  
Docket No. SP09-403) which states as  
follows:

“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.”

**DECLARATION OF CHRISTOPHER T. GOODIN**

I, Christopher T. Goodin, hereby declare as follows:

1. I am one of the attorneys for Ko Olina Community Association and Senator Maile Shimabukuro in this action and make this declaration based on personal knowledge.

2. Attached hereto as Exhibit "A" is a true and correct copy of the transcript of proceedings in this action on August 17, 2016.

3. Attached hereto as Exhibit "B" is a true and correct copy of an article dated August 19, 2016, titled Landfill's fate will gain clarity in fall, by Gordon Pang published in the Star-Advertiser.

4. Attached hereto as Exhibit "C" is a true and correct copy of the draft transcript of proceedings in this action on March 1, 2017, before the Honolulu Planning Commission.

5. Attached hereto as Exhibit "D" is a true and correct copy of the Land Use Commission's Order Remanding County Special Use Permit File No. 2008/SUP-2 to the City and County of Honolulu Planning Commission entered October 8, 2012, in this matter.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawai'i, May 12, 2017.

  
CHRISTOPHER T. GOODIN

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BEFORE THE PLANNING COMMISSION

CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the	)	FILE NO. 2008/SUP-2
Application of	)	
	)	
DEPARTMENT OF ENVIRONMENTAL	)	
SERVICES, CITY AND COUNTY	)	
OF HONOLULU	)	DRAFT August 17, 2016
	)	Planning Commission
To delete Condition No. 14 of	)	transcript
Special Use Permit No. 2008/SUP-2	)	
(also referred to as Land Use	)	
Commission Docket No. SP09-403)	)	
which states as follows:	)	
	)	
"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."	)	
	)	

CONTESTED CASE HEARING

Ewa-State Special Use Permit Amendment Application -  
2008/SUP-2 (RY) Waimanalo Gulch Sanitary Landfill

Taken at Mission Memorial Conference Room, Mission  
Memorial Building, 550 South King Street, Honolulu, Hawaii  
96813, commencing at 1:37 p.m. on August 17, 2016, pursuant  
to Notice.

1 APPEARANCES:

2

3 Planning Commissioners present:

4

Dean I. Hazama, Chair

5

Cord D. Anderson, Vice Chair

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Arthur B. Tolentino

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Daniel S. M. Young

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Wilfred A. Chang, Jr.

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10 Planning Commissioners excused:

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Kaiulani K. Sodaro

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Steven S. C. Lim

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Ken K. Hayashida

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Theresia C. McMurdo

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16 Planning Commission staff:

17

Gloria Takara, Secretary-

18

Hearings Reporter

19

20 Deputy Corporation Counsel:

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Jennifer D. Waihee-Polk

22

(Advisory to the Commission)

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24

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1 DPP representative:

2 Raymond Young

3

4 For the City and County of Honolulu, Department of  
5 Environmental Services:

6 Kamilla C. K. Chan, Esq.

7 Deputy Corporation Counsel

8 City and County of Honolulu

9 530 South King Street, Room 110

10 Honolulu, Hawaii 96813

11

12 For intervenor Ko Olina Community Association and Senator  
13 Maile Shimabukuro:

14 Calvert G. Chipchase, IV, Esq.

15 Cades Schutte

16 1000 Bishop Street, Suite 1200

17 Honolulu, Hawaii 96813

18

19 For intervenor Schnitzer Steel Hawaii Corp.:

20 Arsima Muller, Esq.

21 CarlsmtH Ball LLP

22 ASB Tower, suite 2200

23 1001 Bishop Street

24 Honolulu, Hawaii 96813

25

1 For intervenor Colleen Hanabusa:

2 Richard D. Wurdeman, Esq.

3 1003 Bishop Street, Suite 720

4 Honolulu, Hawaii 96813

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21 (Secretary-Hearings Reporter note: A separate transcript of  
22 this Planning Commission meeting was prepared for the  
23 portion of the meeting regarding the public hearing on zone  
24 request 2016/Z-4 (NS), Church of Christ at Pearl Harbor)

25

## P R O C E E D I N G S

Chairman: Okay. At this time we'll move onto our next item on the agenda. A continued contested case hearing, Ewa-State Special Use Permit Amendment Application 2008/SUP-2, Waimanalo Gulch Sanitary Landfill. At this time I'd like to ask the Department to provide an update to the Commission.

Mr. Young: Thank you, Mr. Chair. Mr. Chair, members of the Planning Commission, my name is Raymond Young. I'm the planner that was assigned to the project with respect to the Special Use Permit for the Waimanalo Gulch Sanitary Landfill. If I may, I would like to just start with some basic background information as to when the permit was established and subsequent amendments after that.

Now, since this a permit that exceeded 15 acres all these dates of decisions and most of the events are established by the Land Use Commission. So, for example, when the permit was first granted, the SUP, that was back in April 20, 1987. It was for 60-1/2 acres and subsequent to that two years later in October 1989, there was an amendment to add another 26 acres because they had inadvertently left out the accessory uses. So, essentially it started out as an 86-1/2 acre project. And at that time there was very little opposition, some from the neighbors, but at that time the West Beach Resort which was proposed by Herbert Horita was



1 just getting approved by the Land Use Commission. So was  
2 pretty much vacant that area. Now years later in 2003,  
3 June 9, the SUP was amended to increase capacity for five  
4 years and 21-acre expansion. And at that time Land Use  
5 Commission imposed a condition among others that a new site  
6 be selected and to close the Waimanalo Landfill by May 1st  
7 of 2008.

8 And on March 14th, 2008, the SUP closure deadline  
9 was again extended to November 1st, 2009, which essentially  
10 the Land Use Commission allowed the use of excess capacity  
11 resulting from the Department of Health's permitted increase  
12 in height of the landfill cells.

13 Subsequent to that the SUP area was amended to  
14 include the remainder of the City property, and this was  
15 back in October 22, 2009 to add another 93.1 acres for total  
16 of 200.6 acres. So the entire property owned by the City was  
17 then approved by the Land Use Commission to go for the  
18 sanitary landfill use, but the Land Use Commission did add a  
19 condition, No. 14, that says basically municipal solid waste  
20 would not be permitted to be disposed there after July 1st  
21 of 2012. Following that decision the Applicant, ENV,  
22 submitted a request in July 13th of 2011 to essentially  
23 delete that condition No. 14.

24 The evidentiary portion of that hearing was closed  
25 on April 23rd, 2012, and soon after that the Hawaii Supreme

1 Court ruled that particular condition which was under appeal  
2 by the Department of Environmental Services was unsupported  
3 and therefore the condition was struck and the case was  
4 remanded back to the Circuit Court with instructions for  
5 further remand to the Land Use Commission.

6 On May 25, 2012, now this is the Planning  
7 Commission. The Planning Commission granted a 6-month stay  
8 on the proceedings for the deletion of condition No. 14. So,  
9 what happened was the Supreme Court struck that condition  
10 while the Planning Commission was having their proceedings  
11 on the request to delete that condition and that's why the  
12 stay was granted essentially. However, the proceedings of  
13 that deletion of the condition was sent to the Land Use  
14 Commission and that occurred on June 18th, 2012, in response  
15 to a request that the proceedings be stayed and eventually  
16 the Land Use Commission issued an Order that the Planning  
17 Commission consolidate the record of the deletion  
18 proceedings and the prior proceedings that resulted in the  
19 201 acre approval.

20 And on December 19th, 2012, another continuance  
21 was granted to January of 2013 and subsequent to that on  
22 February 20, 2013, another continuance was granted to April  
23 2013. And no further request for continuances was  
24 entertained after that. And that brings us up to today's  
25 hearing. That concludes my presentation.

1           Chair Hazama: Okay. Thank you. Commissioners,  
2 any questions of Department at this time? [no response]  
3 No. Okay. Thank you, Raymond. Okay.

4           Mr. Young: Thank you.

5           Chair Hazama: Okay. If I can call the parties up  
6 now. Good afternoon. For the record, if we can go through  
7 introductions and who you represent, please.

8           Mr. Wurdeman: Good afternoon. Richard Wurdeman on  
9 behalf of intervenor, Colleen Hanabusa.

10          Chair Hazama: Good afternoon.

11          Mr. Chipchase: Good afternoon. Cal Chipchase for  
12 intervenors Ko Olina Community Association and Maile  
13 Shimabukuro.

14          Ms. Chan: Kamilla Chan for the Department of  
15 Environmental Services.

16          Ms. Muller: Arsima Muller for intervenor Schnitzer  
17 Steel Hawaii Corp.

18          Chair Hazama: Okay. Corporation Counsel, do you  
19 have any additional comments?

20          Ms. Chan: Do you want us to specifically address  
21 the motions that are pending before the Commission at this  
22 time or--

23          Chair Hazama: So, at this time we have  
24 consideration of Order Remanding the County Special Use  
25 Permit No. 2008/SUP-2--

1 [colloquy between Counsel Waihee-Polk and Chair  
2 Hazama]

3 ...So, I guess, we have basically two motions that  
4 are before the Commission at this time. One is by KOCA and  
5 Maile Shimabukuro requesting for consolidation of the 2008  
6 order and the second is a request by Environmental Services  
7 to Stay Proceedings to April 22nd, 2017. Okay. Go ahead,  
8 yeah, you can address the two motions.

9 Ms. Chan: Okay. I guess starting with the Motion  
10 for Consolidation, ENV continues to oppose that motion.  
11 Back in January 2013, we did file an opposition to KOCA's  
12 motion. The basis for our objection at this point is still  
13 the same. You know, we don't believe it's an administerial  
14 act that's being imposed at this point. Well, let me start  
15 with the Land Use Commission. They did remand the 2008  
16 application that case back to the Planning Commission. But  
17 they did not have jurisdiction over the 2011 case, so they  
18 don't actually have jurisdiction to order a consolidation.  
19 So, there's no administerial act for this Commission to act  
20 upon.

21 Likewise, the Supreme Court was considering the  
22 2009 order from the Land Use Commission. So, it too did not  
23 have jurisdiction over the 2011 matter that was still  
24 pending before the Planning Commission at that time. So,  
25 consolidation is not appropriate for that reason. We also

1 feel that it's not--consolidation is not appropriate under  
2 the Commission's rules for consolidation as it does  
3 not--It's Rule 2-61 that would allow for consolidation if  
4 it's contusive to the proper dispatch of the Commission's  
5 business and to the ends of justice. And in this case where  
6 the issue is condition No. 14. We don't believe that  
7 consolidation would be helpful to deal with the issue that  
8 the Supreme Court remanded which is really whether condition  
9 14 was substantiated by the evidence and what should be, I  
10 think, properly considered by the LUC at this point.

11 In addition, we would actually urge the Planning  
12 Commission to at this point dismiss the 2011 petition as  
13 there's no longer--There's really no longer an issue pending  
14 before the Planning Commission. The only issue raised by  
15 the 2011 application was the deletion of the condition that  
16 was actually struck by the Supreme Court. So, at this point  
17 we feel that it's not necessary to pursue that either.

18 Chair Hazama: Okay.

19 Ms. Chan: And as far as the Motion to Stay, do  
20 you want me to address that well?

21 Chair Hazama: Yes, go ahead.

22 Counsel Chan: The Motion for Stay came about  
23 really through discussions with KOCA and with among the  
24 other parties in that process. One of the issues that have  
25 come up was the diversion of waste from the landfill and

1 it's something that the City and KOCA had been working out  
2 for period of time. And going back to October of 2015, we  
3 had agreed to put on the record with the Planning Commission  
4 a stipulation to work toward very specific waste streams for  
5 diversion that we've mentioned in the Motion for Stay. And  
6 with the idea that we would continue to work toward further  
7 diversion. And so the deadline to April of 2017 is really  
8 to give the parties more time to continue to discuss that  
9 and really for ENV to continue working on its commitment to  
10 diverting those waste streams. We've made progress so far  
11 since the period of time where we really started reducing it  
12 down to writing--You know, more waste streams have been  
13 diverted including, I think, probably the more controversial  
14 ones. I don't mean to speak for any of the other parties,  
15 but sewage sledge has since been diverted to H-Power along  
16 with the bulky waste. You know medical waste other than  
17 then the sharps have since been diverted to H-Power as well,  
18 and we're continuing to evaluate, you know, the other waste  
19 streams that are there being sent to the landfill to see  
20 what else we can send to H-Power. It's going to take some  
21 time because there's other regulations and other things that  
22 are going to come into play as we continue to work toward  
23 diversion. So, that's really the intent of that. We're  
24 hoping we can reach a point of entering into some type of  
25 agreement, but we do need that extra time to get there.

1 Chair Hazama: Okay.

2 Mr. Wurdeman: Thank you. Just to add a little  
3 bit more to the background that was articulated by the City  
4 representative, the Department's representative who came up  
5 earlier. The Supreme Court issued its decision on May 4th,  
6 2012, and intervenor Colleen Hanabusa would submit that for  
7 the last 4.5 years, the City and County has operated an  
8 illegal landfill at the Waimanalo Gulch Sanitary Landfill  
9 without a valid Special Use Permit. I mean, that's very  
10 troubling. It's interesting that the State Department of  
11 Health hasn't intervened at this point and started assessing  
12 fines against the City, daily fines what they should be  
13 doing. But the fact remains that for 4.5 years since the  
14 Supreme Court entered its decision, our City and County of  
15 Honolulu again has been operating an illegal landfill. The  
16 history of this landfill--I mean, going back to the 90s when  
17 the City made promises to gulch at some point. And as  
18 Environmental Services representative said that promise  
19 brought up again in 2003; by 2008 the landfill will be  
20 closed. Then 2008 comes around then the City says we have  
21 no other options, we need some more time. And it's been a  
22 cat and mouse game that the City has been playing for about  
23 two decades now. And there's always been discussion  
24 everytime its come before both the Planning Commission and  
25 the Land Use Commission of some closure date.

1           And in 2009, this 2012 issue which was a material  
2     condition that was brought up by the ENV rep was discussed.  
3     Also during that time in 2009, the City was supposed to find  
4     an alternative site within seven years. And my math 2009  
5     plus seven takes us to 2016. And here we are, there's no  
6     alternative sites. The City has done essentially nothing in  
7     seven years other than as far as designate an initial list  
8     of proposed interested prospective sites that they  
9     might consider and that's been it. So that this pattern of  
10    20 years of broken promises by the City's continuing it.  
11    And my client absolutely and unconditionally wants that  
12    landfill closed period. We object to any continuances at  
13    this point. They've had more than enough time. They've had  
14    4.5 years to operate an illegal landfill without any  
15    repercussions whatsoever.

16           Back in 2012 when the Supreme Court issued its  
17    decision and prior to the case being remanded back to the  
18    LUC by the Hawaii Supreme Court via the First Circuit, the  
19    Chair at that time who is no longer the Chair sent to the  
20    Chair of the Planning Commission who is longer on this  
21    Commission, to hold on, we're going to remand this case for  
22    the Supreme Court back down to you so that you can consider  
23    that along with what has already been heard in this, I  
24    guess, Motion for Modification of a Condition--

25           Mr. Chipchase: Application--



1           Mr. Wurdeman: So, to consider the two records,  
2 the Planning Commission's Chair at that time, as I recall,  
3 went back to the Land Use Commission's Chair and said don't  
4 send us anything. We then had a hearing before the Land Use  
5 Commission. We objected to it being sent back to the  
6 Planning Commission. (inaudible) objected it was sent back  
7 to the Planning Commission and ever since then, I mean other  
8 than the Ko Olina Community Association and the City  
9 apparently discussing possible resolution, there's been no  
10 action taken by either agents. And we've been having  
11 periodic meetings with the Land Use Commission and in our  
12 last appearance before them a few months ago when we  
13 objected to a stipulation being entered for continuance  
14 until next year as the City has talked about. I guess the  
15 solution at that point was for the City to make a formal  
16 request of the Planning Commission to enter (inaudible) a  
17 stipulation. And so that's our position, we object to  
18 anymore continuances. Our position is this landfill needs  
19 to be closed. Thank you.

20           Chair Hazama: Thank you. Mr. Chipchase.

21           Mr. Chipchase: Yes. Thank you, Chair. So, if  
22 it's allright with the Commission, I'll take the motion sort  
23 of in reverse order in how I talk about them. And, I'll try  
24 to start with where it seems everybody agrees and that this  
25 has been going on a long time. I think everybody is on the

1 same page there. This has been going on for a long time.  
2 What we've tried to do through the Motion to Stay which  
3 reflects a stipulation that was signed by my clients or on  
4 behalf of my clients, the City and Schnitzer, is not to  
5 postpone things indefinitely, not to add time to what we've  
6 already experienced. And Ko Olina and Maile Shimabukuro  
7 feel the delay as much as Ms. Hanabusa and the frustration  
8 of the community is the same.

9 But what we're trying to do is to continue to  
10 provide a vehicle, some time to continue discussions with  
11 the City to end up at a point where we reach agreement. We  
12 may not get there, but we've made enough progress in those  
13 discussions to give it a go, to give it more time. And what  
14 an agreement would look like and again taking up a point  
15 of--There is no dispute on. The City needs a permit. The  
16 City knows it needs a permit to operate a landfill. The City  
17 doesn't think it can dismiss both proceedings and continue  
18 operating the landfill. The City doesn't think that some  
19 private agreement between my client and the City will result  
20 in permission to operate the landfill. The City needs a  
21 permit and that permit has to go through this body which  
22 forwards a findings and conclusions to the LUC, which has to  
23 approve the permit. So what an agreement between the  
24 parties, if we're able to reach one would like that is  
25 stipulated Findings of Fact, Conclusions of Law, Decision

1 and Order. And we've been trying to get to that point now  
2 for more than three years. We haven't made it.

3 We're not there yet. But we've made enough progress. And  
4 you heard some of the progress with respect to diversions at  
5 least today from the City. We've made enough progress that  
6 we're willing to give it more time and the stipulation sets  
7 out what that time--I believe it's April of 2017 and sets  
8 out different bench marks for updates that the City would  
9 submit so that everybody knows what is going on and what  
10 kind of progress we're making. So, that's the intent and the  
11 goal of the stipulation to see if we can arrive at  
12 stipulated Findings of Fact, Conclusions of Law, Decision  
13 and Order. It may not be agreeable to every party, but  
14 maybe we've got a majority of the parties or at least a  
15 couple of the parties on board with that, who can then come  
16 before this body for decision and action and then to the LUC  
17 for decision and action.

18 The consolidation of the two proceedings really  
19 goes back to the way the City handled this. The City had  
20 the 2008 application resulted in an approved permit  
21 continuing operating a landfill but had a closure deadline.  
22 While the City was appealing that closure deadline, the City  
23 filed the application to amend the permit to delete the  
24 closure deadline. In response to that application my client  
25 intervened in the proceedings and we went through, gosh, i

1 don't know what it was, eight hearing days, nine hearing  
2 days. I mean, it was an extensive record before this body  
3 with expert witnesses on both sides, lots of testimony, lots  
4 of documents. And just as we were at the point of this body  
5 entering its Findings of Fact, Conclusions of Law, Decision  
6 and Order, the Supreme Court came down with its decision. I  
7 mean, that Decision as the City had explained, it struck the  
8 closure deadline, but the Court recognized that closure  
9 deadline was material to the LUC's approval. Meaning the  
10 Court couldn't say that the LUC would've approved the permit  
11 without the closure deadline. So, the Supreme Court vacated  
12 the entire Order approving the permit. There is no Order  
13 approving the permit. And you heard from the City and from  
14 Mr. Wurdeman the two different views on the consequence of  
15 that. Mr. Wurdeman believes that since the Order was  
16 vacated there is no permit. The City is operating in an  
17 illegal landfill. The City believes that it can continue  
18 operating even though the permit was vacated because there  
19 needs to be a landfill.

20 I'm not here today to take a position on that or  
21 make those arguments to the body. My point is only that it  
22 left us with a proceeding that was remanded to the LUC  
23 specifically to address when and whether and how the  
24 landfill should close in the 2008 application. And the 2011  
25 application to amend the whole entirety of which concerned

1 whether, when and how the landfill should close. Reams of  
2 evidence on both sides, two proceedings on that very issue  
3 with an expressed direction from the Supreme Court go back  
4 and revisit this closure issue. And encouraging them,  
5 because the Court was aware of the 2011 proceedings,  
6 encouraging you, hey guys, we know you have this other  
7 proceeding, all of which concerns closure. We encourage you  
8 to consider that.

9           The Land Use Commission when it got the remand  
10 back decided that's good advice Supreme Court. We should  
11 consider all of the evidence in both proceedings before we  
12 make a decision on closure. Remand it to this body with  
13 expressed directions to consolidate the two proceedings.  
14 All we've done in our motion is just to effect what the LUC  
15 has directed this body to do. And you've heard from the  
16 City they don't think the LUC has the power to do that.  
17 They don't think they have the power to order you to  
18 consolidate. We can put that aside, I suppose. The question  
19 is whether it makes sense. And it's really difficult to  
20 argue that having gone through an entire proceeding, all the  
21 way to the close of evidence and submittal of draft Findings  
22 of Fact, Conclusions of Law, concerning whether and how the  
23 landfill should close. But all of that proceeding should be  
24 ignored, kept separately, dismissed as the City had said  
25 today from the very issue that's on remand, whether, how and

1 when the landfill should close. It's the same issue. That  
2 is the key in both cases. The record should be  
3 consolidated, and it should be consolidated no matter which  
4 way this goes. If we end up with an agreement, Stipulated  
5 Findings of Fact, Conclusion and Law, Decision and Order, it  
6 makes sense to have them filed in one single proceeding that  
7 resolves both applications that the City filed at the same  
8 time. If we're unable to get to that point, and we have to  
9 resume the contested case, it makes sense for this body and  
10 the LUC to have all the available evidence together in one  
11 single proceeding, so they make the best decision possible.  
12 Decision that is both correct, that has the best chance of  
13 being affirmed on appeal. Going the other way, right,  
14 refusing to consolidate the case leaves us with this.  
15 It leaves us with this body ignoring the LUC's direct order.  
16 Leaves with this body ignoring the expressed encouragement  
17 by the Hawaii Supreme Court, and leaves us with an entirely  
18 separate appeal from their refusal to consolidate the  
19 proceedings that will go up and effect whatever approval  
20 whether stipulated or not or ultimately able to reach.

21 So, I would submit that the City's position is not  
22 the right one in this case. The case should be consolidated.  
23 That's the most effective administrative substantive way to  
24 do it. It's consistent with the LUC and the Hawaii Supreme  
25 Court. And once they're consolidated let's stay them.

1 Let's stay those two proceedings. Let's give it another  
2 whatever it is, seven months, something like that, eight  
3 months to try and work it out. If we can't then we'll be  
4 back before this body and this body will have to make a  
5 decision. But if we can, then I think we've done a good  
6 thing for the community and for the entire state. Thank  
7 you.

8 Chair Hazama: Thank you. Okay. Ms. Muller.

9 Ms. Muller: Thank you, Commissioner. On the  
10 Motion to Effect Consolidation, Schnitzer was not an  
11 intervenor in the LUC proceedings, however, we were an  
12 intervenor in this Commission's proceeding. As  
13 Mr. Chipchase just argued it makes sense for those two  
14 proceedings to be merged. We went through a lengthy hearing  
15 before this Commission and not having the benefit of that  
16 when considering the permit just does not make sense. So,  
17 for that reason Schnitzer is in favor of the motion to  
18 affect consolidation. On the Motion to Stay Proceedings as  
19 Mr. Chipchase also indicated, Schnitzer was in favor of  
20 having the parties working on Stipulated Findings of Fact,  
21 Conclusions of Law. For that reason, Schnitzer is also in  
22 favor of the Motion to Stay Proceedings. Thank you.

23 Chair Hazama: Thank you. Okay.

24 Commissioners, do we have any questions of any of the  
25 parties at this time? [no response]

1           Ms. Chan: Could I actually address a couple of  
2 things that came up?

3           Chair Hazama: Okay.

4           Ms. Chan: I won't take too long. It's come up  
5 with what the City's position is and the reasons for the  
6 second application. So, I just want to clarify a couple of  
7 things. The City's position as far as the SUP at this point,  
8 we do believe that the Supreme Court recognize that the  
9 Waimanalo Gulch Landfill is the only permitted landfill and  
10 that there is an actual health safety need to have an  
11 operable landfill. It's our position that the only thing  
12 that was struck was the deadline. And to clarify the reason  
13 for the 2011 application it was because we--It wasn't clear  
14 whether the Supreme Court would reach a decision. And out  
15 of responsibility and caution we took those steps to address  
16 the deadline that had been imposed by the LUC. The timing I  
17 recognize, you know, we did go through those, a number days  
18 of hearing. I think Mr. Chipchase's estimate is correct  
19 probably eight or nine days and the timing of the Supreme  
20 Court decision shortly after that is unfortunate, but we  
21 still don't believe that there's a need to continue with  
22 those proceedings based on that decision.

23           Chair Hazama: Okay. Questions? [no response] I  
24 think I share some of the frustration in how long this is.  
25 It's like playing ping-pong back and forth between, I don't



1 know how many different courts. But regarding, I guess the  
2 City's position, you know, if I'm reading what the Supreme  
3 Court's ruling was as well as the State Attorney General's  
4 opinion, it doesn't appear that they agree that the City's  
5 2009 SUP application was ever approved by the LUC. And I  
6 don't think the LUC believes they approve the 2009  
7 application either, although they did strike down the date  
8 requirement in the 2011. So, it does concern me that the  
9 City doesn't have a permit, technically. They don't have a  
10 permit. I don't think anybody disputes Supreme Court's  
11 decision or opinion that there is a need for the landfill  
12 land. It's currently the only one we have right now, so we  
13 have to keep it open. But from my understanding is that you  
14 don't have a permit. Your permit expired 2009 was the  
15 application to extend and expand a new permit, and that was  
16 never approved. So, that does cause some concern, I guess,  
17 from the taxpayer's side of the seat that you're going to  
18 need a permit.

19 The 2011 second action was filed by the  
20 Department, so you guys kind of created that.

21 Ms. Chan: Out of necessity.

22 Chair Hazama: Yes, I understand. But, I mean,  
23 that's what created the whole thing, and there are two  
24 actions. My only other comment was, and Mr. Wurdeman, I  
25 agree that we have terms and they expire. So, it's been so

1 long that we have all new Commissioners now. That's just  
2 the way things are. But by consolidating the actions it  
3 allows the current Commission can now review all subsequent  
4 actions and provide their comments and additional conditions  
5 if they so desire. I think that's only fair for this  
6 Commission because we're talking about a 2009 decision that  
7 was made by Commissioners that no longer sit on this  
8 Commission. And if I have to ask these guys to review and  
9 approve a SUP, you know, in fairness to them, I would like  
10 them to have input and the their ability to provide their  
11 comments as well.

12           Regarding the Motion for Extension, I am, I guess  
13 I was a little disappointed because I actually served on the  
14 Commission that granted the last stay. And there was very  
15 little communication or updates provided to the Commission  
16 since the Stay, and it's been a while. I guess my question'  
17 to you, Mr. Chipchase is, and I know you guys all have the  
18 2009 Planning Commission D&O. How far, I mean, how much of  
19 a difference from what you have worked with the City so far,  
20 does that D&O not contain, I guess, is my question?

21           Mr. Chipchase: You know, the question is  
22 challenging to answer, I think because the approach have  
23 been different. So, I would like to see it not like as a  
24 quantitative difference where we compare this condition with  
25 that condition, but really is a qualitative difference. And

1 so what we try to effect through the stay was some  
2 qualitative changes where the City is held to or commits to  
3 attempting these further diversion area methods, and they're  
4 detailed in the draft stipulation, signed actually by three  
5 of the four parties. A draft stipulation that is attached  
6 is Exhibit A to the City's Motion to Stay.

7           So, those, negotiating those diversionary goals to  
8 an extraordinary amount of time and there was a great deal  
9 of direct party to party negotiation which the attorneys  
10 weren't even involved. And, so the parties themselves were  
11 able to come up with these goals as the framework or the  
12 benchmark maybe is a better way to put it, that would let us  
13 continue negotiations for Stipulated Findings of Fact,  
14 Conclusion of Law, Decision and Order. And, so that to me is  
15 how we approach it rather than looking at the 2009 Decision  
16 and Order and looking at how we can agree on adjusting this  
17 condition or that condition. We started with that approach  
18 in 2013 and went through exchanging drafts of Decision and  
19 Orders with the City, and we just couldn't close the gap.  
20 We just either had to abandon the effort or qualitatively  
21 shift to a different direction. And the result of that was  
22 the diversionary goals that are set out in the stipulation.

23           And, so I think to get back to what is different.  
24 What I'd like to cast it as what is different from today  
25 from where we were in 2013 when we almost abandoned the

1 effort to come up with stipulated Findings of Fact,  
2 Conclusions of Law. And that is that we made a great deal  
3 of progress, a great deal agreement I would say on  
4 diversionary goals. And it's that source of agreement that  
5 gave us hope that we can may be reach agreement on the rest  
6 of the things, the other parts of the order that we would  
7 have to agree to before we could present the stipulated  
8 Order to this body. And recognizing that we did not want it  
9 to go on forever, we set a deadline to the Stay rather than  
10 having us come back to you and say, we give up; we set firm  
11 deadline for us and recognizing, I think to our own  
12 frustration that maybe everyone's frustration including  
13 Mr. Wurdeman and Ms. Hanabusa is that communication may not  
14 have been as good as it could have been. We set out those  
15 report deadlines in the stipulation. If the Commission  
16 wanted further additional reports, if the Commission wanted  
17 the parties to appear and update the Commission, I'm certain  
18 my clients have no objection to that. We would be as open  
19 and transparent as this body thinks is appropriate for it  
20 and for the community.

21 Chair Hazama: Here's the problem is the '09  
22 Planning Commission's D&O basically put milestone dates on  
23 reports updates, etc. But because that was technically  
24 never enacted. None of that went into place.

25 Mr. Chipchase: Exactly.

1           Chair Hazama: So, that does concern me as well.

2       While I understand what you're saying regarding the  
3       extension and all of that, I think for me anyway, the  
4       overbearing matter of importance is the fact that we need to  
5       get the City's SUP and, therefore, I don't know how much  
6       harm it will do you if we don't actually grant the Stay and  
7       actually continue with the proceedings for a D&O with the  
8       consolidated thing. That's just my opinion. We've kind of  
9       kept this can on the road long enough. We do need a SUP,  
10      the City needs a SUP. I believe that by consolidating the  
11      issues together and then providing them with a D&O. Of  
12      course you'd be able to provide whatever your input is at  
13      that time regarding conditions, etc. But providing that  
14      back to the LUC, I think will not only prevent them from  
15      remanding it back to us again, but we'll be able to move  
16      forward and get the SUP approved.

17           Ms. Chan: Chair, your statement reminded me of  
18      something else that I forgot to mention--

19           Chair Hazama: Okay.

20           Ms. Chan: One of the conditions in the 2009 D&O  
21      from this body did require the City to start looking into  
22      other landfills--

23           Chair Hazama: That's correct.

24           Counsel Chan: ...that was the condition because  
25      they were keeping it open-ended to capacity, but they didn't

1 want the City be faced in with a situation where we weren't  
2 prepared with the landfill once we did hit capacity. And, I  
3 know Mr. Wurdeman has stated that nothing really has been  
4 done on that front. I did want to mention that the City had  
5 a panel back in 2012 that they came up with 11 or 12 sites.  
6 And that list needed further evaluation after that initial  
7 list was compiled. So that is something the City is  
8 actively working on. They broke up the project, I believe  
9 into two phases and they're kind of through most of the  
10 first phase in terms of evaluating what the current disposal  
11 is at the landfill. Because as you know the more we divert  
12 to H-Power and recycling and the less we put into landfill.  
13 So, they're having to reevaluate those things as well as well  
14 what's going to be appropriate at that time we do hit  
15 capacity. So, that's going to be, I believe in the second  
16 part of what they're evaluating. So, they are working on  
17 certain things, I believe are contained in that D&O.

18 Chair Hazama: I understand, but nothing is  
19 infinite. The key, I think is working with the Department  
20 of Health. And the LUC is a state Commission, so they can  
21 further compel the Department of Health to determine what  
22 the trigger is to when the City actually needs to get a new  
23 landfill.

24 Ms. Chan: And the City does recognize this. Yes,  
25 We are going to--We need to look at what the options are at

1 that point in time as well or prior to that point in time.

2 Chair Hazama: I think first step is the City  
3 needs to get this SUP approved. I think that's the first  
4 step. So--

5 Mr. Wurdeman: Mr. Chair, if I could just couple  
6 of points. You know, Ms. Hanabusa's position is obviously  
7 been to close the landfill period. So, if there's some kind  
8 of stipulated agreement between all of the other parties but  
9 her, to be presented to the Commission as a proposed  
10 stipulated Decision and Order for its consideration.

11 You know that would potentially give Ms. Hanabusa and as  
12 the person not in agreement and having then to deal with a  
13 record. She didn't participate in the second proceeding  
14 while the case was up on Supreme Court as Schnitzer didn't  
15 participate in the first proceeding but in the second  
16 proceeding. As such, she would have to object to be placed  
17 in that situation where she may have to be bound by the  
18 record in which she wasn't even participating in. So, I  
19 just wanted to make those comments to the Commission.

20 [colloquy between Chair Hazama and Counsel  
21 Waihee-Polk]

22 Okay. So your client is part of the '09,  
23 correct?

24 Mr. Wurdeman: Yes.

25 Chair Hazama: And Schnitzer is participating the

1 '11?

2 Ms. Muller: Yes.

3 Chair Hazama: So, I guess my comment is  
4 consolidating it would allow you to participate--both of you  
5 participate in it?

6 Ms. Muller: That's right, that's why we support  
7 the consolidation.

8 Chair Hazama: Understood. So, I guess we'd be  
9 okay.

10 Mr. Wurdeman: Ms. Hanabusa obviously didn't have  
11 an opportunity to present evidence to cross-examine  
12 witnesses. I mean, she participated in a several day  
13 contested case process in '08 and '09 herself. And she  
14 certainly satisfied with the record that she made but, I  
15 guess we're--she would have to object because she's shooting  
16 in the dark not knowing completely what this second record  
17 is that we're consolidating as one. And the potential  
18 situation where there may be an agreement with all of the  
19 other parties but for Ms. Hanabusa, and we're now trying to  
20 make arguments on a record that she didn't even participate.

21 Chair Hanabusa: Understood. But, I guess, my  
22 only comment is the crocks of the 2011 proceeding was  
23 regarding the date requirement was struck down by the  
24 Supreme Court anyway. So, I mean, there's really no meat in  
25 it. So, I don't know why she would be concerned with that



1 part of the record, is my question.

2 Mr. Wurdeman: Well, I mean, like I said we're  
3 speculating as to what may or may not be in the record and  
4 as such we'd have to make record objections to that  
5 consolidation.

6 Chair Hazama: Okay. All right. But you're still  
7 willing to be a party in the proceedings, correct?

8 Mr. Wurdeman: Yes.

9 Chair Hazama: Okay.

10 Mr. Wurdeman: Certainly.

11 Chair Hazama: Okay.

12 Any other questions of the parties at this time? Any other  
13 comments, parties? No. Okay.

14 Mr. Chipchase: If I could just very briefly,  
15 Chair. You'd asked what the harm would be in if just  
16 restarting proceedings now. And my only comment on that  
17 would be that we may end up with, we may up not being able  
18 to reach agreement on an Order quickly. And if we don't  
19 reach agreement on an Order, even if it's just some of the  
20 parties and not Ms. Hanabusa or just the City and KOCA and  
21 not Schnitzer, we'll end up with competing Orders and that  
22 has the potential for this body to make decision that is  
23 disputed by more people than if we were able to give the  
24 time. It's another eight months and see if we can reach a  
25 single or only one dispute or two dispute as to certain

1 points in a stipulated Findings of Fact, Conclusions of Law  
2 And, I think that at least gives us the potential to end up  
3 with a better Order then if we start proceedings again  
4 immediately.

5 Chair Hazama: But then you'll have the  
6 opportunity to argue before LUC.

7 Mr. Chipchase: Of course.

8 Chair Hazama: So, I mean, it's just getting--I  
9 guess, my thing is let's get this thing cleared up for the  
10 LUC, put it back to them and then you guys--If there's  
11 Orders that you object with or a portion of the D&O that you  
12 don't agree with it, then obviously you have the opportunity  
13 to argue your points before the LUC at that point. At this  
14 point in time, I don't think they're going to take you up on  
15 the docket like anytime real soon anyways. So, for my  
16 position just a matter of let's just move this along and get  
17 this stuff going down the process.

18 Mr. Chipchase: Understood, Chair.

19 Chair Hazama: Okay. Thank you very much, parties.

20 All parties: Thank you.

21 Chair Hazama: Okay.

22 Commissioners, we have, I guess two Orders or two Motions  
23 before us.

24 Okay. Can we get a motion to go into executive  
25 session real quick.

1 Member Tolentino: So move.

2 Member Anderson:

3 Second.

4 Chair Hazama: Any objections? [no response] Any  
5 abstentions? [no response] Okay. The Commission will now  
6 move [bangs gavel] into executive session. Thank you very  
7 much.

8 [At 2:32 p.m., the Planning Commission and Deputy  
9 Corporation Counsel Jennifer D. Waihee-Polk (advisory to the  
10 Commission) convened in executive session. Those not  
11 participating in the executive session exited the hearings  
12 room.]

13 [EXECUTIVE SESSION MINUTES (Closed)]

14 [There being no further business in executive  
15 session, the Planning Commission reconvened into regular  
16 session at 2:47 p.m.]

17 Chair Hazama: Okay. Calling the meeting back to  
18 order. [bangs gavel] Sorry for the delay.

19 Any additional questions, Commissioners, of the  
20 party at this time? [no response] Okay. Seeing none.

21 Vice Chair Anderson: I'd like to make a motion on  
22 Item A. Motion to grant intervenors Ko Olina Community  
23 Association and Maile Shimakuro's motion to effect the  
24 consolidation of a separate proceedings in 2008/SUP-2 as  
25 ordered by the State Land Use Commission on October 8, 2012.

1 Chair Hazama: Okay. So moved. Any second?

2 Member Young: Second.

3 Chair Hazama: Moved and seconded. Members, we're  
4 in discussion. Any discussion? At this time I do concur  
5 with the City's position that the LUC has no authority to  
6 compel the Planning Commission to consolidate the two  
7 Orders. However, for the sake of consistency, as well as I  
8 stated previously the ability for the current Commissioners  
9 to provide input into this matter, I do believe that  
10 consolidation of the issues is appropriate at this time.  
11 Commissioners, any other questions? [no response] Okay.  
12 All those in favor of the motion, say aye.

13 All Commissioners: Aye.

14 Chair Hazama: Any opposed? [no response] Any  
15 abstentions? [no response] Okay. The motion to consolidate  
16 the two matters has been approved.

17 Regarding the second matter on the request for  
18 Motion to Stay in the proceedings.

19 Vice Chair Anderson: I'd like to make a motion,  
20 Chair. Motion to deny Department of Environmental Services,  
21 City and County of Honolulu, Motion to Stay Proceedings to  
22 April 22nd, 2017.

23 Chair Hazama: It has been moved. Do I have a  
24 second?

25 Member Tolentino: Second.

1           Chair Hazama: Moved and seconded. Commissioners,  
2 we're in discussion. At this time we're looking at--I  
3 guess, I will be willing to take the parties input as far as  
4 dates. We're looking at our current docket for the remainder  
5 of the year and October 12th looks like a good date for us.  
6 I will also, as part of this motion allow the parties to  
7 resubmit an amended Findings of Facts and Orders.

8           Mr. Wurdeman: I am flying in on the morning of  
9 the 12th. I think I get in about 12:30. So, I'm not sure  
' 10 if I'll be able to get here 1:30, assuming my flight is on  
11 time.

12           Chair Hazama: Okay. October 26th?

13           Mr. Chipchase: Chair, just want to clear that  
14 hearing will be, the purpose of that hearing will be for  
15 what?

16           Chair Hazama: D&O, D&O of the consolidated 2009,  
17 2011.

18           Mr. Chipchase: Okay. So, sometime advance to  
19 that we will submit the draft Findings of Fact--

20           Chair Hazama: Correct. So as I submit, as we  
21 approve the date, then I'll kind of back date it from there.

22           Mr. Chipchase: Make sense.

23           Chair Hazama: So, October 26th is okay?

24           Ms. Chan: Yes.

25           Chair Hazama: Okay. We will then continue this

1 contested case hearing to October 26 at which time  
2 submission--is the 14th good as far as submission of amended  
3 Facts and Findings?

4 Ms. Muller: In October--

5 Chair Hazama: October 14th, yes; that's the  
6 question.

7 Ms. Muller: That's okay.

8 Mr. Chipchase: Yes, Chair.

9 Chair Hazama: Okay. Mr. Wurdeman, October 14th?

10 Mr. Wurdeman: Yes.

11 Chair Hazama: Okay. So, we will then continue  
12 this contested case hearing at 1:30 on October 26th here at  
13 Mission Memorial Conference Room, and your deadline for  
14 submitting an amended Decision of Findings of Facts is  
15 October 14th.

16 Mr. Chipchase: Mr. Chair, is there a date for  
17 responses to the amended Findings of Facts, responding  
18 parties submissions?

19 [colloquy between Chair Hazama and Counsel  
20 Waihee-Polk}

21 Chair Hazama: Sure. Give you 'til the 21st; 21st  
22 of October for any rebuttals.

23 Mr. Chipchase: Chair, if I may, there's one other  
24 motion, I believe it's still pending. Maybe Ms Chan can  
25 correct me if I'm wrong. But at the conclusion of the

1 evidence in the 2011 proceedings, we had moved to supplement  
2 the record with couple admissions. I don't believe that  
3 motion has ever been acted upon. I'd be happy to resubmit  
4 so everybody has a fresh look at, but I'd ask that we take  
5 that up as well.

6 Counsel Waihee-Polk: I'll look into it; I'll look  
7 into the record.

8 Chair Hazama: If he doesn't amend it, the Findings  
9 of Fact, he can include the exhibits in that, couldn't you?

10 Counsel Waihee-Polk: Because it wasn't provided at  
11 the hearings you had. I saw that Motion. I thought it  
12 was--I will look into it and see if we did decide or not.

13 Mr. Chipchase: If its already been resolved, then  
14 my apologies. My memory about it is a little fuzzy. I  
15 thought if it hadn't been acted upon--

16 Counsel Waihee-Polk: It may not. I will go look  
17 into the record and see. If not, I guess we could raise it.

18 Chair Hazama: On the 26th--

19 Counsel Waihee-Polk: Oh, if you want before.

20 Chair Hazama: Yeah, we just going to need it  
21 before.

22 Counsel Waihee-Polk: Well, then we'll have an  
23 earlier one, I guess. I'll look into it.

24 Chair Hazama: What was your motion again?

25 Mr. Chipchase: It was a motion to reopen the

1 record, submit some evidence. I believe the evidence  
2 related to the Blue Ribbon Committee on finding a Landfill,  
3 that was operating concurrently while we were going through  
4 these hearings. And, I think the evidence related to either  
5 the determination that committee without a decision or no  
6 further action was taken on locating any landfill. I'm not  
7 100% on that because it's a little fuzzy. I just noticed it  
8 on the my list of pending things as I came over here. So, I  
9 need to take another look at the substance of it. That's my  
10 recollection is what we addressed. Ms. Chan, do you have  
11 any recollection? She wasn't counsel at that time, but I  
12 don't know if you looked at it.

13 Ms. Chan: I'm not--

14 Counsel Waihee-Polk: I'll look into it, and then  
15 if you have to reset everything, you can; need to have a  
16 hearing on that.

17 Chair Hazama: Okay. And if we find that we have  
18 to have another hearing, we'll have that on the 12th then.  
19 Is that enough time for you?

20 Mr. Chipchase: Oh, that'll be fine. Mr. Wurdeman  
21 I don't know--How about I forward a copy of the motion to  
22 Mr. Wurdeman. You may not have an objection to it, so it  
23 wouldn't affect your travel even if you weren't to attend.

24 Mr. Wurdeman: Very well.

25 Counsel Waihee-Polk: Okay. And I'll look into it.



1           Chair Hazama: Okay. So, can we have a motion  
2 then to continue this contested case hearing to October  
3 26th, 1:30 p.m. here in the Mission Memorial Conference.

4           Member Tolentino: So move.

5           Chair Hazama: So move. Any second?

6           Member Young: Second.

7           Chair Hazama: Moved and seconded. Any objections?  
8 [no response] Any abstentions? [no response]. Okay. This  
9 contested case hearing is continued to October 26th. Thank  
10 you very much. [bangs gavel]

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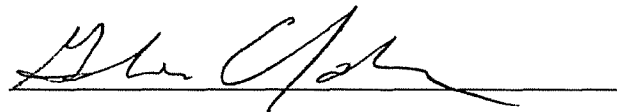
1 ADJOURNMENT

2           There being no further business before the  
3 Planning Commission, the meeting was adjourned by Chair  
4 Hazama at approximately 2:54 p.m.  
5

6                               --oOo--  
7

8 I certify that the foregoing is  
9 a true and correct transcription  
10 of the proceedings, prepared to  
11 the best of my ability, of the  
12 meeting held on Wednesday,  
13 August 17, 2016.

DRAFT August 17, 2016  
Planning Commission  
transcript

14  
15 

16 Gloria Takara

17 Secretary-Hearings Reporter  
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Hawaii News

**Landfill's fate will gain clarity in fall**

By Gordon Y.K. Pang

Posted August 19, 2016

August 19, 2016

*Updated August 19, 2016 5:30am*



STAR-ADVERTISER / MARCH 15

Mayor Kirk Caldwell walked the grounds with Brian Bowen, right, Sr. District Manager for Waste Management of Hawaii after he held a press conference at the Waimanalo Gulch Landfill in Kapolei on March 15.

The Honolulu Planning Commission decided this week to make a recommendation in October on the future of the Waimanalo Gulch Sanitary Landfill in West Oahu.

Meanwhile, the attorney representing former U.S. Rep. Colleen Hanabusa continues to oppose the use of the West Oahu landfill and argue that the city should be fined daily by the state for operating it illegally.

Dean Hazama, Planning Commission chairman, said Thursday that the commission voted Wednesday to deny a request by the city, the Ko Olina Community Association and state Sen. Maile Shimabukuro (D, Kalaeloa-Waianae-Makaha), and Schnitzer Steel to extend proceedings through April while they continue to hash out a long-delayed settlement to resolve the matter of whether the landfill should be allowed to continue operations.

The commission is now slated on Oct. 26 to issue a recommendation — to be forwarded to the state Land Use Commission — on whether the city should get an extension of a special permit that allows the landfill to continue, Hazama said.

For years the Ko Olina association and Hanabusa fought to shut down the landfill, opposing city efforts to expand and extend its operable life. They argued that the landfill's odors and other concerns were an affront to Leeward Coast residents and that the city has been foot-dragging on its promised efforts to examine the idea of relocating the landfill.

But the association and Shimabukuro, Hanabusa's successor as the area's state senator, have been working on a settlement with the city while Hanabusa has not, said Richard N. Wurdeman, Hanabusa's attorney.

Hazama said he expects the commission will recommend the LUC grant the city's request for extended use of the landfill. While he appreciates the argument being made by Wurdeman and Hanabusa, Hazama said, "we have to have an operating landfill. I think it's unreasonable to expect the city to just close it down."

The LUC had previously issued a permit extension for the city, but only with the stipulation that the city stop accepting municipal solid waste (except ash) beyond July 31, 2012. The Hawaii Supreme Court ruled in May 2012, however, that the state acted improperly by imposing a deadline for the landfill's closure despite the continuing need for the facility to operate beyond that date. The court also determined that the LUC, even though it issued the special-use permit, did not have the authority to impose a deadline on the city.

The court kicked the matter back to the LUC, which in turn remanded it to the Planning Commission for its recommendation. The matter has been in the city commission's hands since December 2012.

"That's my hope, that we can move this along so that at least the city will have a valid permit that will allow it to operate it," Hazama said.

Wurdeman took exception to Hazama's comments, noting that attorneys both recommending approval and rejection of an extension of the landfill's life have until Oct. 14 to submit proposed findings and conclusions.

"It makes you wonder whether they're predetermining the case," Wurdeman said. "I'm disheartened to hear Mr. Hazama making his conclusion without the matter being fully heard and briefed by the board."

The Supreme Court stated in May 2012 that the imposition of a July 31, 2012, end date was a material condition of the special-use permit, he said.

City officials have argued that the city has made strides in reducing the amount of trash going to the landfill, such as developing a third boiler at the city's waste-to-energy incinerator at HPOWER, but that it's taking time to implement other alternative disposal methods.

City Environmental Services Director Lori Kahikina, in a statement Thursday, reiterated that position: “In light of the city’s steeply declining use of the landfill and its ongoing effort to reduce waste streams, we look forward to working toward our goals of increased recycling and further diversion of waste from the landfill, while having a reliable landfill available to protect the public’s health and safety.”

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BEFORE THE PLANNING COMMISSION

CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the	)	File No. 2008/SUP-2
Application of	)	
	)	<u>DRAFT ONLY</u>
DEPARTMENT OF ENVIRONMENTAL	)	
SERVICES, CITY AND COUNTY	)	
OF HONOLULU	)	
	)	
To delete Condition No. 14 of	)	
Special Use Permit No. 2008/SUP-2	)	
(also referred to as Land Use	)	
Commission Docket No. SP09-403)	)	
which states as follows:	)	
	)	
"14. Municipal solid waste	)	
shall be allowed as 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."	)	
	)	

CONTINUED - CONTESTED CASE HEARING

Ewa-State Special Use Permit Amendment Application -  
2008/SUP-2 (RY) Waimanalo Gulch Sanitary Landfill

Taken at Mission Memorial Conference Room, Mission  
Memorial Building, 550 South King Street, Honolulu, Hawaii,  
96813, commencing at 1:30 p.m. on March 1, 2017, pursuant to  
Notice.

1 APPEARANCES:

2

3 Planning Commissioners present:

4

Dean I. Hazama, Chair

5

Cord D. Anderson

6

Daniel S. M. Young

7

Ken K. Hayashida

8

Wilfred A. Chang, Jr.

9

10 Planning Commissioners excused:

11

Arthur B. Tolentino

12

Kaiulani K. Sodaro [recused,  
prior notice given]

13

14

Steven S. C. Lim [recused,  
prior notice given]

15

16

Theresia c. McMurdo, Vice Chair  
[prior notice given]

17

18

19 Deputy Corporation Counsel:

20

Jennifer D. Waihee-Polk

21

(Advisory to the Commission)

22

23 Planning Commission staff:

24

Gloria Takara,

25

Secretary-Hearings Reporter

1 For the City and County of Honolulu, Department of  
2 Environmental Services: .

3 Kamilla C. K. Chan, Esq.  
4 Deputy Corporation Counsel  
5 City and County of Honolulu  
6 530 South King Street, Room 110  
7 Honolulu, Hawaii 96813  
8

9 For intervenor Ko Olina Community Association and Senator  
10 Maile Shimabukuro:

11 Calvert G. Chipchase, Esq.  
12 Christopher T. Goodin, Esq.  
13 Cades Schutte LLP  
14 1000 Bishop Street, Suite 1200  
15 Honolulu, Hawaii 96813  
16

17 For intervenor Schnitzer Steel Hawaii Corp.:

18 Arsima Muller, Esq.  
19 Carlsmith Ball LLP  
20 ASB Tower, Suite 2200  
21 1000 Bishop Street  
22 Honolulu, Hawaii 96813  
23  
24  
25



1 For intervenor Colleen Hanabusa:

2 Richard N. Wurdeman, Esq.

3 1003 Bishop Street, Suite 720

4 Honolulu, Hawaii 96813

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## P R O C E E D I N G S

Chairman: Good afternoon. Welcome to the Planning Commission meeting for Wednesday, March 1st, 2017. Call this meeting to order. [bangs gavel] First item on our agenda is approval of our January 4th and January 18th, 2017 meeting minutes. Commissioners, do you have any questions, corrections or concerns regarding both meeting minutes for January 4th and January 18th. [no response] Okay. Seeing none, any objections to adopting the minutes? [no response] Any abstentions? [no response] Okay. The minutes have been adopted.

Moving on to continued contested case hearing, Ewa State Special Use Permit, amendment application 2008/SUP-2, Waimanalo Gulch Sanitary Landfill, WGSL.

Okay. Moving on for action. First item for action is Department of Environmental Services, City and County of Honolulu, Motion to Strike Intervenor Colleen Hanabusa's (1) Renewal of Submission of Proposed Findings of Fact and Conclusions of Law. Department. Okay. For the record.

Ms. Chan: Kamilla Chan for the City and County of Honolulu.

Mr. Wurdeman: Richard N. Wurdeman for intervenor Colleen Hanabusa.

1 Chairman: Okay. Ms. Chan.

2 Ms. Chan: Thank you, Chair. The City request that  
3 the Planning Commission grant its motion to strike  
4 intervenor Hanabusa's Proposed Findings of Fact and  
5 Conclusions of Law on the basis that they were submitted  
6 late. The deadlines were set by the Planning Commission  
7 back in October and no objections were raised during the  
8 four months that lapsed between then and the actual  
9 deadline. Objections to the deadline could've been raised  
10 before the deadline reached under the Planning Commission's  
11 rules, yet objections were raised for the first time and the  
12 Proposed Findings of Fact were filed two weeks after the  
13 deadline. Bottom line is they are late. The Planning  
14 Commission didn't set further extended deadlines for the  
15 parties to respond to that submission. In the event that  
16 the Planning Commission is intending to consider intervenor  
17 Hanabusa's filings, the City would request additional time  
18 to supplement its 2009 response.

19 I know intervenor Hanabusa argues that she refers  
20 to those filings or the resubmission of those filings in her  
21 October 7th, 2016 statement. However, it's not clear what  
22 was going to be filed. It does reference that modifications  
23 may be made into the pleading. There has been additional  
24 evidence since the time that the 2009 filing was initially  
25 filed with the Planning Commission and the City would be

1 supplementing its response.

2 Chairman: Okay. Mr. Wurdeman.

3 Mr. Wurdeman: Well, the reason why there's been  
4 evidence since 2009 is one, there was a separate proceeding  
5 in which Ms. Hanabusa did not participate. And over  
6 strenuous objections this Commission consolidated its two  
7 records, depriving her of her rights of due process to  
8 confront witnesses in those proceedings, to present her own  
9 evidence in those proceedings. And that's one point with  
10 respect to evidence subsequent to July 17th, 2009. She  
11 objects to again that record and that certainly not going to  
12 be something that she's incorporating in her proposed  
13 findings if she's objecting to it.

14 The second point is that Ms. Hanabusa has been the  
15 one consistent party since the remand to object to a number  
16 of continuances by the City, Environmental Services under  
17 the guise of they were in negotiations with Ko Olina  
18 Community Association. That went on for years. We were in  
19 front of the Land Use Commission, and they wanted status  
20 reports what's going on. The City kept--at one point gave  
21 them a presentation about the recycling program that was  
22 completely irrelevant to anything. And what has happened is  
23 since 2009, the City during that first contested case  
24 hearing. And this is another point that we continue to bring  
25 up is that the City during those proceedings represented to

1 both the Planning Commission and the Land Use Commission  
2 that it would be at least seven years in which to find an  
3 alternative site. And, we are here now on the 8th year and  
4 haven't done a darn thing to find an alternative site. And,  
5 I think this is really reflective of their gamesmanship in  
6 stalling in these proceedings. Because they didn't have,  
7 never had any intention whatsoever of looking for  
8 alternative sites. And, Ms. Hanabusa as a result relied  
9 consistently upon her July 17th, 2009 filing which is  
10 certainly timely, is filed as part of the record. She's  
11 relying on it. The City filed its objections at that time.  
12 In October 7th, 2016, she's indicated that she was going to  
13 rely on that again, although there may have been some  
14 changes to the names because two of the parties in that  
15 original findings have proceeded with other counsel and have  
16 submitted their own proposed findings. And those parties  
17 did participate in the second proceedings, contested case  
18 hearings. So, you know, given that this has been on file  
19 since July 17th, 2009. We indicated that we are relying on  
20 it. There is no surprise to the City, and we ask as a  
21 result that their motion be denied.

22 Chairman: Okay. Thank you. Commissioners, any  
23 questions of either party? [no response] So, Mr. Wurdeman,  
24 then your contention is, therefore, that your Findings of  
25 Fact, Conclusions of Law, Decision and Order, regarding your

1 2009 submission is what you have submitted before the  
2 Commission?

3 Mr. Wurdeman: Yes. That's what was submitted in  
4 2009, which is still pending before the Commission and upon  
5 which intervenor Hanabusa is still relying.

6 Chairman: Okay. Corporation Counsel, then  
7 therefore your motion to strike applies to Mr. Wurdeman's  
8 2017--I guess, that is where the confusion is coming in.  
9 His February 10th 2017 submission to the Planning Commission  
10 that is what you are motioning to strike?

11 Mr. Chan: Yes. We're seeking to strike that.

12 Chairman: So, your motion is not to strike  
13 intervenor's 2009 submission to the Land Use Commission?

14 Mr. Chan: No. And our position is that was  
15 previously decided by the Planning Commission. They  
16 considered--

17 Chairman: You mean the deadline? What was  
18 decided previously--

19 Ms Chan: No. That 2009 filing was submitted when  
20 the application was first brought before the Planning  
21 Commission. That was the case that eventually went up to  
22 LUC, to supreme court. The deadline was struck, and it came  
23 back down to the Planning Commission.

24 Chairman: Right. However---

25 Ms. Chan: So, that's already been considered by

1 the Planning Commission.

2 Chairman: Correct. However, based on the October  
3 meeting, that all parties were allowed to submit amendments  
4 to the original filings, Decision and Order. So, I'm of the  
5 belief that the 2009 filing stands. I mean, you're not  
6 trying to strike his 2017?

7 Ms. Chan: We're striking, I guess the style, the  
8 resubmittal of the 2009 filing.

9 Chairman: Okay. So, for clarification, Mr.  
10 Wurdeman, now mainly perhaps the title of your filing is  
11 misleading in the sense--

12 Mr. Wurdeman: Yes. If that's the case, then I  
13 apologize for that, but we certainly just wanted to make it  
14 a point that she continue to rely on her 2009 filing and  
15 that was the only intent for that Part 1.

16 Chairman: Okay. So for clarification purpose, you  
17 have not submitted any amendment of Findings of Fact,  
18 Conclusions of Law, and Decision and Order, after your 2009  
19 filing?

20 Mr. Wurdeman: Correct.

21 Chairman: Okay. Commissioners, any questions at  
22 this time? [no response] Okay. We have to take action on  
23 the motion before us in regards to Environmental Services  
24 motion to strike intervenor Colleen Hanabusa's February  
25 10th, 2017 document. Do we have a motion? You can ask

1 questions.

2 Member Hayashida: So, it's irrelevant, right?

3 I mean--

4 Chairman: The motion--

5 [colloquy between DCC Jennifer Waihee-Polk and  
6 Chairman Hazama]

7 Member Anderson: Make a motion to move into  
8 executive session, please.

9 Chairman: Okay. So moved.

10 Member Hayashida: Second.

11 Chairman: Moved and seconded. Any objections?

12 [no response] Any abstentions? [no response] Okay. The  
13 Commission will move into executive session to consult with  
14 Corporation Counsel on authority, duties, privileges,  
15 immunities pertaining to Section 205-6 of the Hawaii Revised  
16 Statutes as amended in Chapter 2, Subchapters 4 and 5 of the  
17 Rules of the Planning Commission and in accordance with HRS  
18 92-5. Okay. We're in executive session.

19 [EXECUTIVE SESSION MINUTES]

20 Out: 1:43 p.m.

21 In: 2:11 p.m.

22 Chairman: Okay. Thank you for your patience. I  
23 call this meeting back to order. [bangs gavel] At this time  
24 we are still in regards to the Environmental Services motion  
25 to strike. Do we have a motion before the Commission?



1 Member Anderson: Sure. I'll make a motion to  
2 strike intervenor Colleen Hanabusa's renewal of submission  
3 of Proposed Findings of Fact and Conclusions of Law.

4 Chairman: Okay. So moved. Do we have a second?

5 Member Hayashida: Second.

6 Chairman: Okay. All those in favor, say aye.

7 All Commissioners: Aye.

8 Chairman: I'm sorry. Do we have any discussion on  
9 the matter regarding this issue? [no response] I don't  
10 see--

11 Mr. Wurdeman: Could I ask for a clarification? So,  
12 you're striking--I'm sorry, what was--

13 Chairman: We're striking your February 10th,  
14 2017--

15 Mr. Wurdeman: Okay. So, the July 2009 though is  
16 still part of the record, that can't be stricken.

17 Member Anderson: Yes.

18 Mr. Wurdeman: Okay.

19 Chairman: I don't see any objections,  
20 Mr. Wurdeman, or any of the parties, so like I said I don't  
21 have a problem supporting the City's position on this issue.  
22 Any further discussion, Commissioners? [no response] If  
23 not, all those in favor, say aye.

24 All Commissioners: Aye.

25 Chairman: Any opposed? [no response] Any

1 abstentions? [no response] Okay. The motion is granted.

2 Okay. Moving on to the second item of the agenda,  
3 Adoption of Findings of Fact, Conclusions of Law, and  
4 Decision and Order. At this time I call all parties up.

5 Okay. For the record, appearances, please.

6 Mr. Wurdeman: Richard N. Wurdeman for intervenor  
7 Colleen Hanabusa.

8 Ms. Chan: Kamilla Chan for the City and County of  
9 Honolulu.

10 Ms. Muller: Arsima Muller for intervenor Schnitzer  
11 Steel Hawaii Corp.

12 Mr. Chipchase: And Cal Chipchase and Chris Goodin  
13 for Ko Olina Community Association and Senator Maile  
14 Shimabukuro. With us in the hearing room is Ken Williams,  
15 who's the general manager for the association, association's  
16 designated representative and was a witness in these  
17 proceedings.

18 Chairman: Okay. Thank you. So for the record,  
19 Commissioners, the Planning Commission is in receipt of, I  
20 guess, submission of Findings of Fact, Conclusions and Law,  
21 Decision and Order for the parties with the exception of  
22 Mr. Wurdeman. So, we have your records as well as your  
23 rebuttals regarding each others decision and orders.

24 Okay. Commissioners. Also for the record I'd  
25 like to confirm that the evidentiary portion of the

1 contested case hearing is closed. So before us now, I  
2 guess, is Commission's action.

3 [colloquy between DCC Waihee-Polk and Commissioner  
4 Anderson]

5 Member Anderson: Chair, I'd like to make a  
6 motion, please.

7 Chairman: Okay.

8 Member Anderson: Motion to adopt the 2011 ENV  
9 application Findings of Fact, Conclusions of Law, and  
10 Decision and Order with the following conditions. I would  
11 like to add from page 82 of intervenor Ko Olina Community  
12 Association and Maile Shimabukuro's Proposed of Findings of  
13 Fact, Conclusions of Law, and Decision and Order. Again,  
14 page 82, Item C, that deals with ENV providing semi-annual  
15 reports to the Planning Commission and LUC. The second  
16 added condition will be on the same document, page 86, Item  
17 No. 5, which deals with public health and safety conditions,  
18 and the third condition would be that the City, ENV in  
19 particular, ID an alternate site by December 31st, 2022,  
20 that will be used upon Waimanalo Gulch Sanitary Landfills  
21 reaching its capacity.

22 Chairman: Okay. Do we have a second?

23 Member Hayashida: Second.

24 Chairman: Okay. It's moved and seconded. Okay.  
25 Commissioners, we are now in discussion. Any further

1 discussion?

2 Mr. Chipchase: Commissioners, I'm sorry to  
3 interrupt. It's always been customary in presentations that  
4 I've done in findings to be able to present the findings to  
5 the Commission before they adopt them and ask for that  
6 opportunity, particularly, as majority of the Commission  
7 didn't have an opportunity to sit through the proceedings.

8 Chairman: Okay. However, we have the record.  
9 So, we have all evidentiary records and have reviewed them.  
10 So, that's each Commissioner's responsibility, and we also  
11 have your submittal. So, we have everything.

12 Mr. Chipchase: No. I understand that you have  
13 the record, Commissioners, and I appreciate that. But it  
14 has always been customary in my experience to have an  
15 opportunity to present those findings, and we certainly did  
16 in the 2012, conclusion of 2012 proceedings, had an  
17 opportunity to present those to the Commission. But there's  
18 a dialog and discussion about why we're requesting certain  
19 conditions before the Commission actually adopts a proposed  
20 form of order. And I ask for that before the Commission  
21 votes on the motion.

22 [colloquy between DCC Waihee-Polk and Chairman  
23 Hazama and Member Anderson]

24 Member Anderson: I make a motion for executive  
25 session.

1 Member Hayashida: Second.

2 Chairman: Moved and seconded. Basically the  
3 Commission has made a motion to go into executive session to  
4 consult with the Commissioner's attorney on the authority,  
5 duties, privileges and immunities pertaining to Section  
6 205-5 of the Hawaii Revised Statutes as amended in Chapter  
7 2, Subchapters 4 and 5 of the Rules of the Planning  
8 Commission in accordance with HRS 92-5. Okay.

9 Mr. Wurdeman: Mr. Chairman, may I be heard please  
10 before you go into executive session. The City's last  
11 motion was for a Part 1 of the February 10th filing and not  
12 Part 2. And not it only was it our findings timely filed on  
13 July 17th, 2009, but we reiterated our reliance on October  
14 12, 2016, and two separate times, not only was it filed  
15 timely but it was reiterated that it be relied upon timely  
16 in October well before any other parties submitted anything,  
17 one. Two, is in the second part that wasn't the subject of  
18 the City's motion is my objections to this Chair presiding  
19 over this matter because of this Chair's apparent  
20 pre-determination of the facts and conclusions in the  
21 attached newspaper article in the Honolulu Star Advertiser  
22 that it was dated August 19th, 2016, in which is part of my  
23 February 10, 2016 [sic] submission. And that is  
24 respectfully challenging you, Mr. Chairman, in presiding  
25 over these matters when you've already pre-determined this

1 case.

2 And, I have some familiarity with this issue  
3 because the cited decision, Mauna Kea Anaina Hou, is a case  
4 that I argued before the Hawaii Supreme Court on.  
5 Pre-determining matters before the parties have been allowed  
6 and meaningful opportunity be heard. And given our timely  
7 filings, it makes me wonder--And I have to call into  
8 question, the last Board's ruling on intervenor Hanabusa's  
9 decision. Because that was done without taking it into  
10 consideration the Part 2 of my pleading, which was my  
11 objections respectfully to you, presiding over this because  
12 of your pre-determination on this matter. So, I'd like that  
13 to be decided on before we move any further and talk about  
14 anything further in these matters because obviously the  
15 Chair does have a lot of influence on the other Commission  
16 members. And, if the Chair has already decided on this  
17 matter before all the proper submissions were made; and it's  
18 obvious in the quotes back in August that was done by this  
19 Chair. "We have to have an operating landfill. I think it's  
20 unreasonable to expect the City to just close it down,"  
21 Hazama said. Another quote is, "that's my hope that we can  
22 move this along so that at least the City will have a valid  
23 permit that will allow it to operate it," Hazama said. This  
24 was all in the August news article that I reference. You  
25 were quoted in that, Mr. Chair. And, intervenor Hanabusa

1 takes exception to given that that's your stated position  
2 publicly that you are now in these proceeding precluding her  
3 from submitting proposals that are contrary to your opinion  
4 way back in August before all of these submissions were  
5 made. So, I would like that objection to be made. I would  
6 respectfully ask you to recuse yourself from these  
7 proceedings because of your pre-determination of the issues.

8 And, finally, I would like to also ask that there  
9 be a confirmation, because the law requires that especially  
10 in light of, I believe, that--and if not all of the  
11 Commissioners were present in both proceedings, I believe at  
12 least most of the Commissioners were present. And the law  
13 requires a review of all records, evidence going through  
14 transcript, going through exhibits, of all those  
15 proceedings, by each and every Commissioner before a vote  
16 can be had, and I'd like that to be confirmed as well. With  
17 all of the Commissioners, since none of them had, as far as  
18 I know, sat through both of the proceedings. So, that would  
19 also be my second request. But my first is I respectfully  
20 ask yourself to recuse yourself because of your comments  
21 that were made publicly back in August. Thank you.

22 Chairman: So, you had your say? So, the motion on  
23 the floor is for executive session. Seconded it. Any  
24 objections? [no response] Any abstentions? [no response]  
25 Okay. At this time, we will move into executive session.

1 [EXECUTIVE SESSION MINUTES]

2 Out: 2:26 p.m.

3 In: 2:44 p.m.

4 Chairman: Okay. Thank you. I call this meeting  
5 back to order. [bangs gavel]

6 Okay. For the record, Commissioners, I need  
7 confirmation from you that you have reviewed all evidence  
8 and the entire record from the 2008 and 2011 SUP  
9 proceedings. Commissioners.

10 Member Hayashida: I reviewed the records.

11 Chairman: Okay. Commissioner Chang.

12 Member Chang: I have as well.

13 Chairman: Okay. Commissioner Young.

14 Member Young: So have I.

15 Chairman: Okay.

16 Member Anderson: Yes. I have reviewed all of the  
17 records presented to us. Thank you.

18 Chairman: Okay. And, likewise, I have as well.

19 In regards to, for the record, Mr. Wurdeman, your  
20 presumption on my influence over the entire Commission, I  
21 think is incorrect. So, I'm one Commissioner that has one  
22 vote equal to the weight of any other Commissioner on this  
23 body.

24 In regards to your request regarding Part 2.  
25 Because we received, the Commission has received it, so it



1 is part of the record. We have not stricken it from the  
2 record. Just for your clarification.

3 And in regards to your comments about my  
4 objectivity in this matter, I believe that your citing, my  
5 personal opinions taken out of context in regards to the  
6 news article. So, I don't have any influence in regards  
7 to--execution of my duties as Chair.

8 In regards to Mr. Chipchase's request, because  
9 as--

10 Mr. Wurdeman: Excuse me, if I may, what does that  
11 mean, Mr. Chair? Those are direct--I'd like a clarification  
12 on how it was taken out of context because--

13 Chairman: I'm not going to clarify because I  
14 didn't write the article. So, in regards to Mr. Chipchase's  
15 request--

16 Mr. Wurdeman: Mr. Pang is here. I'd like to call  
17 him as a witness then.

18 Chairman: Denied. In regards to Mr. Chipchase's  
19 request, because the Commissioners have reviewed all  
20 evidence, entire record that is on file, at this time we are  
21 not going to be allowing any presentations.

22 Mr. Chipchase: Very well, Chair. Then for the  
23 record allow me just to state my objection to that.

24 Chairman: That's fine.

25 Mr. Chipchase: The motion made by Commissioner

1 Anderson was made without public discussion. The decision or  
2 the motion to adopt particular parties, Findings of Fact,  
3 Conclusions of Law, is then made not in a public setting.  
4 The genesis for it is not identified in any public  
5 proceeding that I am aware of. The selection of particular  
6 conditions from our proposed Findings of Fact, Conclusions  
7 of Law, and Decision and Order that would amend the ENV's  
8 proposed findings. I'm not aware that there was any public  
9 deliberation or public discussion as to why those were to be  
10 included in the motion. And, so it seems to me that the  
11 decisions in this matter were not made open and publicly and  
12 certainly were not made following the opportunity of the  
13 parties to present their evidence in this case, in the form  
14 of discussion and argument regarding the Findings of Fact,  
15 Conclusions of Law, Decision and Order. It would then allow  
16 the Commission to ask the parties questions and to fair it  
17 out why particular conditions were included and why  
18 particular conditions were not. I would note that as part  
19 of that a number of the conditions that are existing in the  
20 orders today from both this body and the LUC were not  
21 included in the City's proposed submission. Yet, this  
22 Commission would adopt those providing less protection,  
23 providing less notice, providing less than its currently  
24 imposed through prior orders.

25 I don't believe that those kinds of decision

1 should have been made in private or without an opportunity  
2 for the parties to present the record. And, so I make an  
3 objection to that process. I make an objection to the  
4 refusal to allow argument on the motions and the  
5 presentation today. And, I join in Mr. Wurdeman's motions,  
6 both recusal and his objections to this process.

7 Mr. Wurdeman: And, I'd like to also join with  
8 Mr. Chipchase's objections as well.

9 Chairman: Okay. Your objection is noted. Okay.  
10 Moving on to the motion--So, I'll put the motion back on the  
11 floor, been seconded. So we are in discussion regarding the  
12 motion. Any discussions, Commissioners, at this time?

13 Member Hayashida: The only thing that I have is  
14 the Findings of Fact before 2011, ENV's 2011 application do  
15 not need to be included for the record.

16 Chairman: Are you making a motion to include the  
17 changes?

18 Member Hayashida: I'll make the motion to include  
19 the changes, to not include the Findings of Fact before  
20 ENV's 2011 application.

21 Chairman: Okay. Any objections to accepting the  
22 motion?

23 Member Anderson: No.

24 Chairman: Okay. Commissioners--

25 Member Anderson: Just to clarify. He--There was

1 an additional condition added upon my motion?

2 Chairman: Yes.

3 Member Anderson: Okay. Yeah, I have no objection  
4 there.

5 Chairman: Okay. Is there a second to his motion?

6 Member Anderson: I'll second it.

7 Chairman: Now, do you have any objections?

8 Member Anderson: No objections. But I do have just  
9 some general discussion points why I included, I guess, the  
10 two conditions from KOCA and the timing of the  
11 identification of an alternate site. Mr. Chipchase, I do  
12 appreciate the thoroughness of your Findings of Fact,  
13 Conclusions of Law, Decision and Order. Looking through the  
14 numerous conditions in there, I did pick out these two  
15 items, I think should be added to ENV's--Also with the--I  
16 did have some reservations about identifying a specific date  
17 when the landfill should be closed primarily due to the fact  
18 that, I think that date is more contingent upon the capacity  
19 and filling the capacity. Not a specific date. Thus, I felt  
20 a little more comfortable identifying an alternate site at a  
21 specific date and that site will just be, in other words, I  
22 guess a stand-by site until the current landfill hits  
23 capacity. That's a justification behind my three conditions  
24 I added to the motion.

25 Chairman: Okay. Any further discussions? [no

1 response] I understand, I guess, and I appreciate the  
2 parties positions. There are extensive submissions that you  
3 gave us. We as Commissioners have to review and study all of  
4 that and understand your position. So, you know, I  
5 appreciate all the hard work you guys put into this.  
6 However, I agree with Commissioner Anderson the fact that  
7 putting dates necessarily on particular, this particular  
8 subject matter and with the lack of another landfill or any  
9 other option that is affordable to the residents of this  
10 county, we have really no other choice in my opinion but we  
11 have to have an operating landfill. I mean whether your  
12 positions are that we don't or not, but I can appreciate  
13 that. But in reality of the matter is that we need a  
14 landfill.

15 Now, the City has two technology. I believe the  
16 City has stated, you know, their increase and the capability  
17 of reducing the amount of landfill, the amount of material  
18 that's going into the landfill. And, I further have a  
19 problem then with setting a date. I also think it's a more  
20 function of capacity rather than just coming and trying for  
21 any body whether it's this body or the LUC to try and set a  
22 potential date when that landfill will be closed in the  
23 absence of a working landfill or another existing landfill.  
24 Whether you agree with me or not, you know, we need a  
25 landfill. We just can't put it in somebody's backyard,

1 can't dump it in the ocean. We have to comply with whatever  
2 EPA standards and Department of Health standards that are  
3 required.

4           So, having said that, I concur with Commissioner  
5 Anderson's assessment that we do--It should really be a  
6 function of capacity. Having said that, however, personally  
7 I believe the City had an obligation and have an obligation  
8 to start working in identifying another landfill once this  
9 once hits whatever capacity. I'm not so sure from reading  
10 the submissions and the record that has been--That we're  
11 actually up to a point where we need to be as far as finding  
12 that. And, therefore--or I might not agree with the  
13 motion's date, as far as the deadline. I think that it's  
14 perfectly fine to set a deadline for the City to at least  
15 identify their next landfill. I think that's an obligation  
16 the City owes the people as well. And, I can appreciate  
17 that. Any other discussion?

18           Member Anderson: I could echo some of your  
19 comments, sir. One, in specific just to go on record, that  
20 it is disheartening. I believe I've been part of this  
21 Commission for several years now. I would say in 2012, the  
22 City made some progress and, I think we had a presentation  
23 identifying certain sites for replacement landfills. And so  
24 it's disheartening. I'm not sure if the ball was dropped  
25 there or what progress has been made to that effect in the

1 time being. And the 2022 date of identifying was 5.5 years  
2 from today. That's debatable whether that's enough time or  
3 not. It could be done in two years, it could be 10 years.  
4 I'm not sure. I just picked 5 years.

5 Chairman: That's fine. So, to clarify your point  
6 is for identification of a landfill, correct? Or a new  
7 landfill?

8 Member Anderson: Yes.

9 Chairman: So, it's not necessarily--

10 Member Anderson: And I acknowledge that's going to  
11 be a difficult decision by anyone. It's not that easy.

12 Chairman: Okay.

13 Ms. Chan: Chair, may I respond to the  
14 concerns--the one concern that was raised of the siting of  
15 the landfill and the City's work on that.

16 Chairman: Is it on the record already or--

17 Ms. Chan: No. My comment is just that the record  
18 in this proceeding for all intents and purposes was closed  
19 in 2012. So, there was no opportunity for the City to  
20 supplement that record, to add in any additional  
21 information, and that would be the reason that it appears  
22 that nothing had occurred since that time.

23 Chairman: That may be true, however, the City's  
24 requirement to submit your annual report has always been a  
25 condition on the record.

1 Ms. Chan: And the City has continued to comply  
2 with that as we reported in our annual report.

3 Chairman: Well, I guess my comment to that would  
4 be that, yes, the City has complied with submission of the  
5 record and even contentiousness to how far you've progressed  
6 in regards to actually identifying the next landfill site.  
7 So, that's not our fault.

8 Ms. Chan: No. I understand the concern. I just  
9 wanted to clarify why some of that is not currently in the  
10 record.

11 Chairman: Okay. Thank you.

12 Member Anderson: I appreciate it, and I think  
13 some of my concern might have been even though I've reviewed  
14 all of the material, I can't represent it verbatim, but I  
15 believe that in 2012 thereabouts when we were given a  
16 presentation on the alterate sites. I believe that might've  
17 been triggered in 2008, and there were discussion about why  
18 it has taken so long just to get to that point.

19 So, hopefully there has been progress since 2012. That's  
20 all.

21 Chairman: Okay. Any further discussion,  
22 Commissioners, at this time?

23 [colloquy between DCC Waihee-Polk and all  
24 Commissioners]

25 Member Anderson: Chair, make a motion for



1 executive session, please.

2 Member Hayashida: Second.

3 Chairman: Moved and seconded. Any objections?

4 [no response] Any abstentions? [no response] Okay. At  
5 this time the Commissioners move into executive session to  
6 consult with the Commission's attorney on the authority,  
7 duties, privileges and immunities pertaining to Section  
8 205-6 of the Hawaii Revised Statutes as amended in Chapter  
9 2, Subchapters 4 and 5 of the rules of the Planning  
10 Commission in accordance with HRS 92-5.

11 Mr. Chipchase: Chair, I have to object going into  
12 executive session while the motion to adopt an order is  
13 pending. And, I believe that counsel stated reasons for the  
14 executive session were to clarify the motion, which I  
15 believe should be done publicly and not in executive  
16 session.

17 Mr. Wurdeman: I join in with that assertion.

18 Counsel Waihee-Polk: I guess, further advice which  
19 I don't want to say in open meeting. So, I'm just going to  
20 say, I was trying--It's not something I want to discuss in  
21 open meeting. It's a legal advice I want to provide to my  
22 client, and it's not exactly that. That's partially what I  
23 started to say, and then I realized as I spoke on, I was  
24 actually starting to actually give advice openly in open  
25 meeting, and that's not something I should be doing. So,

1 I've requested that, and we can hold that just so that I can  
2 give one word of advice and you go back for discussion.

3 Chairman: Okay.

4 [EXECUTIVE SESSION MINUTES]

5 In: 3:00 pm.

6 Out: 3:18 p.m

7 Chairman: Okay. I'll call this meeting back into  
8 order. [bangs gavel] We have a motion, seconded. We're on  
9 discussion regarding Commissioner Hayashida's motion to  
10 remove all items from 2011, well from prior to 2011  
11 proceedings.

12 Okay. Commissioners, any further discussion on the  
13 matter?

14 Member Anderson: Chair, I'd like to discuss a  
15 little more openly just so I'm clear on couple things. I'm  
16 fairly certain that my motion perhaps isn't overly clear at  
17 the moment with the rest of the Commissioners. Try not to  
18 lose sight of the fact that in front of us right now is the  
19 LUC approved 2008/SUP-2. In my motion I reference that 2011  
20 ENV application and include the D&O. I think I prefer  
21 withdrawing my motion and clarifying and restating it. Just  
22 looking at the LUC approved 2008/SUP-2. Removing Condition  
23 14 and adding the three conditions I'd previously stated.  
24 Does that help clarify things?

25 Member Hayashida: So, you're removing the ENV's

1 Decision and Order, Item--

2 Member Anderson: Yes. I'm removing Condition 14.

3 Member Hayashida: This the document--

4 Member Anderson: Yes.

5 Chairman: Well, let me ask you this question  
6 then. The motion that you accepted was to strike from ENV's  
7 submission anything prior to 2011, correct?

8 Member Anderson: Commissioner Hayashida's.

9 Chairman: Yes.

10 Member Anderson: Correct.

11 Chairman: So, then for clarification purposes  
12 anything in the document prior to the 2011 proceedings then  
13 would be stricken anyway, correct?

14 Member Anderson: Yes.

15 Chairman: Okay. Any other discussion there? I  
16 mean, that's my understanding what his motion was.

17 Member Anderson: Yes. Technically, I just  
18 mentioned I'd like to withdraw my motion and just restate it  
19 to add some clarity. Is that okay with you, Chair? How  
20 should we address that open motion on the table?

21 Chairman: Well, the problem with withdrawing is  
22 he already--I guess--

23 Member Hayashida: You want me to withdraw my  
24 motion?

25 Chairman: You need a motion too. So--I mean, I

1 think for clarification purposes--Oh, may be not. I  
2 was thinking if he can restate the motion again, but he  
3 already made a motion that you accepted. So we're still in  
4 discussion on his motion. So, I guess that's fine. I mean,  
5 if you want, if that's what you--

6 Member Anderson: I would prefer, yeah. I mean,  
7 my intent is to just clarify the situation right now. It  
8 seems like there is some indecision on all of our parts,  
9 mine included, whether it's my motion and Commissioner  
10 Hayashida's. I would almost prefer just to start a clean  
11 slate and restate it clearly all at one time.

12 Chairman: Okay. So, then you need to withdraw  
13 your motion.

14 Member Hayashida: Withdraw my motion.

15 Chairman: Motion to withdraw. Do we have a  
16 second?

17 Member Anderson: Second.

18 Chairman: Moved and seconded. Any discussion on  
19 the motion to withdraw? [no response] Seeing none, any  
20 objections or any abstentions? [no response] Okay. Seeing  
21 none, then Commissioner Hayashida's motion has been  
22 withdrawn. Now you can go and withdraw yours.

23 Member Anderson: Okay. I would like to withdraw  
24 my original motion due to lack of clarity, I believe.

25 Chairman: Okay. So moved.

1 Member Hayashida: Second.

2 Chairman: Moved and seconded. Any discussion?  
3 [no response] Okay. Seeing none, any objections or any  
4 abstentions? [no response] Okay. Seeing none, then  
5 Commissioner Anderson's original motion--

6 Member Anderson: So, the motion I'd like to make,  
7 Chair, is look at the LUC approved 2008/SUP-2 to strike  
8 Condition 14 and add the three conditions that I'd  
9 previously mentioned from the KOCA D&O, page 82, Section C;  
10 page 86, No. 5; and the identification of an alternate site  
11 by December 31st, 2022.

12 Chairman: Okay. Clarification purposes, then the  
13 ENV submission you are still accepting the Findings of  
14 Fact--

15 Member Anderson: Conclusions of Law; correct.

16 Chairman: However, regarding the Decision and  
17 Order, you're just adding the three conditions?

18 Member Anderson: Correct.

19 Chairman: Okay. And what was--

20 Mr. Chipchase: I'm sorry, that's not how I  
21 understood the motion. If I could have clarity of that.  
22 I thought Commissioner Anderson you were adopting these  
23 Findings and Conclusions, but proposing to amend the  
24 Decision and Order to be the LUC's approved Decision and  
25 Order with deletion of Condition 14 and the addition of the

1 three conditions you mentioned earlier?

2 Member Anderson: Correct. That's my  
3 understanding.

4 Chairman: Okay.

5 Member Anderson: I believe, Chair, we're saying  
6 the same thing, although you may have left out removing, the  
7 deletion of Condition 14.

8 Chairman: Oh, okay. Correct, correct.

9 Okay. So, adding on the deletion of Condition 14, you're  
10 still accepting ENV's Findings of Fact, Conclusions of Law  
11 and adding your three additional conditions.

12 Member Anderson: Yes, while removing Condition  
13 14.

14 Chairman: Okay.

15 Member Anderson: Does that clarify things a little  
16 bit?

17 Member Hayashida: Yes.

18 Member Anderson: Okay.

19 Chairman: In regards to the Findings of Fact and  
20 Conclusions of Law; in regards to striking anything prior to  
21 2011?

22 Member Anderson: Yes. Sorry. It goes without  
23 saying picking up on what Commissioner Hayashida earlier  
24 said that anything in there prior to 2011 would be removed.

25 Chairman: Okay. It's been moved. Do we have a

1 second?

2 Member Hayashida: Second.

3 Chairman: Okay. Moved and seconded. We are in  
4 discussion on the motion basically for, I guess, my  
5 clarification purposes, the D&O portion from the 2008/SUP-2  
6 that was ruled on already by the LUC is what stands and then  
7 you're just adding the three additional conditions today to  
8 that?

9 Member Anderson: Yes, and removing 14.

10 Chairman: And removing 14.

11 Member Anderson: Yes.

12 Chairman: And 14 was the date restriction.

13 Member Anderson: Yes. Page 14 is basically solid  
14 waste shall be allowed at WGSL up to July 31st, 2012,  
15 provided that only ash and residue from HPOWER shall be  
16 allowed at the WGSL after July 31st, 2012.

17 Chairman: That's basically your clarification  
18 because my understanding is that the court have already  
19 struck down Condition 14.

20 Member Anderson: Yes.

21 Chairman: Okay. All right. Any further  
22 discussion, Commissioners? [no response] Okay. Seeing none,  
23 the motion on the floor. All those in favor, say aye.

24 All Commissioners: Aye.

25 Chairman: Any opposed? [no response]

1 Any abstentions? [no response] Okay. The motion is passed.

2 You have anything else, Commissioners? Okay.

3 Seeing none, do you have a motion to adjourn?

4 Member Hayashida: Motion to adjourn.

5 Chairman: It's been moved.

6 Member Young: Second.

7 Chairman: Moved and seconded. Any objections? [no

8 response] Any abstentions? [no response] Okay. Thank you

9 very much, Commissioners. This meeting is adjourned.

10 [bangs gavel].

11 ADJOURNMENT:

12 There being no further business before the  
13 Planning Commission, the meeting was adjourned by Chair  
14 Hazama at approximately 3:28 p.m.

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1 I certify that the foregoing is  
2 a true and correct transcription  
3 of the proceedings, prepared to  
4 the best of my ability, of the  
5 meeting held on Wednesday,  
6 March 1, 2017.

7  
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9 \_\_\_\_\_  
10 Gloria Takara  
11 Secretary-Hearings Reporter  
12  
13

14 ADOPTED ON: \_\_\_\_\_  
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BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In The Matter Of The Application Of The ) DOCKET NO. SP09-403  
)  
DEPARTMENT OF ENVIRONMENTAL ) ORDER REMANDING COUNTY  
SERVICES, CITY AND COUNTY OF ) SPECIAL USE PERMIT FILE NO.  
HONOLULU ) 2008/SUP-2 TO THE CITY AND  
) COUNTY OF HONOLULU  
For A New Special Use Permit To ) PLANNING COMMISSION;  
Supersede Existing Special Use Permit To ) AND CERTIFICATE OF SERVICE  
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 )  
\_\_\_\_\_ )

ORDER REMANDING COUNTY SPECIAL USE PERMIT FILE NO. 2008/SUP-2 TO  
THE CITY AND COUNTY OF HONOLULU PLANNING COMMISSION

AND

CERTIFICATE OF SERVICE

This is to certify that this is a true and correct copy of  
the document on file in the office of the State Land  
Use Commission, Honolulu, Hawai`i.

October 8, 2012 by

Executive Officer

**EXHIBIT D**

LAND USE COMMISSION  
STATE OF HAWAII  
2012 OCT -8 P 12:45



BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

LAND USE COMMISSION  
STATE OF HAWAII  
2012 OCT -8 P 12:41

In The Matter Of The Application Of The	)	DOCKET NO. SP09-403
	)	
DEPARTMENT OF ENVIRONMENTAL	)	ORDER REMANDING COUNTY
SERVICES, CITY AND COUNTY OF	)	SPECIAL USE PERMIT FILE NO.
HONOLULU	)	2008/SUP-2 TO THE CITY AND
	)	COUNTY OF HONOLULU
For A New Special Use Permit To	)	PLANNING COMMISSION;
Supersede Existing Special Use Permit To	)	AND CERTIFICATE OF SERVICE
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	)	
_____	)	

ORDER REMANDING COUNTY SPECIAL USE PERMIT FILE NO. 2008/SUP-2 TO  
THE CITY AND COUNTY OF HONOLULU PLANNING COMMISSION

AND

CERTIFICATE OF SERVICE



LAND USE COMMISSION  
STATE OF HAWAII  
2012 OCT - 8 P 12:41

BEFORE THE LAND USE COMMISSION  
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In The Matter Of The Application Of The ) DOCKET NO. SP09-403  
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Extension For Waimānalo Gulch Sanitary )  
Landfill, Waimānalo Gulch, O`ahu, )  
Hawai`i, Tax Map Key: 9-2-03: 72 And 73 )  
\_\_\_\_\_ )

ORDER REMANDING COUNTY SPECIAL USE PERMIT FILE NO. 2008/SUP-2  
TO THE CITY AND COUNTY OF HONOLULU PLANNING COMMISSION

On September 14, 2012, the State Land Use Commission ("LUC")  
met in Ko `Olina, O`ahu, Hawai`i, to continue discussion and deliberation on the  
procedural issues arising from Civil No. 09-1-2719-11.<sup>1</sup> Dana Viola, Esq., and

<sup>1</sup> On July 5, 2012, the LUC commenced its proceedings on this matter. During its presentation, the Department of Environmental Services, City and County of Honolulu ("Applicant"), orally moved for an additional two weeks for the parties to file written briefs with the LUC to more fully address the procedural issues. The LUC granted the Applicant's oral motion and ordered the parties to file the written briefs with the LUC by the close of business on July 19, 2012. The State Office of Planning ("OP") and Schnitzer Steel Hawai`i Corp. ("Schnitzer"), an intervenor in the Applicant's pending application before the City and County of Honolulu Planning Commission ("Planning Commission") to modify the LUC's Order Adopting The City And Docket No. SP09-403 Department Of Environmental Services, City And County Of Honolulu 1  
Order Remanding County Special Use Permit File No. 2008/SUP-2 To The City And County Of Honolulu Planning Commission

Brian Black, Esq., appeared on behalf of the Applicant. Calvert G. Chipchase, Esq., appeared on behalf of Intervenors the Ko 'Olina Community Association ("KOCA") and Maile Shimabukuro ("Shimabukuro"). Richard Wurdeman, Esq., appeared on behalf of Intervenor Colleen Hanabusa ("Hanabusa"). Don Kitaoka, Esq., was also present on behalf of the City and County of Honolulu Department of Planning and Permitting as were Bryan C. Yee, Esq., and Rodney Funakoshi on behalf of OP.

At the meeting, the LUC heard public testimony from Cynthia Rezentes, Beverly Munson, Kirk Fritz, Kamaki Kanahale, Maile Shimabukuro, and Joseph Imaoka, and entered the written testimonies of Greg Nichols, Ken Williams, Sweetie Nelson, and Joy Leilei Shih into the record.<sup>2</sup>

Following the receipt of public testimony, the parties provided oral argument on the procedural issues and options available to the LUC in this matter.

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County Of Honolulu Planning Commission's Findings Of Fact, Conclusions Of Law, And Decision And Order With Modifications ("LUC Order") filed October 22, 2009, were also free to file written briefs with the LUC by the aforementioned date.

<sup>2</sup> Prior to the receipt of public testimony, Commissioner Nicholas Teves disclosed that his firm, Commercial Electric Inc., had completed two projects for KOCA in 2011, but that he did not have any personal contact in the projects and could make an impartial decision on the matter. Commissioner Ronald Heller disclosed that he represents the Association of Apartment Owners of Beach Villas, a member of KOCA, in litigation against KOCA. There were no objections by the Applicant or Intervenors KOCA and Shimabukuro to the participation of Commissioners Teves and Heller in the proceeding. Intervenor Hanabusa took no position on the matter.

Docket No. SP09-403 Department Of Environmental Services, City And County Of Honolulu 2  
Order Remanding County Special Use Permit File No. 2008/SUP-2 To The City And County Of Honolulu Planning Commission

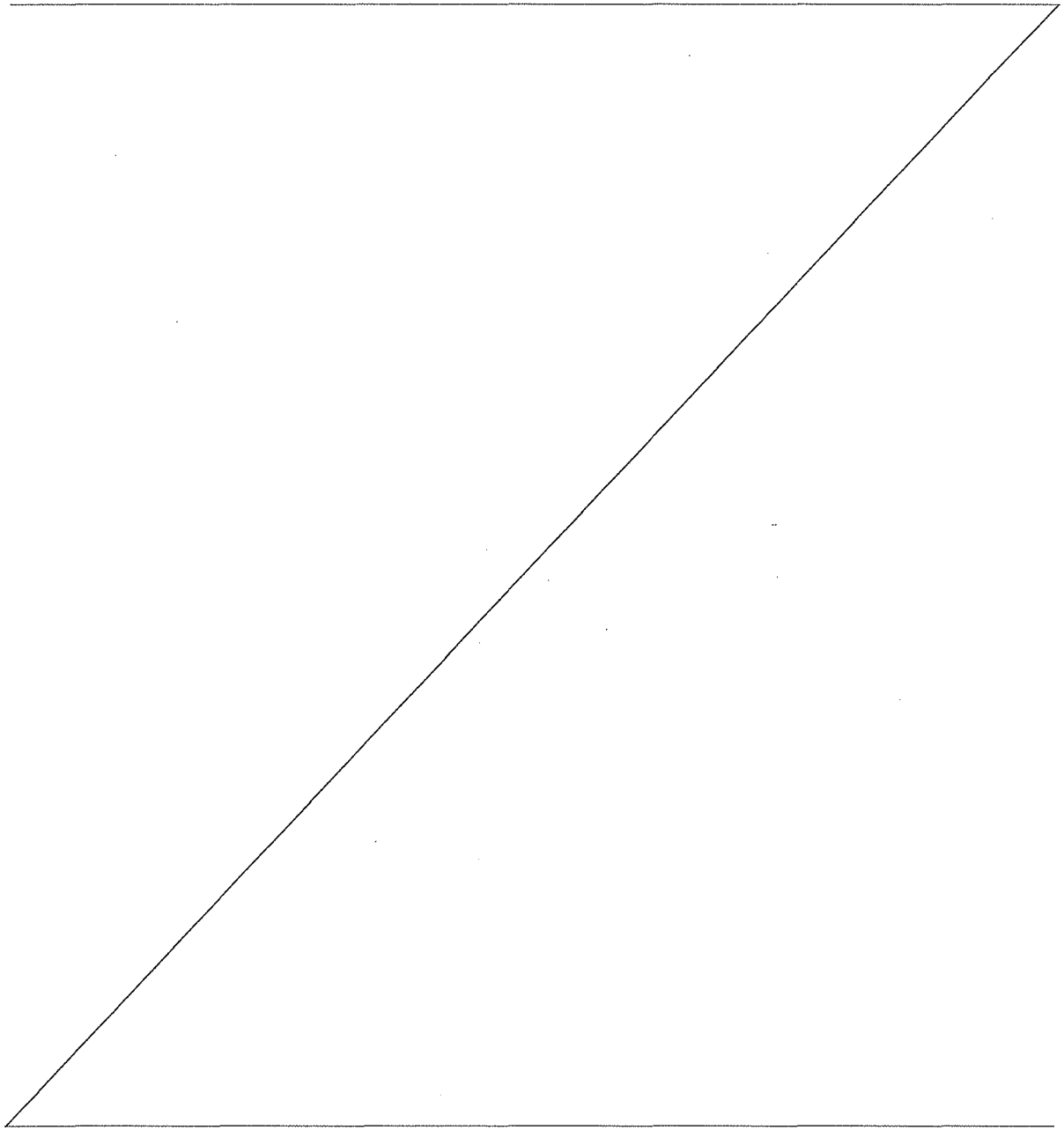
Following discussion, a motion was made and seconded to remand County Special Use Permit File No. 2008/SUP-2 to the Planning Commission for the expressed purpose of consolidating it with the proceeding on the Applicant's pending application to modify the LUC's Order filed October 22, 2009, in order that the Planning Commission may issue and transmit a single, consolidated Findings of Fact, Conclusions of Law, and Decision and Order on the matter to the LUC for further action pursuant to section 205-6, Hawai'i Revised Statutes ("HRS"), and sections 15-15-95 and 15-15-96, Hawai'i Administrative Rules ("HAR"). There being a vote of 7 ayes, 0 nays, and 2 excused, the motion carried.

#### ORDER

The LUC, having duly considered the written and oral arguments presented by the Applicant, Intervenor KOCA, Shimabukuro, and Hanabusa, OP, and Schnitzer, and a motion having been made and seconded at a meeting on September 14, 2012, in Ko 'Olina, O'ahu, Hawai'i, and the motion having received the affirmative votes required by section 15-15-13, HAR, and there being good cause for the motion,

HEREBY ORDERS that County Special Use Permit File No. 2008/SUP-2 be REMANDED to the Planning Commission for the expressed purpose of consolidating it with the proceeding on the Applicant's pending application to modify the LUC's Order filed October 22, 2009, in order that the

Planning Commission may issue and transmit a single, consolidated Findings of Fact, Conclusions of Law, and Decision and Order on the matter to the LUC for further action pursuant to section 205-6, HRS, and sections 15-15-95 and 15-15-96, HAR.



ADOPTION OF ORDER

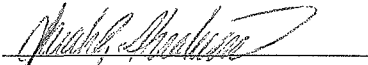
The undersigned Commissioners, being familiar with the record and proceedings, hereby adopt and approve the foregoing ORDER this 8th day of October, 2012. This ORDER may be executed in counterparts. This ORDER shall take effect upon the date this ORDER is certified by this Commission.

Done at Honolulu Hawai'i, this 8th day of October, 2012, per motion on September 14, 2012.


LAND USE COMMISSION

APPROVED AS TO FORM

STATE OF HAWAII

  
Deputy Attorney General

By \_\_\_\_\_  
KYLE CHOCK  
Chairperson and Commissioner

By  \_\_\_\_\_  
RONALD HELLER  
Vice- Chairperson and Commissioner

By \_\_\_\_\_  
CHAD McDONALD  
Vice- Chairperson and Commissioner



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LAND USE COMMISSION

APPROVED AS TO FORM

STATE OF HAWAII

\_\_\_\_\_  
Deputy Attorney General

By   
KYLE CHOCK  
Chairperson and Commissioner

By \_\_\_\_\_  
RONALD HELLER  
Vice- Chairperson and Commissioner

By \_\_\_\_\_  
CHAD McDONALD  
Vice- Chairperson and Commissioner

ADOPTION OF ORDER

The undersigned Commissioners, being familiar with the record and proceedings, hereby adopt and approve the foregoing ORDER this 8th day of October, 2012. This ORDER may be executed in counterparts. This ORDER shall take effect upon the date this ORDER is certified by this Commission.

Done at Honolulu Hawai'i, this 8th day of October, 2012, per motion on September 14, 2012.

LAND USE COMMISSION

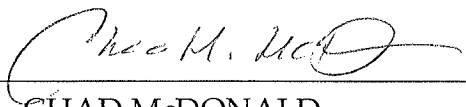
APPROVED AS TO FORM

STATE OF HAWAII

\_\_\_\_\_  
Deputy Attorney General

By \_\_\_\_\_  
KYLE CHOCK  
Chairperson and Commissioner

By \_\_\_\_\_  
RONALD HELLER  
Vice- Chairperson and Commissioner

By  \_\_\_\_\_  
CHAD McDONALD  
Vice- Chairperson and Commissioner

By Sheldon R. Biga  
SHELDON BIGA  
Commissioner

By Lance Inouye  
LANCE INOUE  
Commissioner

By (excused)  
JAYE NAPUA MAKUA  
Commissioner

By Ernest Matsumura  
ERNEST MATSUMURA  
Commissioner

Filed and effective on:

10/8/12

By (excused)  
THOMAS CONTRADES  
Commissioner

Certified by:

Daniel Orodanker  
DANIEL ORODENKER  
Executive Officer

By Nicholas W. Teves Jr.  
NICHOLAS W. TEVES JR.  
Commissioner



BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

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

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) DOCKET NO. SP09-403  
) ORDER REMANDING COUNTY  
) SPECIAL USE PERMIT FILE NO.  
) 2008/SUP-2 TO THE CITY AND  
) COUNTY OF HONOLULU  
) PLANNING COMMISSION ;  
) CERTIFICATE OF SERVICE  
)  
)

LAND USE COMMISSION  
STATE OF HAWAII  
2012 OCT -8 P 12:45

CERTIFICATE OF SERVICE

I hereby certify that a copy of the ORDER REMANDING COUNTY SPECIAL  
USE PERMIT FILE NO. 2008/SUP-2 TO THE CITY AND COUNTY OF  
HONOLULU PLANNING COMMISSION was served upon the following by either  
hand delivery or depositing the same in the U. S. Postal Service by regular or certified  
mail as noted:

DEL. Jesse Souki, Director  
Office of Planning  
P. O. Box 2359  
Honolulu, Hawaii 96804-2359

Bryan Yee, Esq.  
Deputy Attorney General  
Hale Auhau, Third Floor  
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CERT. David Tanoue, Director  
Department of Planning and Permitting  
City and County of Honolulu  
650 South King Street  
Honolulu, Hawaii 96813

CERT. Don Kitaoka, Esq.  
Deputy Corporation Counsel  
City & County of Honolulu  
530 South King Street  
Honolulu, Hawaii 96813

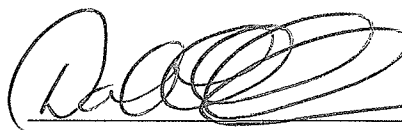
CERT. Dana Viola, Esq.  
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City and County of Honolulu  
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CERT. Department of Environmental Services  
City & County of Honolulu  
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CHRISTOPHER T. GOODIN  
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Honolulu, HI 96813

Dated: October 8, 2012, Honolulu, Hawaii.



Daniel Orodener, Executive Officer

BEFORE THE LAND USE COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of

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

PLANNING COMMISSION FILE NO.  
2008/SUP-2

**CERTIFICATE OF SERVICE**

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF  
HONOLULU

To delete Condition No. 14 of Special

Use Permit No. 2008/SUP-2 (also  
referred to as Land Use Commission  
Docket No. SP09-403) which states as  
follows:

“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.”

**CERTIFICATE OF SERVICE**

The undersigned certifies that on this day a copy of the foregoing document was  
duly served on the following persons by hand delivery:

DONNA Y.L. LEONG, ESQ.  
Corporation Counsel  
KAMILLA C.K. CHAN, ESQ.  
Deputy Corporation Counsel  
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Honolulu, HI 96813

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DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF HONOLULU

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DEBORAH DAY EMERSON, ESQ.  
Deputy Attorneys General  
Department of the Attorney General  
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Honolulu, Hawai'i 96813

Attorneys for  
OFFICE OF PLANNING, STATE OF HAWAII

DATED: Honolulu, Hawai'i, May 12, 2017.

CADES SCHUTTE  
A Limited Liability Law Partnership

A handwritten signature in black ink, appearing to read "Calvert Chipchase", written over a horizontal line.

CALVERT G. CHIPCHASE  
CHRISTOPHER T. GOODIN

Attorneys for Intervenors  
KO OLINA COMMUNITY ASSOCIATION  
and MAILE SHIMABUKURO