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DEPT OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLULU

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

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
Waimanalo Gulch Sanitary Landfill,
Waimanalo 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 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 21, 2012, provided that
only ash and residue from H-POWER shall be
allowed at the WGSL after July 31, 2012.”

FILE NO. 2008/SUP-2
LUC DOCKET NO. SP09-403

INTERVENOR SCHNITZER STEEL
HAWAII CORP.'S RESPONSE TO
INTERVENORS KO OLINA
COMMUNITY ASSOCIATION AND
MAILE SHIMABUKURO'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION AND ORDER;
CERTIFICATE OF SERVICE

**INTERVENOR SCHNITZER STEEL HAWAII CORP.'S RESPONSE TO
INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE
SHIMABUKURO'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER**

COMES NOW INTERVENOR SCHNITZER STEEL HAWAII CORP. ("Schnitzer"), by and through its undersigned attorney, and respectfully submits its Response to Intervenors Ko Olina Community Association and Maile Shimabukuro's ("KOCA") Proposed Findings of Fact, Conclusions of Law and Decision and Order, filed on January 27, 2017, pursuant to the Rules of the Planning Commission ("RPC") § 2-74.

Citations to the evidence in the record provided by Schnitzer within its Response are not intended to be exhaustive, but are merely illustrative of evidence supporting Schnitzer's exceptions. Citations to the record in these exceptions are noted by "Tr." with a date and page number for testimony during the contested case hearings. References to exhibits are denoted by "A___" for the City and County of Honolulu, Department of Environmental Services ("ENV"), "S___" for Schnitzer, and "K___" for KOCA.

I. STANDARD OF REVIEW FOR REVERSAL OR MODIFICATION OF ADMINISTRATIVE FINDINGS, CONCLUSIONS, DECISIONS, OR ORDERS

To prevent judicial reversal or modification of administrative findings of fact under § 91-14(g), Hawaii Revised Statutes ("HRS"), the Planning Commission should, upon review of the record, reverse or modify findings that are "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *In re Gray Line Hawaii Ltd.*, 93 Hawai'i 45 (2000). A finding of fact is clearly erroneous when: (1) the record lacks substantial evidence to support the finding or determination, or (2) despite substantial evidence to support the finding or determination, the Planning Commission is left with the definite and firm conviction that a mistake has been made. *Kienker v. Bauer*, 110 Hawai'i 97, 105 (2006).

Similarly, conclusions of law should be reversed or modified where the Planning Commission finds they are in violation of constitutional or statutory provisions, in excess of the statutory authority or jurisdiction of the Commission, or affected by other error of law. *Id.*

II. DISCUSSION

This matter is a consolidation of two separate, but related, applications before the Planning Commission, City and County of Honolulu (the “Planning Commission”): (1) ENV’s December 3, 2008 Application for State Special Use Permit (“SUP”), seeking to supersede an existing SUP and allow a 92.5 acre expansion of the Waimanalo Gulch Sanitary Landfill (“WGSL” or the “Landfill”) and extend its time of use (the “2008 Application”), being re-considered by the Planning Commission pursuant to an order of remand from the State of Hawaii Land Use Commission (“LUC”); and (2) ENV’s June 28, 2011 Application to Modify the Special Use Permit No. 2008/SUP-2 by Modifying the Land Use Commission’s Order Adopting the City and County of Honolulu Planning Commission’s Findings of Fact, Conclusions of Law, and Decision and Order with Modifications dated October 22, 2009 (the “2011 Application”).

On January 27, 2017, ENV, KOCA, and Schnitzer filed their respective Proposed Findings of Fact, Conclusions of Law, and Decision and Order. Intervenor Colleen Hanabusa did not submit a Proposed Findings of Fact, Conclusions of Law, and Decision and Order.

A. EXCEPTIONS TO KOCA’S FINDINGS OF FACT

Schnitzer submits the following exceptions to the proposed findings of fact submitted by KOCA. Schnitzer’s exceptions are noted in indented narrative following any finding or other assertion by KOCA which is disputed by Schnitzer. The paragraph numbers referenced herein are as provided in KOCA’s proposed Findings of Fact, Conclusions of Law and Decision and Order:

109. Schnitzer attempted to file the written direct testimony of Schnitzer General Manager Larry Snodgrass. Because Mr. Snodgrass did not sign the written direct testimony, it is not admissible in the contested case hearing.

MISLEADING. RPC § 2-70(e) does not require that written testimony be signed in order to be admissible. Moreover, as permitted by RPC § 2-70(e), Mr. Snodgrass summarized his written testimony into the record. *See* Tr. 1/25/12 at 72: 16-18. Further, neither ENV nor KOCA objected to the filing of Mr. Snodgrass' written testimony. Therefore, the written testimony is admissible.

251. In 2004, the City Council did not follow the committee's recommendation and instead passed a resolution to select the existing Waimanalo Gulch Sanitary Landfill as the "new" landfill.

MISLEADING. This statement fails to provide the bases for the City Council not following the blue ribbon committee's recommendation and in doing so fail to give an accurate picture of what transpired. In Resolution No. 04-348, CD1, FD1, the City Council explained that while the blue ribbon committee recommended four possible sites for a new landfill (Maili, Makaiwa, Nanakuli B and Ameron Quarry), the state office of information practices ("OIP") concluded, in an opinion dated January 13, 2004, that the committee's final report was void, due to violations of the state's sunshine law. Since the committee's report was merely advisory, and because OIP found the committee's report to be void, the Council concluded that it was not restricted to selecting a new landfill site from the committee's list of recommended sites, and thereby picked WGSL as the site for the City's landfill because (1) the Waimanalo Gulch site had at least 15 years of capacity left, (2) the Waimanalo Gulch site was the most economical site for which all costs and revenues are known factors, (3) other sites would have required large amounts of money to acquire land and develop the site and infrastructure, (4) an operating contract was already in existence, and (5) the Landfill operator was committed to addressing community concerns. Resolution No. 04-348, CD1, FD1 (December 1, 2004). *See* 2011AP Exhibit A11.

356. With the third boiler, the ENV has said it will achieve a Landfill diversion rate of 90%. 2011AP Ex. K251 at 1-2 (5/5/11 ENV press release).

MISLEADING, UNSUBSTANTIATED. This statement is based on outdated materials. Director Steinberger testified in this proceeding that ENV's goal is 80% diversion from the landfill with 20% of the waste still going to the Landfill. Tr. 1/1/12, 140:10-25, 141:1-11. Director Steinberger also pointed out that this is not

an absolute number but a goal that would reinforce ENV's desire to minimize use of the Landfill. *Id.*

358. Therefore, the third boiler will add more capacity than is needed to dispose of all of O'ahu's remaining landfilled MSW.

UNSUBSTANTIATED and OVERBROAD. This conclusion is not supported by the evidence because it does not take into account MSW that cannot be burned at H-POWER. *See* Tr. 1/11/12 at 78:4-16.

365. With the added capacity provided by the third H-POWER boiler, the ENV will not need to landfill putrescible waste or any combustible MSW. 3/7/12 Tr. at 22:24-23:7 (Miller). As Mr. Miller explained, with alternative diversion there is no need to have a general purpose MSW landfill on O'ahu. *Id.*

MISLEADING, UNSUBSTANTIATED, and OVERBROAD. Although Mr. Miller did testify that he did not believe there was a need for a general purpose MSW landfill on O'ahu, he also testified that his definition of a "general purpose" MSW was quite limited: "when I state general purpose, what I'm really referring to is one that is receiving putrescible waste, so the biosolids, the food waste, the green waste, incidental green waste and so forth into it." Tr. 3/7/12 at 23:3-7. However, as noted by KOCA, the definition of municipal solid waste is not limited to putrescible waste. Their finding #236 states: "MSW" or "municipal solid waste" is defined as "garbage, refuse, and other residential or commercial discarded materials, including solid, liquid, semisolid, or contained gaseous materials resulting from industrial, commercial, mining, and agricultural operations; sludge from waste treatment plants and water supply treatment plants; and residues from air pollution control facilities and community activities. This term does not include solid or dissolved materials in domestic sewage or other substances in water sources, such as silt, dissolved or suspended solids in industrial wastewater effluents, dissolved materials in irrigation return flows, or other common water pollutants." *citing* HRS § 342F-1. This definition is much broader than just putrescible waste.

Furthermore, on cross-examination, Mr. Miller admitted that there are still wastes that need to go to the landfill:

Q: When you say general purpose, what do you mean? Are there wastes that cannot otherwise be disposed of except through a landfill?

A: Are there wastes?

Q: Yes.

A: Well, at this point, because alternatives have not been determined for the ash, I would say ash would continue going there. It is non-putrescible waste and my understanding is that under the ordinance that it is allowed to continue going there. I would say other inert wastes would be able to continue going there if they're not odor-causing, they're not gas, methane gas or landfill gas causing. So, you know, some of the industrial waste that currently goes there, such as the auto fluff that comes from some of the recyclers, as well as other kind of those incidental wastes that are -- I mean, truly are difficult to recycle.

There are some technologies that are coming in place even for auto fluff now, but, you know, it's going to be a while before that happens, and so being able to continue to receive those there, that probably makes sense. Those are non-putrescible, and what I mean by that -- they don't rot, they don't break down and decompose and cause the odors that have a problem at the landfill.

So there are wastes that at this point in time cannot be, you know, disposed of or recycled elsewhere. But what I would generally say is that biosolids, there's absolutely no reason with the technologies that are available today, and in fact the technologies that are being developed here, that those should ever go into that landfill after those technologies come on board.

I would say that there's no reason why any incidental green waste or other, you know, compostable materials should go into that, into the landfill, including food waste. Those are materials that can be composted and as part of the process that can be composted in the new in-vessel composting project that's being brought on. So that's, I guess, what I'm generally saying. There is absolutely no reason why those things that have traditionally made a municipal solid waste landfill a sanitary landfill, which are those things that decompose, that rot, that cause odors and so forth, there's no reason why those materials have to go into the landfill anymore with the third boiler at H-POWER and the biosolids operations that are coming.

Q: So, with the technology in place for the alternatives, you're still saying that there is a need for a landfill for these non-putrescible and other types of waste that cannot otherwise be disposed of? There would still be a need for a landfill, is that correct, for ash and inert waste and auto fluff and all of those other wastes that cannot otherwise be disposed of?

A: True. I do not believe that Honolulu can do without a landfill.

Tr. 3/7/12 at 97:12 - 99:23.

366. Steinberger agreed: "If it's just solely MSW, I would say [Mr. Miller is] probably correct.

MISLEADING. As noted previously, Mr. Miller's definition of MSW was quite limited. In addition, Mr. Steinberger's statement is taken out of context. The context of the statement shows that Mr. Steinberger did not agree that there no need to landfill all MSW, as defined by HRS § 342F-1. The full context of Mr. Steinberger's statement is as follows:

Q: Mr. Miller also criticizes -- I guess, no, he didn't criticize -- he opines that there is no need for a general purpose landfill if you utilize alternative disposal methods.

Do you agree with that statement?

A: I disagree.

Q: Why?

A: Again, you have to look at the entire spectrum of waste that goes -- that the City has to deal with on a daily basis. If it's just solely MSW, I would say that he's probably correct. But it's not just solely MSW. There's a whole range of things.

You also have to keep in mind that outside of your day-to-day household trash that we deal with, we also have things such as agricultural waste. And when I say agricultural waste, that may include things from the dairy farmers. It may also include waste from pig farmers. It may also deal with carcasses from the zoo or from the various type of agricultural entities, also. So those types of things, you know, I couldn't agree with.

The other is, we're in the middle of the Pacific Ocean. We've already found that trying to transport our waste to somebody else doesn't work. We went that route. We tried very hard for a year before we ended up having to take care of it ourselves here locally. So it's not that simple of an issue.

Tr. 4/11/12 at 106:12 - 107:15.

368. Much of this small percentage "can go to . . . [the] PVT [C&D landfill]," including resins and chemical debris and petroleum contaminated soil. 1/11/12 Tr. at 47:19-22, 145: 4-146:1 (Steinberger); 2011 AP 1/25/12 Tr. at 12:2-3, 44: 12-14 (Chang).

MISLEADING and UNSUBSTANTIATED. PVT Landfill is a private landfill that accepts construction and demolition waste. See Tr.1/11/12 at 47:10 - 25. Mr. Steinberger testified that resins or chemical debris can go to PVT Landfill "if it's associated with debris from construction." *Id.* at 145:22-25. Mr. Steinberger did not testify that all resins or chemical debris can go to PVT Landfill. In addition, Mr. Chang only testified that petroleum-contaminated waste can go to PVT Landfill. Neither testified that this amounted to "much" of the small percentage that will not be accepted at H-POWER. On the contrary, Mr.

Steinberger testified that there are a number of products that cannot go to H-POWER or PVT Landfill, including sandblast grit (*id.* at 146:2-8), medical sharps (*id.* at 147:1-8), and mattresses (*id.* at 147:18-20). In addition, Schnitzer provided testimony to show that its residual waste also cannot go to the PVT Landfill. *See* Written Testimony of Larry Snodgrass at 5. KOCA's statement that "much" of the small percentage of items that cannot be accepted at H-POWER can be accepted at PVT Landfill is, therefore, unsubstantiated.

377. Because the third boiler will be operational in October or November 2012, the ENV will not need a general purpose MSW landfill beyond January 1, 2013. After January 1, 2013, all sewage sludge and all other putrescible waste, such as food waste and green waste, all treated medical waste (except sharps), and all combustible general MSW can be burned or disposed of through alternative means.

MISLEADING, UNSUBSTANTIATED, and OVERBROAD. As previously noted, KOCA's use of the term "MSW" is much more limited than that defined under HRS § 342F-1. MSW is not limited to putrescible waste. As Mr. Steinberger noted, there are numerous other wastes that have to go to the landfill. *See* Tr. 4/11/12 at 106:12 - 107:15. Therefore, KOCA's statement that ENV will not need a general purpose MSW landfill beyond January 1, 2013, is not substantiated by the facts.

In addition, Mr. Steinberger testified that H-POWER is currently permitted as a waste-to-energy facility. Tr. 4/23/12 at 198:1-7. Therefore, not all combustible general MSW can be burned at H-POWER under its current permit. For instance, H-POWER cannot accept biosolids that have no BTU value. *Id.* at 198:21-25. KOCA's statement that all other putrescible waste can be burned or disposed of through alternative means is too broad.

385. It took the ENV "about two-and-a-half years" to identify, permit, and have the Landfill operational. 2011AP Ex. K220 at 244:16 - 19 (7/1/09 Tr.:Doyle).

MISLEADING, IRRELEVANT. This statement misrepresents the time required to site and develop a new landfill by taking Mr. Doyle's statement out of context. KOCA fails to mention that this estimate was applicable in 1987. *See* 2011AP Exhibit K220. The date is significant because, as Dr. Sharma pointed out, the laws regulating landfills in 1987 were not as stringent as the laws that were enacted in October 1993. Therefore, in 1987, one could site and build a landfill very quickly as compared to that same process today. Tr. 4/11/12, 51:22-25, 52:1-14. In any regard, this time estimate is not relevant to the present proceeding.

390. Mr. Miller's estimate is consistent with the timeline set out by Director Doyle. Director Doyle stated before the Land Use Commission: We have asked for a five-year extension because that the time that we believe it's going to take in order for us to establish a new landfill." 2011AP Ex. K85 at 95: 6-8 (3/27/03 Tr.:Doyle). Director Doyle added: "We think the time that is necessary for us to get us there is at least three, probably four years just to get ourselves up and operational at that landfill site." K85 at 100:23-25 (Doyle).

MISLEADING. In the proceeding relating to the 2009 SUP Application to expand WGSL, the Planning Commission and the LUC relied upon Mr. Doyle's testimony to establish the length of time needed to develop a landfill. Specifically, Planning Commission member Kerry Komatsubara asked Mr. Doyle:

"How long does it take for the whole process, identification of the new site, blue ribbon commission hearings, EIS, site selection, hiring the contractors, going through the procurement process, going through the protest process, building, construction and opening the doors? How long does it take? . . . And the reason why I ask it that **I want to make sure no one has the impression that in two years we're going to have a new landfill.**"

Tr. 4/11/12, 72:11-21 (emphasis added). Mr. Doyle responded, "No, no, absolutely not. We're looking at seven plus."

The Planning Commission and LUC relied on this testimony in finding that it would take more than seven years to identify and develop a new landfill site. Tr. 4/11/12, 73:19-25, 74:1-5, see also 2011AP Exhibit "A18" at pg. 8, see also Tr. 4/11/12, 122:6-25, 123:1-12.

402. Based on the evidence, no more than five to seven years is needed to site and develop a landfill if the ENV proceeds with reasonable diligence.

UNSUBSTANTIATED. This statement is not supported by substantial evidence. As Ms. Marsters, Dr. Sharma, and Director Steinberger established, a minimum of seven years is required and more likely longer to take a landfill from selection to operation.

As an environmental engineer who has worked in Hawaii and the Pacific for over 20 years, mostly in the area of environmental planning and permitting for construction projects, Ms. Marsters is familiar with the permitting and

environmental review process and is aware of how long it takes to develop a site. Tr. 4/4/12, 55:10-25, 56:1-2, see also AP2011 Exhibit "A36." Ms. Marsters concluded that the permitting and environmental review process, land acquisition, and the landfill design itself, which is a very rigorous process because you have to design the liners and the leachate collection systems and the groundwater monitoring systems and so forth, would take five to seven years. Ms. Marsters further concluded that it would take additional time to build the infrastructure necessary for the landfill and to construct the landfill. Tr. 4/4/12, 56:1-25, 57:1-25, 58:1-17. Ms. Marsters further opined that three years to complete the development of a new landfill was not enough time and that especially in Hawaii, because we have a very inclusive environmental review process that allows for a lot of opportunity for public input, more time is needed for the development of a new landfill. Tr. 4/4/12, 58:18-25, 59:1-11.

Dr. Sharma, who was qualified as an expert in landfill design and permitting, and who was the principal in charge of permitting and construction of the expansion cells in WGSF, observed the development of new landfills in the 80's and 90's and stated that it took about seven to ten years to complete development of new landfills at that time. Dr. Sharma further stated that in the 2000s and now, there are very few if any completely new landfill sites being approved because most landfill work is in expansion of existing landfills. Therefore, he believes that development of a new landfill would take even longer than seven to ten years. Tr. 4/11/12, 41:2-25, 42:1-6. Dr. Sharma also stated that for just the latest expansion of WGSF, it took 3-4 years, so it is not possible for a completely new landfill in Hawaii to be developed in 3-4 years. Tr. 4/11/12, 42:7-19.

Director Steinberger pointed out that even after the Site Selection Committee ("SSC") makes its recommendation, ENV will need more than seven years to complete the tasks necessary to start operations at a new site(s). These tasks include, but are not limited to: (1) the preparation and processing of an EIS in full compliance with HRS Chapter 343 and related administrative rules for O'ahu's next landfill site or sites (*e.g.*, conducting site surveys and investigations, analyzing alternatives including alternative sites and technologies, obtaining public and governmental agency input, analyzing direct, secondary, and cumulative impacts, developing appropriate mitigation measures, and ensuring the opportunity for public participation and comments); (2) the acquisition of landfill sites, which may require an appraisal of the land value, a determination by the City regarding the funding source for the acquisition, and approval for the expenditure of public funds by the Honolulu City Council; and (3) detailed engineering studies, construction and bid documents, and other approvals. Written Testimony of Timothy E. Steinberger, pgs. 15-16.

The detailed engineering studies are also needed to support the landfill design. These studies will include, but are not limited to: land surveys; geotechnical soils and structural investigations; hydrology and hydrogeological investigations. The completion of these studies is required so that the landfill construction drawings

can incorporate civil design requirements, such as the provision of drainage, access roadways, and infrastructure, to support the use of the site. Coordination with governmental agencies, utilities, and adjoining landowners, consistent with mitigation measures identified in the EIS, will also be required to minimize disturbance to nearby property owners and utilities. The length of time required for the completion of detailed engineering studies, construction drawings and bid documents, and the processing of procurements for the design and construction contractors (which could include the selection of a qualified landfill operator), as well as the acquisition of building permits, land use approvals such as a SUP or district boundary amendment, depending on where the site(s) is located, and other necessary approvals, is estimated to be between one and three years. That is before the City even breaks ground on a new site. *Id.* at 16.

Based on the foregoing and the fact that Ms. Marsters, Dr. Sharma, and Director Steinberger have direct experience with the land use process in relation to WGS�, a new landfill is more than likely to take more than seven years to develop. Consequently, taking seven or more years to develop a landfill is not only reasonably diligent but realistic.

403. The LUC’s 2009 Order directed the ENV to select and develop a “new” landfill site that would either “replace or supplement” the existing Landfill.

MISLEADING. Condition No. 1 of the 2009 Planning Commission Decision (Condition No. 4 of the 2009 Land Use Commission) requires the City, on or before November 1, 2010, to begin to identify and develop one or more new landfill sites that shall either replace or supplement the Landfill. *See* Ex. A18 at 25.

429. Once the new site opens, the ENV will no longer need the Landfill.

UNSUBSTANTIATED. No evidence has been presented to show that ENV will no longer need the Landfill once a new site opens.

B. EXCEPTIONS TO KOCA’S CONCLUSIONS OF LAW

Schnitzer submits the following exceptions to the proposed conclusions of law (“COL”) submitted by KOCA. Schnitzer objects to proposed COL 6(f)(i) on the basis that there is nothing in the record to supporting a condition that “[f]rom the date of this Order, until March 1, 2024, MSW, including sewage sludge, may not be deposited at WGS� unless it cannot be disposed of within the City by an means other than landfilling.”

Schnitzer also objects to COL 6(f)(ii) on the basis that there is nothing in the record to support a condition that the Landfill “shall stop accepting any form of waste and close on or before March 2, 2027.”

C. EXCEPTIONS TO KOCA’S PROPOSED DECISION AND ORDER

KOCA’s proposed Decision and Order is not appropriate in that it seeks an immediate ban on the acceptance of MSW that cannot be disposed of by any means other than landfilling until March 1, 2024, and seeks a ban on all waste and closure of the Landfill by March 2, 2027. Such conditions are arbitrary and not supported by the record.

III. CONCLUSION

For the foregoing reasons, Schnitzer respectfully requests that KOCA’s Proposed Order Proposed Order be rejected to the extent that it conflicts with Schnitzer’s Proposed Order, and requests that Schnitzer’s Proposed Order be adopted.

DATED: Honolulu, Hawaii, February 10, 2017.



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FILE NO. 2008/SUP-2

LUC DOCKET NO. SP09-403

CERTIFICATE OF SERVICE

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I hereby certify that a true and correct copy of the foregoing document was duly served
upon the parties identified below by hand delivery on the date set forth below:

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