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DEPT OF PLANNING  
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CITY & COUNTY OF HONOLULU

Attorneys for Petitioner  
**SCHNITZER STEEL HAWAII CORP.**

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

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

To Modify SUP No. 2008/SUP-2 by  
Modifying the State Land Use Commission's  
Order Adopting the City and County of  
Honolulu Planning Commission's Findings of  
Fact, Conclusions of Law, and Decision and  
Order with Modifications, Dated October 22,  
2009

PETITION TO INTERVENE

MEMORANDUM IN SUPPORT OF PETITION

VERIFICATION

CERTIFICATE OF SERVICE

BEFORE THE PLANNING COMMISSION  
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PETITION TO INTERVENE

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COMES NOW, SCHNITZER STEEL HAWAII CORP. ("Schnitzer"), by and through its attorneys, Carlsmith Ball LLP, and hereby respectfully submits its petition to intervene in the above-captioned proceeding. The Department of Environmental Services, City and County of Honolulu ("ENV") seeks to modify the State Special Use Permit ("SUP") No. 2008/SUP-2, by deleting the July 31, 2012 deadline to cease disposal of municipal solid waste at Waimanalo Gulch Sanitary Landfill ("WGSL"), which was imposed as Condition No. 14 by the State Land Use Commission ("LUC") in that certain Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order, filed and effective on October 22, 2009, in LUC Docket No. SP09-403 (the "2009 LUC Order").

The Notice of Publication for the hearing on the above-captioned proceeding appeared in the Honolulu Star-Advertiser on September 4, 2011.

This petition for intervention is brought pursuant to §§2-52(c), 2-53, 2-55 and 2-56 of the Rules of the Planning Commission, and Hawaii Revised Statutes §205-6, and is based on the attached Memorandum in Support of Petition to Intervene and the records and files of this case.

DATED: Honolulu, Hawaii, September 16, 2011.



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IAN L. SANDISON  
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TIM LUI-KWAN

Attorneys for Petitioner  
SCHNITZER STEEL HAWAII CORP.

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MEMORANDUM IN SUPPORT OF  
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MEMORANDUM IN SUPPORT OF PETITION TO INTERVENE

COMES NOW, SCHNITZER STEEL HAWAII CORP. ("Schnitzer"), by and through its attorneys, Carlsmith Ball LLP, and hereby respectfully submits its Memorandum in Support of its Petition to Intervene.

**I. BACKGROUND**

Schnitzer is a major recycler in the State. Formerly known as Flynn Learner and Hawaii Metal Recycling, its recycling operation has been serving Hawaii since 1949. Schnitzer's operations on Oahu employ approximately 40 people, and include equipment and processes to recycle ferrous and non-ferrous scrap metal. Its state-of-the-art metal shredder can reduce a full-size automobile into fist-sized pieces of shredded steel scrap in approximately 30 seconds. For each ton of scrap metal received by Schnitzer, its recycling operation reduces the volume by 80%. Much of this material would otherwise take up significant space in the Waimanalo Gulch Sanitary Landfill ("WGSL"), or be simply abandoned on Oahu's streets and vacant lots.

Recycling operations produce some residual waste. Schnitzer shreds approximately 120,000 tons of scrap metal every year. In so doing, it generates approximately 20,000 tons of recycling residue. That residue consists primarily of plastics, glass, carpet and other nonmetallic automobile and appliance components.

Schnitzer's recycling operations are permitted by the Department of Health, State of Hawaii ("DOH") through a Solid Waste Management Permit ("SWMP"). One of the conditions of the SWMP is that Schnitzer's recycling residue must be deposited in a DOH-permitted solid waste disposal facility. WGSJ is the only DOH-permitted solid waste disposal facility on Oahu where Schnitzer can dispose of recycling residue.

Condition 14 of Special Use Permit No. 2008/SUP-2, as set forth in the State Land Use Commission 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 "2009 LUC Order"), provides as follows:

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

The Department of Environmental Services, City and County of Honolulu ("ENV") is currently seeking to delete Condition 14. Schnitzer supports ENV's request. If WGSJ is limited to ash and residue from H-POWER after July 31, 2012, then Schnitzer will have no other place to dispose of its recycling residue. This would have a significant impact on Schnitzer's recycling operation on Oahu. Without question, Schnitzer will suffer substantial harm that is different from that suffered by the general public or the City and County of Honolulu.

## II. LEGAL ARGUMENT

### A. STANDARD FOR INTERVENTION

The subject matter of these proceedings is a modification of State Special Use Permit No. 2008/SUP-2. Under §2-49 of the Rules of the Planning Commission ("RPC"), a request to modify or delete a condition imposed in a special use permit shall be processed in the same manner as the original petition for the special use permit. Pursuant to RPC §2-52(c) "[p]ersons may petition the commission to intervene in all proceedings before the commission for special use permits, subject to the requirements of this subchapter [RPC Subchapter 5]." Furthermore, under RPC §2-56(d) any petitioner seeking to intervene who has been denied standing as a party may appeal that denial to the Circuit Court.

RPC Subchapter 5, in turn, requires particular information in a petition to intervene. RPC §2-53(b) provides as follows:

- (b) Contents of petition to intervene as a party. The petition shall include the following points:
  - (1) The nature of petitioner's statutory or other right to intervene as a party to the proceedings.
  - (2) The nature and extent of petitioner's interest in the proceedings, and if the petitioner is an abutting property owner, the tax map key description of the property.
  - (3) A statement of the specific issues to be raised or contested by the petitioner in the contested case hearing.
  - (4) The effect of any decision in the proceeding on the petitioner's interest.

Once a timely request to intervene has been made, it can only be denied in limited circumstances, as provided in RPC §2-55(c):

- (c) Leave to intervene shall be freely granted, provided that the commission may deny petition to intervene when in the commission's discretion, it appears that:
  - (1) The position of the party requesting intervention concerning the proposed action is substantially the same as the position of a party already admitted to the proceeding; and

- (2) The admission of additional parties will render the proceedings inefficient and unmanageable.

The term "party" is defined under RPC §1-5 as follows:

- (j) "Party" means any person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party in a proceeding. More specifically, it includes the following, upon the filing of timely requests:
  - (1) Any state or county agency,
  - (2) Any person who has some property interest in the land, or who lawfully resides in the land, or who can demonstrate that person will be so directly and immediately affected by the Commission's decision that that person's interest in the proceeding is clearly distinguishable from that of the general public; provided that this requirement shall be liberally construed.

## B. ANALYSIS

As explained in more detail below, Schnitzer meets the requirements for intervention under RPC §2-53, and under RPC §2-55, leave to intervene should be freely granted.

1. RPC §2-53(b)(1): The nature of petitioner's statutory or other right to intervene as a party to the proceedings.

Schnitzer is a major private user of WGS� and has a legal right to intervene to ensure its continued access to use WGS�. Schnitzer currently holds a SWMP, which requires it to dispose of its recycling residue at a DOH-permitted solid waste disposal facility. WGS� is the only DOH-permitted solid waste disposal facility on Oahu that can accept Schnitzer's residual waste.

If Condition No. 14 of the 2009 LUC Order remains intact, it would prohibit Schnitzer from being able to deposit its recycling residue at WGS� after July 31, 2012, thereby prohibiting Schnitzer from being able to comply with its SWMP. This would jeopardize an integral component of Schnitzer's recycling operation. Therefore, Schnitzer has a direct stake in the outcome of these proceedings. In addition, as a holder of a SWMP, and a major user of WGS�, due process dictates that Schnitzer has a right to be a party to these proceedings in order to protect its business interests.

2. RPC §2-53(b)(2): The nature and extent of petitioner's interest in the proceedings, and if the petitioner is an abutting property owner, the tax map key description of the property.

Schnitzer is not an abutting property owner. Nevertheless, Schnitzer has a direct, personal stake in these proceedings. A key factor for determining standing is whether the petitioner has "a personal stake in the outcome of the controversy." *Life of the Land v. Land Use Comm'n*, 63 Haw. 166, 172, 623 P.2d 431, 438 (1981). Continued use of WGS� to dispose of recycling residue is an integral part of Schnitzer's recycling operations.

If Condition No. 14 to the 2009 LUC Order is not deleted or amended, Schnitzer's continued business viability will be called into question. This is sufficient injury for Schnitzer to intervene in the proceeding and challenge the propriety of Condition No. 14. *See In re Hawaiian Elec. Co., Inc.*, 56 Haw. 260, 535 P.2d 1102 (1975). In that case, the Public Utilities Commission denied a petition for intervention filed by a nonprofit corporation in a rate increase proceeding. The corporation appealed that denial; two members of the corporation testified that they would be paying higher utility rates as a result of the PUC decision. The Hawaii Supreme Court held that one who has to pay higher utility rates due to an agency action is a person "specially, personally and adversely affected." *Id.* at 264, 535 P.2d at 1105. The Court added that "[t]he fact that he shares this additional burden with other users does not disentitle him from challenging the results." *Id.* Schnitzer's business relies on WGS�. Therefore, Schnitzer could be directly, specifically, personally and adversely affected by the Planning Commission's (and later, the LUC's) decision on this matter.

Furthermore, the outcome of these proceedings directly affects Schnitzer's property interest in its SWMP. Schnitzer holds a SWMP from the DOH. *See Brown v. Thompson*, 91 Hawaii 1, 979 P.2d 586 (1999) (holding that a mooring permit is constitutionally protected property that cannot be taken without due process). The SWMP is essential for Schnitzer's



business, and it requires Schnitzer to dispose of waste at a DOH-permitted facility. WGS� is the only DOH-permitted facility on Oahu that can accept Schnitzer's residual waste. Therefore, the outcome of these proceedings will directly affect Schnitzer's property interest in its SWMP.

3. RPC §2-53(b)(3): A statement of the specific issues to be raised or contested by the petitioner in the contested case hearing.

Without access to WGS�, or an adequate alternative, there would be no place to deposit recycling residue on Oahu. This would have a major, critical impact on Schnitzer's business. Moreover, for many years, Schnitzer has taken an active role in reducing the amount of scrap metal waste that enters WGS�. Loss of Schnitzer's recycling operation due to the closing of WGS� would substantially increase the volume of unrecycled waste on Oahu.

4. RPC §2-53(b)(4): The effect of any decision in the proceeding on the petitioner's interest.

Schnitzer will be directly and immediately affected by the Commission's decision in this proceeding. As a major recycler in the State, Schnitzer relies on WGS� to continue its recycling operations. The SWMP requires Schnitzer to deposit its recycling residue at WGS�. If Schnitzer can no longer use WGS�, and if no alternative landfill is found by July 31, 2012, Schnitzer will not be able to comply with its SWMP. If that occurs, there could be significant harm to Schnitzer's business interests.

5. RPC §2-53(c): Schnitzer's Petition is Timely.

RPC §2-53(a) provides that "[a]ny person or agency, requesting to intervene as a party shall file a petition with the commission within fourteen (14) days of the date of newspaper publication of not the notice of a public hearing to be held by the planning commission on a petition for a special use permit." The notice for this proceeding was published on September 4, 2011. Schnitzer's request is, therefore, timely.

6. RPC §2-55(c)(1): Schnitzer's Interest is Not Substantially the Same As Any Other Party's.

Currently, ENV is the only party to these proceedings. ENV states that WGS� is a critical component of the City's solid waste management system. *See* Application to Modify SUP No. 2008/SUP 2 by Modifying the LUC's Order Adopting the City and County of Honolulu Planning Commission's Finding of Fact, Conclusions of Law, and Decision and Order with Modifications dated October 22, 2009, filed June 28, 2011, at 13. ENV further states that the limitation imposed by Condition 14 "will likely result in major public health and safety problems for the City, its residents and visitors, and the State of Hawaii." *Id.* at 13-14. ENV represents the interests of the general public and the City and County of Honolulu.

Schnitzer's interest is distinct from that of the general public and the City and County. Schnitzer is a private user of WGS�. Schnitzer holds a SWMP, which allows it to operate a major recycling operation. WGS� is an essential component of Schnitner's business. Schnitzer's business and economic interest in continued access to WGS� is clearly different from that of ENV's.

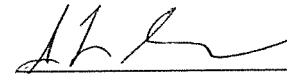
7. RPC §2-55(c)(2): Schnitzer's Intervention Will Not Render the Proceedings Inefficient and Unmanageable.

Schnitzer is only a single party seeking intervention in this proceeding. Because its interest in these proceedings is not substantially the same as that of ENV, there will not be duplication of claims or evidence. There is, therefore, no danger of these proceedings becoming inefficient and unmanageable.

**III. CONCLUSION**

For the reasons stated herein, Schnitzer respectfully requests that the Planning Commission grant this petition and allow Schnitzer to intervene as a party to the proceedings in State Special Use Permit Amendment Application No. 2008/SUP-2.

DATED: Honolulu, Hawaii, September 16, 2011.



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IAN L. SANDISON  
DEAN H. ROBB  
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Attorneys for Petitioner  
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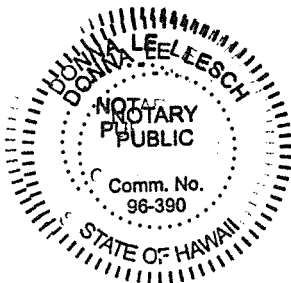
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VERIFICATION

STATE OF HAWAII )  
 ) SS.  
CITY AND COUNTY OF HONOLULU )

LARRY SNODGRASS, being first duly sworn on oath, deposes and says he is  
the General Manager of SCHNITZER STEEL HAWAII, CORP., and as such he is authorized to  
make and hereby makes this verification on behalf of SCHNITZER STEEL HAWAII CORP.,  
that he has read the foregoing PETITION TO INTERVENE, knows the contents thereof, and the  
same is true to the best of his knowledge and belief.



*Larry Snodgrass*  
\_\_\_\_\_  
Larry Snodgrass

*Donna Le Lesch*  
\_\_\_\_\_  
Name: Donna Le Lesch  
Notary Public, State of Hawaii  
My commission expires: July 18, 2012



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CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was duly served upon the following parties at their respective addresses by the manner indicated thereto:

CERTIFIED MAIL

DELIVERY

DAVID K. TANOUE  
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DATED: Honolulu, Hawaii, September 16, 2011.



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