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BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

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| In the Matter of the Application of |) FILE NO. |
| |) |
| DEPARTMENT OF ENVIRONMENTAL |) 2008/SUP-2 |
| SERVICES, CITY AND COUNTY OF |) |
| HONOLULU |) |
| |) |
| To Modify SUP No. 2008/SUP-2 by |) |
| Modifying the State Land Use Commission's |) |
| Order Adopting the City and County of |) |
| Honolulu Planning Commission's Findings of |) |
| Fact, Conclusions of Law, and Decision and |) |
| Order with Modifications, dated October 22, |) |
| 2009 |) |
| ----- |) |

CITY AND COUNTY OF HONOLULU
PLANNING COMMISSION
CONTESTED CASE HEARING

Taken at the Mission Memorial Hearings Room,
Mission Memorial Building, 550 South King Street,
Honolulu, Hawaii, commencing at 1:10 p.m., on
December 7, 2011, pursuant to Notice.

BEFORE: Nancy Christensen, RPR, CSR NO. 476

1 APPEARANCES:

2

3 For Intervener Schnitzer Steel Hawaii Corp.:

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12 Services City and County of Honolulu:

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21 For Interveners Ko'olina Community Association
22 and Maile Shimabukuro:

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1 APPEARANCES:

2 Gayle Pingree, Chair

3 James C. Pacopac

4 Beadie K. Dawson

5 Daniel S.M. Young

6 Cord D. Anderson

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8 Winston Wong, Deputy Corporation Counsel

9 for the Planning Commission

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1 CHAIR PINGREE: We're going to call the
2 meeting to order. Today is December 7, 2011. The
3 agenda today is the contested case hearing, Ewa State
4 Special Use Permit Amendment Application, 2008/SUP-2,
5 Waimanalo Gulch Sanitary Landfill.

6 I will call the meeting to order. Before
7 going into the formal hearing, what I would like to do
8 is introduce two new commissioners to the Planning
9 Commission. The first is Mr. Daniel Young on my right,
10 and Cord Anderson on my left. For the record, they
11 both received applicable information and have reviewed
12 it accordingly for the record. Thank you.

13 Today, first on the agenda is to hear the
14 motion to dismiss by Ko'olina Community Association and
15 Maile Shimabukuro.

16 Thank you. Appearances please.

17 MR. CHIPCHASE: Good afternoon,
18 Commissioners. My name is Cal Chipchase. I represent
19 the Ko'olina Community Association and Maile
20 Shimabukuro. Ken Williams, who is our partner
21 representative of the association, he is here as well,
22 as are certain members of the Association.

23 MR. SANDISON: Good afternoon. My name is
24 Ian Sandison. I represent Schnitzer Steel Hawaii
25 Corporation in this matter.

1 MS. VIOLA: Good afternoon. Deputy
2 Corporation Counsel, Dana Viola, as well as Brian
3 Black, appearing on behalf of the City and County of
4 Honolulu.

5 CHAIR PINGREE: Thank you.

6 MR. CHIPCHASE: Thank you. I appreciate the
7 opportunity to address you. On our motion, there are
8 really only two questions that the Commission needs to
9 answer. The first is: What has the ENV asked for?
10 What do they want?

11 The second is: Do you have the power to
12 grant it? Is that within some specific statute or rule
13 or regulation authorizing you to grant what the
14 Association is after?

15 To answer the first question, we look at the
16 application that the Association -- or that ENV, I'm
17 sorry, filed. I will read it to you: The ENV,
18 "Respectfully moves the Planning Commission, City and
19 County of Honolulu, for an order modifying State
20 Special Use Permit No. 2008/SUP-2." That is what they
21 have asked for, an order modifying Special Use Permit.

22 Modifying it in what way? Well, to modify it
23 to delete Condition 14 imposed by the Land Use
24 Commission. So then we turn the next question: Does
25 this Body have authority, have the power, have

1 jurisdiction to grant that relief to modify an existing
2 permit? They haven't applied for new permits, an
3 existing permit. To modify an existing permit by
4 deleting a condition imposed by the Land Use
5 Commission. Again, we turn to the application that the
6 ENV filed.

7 They cite three bases for the application,
8 for the motion, to amend, to modify the existing order.
9 Section -- "Section 2-18 and Section 2-49 of the Rules
10 of the Planning Commission, this body, and Section
11 15-15-70 of the State of Hawaii Land Use Commission"
12 rules. Only those three bases are identified as
13 providing this Body with jurisdiction to hear the
14 request the ENV has made.

15 So let's turn to each provision cited by the
16 ENV. First, Rule-2-18 deals with meetings of this
17 Body. That's all it provides: Meetings, regular
18 meetings, special meetings, executive meetings,
19 informational briefings. Nothing about this Body's
20 powers, nothing about this Body's jurisdiction,
21 certainly nothing about this Body's power of authority
22 to modify an existing permit by deleting a condition
23 imposed by the Land Use Commission.

24 The second rule identified in the ENV's
25 application, 2-49 of the Planning Commission Rules. A

1 request for modification or deletion of a condition.
2 The rule provides: "A petitioner who desires a
3 modification or deletion of a condition imposed by the
4 Commission shall make such a request to the Commission
5 in writing."

6 These rules specifically define the
7 Commission to mean, "Commission means the Planning
8 Commission of the City and County of Honolulu or the
9 Commission's duly authorized representative." Nothing
10 about a condition imposed by the Land Use Commission.

11 That rule by its express terms applies to
12 conditions imposed by this Body. That makes a great
13 deal of sense. If you impose a condition, you ought to
14 have the ability to modify. In Rule-2-49 provides that
15 power, but it does not give you the power, nor could it
16 give you the power, to modify a condition imposed by
17 the Land Use Commission. And Condition 14 was imposed
18 by the Land Use Commission.

19 So then we come to the very final section,
20 very final authority cited in the ENV's application for
21 the request that is made. And that is the Land Use
22 Commission Rules, the HAR 15-1570. That is the right
23 rule for modifying a Land Use Commission order or
24 condition.

25 But they're before the wrong Body. According

1 to that rule, quote, Section D, "The moving party shall
2 serve a copy of all motion papers on all of the parties
3 and shall file the original plus 15 copies with the
4 Commission and proof of service." The Land Use
5 Commission was defined "the Commission" for purposes of
6 those rules as the "Land Use Commission," not at this
7 Body.

8 Right rule; wrong Body. So there you have
9 it. The ENV has asked you to do something that no
10 rule -- any of the rules they've cited, any of the
11 provisions they cited gives you the power to do it.

12 In response to this, the ENV will tell you
13 three things. They will say, Well, there is nothing
14 that says you can't do it. There is no rule or
15 provision that says that you can't modify a Land Use
16 Commission.

17 Let's accept that premise for just a moment.
18 That is exactly backwards of the way agency
19 jurisdiction works. Agency jurisdiction does not
20 operate in a vacuum. If nothing says you can't, and
21 then you can. It couldn't possibly work that way.

22 Agency jurisdiction works according to rules.
23 If you have the authority, it must be set out in a rule
24 or statute or here an ordinance or some provision
25 giving you jurisdiction to do it. There is no such

1 provision.

2 The next thing that ENV will tell you is,
3 well, this is permissible because it's a new
4 application. Yes, but a new application to do what?
5 Not a new application for a new permit. The ENV could
6 have brought a new application for a new permit and it
7 would start here. ENV did not do that. They did not
8 do that because then they would have to meet all the
9 burdens and all of the standards and all of the
10 difficulties associated in getting a new permit to
11 supersede and replace their existing permit.

12 They didn't do that. Instead they brought an
13 application, or rather, they called it a "motion" to
14 modify an existing permit. That is what is at issue
15 the existing permit -- and specifically a condition
16 imposed by the Land Use Commission.

17 The last thing they will tell you is that,
18 well, we have to do it this way because otherwise
19 Schnitzer could not participate. Simply not accurate.
20 The ENV is free to request a hearing before the Land
21 Use Commission where they should have brought this, and
22 Schnitzer is free to appear and testify at that
23 hearing. And they've also cited: No provision
24 precluding them from intervening if they so chose. And
25 if they want, I will represent that we would not oppose

1 that intervention. But we do oppose this proceeding.

2 The second point raised, or the second reason
3 for our objection raised in our papers is that this
4 application, the application they want you to modify
5 the 2008 application, the 2008 permit, I should say,
6 that they want you to modify is on appeal. It's on
7 appeal before the Hawaii Supreme Court. The Hawaii
8 Supreme Court is reviewing that application. And,
9 indeed, reviewing the specific items, the specific
10 condition imposed by the Land Use Commission.

11 When an appeal is taken to court, the
12 jurisdiction over that existing permit transfers with
13 the appeal. And it sits right now with the Hawaii
14 Supreme Court. There are two ways that jurisdiction
15 could be moved back down to address the condition. The
16 ENV is not left without an option. The first is they
17 can simply dismiss their appeal.

18 The second is they can follow the processes
19 described in the statute for petitioning the Court for
20 permission to modify an order on appeal. They haven't
21 done that. Instead, they've taken the shortest cut
22 possible applying to this Body for modification of an
23 existing order imposed by the Land Use Commission and
24 on appeal before the Hawaii Supreme Court.

25 The great public importance of any project,

1 any proposal, does not justify taking a shorter cut
2 than the rules and statutes and ordinances that we have
3 all agreed to live by and provide. And that is what is
4 happening here, and the application should be
5 dismissed. Thank you.

6 MS. VIOLA: In response to Intervener's
7 argument, first of all, I would like to make a
8 correction, I apologize, in the application as well as
9 in our briefing. We reference a section of the
10 Planning Commission Rule 2-18, and it should be 2-38,
11 which establishes the jurisdiction of the Planning
12 Commission to consider Special Use Permits. I
13 apologize for the typo.

14 Essentially, Mr. Chipchase mischaracterized
15 the City's application, which is in and of itself an
16 application. We are -- we are putting the City before
17 the Planning Commission and going through the intricate
18 process the City would characterize as reevaluating the
19 condition in the existing permit.

20 It's not a motion to modify pursuant to the
21 existing case that's on appeal. It's a new application
22 to reconsider the condition that was imposed in the
23 previous proceeding.

24 In that regard, we filed an application with
25 the Department of Planning and Zoning and did not file

1 a motion with the Department of Planning. We filed an
2 application, which required review by the Department of
3 Planning and Permitting, which required also input from
4 agencies on the application and which would also
5 require review by the public, public hearing, and
6 review by the Commission itself.

7 We instigated this process, not as a
8 shortcut, but as an attempt to facilitate adequate and
9 very extensive review for this specific condition,
10 which is extremely detrimental to the City, to the
11 people of the City of Honolulu.

12 Inasmuch -- and if this deadline, the subject
13 matter of our request, is imposed for the City's SUP,
14 to delete -- I mean, to essentially require that the
15 landfill to cease collecting municipal solid waste as
16 of July 31, 2012. That deadline would essentially
17 create a situation where the City could not collect and
18 dispose of various waste in particular sewage sludge.

19 Now, the City had -- it went through the
20 probate mechanism for the appeal in the previous
21 decision and which is what the current matter is on
22 appeal.

23 But in order for the City to ensure that the
24 City is protecting the interest of the citizens of the
25 City of Honolulu, we also took the concurrent step of

1 filing another application to consider that condition.

2 This is because there is no guaranty that the
3 Supreme Court will be able to make a decision on this
4 very important matter before the deadline expires. So
5 we needed -- we took in the abundance of caution to be
6 sure that this critical decision would be adequately
7 reviewed, we came -- we submitted a new application to
8 consider this condition of our existing SUP.

9 Regarding the Intervener's characterization
10 of the appropriate forum, the appropriate body, for us
11 to consider such a new application. The Planning
12 Commission rules specifically do state, or at Rule
13 2-49, do reference a condition of the Planning
14 Commission. But that is on a motion for request for
15 modification on the existing matter.

16 This is, again, a new application. That is
17 why we went under the jurisdiction of the Planning
18 Commission as ordered by the Hawaii revised statutes
19 Section 205-6 and articulated further in the rules of
20 the Planning Commission.

21 Now, the modification that he also references
22 in the Land Use Commission Rules, that's 5-15-94, that
23 modification specifically references, as the Intervener
24 has argued in the past, specifically references
25 modifications for district boundary amendments and not

1 matters related to Special Use Permit, SUP.

2 Moreover, that modification, again, is in the
3 context of existing case and not pursuant to a new
4 application. So the City would assert that we properly
5 brought this action before the Planning Commission, and
6 this is, therefore, based on the statutory authority,
7 as well as the authority granted by the Planning
8 Commission Rules; it's properly before the Planning
9 Commission. Thank you.

10 MR. SANDISON: Schnitzer joins in the City's
11 opposition to Ko'olina's motion. We believe that this
12 turns on that this is a new application; this is not a
13 continuation of the proceedings. It is the appropriate
14 reason -- for all the reasons that the City discussed
15 that is appropriately before this Commission under its
16 Rules of Practice and Procedure.

17 We want to note that Ko'olina has shown a
18 miscite in the Hawaii Administrative Procedures Act to
19 prohibit modifications of existing Special Use Permit
20 while it was undergoing appeal. The proceeding that
21 the Administration Procedures Act, Section 91-14(a)
22 specifically allows for redress and relief that is
23 outside of the judicial system. In addition, to the
24 extent that Ko'olina and Shimabukuro sought to prohibit
25 the City from filing a new application in a matter that

1 they wish to seek an injunction or stay of prior
2 proceeding involved for reconsideration by the Land Use
3 Commission under 91-14(b) not do that.

4 In addition and furthermore, the cases cited
5 by Ko'olina and Shimabukuro are not applicable to this
6 situation. They all relate to agencies that are
7 situated similarly to the Land Use Commission reopening
8 those matters while those matters are on appeal.
9 That's not the case. This is a new application.

10 Further, we do believe that dismissal of this
11 matter, this proceeding, would prejudice Schnitzer.
12 Schnitzer was not involved, although I do recall
13 testimony in the prior Land Use Commission, there was a
14 discussion about intervener status wherein the chief
15 executive of the Land Use Commission, we have been
16 advised that we are in jeopardy of being excluded in an
17 attempt to get intervener status in a subsequent
18 proceeding before for the Land Use Commission absent
19 intervention before the Planning Commission.

20 If this condition goes into effect, Condition
21 14 goes into effect, Schnitzer will be irreparably
22 harmed and it will simply have no place to dispose of
23 its waste. And therefore, the opportunity to be heard
24 before this Commission and subsequent proceedings is
25 fundamental and a fundamental due process issue.

1 Schnitzer believes that that is a great risk if it's
2 left at the mercy of the Intervener in the future like
3 the Land Use Commission hearing. Simply dismissing
4 this case runs a great risk of Schnitzer being deprived
5 of its opportunity to be heard.

6 CHAIR PINGREE: Thank you.

7 MR. CHIPCHASE: Thanks for an opportunity to
8 respond. I will try to be brief. What I've heard was
9 this is not a modification. This is a new application.
10 Only a lawyer could come up with that distinction. And
11 it is creative, but it doesn't exist.

12 Let's go right back to the application, the
13 paper the ENV filed, "respectfully moves," that's a
14 quote from the application. "The Planning Commission
15 for an order modifying," all quoted, "State Special Use
16 Permit SUP 2008/SUP-2." That is what they have sought.

17 It's creative to call it a new application.
18 In some abstract theory, maybe that works. But what
19 they have filed this new application for is to move to
20 modify an existing permit. That is what is at issue
21 here.

22 They have not filed a petition under 2-40 of
23 your rules for a new permit. Instead, they invoked --
24 and I will accept the correction 2-38, which just says
25 you have jurisdiction relating to petitions for State

1 Special Use Permits, not what they've done. They
2 invoke 2-49. Admittedly, that applies to modifications
3 of conditions that you impose. No application here
4 because it's not new conditions. And they invoked
5 15-15-70 of the Hawaii Administrative Rules, which
6 applies to modifications of existing orders.

7 So the rule they invoke in their application,
8 what they say in their application, what they want done
9 based on the plain language of their application is a
10 modification. That is what they've told you they want.
11 Those are the rules they've cited.

12 The problem is they've come before the wrong
13 body because you didn't impose that condition.
14 15-15-70 right rule; wrong body. They need to go.
15 They need to go to the Land Use Commission. Thank you.

16 CHAIR PINGREE: Thank you.

17 MS. VIOLA: Thank you. The problem with that
18 analysis is that 15-15- -- 15-94, which is the Land Use
19 Commission rule that provides for modification,
20 specifically references district boundary limitations.
21 This is not a district boundary amendment proceeding.
22 This is a Special Use Permit proceeding that relates to
23 the Special Use Permit that the City now holds for the
24 Waimanalo Gulch Sanitary Landfill.

25 Now, in terms of creativity, there may be

1 some ambiguity that results from the lack of
2 specificity in the Planning Commission rules, but
3 that's where the argument that there is nothing
4 precluding us from filing a new application to seek
5 action on the existing SUP since it comes into play.
6 This would allow us to have the opportunity to have the
7 Commission reconsider or have the Commission consider a
8 new condition if it were to be imposed by the Land Use
9 Commission.

10 Now, if modification is the only route that
11 the City were to take, according to Mr. Chipchase's
12 argument, then the City would be precluded for ever
13 modifying because under the Planning Commission rule as
14 he's defined it, a Planning Commission can only modify
15 their own Commission. But, likewise, under the Land
16 Use Commission rules, the Land Use Commission only
17 provides a modification of dba proceedings.

18 So there is ambiguity within both of the
19 Commissions laws. And in that regard, we look to the
20 general jurisdiction of the Planning Commission, which
21 is afforded by the Statute 205-6, which says that the
22 Planning Commission has original jurisdiction over
23 Special Use Permit proceedings. So, therefore, taking
24 action on this Special Use Permit, we go before the
25 Planning Commission for you to consider a revision to

1 the condition in the current SUP. Thank you.

2 CHAIR PINGREE: Thank you.

3 MR. SANDISON: We concur with the City, and
4 we would cite to the Supreme Court case and Hawaii --

5 CHAIR PINGREE: Excuse me? Pardon me?

6 Can you hear?

7 MR. SANDISON: We would cite the Commission,
8 County of Hawaii v. Coupe, in which the Supreme Court
9 said that we should not improperly interpret the rules,
10 Administrative Rules, to result in an absurd result.

11 And that's where we would find ourselves if
12 we were too narrowly interpret the Land Use Commission
13 rules and narrowly interpret the Planning Commission
14 rules as to nullify jurisdiction of this application.

15 MR. CHIPCHASE: If I could just very briefly
16 respond to a couple of those points. And I will limit
17 it to that.

18 The reference to 15-15-94 of the HAR, I
19 respect Ms. Viola, that is simply not accurate. It's
20 been followed, that rule and the modification of the
21 Land Use Commission -- or condition imposed by the Land
22 Use Commission has been followed in a prior permit.
23 Right? That's the process they went through. The City
24 argued for it. They got it. The Land Use Commission
25 agreed.

1 So it's just -- it's not accurate to say they
2 would be left without recourse or that it would be an
3 absurd result. They followed the process that they
4 followed in another case. And I would add to that that
5 the City has recognized and invoked 15-15-70 as a basis
6 for modifying an existing order, they just brought it
7 before the wrong body.

8 And the second point that was made that
9 was -- again, going back to the lack of prohibition. I
10 think the Supreme Court, the Hawaii Supreme Court,
11 dealt with the lack of anything precluding jurisdiction
12 in Swire against ZBA. In that case there is no express
13 jurisdiction for the Zoning Board of Appeals to
14 consider appeals taken from building permits. The
15 Court analyzed it and said, It's not the lack of
16 jurisdiction, the lack of authority that grants power
17 to an agency or to a body, it's an express provision.

18 You don't have an express provision granting
19 you authority ZBA to take appeals from building permits
20 for administrative acts, and therefore, you don't have
21 jurisdiction, and the appeal fails.

22 The last point was a reference to 205-6,
23 which again deals with new SUP petitions. This is not
24 one. This is a motion, call it an application, call it
25 a motion, they've moved to modify an existing permit.

1 205.6 does not apply.

2 MS. VIOLA: I will be brief. We filed an
3 application as a new application; this is not a motion.
4 Essentially, as the Commission has already acted in
5 terms of allowing the Intervener, KOCA and Maile
6 Shimabukuro to intervene in this particular proceeding,
7 they denied the basis for continuing participation, but
8 the members of the Commission approved their
9 intervention into new action. As such, the Commission
10 has already taken action consistent with a prior
11 application, and this is a new application.

12 CHAIR PINGREE: Thank you. That's it. Thank
13 you very much. Commissioners? Any questions?

14 MR. PACOPAC: One simple question: Is this a
15 new application or is this a modification?

16 Counsel, you say it's a new application; he
17 says it's a modification. How do I clarify that?

18 I'm going back to him because it's a
19 modification and he will say it's a new application.

20 MR. CHIPCHASE: I just ask you to read what
21 they submitted.

22 CHAIR PINGREE: Beadie?

23 MS. DAWSON: No.

24 CHAIR PINGREE: Do you want to go into
25 executive session?

1 We believe that several of the Commissioners
2 would like to go into executive session to discuss a
3 few issues.

4 Can we have a motion on that?

5 MS. DAWSON: I move that we go into an
6 executive session to consider the clarification, the
7 motion being made.

8 I withdraw that. I move the Commission go
9 into executive section to confer with our counsel.

10 MR. PACOPAC: Second the motion.

11 CHAIR PINGREE: All in favor?

12 (Unanimous.)

13 CHAIR PINGREE: Thank you.

14 (Executive session from 1:40 p.m. to 2:11 p.m.)

15 CHAIR PINGREE: Thank you very much. We're
16 back on the record. We had an opportunity to have very
17 good discussion. I appreciate the time that you
18 afforded us.

19 At this time I'm going to call for a motion.

20 MR. PACOPAC: I move to deny the Intervener's
21 Ko'olina Community Association and Maile Shimabukuro
22 motion to dismiss.

23 MS. DAWSON: Second.

24 CHAIR PINGREE: All in favor or any
25 discussion. Excuse me?

1 MS. DAWSON: We probably should have some
2 discussion before we have a final vote on it.

3 This Commission is concerned that if we grant
4 this motion to dismiss, if that is the case here and it
5 goes away and we're left almost without the information
6 that we desperately need, which is a full report and
7 recommendation from the City in terms of the
8 alternative sites that they have been looking at for
9 the last seven years or more, and they haven't given
10 that to us. So we need time to press for an
11 alternative site, among other things.

12 Therefore, the Commission is very concerned
13 that if we simply grant the motion to dismiss, we will
14 not be able to get that information, not on the record,
15 and we need that.

16 So I say that by way of explanation because I
17 think that we have dealt with this issue now for a good
18 number of years, as has the Waianae Coast. And the
19 burden on them is virtually untenable.

20 And yet, ENV and the City has not offered
21 appropriate relief to them or appropriate alternatives
22 for them. They're caught, and so we would like -- the
23 contested case hearing will give us the opportunity to
24 hear some real answers. And at that time we will move
25 on to the issue at that time.

1 CHAIR PINGREE: Any discussion?

2 Do we have a motion on the table? All in
3 favor?

4 (Unanimous.)

5 CHAIR PINGREE: Any opposed?

6 Thank you very much. Before we move forward
7 with a continuation, I just I would like to point out
8 and put this on the record that on November 9, 2011, I
9 had signed a prehearing -- I don't know the exact
10 verbiage -- an order regarding the prehearing
11 conference. And I'm going to ask counsel that, kindly,
12 if you do change what's in the order or amend the
13 order, please keep in mind that the Commission has to
14 approve that. However, moving forward today, we're
15 going to accept what you proposed as far as proceeding
16 with opening statements.

17 I need that for the record. Thank you. With
18 that said, we'll proceed with opening statements,
19 please. As a reminder, opening statements are limited
20 to 15 minutes.

21 MS. VIOLA: This Special Use Permit
22 application is about one issue and one issue only. And
23 that is the deletion of Condition No. 14 of the City's
24 current Special Use Permit for the Waimanalo Gulch
25 Sanitary Landfill, the condition setting forth the

1 July 31, 2012, deadline the landfill to cease accepting
2 municipal solid waste.

3 The Intervener may attempt to expand and
4 complicate this hearing with side issues, but I would
5 urge you to keep in mind the focus of the City's
6 application, that is, avoiding the serious public
7 health and safety threat that the looming deadline
8 poses.

9 The City seeks to delete this condition
10 because it will severely compromise the City's ability
11 to properly manage solid waste and in turn may
12 jeopardize the health and safety of the residents of
13 Oahu. Plainly stated, we need the landfill to dispose
14 of certain wastes, in particular sewage sludge. If the
15 deadline is not deleted after July 31, 2012, there will
16 be no place to dispose of the sewage sludge generated
17 by all of the City's wastewater treatment plants on
18 Oahu, as well as the private wastewater treatment plant
19 in Hawaii Kai. And other special wastes currently
20 going to the landfill will either have no disposal
21 alternative or need to be disposed of at prohibitive
22 costs to businesses and individuals.

23 The City has a Special Use Permit granted by
24 the Planning Commission and LUC in 2009. The Planning
25 Commission and LUC made salient findings such as:

1 A, There are special wastes that must be land
2 filled because they cannot be combusted, recycled,
3 reused or shipped.

4 Sludge and headworks screenings from
5 wastewater treatment facilities, private tank bottom
6 sludge, storm drain cleanings, sewer line cleanings
7 including fats, oils and grease, animal carcasses, and
8 special wastes, including rejected or outdated food
9 products, contaminated soils, noncommercial
10 asbestos-containing material from homeowners,
11 manufacturing feed stocks and miscellaneous other
12 nonhazardous industrial and commercial wastes.

13 Another finding by the Planning Commission is
14 even City programs to reduce the need for landfill such
15 as the City's waste-to-energy facility, H-Power, these
16 programs are required by their operating permits from
17 the State Department of Health to have a permitted
18 landfill as an alternative disposal option or back up
19 for times when they cannot operate for whatever reason.

20 Another fact, the City must have the ability
21 to landfill disaster debris in order to promptly
22 respond to natural disasters.

23 Another fact I want to talk about to the
24 Planning Commission, Waimanalo Gulch Sanitary Landfill
25 is the only permitted municipal solid waste landfill on

1 Oahu.

2 Another fact, it will take more than seven
3 years to identify and develop a new landfill site.

4 Now, based upon these findings, as the
5 Planning Commission recognized in its 2009 decision, a
6 landfill is needed on Oahu for the disposal of certain
7 wastes, including sewage sludge and special wastes,
8 beyond the deadline of July 31, 2012.

9 The Planning Commission correctly concluded
10 that the landfill should be able to accept municipal
11 solid waste as long as the landfill has space or
12 capacity. It was the Land Use Commission that imposed
13 the July 31, 2012, deadline that is the subject of our
14 application. We are now asking simply that the
15 Planning Commission make the same reasoned conclusion
16 it made in the prior proceeding and keep the landfill
17 open for municipal solid waste.

18 In the 2009 Planning Commission decision, the
19 City has not sat idly by waiting for the deadline. The
20 City has complied with all of the conditions set by the
21 Planning Commission and the City is continuing to move
22 toward a greater diversion of waste from the landfill.
23 Specifically, the City begun the process by identifying
24 and developing one or more landfill sites to replace or
25 supplement the Waimanalo Gulch Sanitary Landfill in

1 early 2010, and in doing so determined the need for an
2 independent committee to thoroughly investigate
3 alternative sites. The Committee is making every
4 effort to come up with an educated and informed
5 recommendation as soon as practically possible.

6 The City has also continued its efforts to
7 use alternative technologies to provide a comprehensive
8 waste stream management program.

9 The H-Power third boiler will be able to take
10 on an additional 300,000 tons of waste per year by the
11 beginning of 2013, bringing its total capacity to
12 900,000 tons per year.

13 The City has also made progress to continue
14 to recycle. Since May 2010, the City has been
15 conducting island-wide curbside recycling, which
16 during fiscal year 2011 resulted in 71,000 tons of
17 waste recycled that would otherwise have gone to the
18 landfill. Curbside recycling contributes to a full
19 six percent to the overall reduction of municipal solid
20 waste going to the landfill.

21 The City has continued its efforts to seek
22 beneficial reuse of stabilized dewatered sewage sludge.
23 The City has entered into a contract to enable the
24 recycling of sludge into compost. And the City has
25 been finalizing efforts to enable H-Power to begin

1 burning dewatered sludge.

2 All of the City's waste diversion efforts,
3 including its educational and legislative efforts, have
4 resulted in a 71 percent total diversion of municipal
5 solid waste from the landfill in 2010. This diversion
6 puts Hawaii within the top ten states in the nation for
7 diversion of waste from landfills.

8 Yet, even with this successful diversion
9 rate, we still need a landfill to properly and safely
10 handle municipal solid waste because there is still
11 waste that cannot be combusted, recycled, or reused.

12 Waimanalo Gulch Sanitary Landfill remains a
13 vital component of the City's solid waste management
14 plan. It remains necessary even with the expansion of
15 H-Power, recycling, and reuse. There are still special
16 wastes that must be disposed of at the landfill because
17 they cannot be disposed of in any other manner, again,
18 sewage sludge. Despite the City's efforts and despite
19 its successes in diverting waste from the landfill,
20 complete diversion simply is not the technological
21 reality at this point. As of July 31, 2012, there will
22 be no place to store and dispose of sewage sludge and
23 disposal alternatives for other wastes will be
24 nonexistent or prohibitively costly to businesses and
25 consumers.

1 Further, with the majority of municipal solid
2 waste going to H-Power, when H-Power is shut down
3 periodically for planned maintenance, if H-Power is
4 incapacitated for any reason, all of the waste going to
5 H-Power will have to go someplace else, to the
6 landfill. Likewise, the disaster debris resulting from
7 hurricanes, tsunamis or other natural disasters or
8 emergencies at home or from places like Japan -- it is
9 predicted that from Japan's devastating tsunami it may
10 reach the beaches on Oahu and also needs to be disposed
11 of expeditiously at the landfill.

12 Moreover, the City needs time to identify a
13 new site. There are no other permitted municipal solid
14 waste lands currently. And as determined by the
15 Planning Commission in 2009, at least seven years is
16 needed to identify, acquire the land for design,
17 permit, and construct a new landfill.

18 In conclusion, Oahu needs a landfill. We
19 need a place to dispose of sewage sludge. We need the
20 option of a landfill to deal with shutdowns,
21 emergencies, and other contingencies. And to account
22 for such contingencies that the Department of Health
23 requires as a permit condition that H-Power have a
24 backup, that H-Power have the landfill in case H-Power,
25 for any reason, cannot process the hundreds of

1 thousands of tons of waste processed each year and with
2 the addition of the third boiler, 900,000 tons of waste
3 per year.

4 The City is working on diverting municipal
5 solid waste from the landfill, but by July 31, 2012,
6 alternatives to deal with all municipal solid waste
7 going to the landfill will still not be available. And
8 that is not withstanding all the diversion efforts of
9 the City as determined by the Planning Commission. But
10 to quote the Planning Commissioners in 2009 it issued a
11 decision, quote, A landfill is currently necessary for
12 proper solid waste management, the lack of which would
13 potentially create serious health and safety issues for
14 the residents in Oahu.

15 The bottom line is if the landfill is shut
16 down to municipal solid waste, there will be no place
17 to dispose of sewage sludge and businesses and
18 individuals alike will have no disposal options, will
19 have to face steep alternative disposal charges for
20 many of the special wastes that are currently being
21 disposed at the landfill.

22 We're asking you -- we're asking that you
23 allow the City to continue proper management of Oahu's
24 solid waste by granting our request to delete the
25 current Special Use Permit Condition No. 14, delete the

1 severely compromising July 31, 2012 deadline for the
2 landfill's receipt of municipal solid waste.

3 Thank you.

4 MR. SANDISON: This case is simple. It needs
5 the landfill to operate. The evidence will show
6 Schnitzer operates one of the largest recycling
7 facilities on the Island of Oahu and, indeed, is the
8 largest facility in the State of Hawaii.

9 In that capacity it processes approximately
10 120,000 tons of scrap metal per year. This metal
11 consists of car bodies, old buses, all of the trash
12 from the City, Kailua Auto Wreckers or that were
13 previously built up on the back roads or in the nooks
14 and crannies of this island and outer islands.

15 Without Schnitzer, Hawaii would have a much
16 more significant solid waste problem than it currently
17 does. Since it really handles the vast majority of
18 scrap metal and metallic solid waste disposed of in the
19 State of Hawaii. In the course of this, Schnitzer
20 generates approximately 20- to 25,000 tons of
21 nonrecyclable waste. It can't be sold. It can't be
22 disposed anywhere else. Schnitzer's is a highly
23 regulated and permitted facility. Indeed, it was
24 permitted by the Hawaii Department of Health, Solid and
25 Hazardous Waste Branch, the very same people that

1 permitted Waimanalo Gulch. Schnitzer's permit requires
2 it to dispose of its solid waste at a permitted solid
3 waste management facility. There is only one of them
4 on the Island of Oahu that can accept the waste, and
5 that is being Waimanalo Gulch.

6 We recently, in the early part of this year,
7 had an opportunity to be faced with a problem of not
8 having Waimanalo Gulch available to dispose of the
9 waste. It was an incredible problem. We went to
10 H-Power and attempted to work with H-Power and the
11 state government to get it disposed of there. We
12 attempted to get it disposed in PVT, which is
13 construction and demolition landfill in Nanakuli. That
14 is not allowable. We approached numerous of the --
15 numerous waste-to-energy folks that have potential
16 possibility of burning waste in the future. Those
17 issues don't work. We have attempted to ship waste off
18 island. That is not viable. We're really between a
19 rock and a hard place without Waimanalo Gulch.

20 In short, and I think our position is that
21 Waimanalo Gulch is absolutely necessary for Schnitzer's
22 operations. And if Schnitzer's operations, in addition
23 to being a business that is impacted by Condition 14,
24 it is also a public service to residents of this
25 island, as well the rest of the state. And it is

1 imperative to Waimanalo Gulch to remain open.

2 For those reasons, we believe that the
3 Planning Commission will ultimately find that it is
4 appropriate to process the City's application and
5 remove the condition. Thank you.

6 MR. CHIPCHASE: Thank you. Listening to the
7 opening statements, I can't help but thinking this is
8 deja vu all over again. We have been down this road.
9 When the landfill was originally permitted in 1987, it
10 opened in 1989, it was supposed to last eight years.
11 It should have been gone by '97. That date came and
12 went.

13 In 2003 the ENV proposed a five-year capacity
14 expansion of the landfill. Why did the ENV settle on
15 five years? Well, according to Mr. Doyle, who was then
16 the acting director of the ENV, "We had originally
17 thought that we could have this landfill operate for
18 another 15 years. And then as part of our discussions
19 with the community and in trying to take a look at
20 their concerns, it was reduced to a five-year
21 operation." That is what Mr. Doyle, that is what the
22 ENV told the Land Use Commission in 2003. Well, we
23 come up on the 2008 closure deadline, ENV comes in and
24 asks for more time. The Land Use Commission ultimately
25 gives them another year, 2009. We come up on that

1 deadline. The ENV comes in and asks for more time.
2 And this time the Land Use Commission says, July 31,
3 2012, that is the end of municipal solid waste and
4 continue to accept ash, but no more municipal solid
5 waste, all that yucky stuff that Ms. Viola told us
6 about: The treated sewage, the animal carcasses, the
7 unusable food. The things nobody wants sitting above
8 their home.

9 But here we are again. Here we are again
10 with another request to kick the can further down the
11 road. They kick it down the road indefinitely this
12 time, just kick it. Deadlines don't matter.

13 So I agree that there is one issue before
14 this Commission. That is the deletion of Condition 14.
15 We need to understand why Condition 14 was imposed.
16 And we need to understand whether the ENV has met its
17 burden of deleting that condition, the burdens imposed
18 by the Land Use Commission, who imposed that condition,
19 and that are imposed by the law governing Special Use
20 Permits.

21 We believe the evidence will show that the
22 City has not met its burden. We believe that the
23 evidence will show that deadlines should matter. We
24 believe the evidence will show that the City should
25 finally be held accountable.

1 Thank you.

2 CHAIR PINGREE: Thank you very much. Thank
3 you. I need from counsel a determination about how
4 much time we need. Because it becomes very much a
5 planning activity for us, as you know.

6 The next possible meeting time for this
7 Commission is on January 11, 2012. We can start at
8 9:00, and we have until 4:30, so that is conceivably
9 six, six and a half hours of time that we can work on
10 this. I need to know how much time we need thereafter.

11 MS. VIOLA: The City has four witnesses, and
12 we plan to submit as to their procuring order written
13 submissions for those four witnesses to cut down the
14 time for testimony.

15 So I estimate that we'll need approximately a
16 half a day to present our four witnesses. And that's
17 with cross-examination.

18 CHAIR PINGREE: With cross?

19 MR. SANDISON: Schnitzer has one witness. We
20 would also, likewise, to have written testimony. And
21 our witness will be limited to ten-minute oral summary
22 and cross-examination. I don't imagine that would go
23 more than an hour and a half.

24 CHAIR PINGREE: Hour and a half? Actually,
25 please clarify half a day. How many hours?

1 MS. VIOLA: I'd say, I think generously about
2 three hours, but that is really longer than we need if
3 there are only four witnesses.

4 MS. DAWSON: To cover all your witnesses?

5 MR. SANDISON: It depends on cross.

6 MS. VIOLA: It depends on cross.

7 CHAIR PINGREE: And Schnitzer, an additional
8 hour and a half?

9 MR. SANDISON: If there is no cross, it's
10 ten minutes.

11 CHAIR PINGREE: Fine. I'd rather you be
12 conservative. Thank you very much.

13 MR. CHIPCHASE: Thank you. Being
14 conservative, I would say, based on what they told me
15 we should anticipate that whole first day to be used on
16 Schnitzer, then I would probably ask for another day
17 and a half, two days for my own witnesses.

18 If there is no cross, again, that ends up
19 being much less, but I can't anticipate that, so I
20 don't want to under cross.

21 CHAIR PINGREE: When you say "two days," are
22 those six-hour days?

23 MR. CHIPCHASE: Yes.

24 CHAIR PINGREE: So we have January 11, 2012,
25 which we anticipate will be more than enough time for

1 ENV and Schnitzer. And, hopefully, we will have
2 additional time to start hearing from KOCA.

3 The next available date is the 25th,
4 January 25th from 1:30. February 8th, 1:30. It looks
5 like you have to give them the 11th. The 25th is only
6 three hours. I'm hopeful we can start on the 11th.
7 Are you able to start on the 11th?

8 MR. CHIPCHASE: Yes.

9 CHAIR PINGREE: If need be?

10 MR. CHIPCHASE: Yes.

11 CHAIR PINGREE: So January 11th from 9:00 to
12 4:30, January 25th from 1:30 to 4:30. February 8th
13 from 1:30 to 4:30. Hopefully, we'll finish by then.
14 Okay.

15 MS. VIOLA: Just for the record, I would like
16 to ask Intervener if they will have their witnesses
17 available January 11th in case ENV finishes.

18 MR. CHIPCHASE: Well, I will do my best to
19 have some of them available. Here is part of the
20 quandary for me. The number will be subpoenaed. I
21 don't really relish making people show up under
22 subpoena to do nothing. And then my other
23 considerations is we have named an expert witness.
24 He's from Seattle. I don't really relish flying him
25 out twice. So I could certainly plan to have a portion

1 of our witnesses to go on the 11th in the event we need
2 to fill in time. But I would plan on having additional
3 people there. If all the time was open for me, I would
4 hate to have everyone there. I will do what I can on
5 the 11th.

6 CHAIR PINGREE: Are you able to identify
7 those witnesses that you could possibly have available
8 on the 11th?

9 MR. CHIPCHASE: I certainly can. I think Ken
10 Williams is available on the 11th. I will call Senator
11 Maile Shimabukuro if she is available on the 11th in
12 addition to some other members of the Waianae Coast.

13 I don't know their specific schedules so I
14 hate to commit them now, but if that is an issue, I can
15 certainly advise Dan and Ian.

16 CHAIR PINGREE: Just for interest of time.
17 Thank you.

18 MR. CHIPCHASE: Absolutely.

19 CHAIR PINGREE: We will take it up until
20 February 8th, and if we need more time we will have to
21 plan for it.

22 We got that all voted? Thank you very much.
23 Now motion to adjourn? Any other discussion?
24 We have a motion to adjourn?

25 MR. YOUNG: Yes.

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MR. PACOPAC: Second.

CHAIR PINGREE: Thank you very much.

(Proceeding concluded at 2:38 p.m.)

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CERTIFICATE

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

I, NANCY CHRISTENSEN, CSR, for the State of Hawaii, do hereby certify:

That on December 7, 2011, at 1:10 p.m., that the proceedings were taken down by me in computerized machine shorthand and were thereafter reduced to print under my supervision; that the foregoing represents, to the best of my ability, a true and correct transcript of the proceedings had in the foregoing matter.

I further certify that I am not counsel for any of the parties hereto, nor in any way interested in the outcome of the cause named in the caption.

DATED this 13th day of December, 2011, in Honolulu, Hawaii.



Nancy Christensen, CSR 476