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DEPT OF PLANNING
CITY AND COUNTY OF HONOLULU

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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

INTERVENOR SCHNITZER STEEL
HAWAII CORP.'S **CONTESTED CASE**
OPENING BRIEF; CERTIFICATE OF
SERVICE

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

INTERVENOR SCHNITZER STEEL HAWAII CORP.'S CONTESTED CASE
OPENING BRIEF

I. INTRODUCTION

This case relates to State Special Use Permit (“SUP”) File No. 2008/SUP-2, issued to the Waimanalo Gulch Sanitary Landfill (“WGSL”), located in Ewa, Oahu. On June 28, 2011, the Department of Environmental Services, City and County of Honolulu (“ENV”) filed an application for modification of SUP File No. 2008/SUP-2, specifically to delete Condition No. 14 of SUP File No. 2008/SUP-2. Condition No. 14, 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 WGS� up to July 31, 2012, provided that only ash and residue from H-POWER shall be allowed at the WGS� after July 31, 2012.

WGS� is the only landfill currently permitted by the Department of Health, State of Hawaii ("DOH") to accept municipal solid waste on Oahu. Though there are ongoing efforts to locate and develop an alternative landfill site, such efforts cannot be completed by the July 31, 2012 deadline provided in Condition No. 14.

Intervenor Schnitzer Steel Hawaii Corp. ("Schnitzer") is a scrap metal recycling facility whose operation is also regulated by the State of Hawaii Department of Health ("DOH"). Schnitzer's Solid Waste Management Permit ("SWMP") specifically requires that Schnitzer must deposit its recycling residue in a DOH-permitted solid waste management facility, or in other words, WGS�. If WGS� cannot accept municipal solid waste after July 31, 2012, and an alternative landfill site is not developed on Oahu before then (which is not possible), Schnitzer will have no other place or alternative to dispose of its recycling residue and will not be able to comply with the terms of its SWMP. This will jeopardize Schnitzer's recycling operation on Oahu. Schnitzer supports ENV's pending application.

Intervenors Ko Olina Community Association and Maile Shimabukuro oppose ENV's pending application. Ko Olina Community Association, as a representative of resort and residential owners of property located near WGS�, claims such owners have grave, financial, property and business interests at stake in this matter. Maile Shimabukuro, as a resident of the Leeward Coast of the City and County of Honolulu and as Senator for State District 21, claims that she and her constituents must pass the WGS� in order to get in and out of Wai'anae. She

also claims that, as a mother of an infant child, she has a heightened concern over the health and welfare of her child. Such claims have no merit. The Planning Commission of the City and County of Honolulu (“Planning Commission”) has already determined, and the State Land Use Commission agreed, that WGS� would not affect the surrounding property so long as it is operated in accordance with government approvals and requirements. This determination is true now as it was then.

II. STATEMENT OF FACTS

A. DESCRIPTION OF THE APPLICATION

ENV filed the present application with the Department of Planning and Permitting, City and County of Honolulu (“DPP”) on June 28, 2011.

The Notice of Publication for the hearing on the application appeared in the Honolulu Star-Advertiser on September 4, 2011. The hearing was set for October 5, 2011.

On September 9, 2011, the Director of DPP recommended approval of the application. In recommending the approval, the Director essentially made the following findings and conclusions:

- Volumes of municipal solid waste delivered to WGS� has steadily decreased (with adjustment for Oahu’s population growth) due to waste diversion programs involving recycling.
- There are no other alternative sites or methods to dispose of municipal solid waste that cannot be recycled or disposed of under current programs.
- The pending application is not subject to the environmental disclosure requirements of Chapter 343, Hawaii Revised Statutes (“HRS”).
- Under a Solid Waste Operating Permit, issued by DOH on June 4, 2010, DES is allowed continued disposal at WGS� until design grades are met or until restricted by any limits of the SUP, whichever occurs first.
- There is adequate capacity to continue operation of the WGS� for another 15 years based on current disposal rates.

- The development of an alternate landfill as required in Condition No. 4 of the 2009 LUC Decision, is projected to take seven years, well beyond the deadline of Condition No. 14.
- Deletion of Condition No. 14 will not have any increased social impacts.
- Denial of the application may have significant adverse impacts upon the health, safety, and welfare of the general public, as well as local businesses.
- The application is in compliance with State and City policies and no infrastructure impacts are anticipated.

On September 16, 2011, Schnitzer filed a Petition to Intervene in the proceedings relating to the application. Also, on September 16, 2011, Ko Olina Association and Maile Shimabukuro (collectively, “KOCA”) filed a Motion to Recognize Ko Olina Community Association and Maile Shimabukuro as Parties or in the alternative Motion to Intervene with DPP.

On October 5, 2011, the Planning Commission granted Schnitzer’s Petition to Intervene. The Planning Commission also denied the Motion to Recognize Ko Olina Community Association and Maile Shimabukuro as Parties, but granted the Motion to Intervene as joint parties. The matter thus converted to a contested case proceeding pursuant to RPC § 2-56(c).

On November 7, 2011, KOCA filed a Motion to Dismiss the current proceedings. ENV and Schnitzer separately filed Memorandums in Opposition to the Motion to Dismiss on November 14, 2011. The Planning Commission held a hearing on the Motion to Dismiss on December 7, 2011. On the same day, the Planning Commission denied the Motion to Dismiss.

B. HISTORY OF THE WGS� SUP

On December 3, 2008, ENV filed an application for a new SUP to supersede the old SUP (SUP File No. 86/SUP-5) relating to use of WGS�. The new application was designated as SUP File No. 2008/SUP-2.

On April 16, 2009, Ko Olina Community Association, Maile Shimabukuro and Colleen Hanabusa filed a petition to intervene in that matter. On May 20, 2009, the Planning Commission heard and granted Ko Olina Community Association, Maile Shimabukuro and Colleen Hanabusa's petition to intervene. The matter was noted as a contested case.

After conducting the contested case, the Planning Commission set forth its Findings of Fact, Conclusions of Law, and Decision and Order dated August 4, 2009 ("Planning Commission Order"). Among the findings of fact made by the Planning Commission were:

34. Mr. Doyle also testified that it would take more than seven years to identify and develop a new landfill site. Id. at 260:16-22; 261:3-22.

* * *

92. Continued availability of WGS� is required as a permit condition to operate H-POWER and to engage in interim shipping of waste, for cleanup in the event of a natural disaster, and because there is material that cannot be combusted, recycled, reused, or shipped. Id. at 181:9-18; 182:2-4, 10-17; 197:2-22.

93. Therefore, a landfill is currently necessary for proper solid waste management, the lack of which would potentially create serious health and safety issues for the residents of Oahu. See Application at 2-6.

94. WGS� is the only permitted public MSW facility on the island of Oahu and the only permitted repository for the ash produced by H-POWER. Id. at 181:20-183:34.

95. WGS� is a critical component of the City's overall Integrated Solid Waste Management Plan ("ISWMP"), which looks at all of the factors that make up solid waste management, including reuse and recycling, the H-POWER facility, and landfilling for material that cannot be recycled or burned for energy. Id. at 178:10-18; 181: 7-18. The ISWMP is required by State law and approved by DOH after public comments. Id. at 182:18-183:25. One theme of the ISWMP is to minimize landfill disposal. Id. at 184:1-3.

* * *

103. The Project complies with the guidelines as established by the Planning Commission. See Tr. 6/22/09, 68:3-13; Application at 2-1 through 2-28.

Planning Commission Order, pp. 8, 18-19, 21. Nowhere in the Planning Commission Order is a deadline imposed for WGS� to continue accepting municipal solid waste. Rather, the Planning Commission specifically approved the new application for a new SUP “until capacity, as allowed by the State Department of Health is reached.” Planning Commission, p. 24.

On October 22, 2009, the LUC rendered its Order Adopting the City and County of Honolulu Planning Commission’s Findings of Fact, Conclusions of Law, and Decision and Order with Modifications. The LUC accepted the Planning Commission’s findings of fact in their totality, and did not change or dispute any of them. Notwithstanding those findings, though, the LUC conditioned its approval of the SUP on the July 31, 2012 deadline. The LUC did not explain the need for the July 31, 2012, deadline given the Planning Commission’s finding that it would take more than 7 years to identify and develop a new landfill site.

ENV thereafter filed an appeal against the LUC, Ko Olina Community Association, Maile Shimabukuro and Colleen Hanabusa in the Circuit Court of the First Circuit. That appeal is currently before the Hawaii State Supreme Court.

C. SCHNITZER’S INTEREST IN THE APPLICATION

Schnitzer is the major scrap metal 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. This includes junked vehicles, metals from demolished buildings, and large appliances. Schnitzer’s state-of-the-art metal shredder can reduce a full-sized automobile into fist-sized pieces of shredded steel scrap in

approximately 30 seconds. For each ton of scrap metal recycled by Schnitzer, the volume of the original waste is reduced by approximately 80%. Much of this material would otherwise take up significant space in 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 per year. That residue consists primarily of plastics, glass, carpet and other nonmetallic automobile and appliance components.

Schnitzer's recycling operations are permitted by the DOH through issuance of a SWMP. The SWMP dictates how Schnitzer can dispose of its residual waste. In October, 2011, when this contested commenced, Schnitzer's SWMP had the following condition:

27. Non-hazardous, non-recyclable materials (waste materials and residuals) shall be properly disposed of at a DOH-permitted solid waste disposal facility, unless the permittee obtains written department approval to recycle or reuse the waste.

Exhibit S-2, p. 10. Since then, DOH has issued a new SWMP to Schnitzer. The new SWMP now has the following condition:

31. Non-hazardous, non-recyclable materials (waste materials and residuals) shall be properly disposed of at a DOH-permitted solid waste disposal facility or out-of-state disposal facilities,, unless the permittee obtains written department approval to recycle or reuse the waste.

Exhibit S-5, p. 12.

WGSL is the only DOH-permitted solid waste landfill facility on Oahu where Schnitzer can dispose of its recycling residue. If WGSL is limited to ash and residue from H-POWER after July 31, 2012, there will no other place for Schnitzer to dispose of its recycling residue on Oahu. Schnitzer will no longer be able to comply with the terms of its SWMP without incurring very high costs. Such a result will jeopardize Schnitzer's recycling operation on Oahu.

III. ENV HAS SATISFIED THE REQUIREMENTS FOR A SUP

The sole issue for consideration in this contested case is whether Condition No. 14 should be deleted. This is an issue properly before the Planning Commission. RPC section 2-49 states that a modification or deletion of a condition shall be processed in the same manner as the original petition for a special use permit. Section 205-6, HRS, allows the county planning commission to permit certain “unusual and reasonable” uses within the agricultural district other than those for which the district is classified.

In determining whether an “unusual and reasonable” use within an agricultural district should be permitted, RPC § 2-45 sets out a five-part test to be applied. This test is similar to that found in the Land Use Commission Rules, HAR §15-15-95(b).

The analysis and subsequent conclusion that WGS� meets the five-part test set out in RPC § 2-45 and HAR §15-15-95(b) has already been completed by the Planning Commission and the Land Use Commission when the original SUP in File No. 2008/SUP-2 (LUC Docket No. SP09-403) was granted on October 22, 2009. Specifically, the Planning Commission concluded:

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

Planning Commission Order, p. 24, ¶ 4. The Land Use Commission adopted the Planning Commission findings and conclusions. 2009 LUC Order, p. 5.

The present application does not affect the prior analysis and conclusion. The application only seeks to delete the deadline set. Its application does not seek to make changes to the physical condition, use, or location of WGSL. Therefore, ENV has satisfied the requirements for a SUP to cover WGSL beyond July 31, 2012.

IV. IF CONDITION NO. 14 IS NOT DELETED, THIS WILL JEOPARDIZE SCHNITZER'S RECYCLING EFFORTS

The failure to delete Condition No. 14 will have catastrophic consequences for Schnitzer's recycling services, and potentially other recycling services as well. Schnitzer's recycling facility is regulated by DOH through issuance of a SWMP. In the SWMP, DOH requires that Schnitzer dispose of its recycling residue in a DOH-permitted solid waste management facility or ship out-of-state. However, Schnitzer has already looked into the possibility of shipping its recycling residue out-of-state. Because of the high costs associated with this option, it simply would not be feasible for Schnitzer to ship its recycling residue off-island and still remain economically viable.

Schnitzer has also looked into the possibility of depositing its recycling residue at other disposal facilities on Oahu. Schnitzer has contacted the Covanta Energy-from-Waste Facility in Kapolei, Oahu, also known as H-POWER. Schnitzer was informed that H-POWER (even with the anticipated third boiler) would not be able to accept the recycling waste because of various concerns, including that Schnitzer's recycling waste might clog the in-feed equipment; Schnitzer's recycling waste burns at an overly high temperature compared to other wastes accepted at H-POWER; left-over glass from automobiles in Schnitzer's recycling waste melts and may damage the refractory in H-POWER's boilers; and the emissions associated with

burning plastics that make up the bulk of Schnitzer's recycling waste might cause exceedances of H-POWER's air emissions limitations. The concerns expressed by H-POWER are consistent with Schnitzer's experiences on the United States mainland where Schnitzer understands that no waste-to-energy facility accepts shredder recycling waste. It has also been pointed out to Schnitzer that even if H-POWER were to accept Schnitzer's recycling waste, the cost to handle the waste would be several hundred dollars per ton, which would make this option economically impossible for Schnitzer.

Schnitzer has also contacted PVT Landfill, a construction and demolition material solid waste landfill in Nankuli, Oahu. Schnitzer was informed that PVT Landfill would not be able to accept Schnitzer's recycling waste because it was prohibited from doing so by its SWMP.

Finally, Schnitzer has contacted Honua Power, a proposed waste-to-energy gasification facility in Kapolei, Oahu, that would use commercial waste as the feedstock to create a synthetic bio-fuel source. Schnitzer was also informed that Honua Power would not be able to accept Schnitzer's recycling waste.

Simply put, none of the other disposal facilities on Oahu can accept Schnitzer's recycling waste. This means that Schnitzer will have no place to dispose of its recycling waste if Condition No. 14 is not deleted.

Schnitzer experienced a similar dilemma in January and February, 2011, when WGS� was not accepting waste due to storm water issues. At that time, Schnitzer had no place to dispose of its recycling waste. The recycling waste had to remain and accumulate on Schnitzer's property. Schnitzer was forced to reduce the time it that it ran the shredder. This resulted in less recycling. It also resulted in fewer cars and appliances being accepted at the Schnitzer facility.

Based on this experience, closure of WGS� without first identifying and building an alternative landfill site will undoubtedly jeopardize Schnitzer’s recycling operation on Oahu.

Without the services provided by Schnitzer and other recyclers, the volume of unrecycled waste on Oahu will substantially increase. Such a result would be contrary to the City’s overall goal of reducing its dependence on a landfill. In addition, there will be nowhere to put this bulky waste, as WGS� and the other disposal facilities cannot legally accept scrap vehicles and major appliances. These items would only end up being abandoned on the City’s streets and throughout rural Oahu. Such a result would be detrimental to Oahu and its residents.

V. IF CONDITION NO. 14 IS NOT DELETED, THIS WILL CREATE SERIOUS PUBLIC HEALTH AND SAFETY ISSUES FOR RESIDENTS OF OAHU

Unless and until an alternative, permitted landfill site has been located and developed, WGS� must continue to accept municipal solid waste for the health and safety of the residents of Oahu. In 2009, the Planning Commission specifically found:

93. Therefore, a landfill is currently necessary for proper solid waste management, the lack of which would potentially create serious health and safety issues for the residents of Oahu. See Application at 2-6.

Planning Commission Order, p. 18. The Land Use Commission adopted this finding. 2009 LUC Order, p. 5.

There is currently no alternative landfill for proper disposal of solid waste management on the island of Oahu. Therefore, the Commission’s findings, as adopted by the LUC 2009 Order, remain true and valid. If Condition No. 14 is not deleted, the landfill will not be able to accept solid waste management and this will potentially “create serious health and safety issues for the residents of Oahu.”


Moreover, as noted by the Director of DPP, development of an alternative landfill is expected to take 7 years. The Planning Commission itself agreed with this. Planning

Commission Order, p. 8. It is not practicable or safe for the residents of Oahu to go without a landfill for 7 years, particularly given the fact that WGS� is not yet at capacity. For the health and safety of the residents of Oahu, Condition No. 14 must be deleted.

VI. CONCLUSION

For the reasons set forth herein, and as will be demonstrated by the evidence presented at the hearing of this matter, all criteria for issuance of a Special Use Permit for Waimanalo Gulch Sanitary Landfill have been previously satisfied before the Planning Commission. Deletion of Condition No. 14 does not affect those findings. Deletion of Condition No. 14, however, is necessary to promote recycling in the State and to safeguard the health and safety of the residents of Oahu. Unless and until an alternative landfill has been designated and built, Oahu needs Waimanalo Gulch Sanitary Landfill to continue operating.

DATED: Honolulu, Hawaii, December 14, 2011.



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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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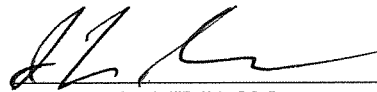
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