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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

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

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

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

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

Intervenor Schnitzer Steel Hawaii Corp. ("Schnitzer") submits the following exceptions to Intervenor Ko Olina Community Association and Maile Shimabukuro's ("KOCA") Proposed Findings of Fact, Conclusions of Law and Decision and Order, filed on May 2, 2012, pursuant to the Rules of the Planning Commission ("RPC") § 2-74.

Citations to the evidence in the record provided by Schnitzer within its exceptions 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

On June 28, 2011, ENV filed an 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 (“Application”), with the City and County of Honolulu, Department of Planning and Permitting (“DPP”) pursuant to the RPC, sections 2-18 and 2-49, and the Rules of the State of Hawaii, Land Use Commission (“LUC”), section 15-15-

70. *See Application.* The Application specifically seeks the deletion of Condition No. 14 of SUP No. 2008/SUP-2 which states as follows:

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

See Application. This matter came on for a contested case hearing before the Planning Commission on December 7, 2011, January 11, 2012, January 25, 2012, February 8, 2012, March 7, 2012, April 4, 2012, April 11, 2012, and April 23, 2012.

On May 2, 2012, the parties filed their respective 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:

63. On April 24, 2012, the SSC's prime consultant, R.M. Towill Corporation, and its subconsultant, SMS Research ("SMS"), disclosed that SMIS had made an error in ranking the sites.

NOT PART OF THE RECORD. These facts are not part of the record and should be stricken.

64. Because of the error, SMS provided new scores for the sites, a new ranking list and a new map of the ranked sites.

NOT PART OF THE RECORD. These facts are not part of the record and should be stricken.

65. Based on this new list, the scores and map entered into evidence as Exhibit K258 were no longer accurate.

NOT PART OF THE RECORD. These facts are not part of the record and should be stricken.

69. The Planning Commission granted the motion and admitted Exhibits K259 and K260.

FALSE. On April 27, 2012, KOCA filed an *Ex Parte* Motion to Reopen the Contested Case Hearing to Admit Limited Additional Documentary Evidence After the Hearing Closed (“Motion to Reopen the Contested Case Hearing”). KOCA sought admission of Exhibits “K259” and “K260” into the record.

On May 1, 2012, ENV filed a Memorandum in Opposition to KOCA’s Motion to Reopen the Contested Case Hearing. However, the Planning Commission did not make a decision on the Motion to Reopen the Contested Case Hearing prior to the parties’ filing of proposed findings of fact, conclusions of law and decision and order. Therefore, contrary to KOCA’s statement, the Planning Commission did not grant the Motion and Exhibits “K259” and “K260” have not been admitted. Any references to Exhibits “K259” and “K260” should be stricken.

186. In addition to sewage sludge, MSW includes other putrescible waste, such as green waste, food waste and biosolids.

VAGUE and IRRELEVANT. Although Mr. Miller states that green waste, food waste and biosolids are examples of “putrescible waste,” he fails to clearly define this term and its significance. Moreover, he postulates on reasons to remove green waste and food waste from the landfill when both of these waste streams are already currently diverted from landfill. Tr. 4/11/12, 114: 2-25, 115:1-25, 116;1-20. Therefore, because the underlying premise – diverting these waste streams from the landfill – is erroneous, these observations are not relevant to the present proceeding.

188. Currently, all putrescible waste that is not burned or recycled is taken to the Landfill.

UNSUBSTANTIATED and OVERBROAD. Because Mr. Miller has not fully defined “putrescible waste,” this all-inclusive conclusion is not supported by the evidence.

193. 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.

204. With the added capacity provided by the third H-POWER boiler, ENV will not need to landfill putrescible waste or any combustible MSW after the third boiler becomes operational. As Mr. Miller [sic] explained, with alternative diversion there is no need to have a general purpose MSW landfill on O'ahu.

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 #96 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.

205. 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. Steingberger 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.

207. Much of this small percentage "can go to . . . [the] PVT [C&D landfill],"

including resins and chemical debris and petroleum contaminated soil.

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.

216. 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, 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.

229. Mr. Miller's estimate is consistent with the timeline set out by Former Acting Director Doyle. Former Acting 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." Ex. K85 at 95: 6-8 (3/27/03 Tr.:Doyle). Former Acting 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 Exhibit “A18” at pg. 8, see also Tr. 4/11/12, 122:6-25, 123:1-12.

242. Based on the evidence, no more than five 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 or for that matter by the length of time of even the present proceeding. It has taken over seven months just to consider one condition of an existing SUP for an already operational landfill. 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 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 WGS�, 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 WGS�, 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 WGSL, 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.

247. The Land Use Commission'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.

265. Subsequently, SMS, a subconsultant, disclosed that it had made an error in ranking the sites. Ex. K259.

REFERENCE TO EXHIBIT NOT IN THE RECORD. To the extent KOCA makes reference to Exhibit K259, which has not been accepted into the record, Schnitzer objects.

266. SMS provided new scores for the sites, a new ranking list and a new map of the ranked sites. Ex. K260.

REFERENCE TO EXHIBIT NOT IN THE RECORD. To the extent KOCA makes reference to Exhibit K260, which has not been accepted into the record, Schnitzer objects.

275. Having chosen to find a replacement site for the Landfill, the Planning Commission finds that 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. The 2009 Land Use Commission Order directs ENV to begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGSL. The 2009 Land Use Commission Order does not limit ENV's options in determining how best to manage the City's waste and there is no evidence in the record to show that ENV would elect to so restrict itself. *See* Ex. A19.

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 7. Substantial evidence has been provided in these proceedings to show that the July 31, 2012 deadline for MSW is not supported by the evidence and would result in harm to human health and the environment. Good cause, therefore, exists to delete Condition No. 14 and allow acceptance of all forms of waste at WGSF until it has reached capacity.

COL 8 and 14 are not supported by the record. Substantial evidence has been provided to show that ENV has complied with the conditions of the 2009 LUC Order and therefore there is no basis to modify the 2009 LUC Order other than to delete the unreasonable Condition No. 14.

Schnitzer objects to COL 9 on the basis that KOCA has not fully defined "putrescible waste" so as to enable it to categorize it as a separate waste stream. In addition, the record does not support KOCA's conclusion that the Landfill should be closed to all treated medical waste and all combustible general MSW.

Schnitzer also objects to COLs 11, 12 and 13 on the basis that there is nothing in the record to support a November 2, 2017 deadline.

C. EXCEPTIONS TO KOCA'S PROPOSED DECISION AND ORDER

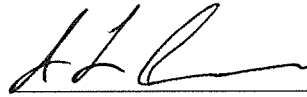
KOCA's proposed Decision and Order is not appropriate in that it seeks a deadline of November 2, 2017. Such a deadline is arbitrary and is not supported by the record.

III. CONCLUSION

Substantial evidence has been provided to establish good cause that Condition No. 14 be deleted. KOCA, however, seeks to impose a November 2, 2012 deadline which has no basis in the record. 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, May 14, 2012.



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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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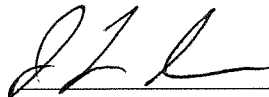
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