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DEPT. OF PLANNING
AND PERMITTING
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 MEMORANDUM IN
OPPOSITION TO DEPARTMENT OF
ENVIRONMENTAL SERVICES, CITY
AND COUNTY OF HONOLULU'S
NOTIFICATION OF SUPREME COURT
DECISION OR IN THE ALTERNATIVE
FOR STAY OF CONTESTED CASE
HEARING; EXHIBIT "A"; CERTIFICATE
OF SERVICE

**INTERVENOR SCHNITZER STEEL HAWAII CORP.'S MEMORANDUM IN
OPPOSITION TO DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND
COUNTY OF HONOLULU'S NOTIFICATION OF SUPREME COURT DECISION OR
IN THE ALTERNATIVE FOR STAY OF CONTESTED CASE HEARING**

COMES NOW, Intervenor Schnitzer Steel Hawaii Corp. ("Schnitzer"), by and through its
attorneys, Carlsmith Ball LLP, and hereby submits this Memorandum in Opposition to
Department of Environmental Services, City and County of Honolulu's Notification of Supreme

Court Decision or in the Alternative Motion for Stay of Contested Case Hearing, filed herein on May 15, 2012.

Schnitzer does not object to reopening the contested case hearing pursuant to Rules of the Planning Commission (“RPC”) § 2-71(f) in order to take official notice of the opinion of the Hawaii Supreme Court in *Department of Environmental Services v. Land Use Comm’n*, SCAP-10-0000157, entered May 4, 2012. It is appropriate for the Planning Commission to take official notice of this opinion inasmuch as it relates to the Special Use Permit that is the subject of this contested case. However, dismissal of these proceedings is premature at this stage and Schnitzer opposes such a course of action. The Supreme Court did not simply strike out Condition No. 14 from the Special Use Permit. Rather, it remanded the proceedings to the Land Use Commission (“LUC”) for further consideration:

In the present case, the relevant question is whether the LUC would have reached the same conclusion (approving SUP-2) without its imposition of Condition 14. Based on the record, we cannot so conclude. Thus, we remand to the LUC for further hearings as the LUC may deem appropriate.

V. CONCLUSION

Pursuant to HRS section 91-14(g)(5) (1993), we vacate the circuit court’s judgment affirming the LUC’s approval of SUP-2, and remand this matter to the circuit court with instructions that the circuit court remand this matter to the LUC for further proceedings consistent with this opinion.

Dep’t of Environmental Services v. Land Use Comm’n, Slip Op. at 35 - 36 (notes omitted).

In remanding the matter to the LUC, the Supreme Court noted that this proceeding was currently pending before the Planning Commission and encouraged the LUC to consider new testimony from this proceeding:

We have been informed in pleadings filed by the LUC that on June 28, 2011, DES filed a “[r]equest for modification of condition 14

of SUP file No. 2008/SUP-2” with the Planning Commission, and that a contested case hearing is ongoing in that proceeding. On remand, we encourage the LUC to consider any new testimony developed before the Planning Commission in that case.

Id. at 36, n. 16.

To date, the proceedings relating to the 2008 Special Use Permit have not been remanded from the Circuit Court back to the LUC. It is unclear when that will happen. When it does, under the current regulatory regime, the LUC can act in one of several ways: the LUC can approve the Special Use Permit as issued by the Planning Commission; the LUC can approve it with modification; the LUC can deny it; or the LUC can remand it to the Planning Commission for further proceedings. *See* Haw.Admin.R. § 15-15-96.

On May 21, 2012, the LUC offered a glimpse into its preferred course of action by passing a motion to send a letter to the Planning Commission asking it to defer decision-making on the pending application until the LUC can remand the 2008 application back to the Planning Commission. On May 22, 2012, the Chair of the LUC, Normand R. Lezy, sent such a letter to the Planning Commission. *See* Ex. A. In the letter, Chair Lezy makes clear that the LUC will forward the record on remand to the Planning Commission so that it may consolidate the original application for the 2008 Special Use Permit with the pending application. *Id.* Under these circumstances, a stay is appropriate in order to allow time for the proceedings relating to the 2008 application to be remanded back from the Circuit Court to the LUC and to allow time for the LUC to then remand it back to the Planning Commission. A stay ensures that these proceedings do not in any way interfere with or complicate the LUC process once the 2008 application is remanded. Accordingly, Schnitzer does not object to a stay of these proceedings. A stay of these proceedings at this time means a stay of the Planning Commission’s decision-

making process. Pursuant to RPC § 2-72, Schnitzer agrees to allow additional time beyond 60 days for the Planning Commission to render its final decision.

In conclusion, for the reasons set forth herein, Schnitzer does not object to the Planning Commission taking official notice of the Hawaii Supreme Court decision in *Department of Environmental Services v. Land Use Comm'n*, SCAP-10-0000157, entered May 4, 2012. In addition, Schnitzer does not object to a stay of these proceedings pending the Land Use Commission's further action pursuant to this decision. However, given the uncertainty resulting from the Supreme Court's decision, Schnitzer opposes a dismissal of these proceedings.

DATED: Honolulu, Hawaii, May 23, 2012.



IAN L. SANDISON
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Attorneys for Petitioner
SCHNITZER STEEL HAWAII CORP.



NEIL ABERCROMBIE
Governor

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BERT K. SARUWATARI
Acting Executive Officer

LAND USE COMMISSION MAY 22 P 1:41
Department of Business, Economic Development & Tourism
State of Hawaii

DEPT OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLULU

May 22, 2012

Ms. Gayle Pingree, Chair
Planning Commission
City and County of Honolulu
650 South King Street, 7th Floor
Honolulu, Hawaii 96813

Dear Ms. Pingree:

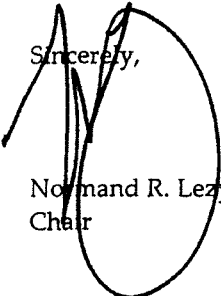
Subject: County Special Use Permit File No. 2008/SUP-2
LUC Docket No. SP09-403
Waimanalo Gulch Sanitary Landfill

On behalf of the State Land Use Commission (LUC), I would like to urge the City and County of Honolulu (C&C) Planning Commission (Planning Commission) to stay its May 25, 2012, proceedings on the C&C Department of Environmental Services' (DES) current request to delete Condition No. 14 of the LUC's Order Adopting the City and County of Honolulu Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order with Modifications filed October 22, 2009 (LUC's Order), until the LUC remands File No. 2008/SUP-2 to the Planning Commission.

In its decision to remand the LUC's Order to the circuit court, the Hawaii Supreme Court (HSC) acknowledged the DES' current request to delete Condition No. 14 and encouraged "... the LUC to consider any new testimony developed before the Planning Commission in that case." To that end, I believe that the consolidation of the remand and the DES' current request would better serve the public interest and provide for a more economical disposition of both matters.

In the event the Planning Commission stays its proceedings on the DES' request, I have instructed my staff to forward the record on remand to the Planning Commission upon receipt from the circuit court so that it may consolidate the proceedings consistent with the spirit and intent of the HSC's decision.

Sincerely,


Norman R. Lezy
Chair

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

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

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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KO OLINA COMMUNITY ASSOCIATION and
MAILE SHIMABUKURO

DATED: Honolulu, Hawaii, May 23, 2012.



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