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DEPT. OF PLANNING  
AND ZONING  
CITY & COUNTY OF HONOLULU

Attorneys for Applicant  
DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF  
HONOLULU

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

For a New Special Use Permit To Supersede  
Existing Special Use Permit To Allow A  
92.5-Acre Expansion And Time Extension For  
Waimanalo Gulch Sanitary Landfill,  
Waimanalo Gulch, O'ahu, Hawai'i, Tax Map  
Key No. (1) 9-2-03: 72 And 73,

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF  
HONOLULU

To delete Condition No. 14 of Special Use  
Permit No. 2008/SUP-2 (also referred to as  
Land Use Commission Docket No. SP09-403)  
which states as follows:

FILE NO. 2008/SUP-2

DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF  
HONOLULU'S MOTION FOR LEAVE  
TO FILE SUPPLEMENTAL BRIEF;  
MEMORANDUM IN SUPPORT OF  
MOTION; DECLARATION OF  
KAMILLA C. K. CHAN; EXHIBIT "1";  
CERTIFICATE OF SERVICE

P12

“14. Municipal solid waste shall be allowed at the WGS� up to July 21, 2012, provided that only ash and residue from H-POWER shall be allowed at the WGS� after July 31, 2012.”

**DEPARTMENT OF ENVIRONMENTAL SERVICES,  
CITY AND COUNTY OF HONOLULU’S MOTION FOR  
LEAVE TO FILE SUPPLEMENTAL BRIEF**

COMES NOW Applicant DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU (“ENV”), by and through its attorney, KAMILLA C. K. CHAN, Deputy Corporation Counsel, under Section 2-67 of the Rules of the Planning Commission, and hereby respectfully moves for leave to file a supplemental brief, which is attached as Exhibit 1.

The brief addresses two new issues that arose during the February 28, 2019 hearing convened by the Planning Commission, City and County of Honolulu (“Planning Commission”). First, the Planning Commission discussed and is presently considering the adoption of a condition that is inconsistent with the evidence in the record and is not supported by substantial evidence. Second, the Planning Commission inquired about and expressed concern regarding matters that are outside the record.

ENV is concerned that the adoption of a condition that is not supported by substantial evidence and the consideration of evidence that is not part of the record of this contested case hearing will subject this proceeding to further remand of the Planning Commission’s findings of fact, conclusions of law, and decision and order and to judicial review. Furthermore, because the contemplated condition is not only unsupported by the record, but would also represent a fundamental reversal of the Planning Commission’s previous and proposed decisions in this

matter, ENV has not had the opportunity to address it fully. For these reasons, ENV requests that the Planning Commission grant this motion and accept the attached brief as filed.

DATED: Honolulu, Hawaii, March 18, 2019.



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KAMILLA C. K. CHAN  
Deputy Corporation Counsel  
Attorneys for Applicant  
DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY  
OF HONOLULU

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FILE NO. 2008/SUP-2

MEMORANDUM IN SUPPORT OF  
MOTION

**MEMORANDUM IN SUPPORT OF  
MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF**

COMES NOW Applicant DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY  
AND COUNTY OF HONOLULU (“ENV”), by and through its attorney, KAMILLA C. K.  
CHAN, Deputy Corporation Counsel, and hereby submits this memorandum in support of its  
motion to file a supplemental brief.

## **I. INTRODUCTION**

This matter is a consolidation of two contested case hearings before the Planning Commission, City and County of Honolulu (“Planning Commission”). The first proceeding involves ENV’s application for a new special use permit (“SUP”) for the expansion of Waimanalo Gulch Sanitary Landfill (“WGSL”) and the withdrawal of County Special Use Permit No. 86/SUP-5, dated December 3, 2008 (“2008 Application”), and designated as County SUP File No. 2008/SUP-2. The second proceeding involves ENV’s application to modify County Special Use Permit File No. 2008/SUP-2 for the sole purpose of deleting the July 31, 2012 deadline for the landfill to accept municipal solid waste (“MSW”) (“2011 Application”).<sup>1</sup>

At the contested case hearing on February 28, 2019 for the adoption of the Commission’s Proposed Findings of Fact, Conclusions of Law and Decision and Order, two new issues arose. First, the Planning Commission discussed and is presently considering the adoption of a condition that is inconsistent with the evidence in the record and not supported by substantial evidence. Second, the Planning Commission inquired about and expressed concern regarding matters that are outside the record.

ENV moves for leave to file a supplemental brief, attached as Exhibit 1, to address these two new issues.

## **II. RELEVANT LAW**

Rules of the Planning Commission (“RPC”) Section 2-67 states: “Motions by any party may be made before, during, or after a hearing . . . and that “[a]ny motion, other than one made during a hearing, shall be made in writing to the commission, shall state

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<sup>1</sup> The lengthy procedural history of the proceedings on the 2008 and 2011 Applications is summarized in the supplemental brief, attached hereto as Exhibit 1.

the relief sought, and shall be accompanied by an affidavit or legal memorandum setting forth the grounds upon which the motion is based.”

### III. ARGUMENT

The two new issues that arose at the Planning Commission hearing on February 28, 2019, are significant issues that could cause this proceeding to be subject to further remand and judicial review.

First, Commissioner Theresia McMurdo suggested that the Planning Commission consider adopting Intervenor Ko Olina Community Association and Maile Shimabukuro’s proposed landfill closure condition. Declaration of Kamilla C. K. Chan, dated March 18, 2019 (“Chan Decl.”) ¶ 4. The proposed condition would require partial closure of the Waimanalo Gulch Sanitary Landfill (“WGSL”) in less than five years and complete closure in less than eight years. *Id.* While the commissioners discussed the condition, no commissioner identified evidence in the record to support the proposed closure condition. Chan Decl. ¶ 5. The landfill closure condition is inconsistent with the evidence in the record and is not supported by substantial evidence. Therefore, it is not likely to withstand judicial review. *See* Haw. Rev. Stat. § 91-14(g)(5); *Dep’t of Env’tl. Servs. v. Land Use Comm’n*, 127 Haw. 5 (2012) (holding that a condition that is not supported by substantial evidence in the record cannot stand).

Second, Commissioners Gifford Chang and Cord Anderson inquired about and expressed concern regarding ENV’s efforts since 2012 to identify a new landfill site (“ENV’s landfill siting efforts”). Chan Decl. ¶ 6. The evidentiary record was closed on April 23, 2012. The Planning Commission may not consider matters outside the record when acting in an adjudicatory capacity. *See* Haw. Rev. Stat. § 91-9(g); *Mauna Kea Power Co. v. Bd. of Land and Natural Res.*, 76 Haw. 259, 262 (1994). While ENV might prefer to address the Commissioner’s concerns and

correct their misperceptions directly, ENV may not submit, and the Planning Commission may not consider, evidence of ENV's landfill siting efforts in deciding this contested case.

**IV. CONCLUSION**

For the foregoing reasons, ENV requests that the Planning Commission grant its motion and accept the attached supplemental brief as filed.

DATED: Honolulu, Hawaii, March 18, 2019.



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KAMILLA C. K. CHAN  
Deputy Corporation Counsel  
Attorneys for Applicant  
DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY  
OF HONOLULU

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only ash and residue from H-POWER shall be  
allowed at the WGS� after July 31, 2012.”

FILE NO. 2008/SUP-2

DECLARATION OF KAMILLA C. K.  
CHAN

**DECLARATION OF KAMILLA C. K. CHAN**

I, KAMILLA C. K. CHAN, hereby declare the following:

1. I am an attorney duly licensed to practice law in the State of Hawaii and am employed by the City and County of Honolulu, Department of the Corporation Counsel, as a Deputy Corporation Counsel, and I make this declaration based on personal knowledge.



2. My duties include handling various matters of representation on behalf of the Department of Environmental Services, City and County of Honolulu (“ENV”), including the above-captioned proceedings.

3. At the hearing on February 28, 2019, the Planning Commission discussed adopting the 2019 Planning Commission Proposed Decision, with ENV’s exceptions, Intervenor Schnitzer’s exceptions, and certain conditions proposed by Intervenor KOCA.

4. At a hearing on February 28, 2019, the Planning Commission considered adoption of the proposed findings of fact, conclusions of law, and decision and order. Commissioner Theresia McMurdo suggested that the Planning Commission consider adoption of Intervenor Ko Olina Community Association and Maile Shimabukuro’s (“Intervenor KOCA’s”) proposed landfill closure condition. The proposed condition states as follows:

Waste Acceptance Conditions

- a. From the date of this Order until March 1, 2024, MSW, including sewage sludge, may not be deposited at WGSL unless it cannot be disposed of within the City by any means other than landfilling; provided, however, that (1) during periods of H-POWER scheduled maintenance when the facility may shut down one or more of the boilers, MSW that would otherwise be processed at H-POWER or other facilities may be disposed of at WGSL and (2) under emergency circumstances, as reasonably determined by the Director of the ENV, MSW that would otherwise be processed at H-POWER or other facilities may be disposed of at the WGSL.
- b. From March 2, 2024, until March 1, 2027, WGSL shall be closed to use and all waste except (1) ash and residue from H-POWER, and (2) automobile shredder residue.
- c. The Landfill shall stop accepting any form of waste and close on or before March 2, 2027.

5. Although the commissioners discussed the adoption of the landfill closure condition, no commissioner identified the evidence in the record to support the proposed condition.

6. Also on February 28, 2019, Commissioners Gifford Chang and Cord Anderson inquired about and expressed concern regarding ENV's efforts since 2012 to identify a new landfill site.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, March 18, 2019.



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which states as follows:

FILE NO. 2008/SUP-2

DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF  
HONOLULU'S SUPPLEMENTAL  
BRIEF; DECLARATION OF  
KAMILLA C. K. CHAN; EXHIBIT "1"

“14. Municipal solid waste shall be allowed at the WGS� up to July 21, 2012, provided that only ash and residue from H-POWER shall be allowed at the WGS� after July 31, 2012.”

**DEPARTMENT OF ENVIRONMENTAL SERVICES,  
CITY AND COUNTY OF HONOLULU’S SUPPLEMENTAL BRIEF**

**I. INTRODUCTION**

At the contested case hearing on February 28, 2019, the Planning Commission discussed a proposed permit condition that would require partial closure of the Waimanalo Gulch Sanitary Landfill (“WGS�”) in less than five years and complete closure in less than eight years. During the discussion, no commissioner identified the evidence in the record that supports the proposed condition. This development is concerning to the Department of Environmental Services, City and County of Honolulu (“ENV”) because the proposed condition is inconsistent with the evidence in the record and is not supported by substantial evidence. A condition that is not supported by substantial evidence in the record should not be adopted because it will subject this proceeding to further remand of the Planning Commission’s findings of fact, conclusions of law, and decision and order and to judicial review.

The commissioners also inquired about and expressed concern regarding ENV’s recent efforts to identify a new landfill site. The evidentiary portion of this contested case hearing closed on April 23, 2012, so the subject of the commissioners’ inquiry and concern is not part of the record of this hearing and thus, cannot be considered by the Planning Commission as it renders its decision and order in this contested case. If the record indicates that the Planning Commission’s decision was influenced by matters outside the record, it will subject this proceeding to further remand of the Planning Commission’s findings of fact, conclusions of law, and decision and order and to judicial review.

## **II. SUMMARY OF RELEVANT PROCEDURAL HISTORY AND FACTS**

The WGSL is located at 92-460 Farrington Highway, Honouliuli, Ewa, Oahu, in a district zoned as agricultural. The City-owned property is approximately 200.622 acres. See Final Environmental Impact Statement, Waimanalo Gulch Sanitary Landfill Lateral Expansion, Waimanalo Gulch, Oahu, Hawaii, TMKs: (1) 9-2-003:072 and 073, dated October 2008, included in the 2011 Contested Case Hearing as “Exhibit A2.”

This matter is a consolidation of two contested case proceedings before the Planning Commission. The first proceeding involves ENV’s application for a new special use permit (“SUP”) for the expansion of the WGSL and withdrawal of County Special Use Permit No. 86/SUP-5, dated December 3, 2008 (“2008 Application”), and designated as County SUP File No. 2008/SUP-2. The second proceeding involves ENV’s application to modify County Special Use Permit File No. 2008/SUP-2 for the sole purpose of deleting the July 31, 2012 deadline for the landfill to accept municipal solid waste (“MSW”) (“2011 Application”).

Following five days of hearing, the Planning Commission recommended approval of the 2008 Application, subject to ten conditions. See Planning Commission Findings of Fact, Conclusions of Law, and Decision and Order dated August 4, 2009 (“2009 Planning Commission Decision”). The Planning Commission’s decision did not impose a closure date for WGSL and permitted the use of WGSL until it reached its capacity. ENV did not object to any of the conditions imposed by this Commission.

The LUC adopted the 2009 Planning Commission Decision as its own, but modified the decision by making the approval of the application subject to six additional conditions. In particular, Condition No. 14 prohibited any further disposal of MSW at the WGSL after July 31, 2012, and allowed only ash and residue from the H-POWER facility to be placed at the WGSL

after July 31, 2012. See 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 ("2009 LUC Decision").

ENV appealed Condition No. 14 to the Circuit Court, which affirmed the LUC's order. ENV appealed the Circuit Court's decision to the Hawaii Supreme Court. Oral arguments were heard by the Supreme Court in February 2012.

In 2011, out of a concern that the Supreme Court would not rule on the appeal before the July 31, 2012 deadline, ENV filed the 2011 Application, which sought to delete Condition No. 14. The 2011 Application came on for a contested case hearing before the Planning Commission on eight days between December 2011 and April 2012. The evidence was closed on April 23, 2012 and the ENV application was fully briefed.

On May 4, 2012, the Supreme Court ruled in favor of ENV and struck down Condition No. 14. The Supreme Court ruled that the MSW deadline imposed by the LUC is inconsistent with the evidence in the record and not supported by substantial evidence. The Supreme Court also determined that because Condition No. 14 appeared to be material to the LUC's approval of the SUP, the approval could not stand without further consideration. Accordingly, the Court remanded the matter to the LUC for further hearings as the LUC deems appropriate to determine whether the LUC would have reached the same conclusion (to approve the SUP) without the imposition of Condition No. 14.

On September 14, 2012, the LUC remanded the Supreme Court case to the Planning Commission with a recommendation to consolidate the 2009 and 2011 Applications for decision-making.

//

On August 17, 2016, the Planning Commission ordered the consolidation of the 2009 and 2011 SUP proceedings.

On September 30, 2016, ENV filed a Motion to Reopen the Contested Case Hearing for the Limited Purpose of Taking Official Notice of Facts. ENV sought to have the Planning Commission take official notice of the Sixth Annual Report of the Status of Actions Taken to Comply With the State Land Use Commission's Order Dated October 2, 2009 and the Status of Operations of the Waimanalo Gulch Sanitary Landfill, which was submitted to the Planning Commission in compliance with Condition No. 6 of the 2009 LUC Order.

On October 5, 2016, ENV filed a Motion for Extension of Time to April 21, 2017, so that the parties may have adequate time to discuss a proposed deadline for the acceptance of MSW, and draft a joint proposed findings of fact, conclusions of law, and decision and order. On October 6, 2017, Intervenor Schnitzer Steel Hawaii Corp. ("Intervenor Schnitzer") joined in the Motion for Extension of Time. On the same date, Intervenor Ko Olina Community Association and Maile Shimabukuro (collectively, "Intervenor KOCA") joined in the request, subject to certain clarifications.

On October 7, 2016, Intervenor Colleen Hanabusa ("Intervenor Hanabusa") filed a statement regarding the various submissions of request for extensions of time to submit proposed findings of fact, conclusions of law, and decision and order and ENV's motion to reopen the contested case hearing.

On October 12, 2016, the Planning Commission heard ENV's Motion for Extension of Time, ENV's Motion to Reopen the Contested Case Hearing, and Intervenor KOCA's Motion to Reopen the Contested Case Hearing. During the hearing, ENV amended its request for an extension of time by requesting a shorter 90-day extension, which was granted. The Planning

Commission denied the motions to reopen the contested case hearing. See Planning Commission Transcript (“PC Tr.”) 10/12/16 13:9-14:17, 18:10-19:14; 19:16-21:22.

On January 25, 2017, ENV, Intervenor Schnitzer and Intervenor KOCA filed their respective proposed findings of fact, conclusions of law, and decision and order.

On February 10, 2017, ENV filed its response to Intervenor KOCA’s proposed findings of fact, conclusions of law, and decision and order. On the same date, Intervenor KOCA filed its responses to ENV’s proposed findings of fact, conclusions of law, and decision and order, as well as Intervenor Schnitzer’s proposed findings of fact, conclusions of law, and decision and order.

Also on February 10, 2017, Intervenor Hanabusa filed a document titled Intervenor Colleen Hanabusa’s: (1) Renewal of Submission of Proposed Findings of Fact and Conclusions of Law; and (2) Objections and Rebuttals (“Intervenor Hanabusa’s Renewal of Submission and Objections”).

On February 17, 2017, ENV filed a Motion to Strike Intervenor Hanabusa’s Renewal of Submission and Objections.

On March 1, 2017, the Planning Commission granted ENV’s Motion to Strike Intervenor Hanabusa’s Renewal of Submission and Objections. Intervenor Hanabusa’s original proposed findings of fact and conclusions of law, which was submitted in 2009, remains in the record. See PC Tr. 3/1/17 12:1-25, 13:1.

Also on March 1, 2017, the Planning Commission convened a meeting and considered the adoption of the findings of fact, conclusions of law, and decision and order. The Planning Commission subsequently issued its Findings of Fact, Conclusions of Law, and Decision and



Order dated April 28, 2017 (“2017 Planning Commission Decision”). The Decision and Order states:

Pursuant to the foregoing Findings of Fact and Conclusions of Law, it is the decision and order of the Planning Commission to APPROVE Applicant’s 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, by deleting Condition No. 14 and adding the following conditions . . .

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4. The foregoing additional conditions shall supersede any inconsistent conditions in the 2009 LUC Order and shall otherwise supplement any and all existing conditions in said 2009 LUC Order.

See 2017 Planning Comm’n Dec. at 30-31. See also 2009 Planning Comm’n Dec. at 24. Again, the Planning Commission permitted the use of WGSL until it reached its capacity.

On May 3, 2017, the LUC received the consolidated record from the Planning Commission. See Land Use Commission Transcript (“LUC Tr.”) 05/24/17 8:1-4, attached hereto as Exh. “1”.

On May 12, 2017, Intervenor KOCA filed a (1) Motion to Deny and Remand, and (2) Motion to Deny the Applications Unless Additional Conditions are Imposed. On May 19, 2017, ENV filed responses to both motions. On May 22, Intervenor Hanabusa filed a Joinder to Intervenor KOCA’s Motion to Deny and Remand. Id. at 8:5-25, 9:3-5.

On May 24, 2017, the LUC considered Intervenor KOCA’s Motion to Deny and Remand and voted to grant in part and deny in part the motion to deny and remand. Id. at 94:1 – 101:1. On June 6, 2017, the LUC issued its Order Granting in Part and Denying in Part Intervenor KOCA’s Motion to Deny and Remand (“2017 LUC Order”). The 2017 LUC Order remanded

the proceedings to the Planning Commission pursuant to HAR § 15-15-96(a) for further proceedings to:

(1) *clarify whether* the Planning Commission followed Section 2-75 of the Rules of the Planning Commission in issuing its Findings of Fact, Conclusions of Law, and Decision and Order; (2) *clarify the basis* of the Planning Commission's proposed additional Condition No. 3, which specifies a December 31, 2022, date within which the Applicant is to identify an alternative site that will be used upon the WGS� reaching its capacity and the implications it has on the closure date of the WGS� to use and the subsequent commencement of operations at the alternative landfill site; (3) *clarify whether* the record needs to include updated information on the operation of the WGS�, the landfill site selection process, and the waste diversion efforts of the City and County of Honolulu; (4) assuming the Planning Commission eventually recommends approval of the matter, *clarify* the effective date of the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order; and (5) *clarify whether* the Planning Commission is ruling on both the 2008 Application and the 2011 Application in its Findings of Fact, Conclusions of Law, and Decision and Order.

See 2017 LUC Order at 5-6 (emphasis added).

Accordingly, the record on the 2008 and 2011 Applications was remanded to the Planning Commission.

At a hearing on August 16, 2017, the Planning Commission expressed its intent to issue a proposed revised Decision and Order in accordance with Planning Commission Rule § 2-75. See PC Tr. 08/16/17 9:15-20.

On December 6, 2017, the Planning Commission convened a hearing and adopted the proposed Findings of Fact, Conclusions of Law, and Decision and Order and set February 5, 2018 as the deadline for the parties to file written objections and comments. The Planning Commission scheduled the next hearing for March 7, 2018. See PC Tr. 12/6/17, 10:11–11:11.

Also on December 6, 2017, the Planning Commission served on the parties its proposed Findings of Fact, Conclusions of Law, and Decision and Order dated December 6, 2017 (“2017 Planning Commission Proposed Decision”). Consistent with the Planning Commission's prior

decisions, the 2017 Planning Commission Proposed Condition did not impose a closure date for WGSL and permitted the use of WGSL until it reached its capacity.

On February 5, 2018, ENV and Intervenors Schnitzer, KOCA, and Hanabusa filed their respective exceptions to the 2017 Planning Commission Proposed Decision.

On March 7, 2018, the Planning Commission considered Intervenor KOCA's Motion to Reopen the Contested Case Hearing and the adoption of Findings of Fact, Conclusions of Law, and Decision and Order. After hearing oral argument of the parties, the Planning Commission scheduled April 4, 2018, for decision-making on the motion to reopen and the adoption of the findings of fact, conclusions of law, and decision and order.

The hearing set for April 4, 2018, was subsequently cancelled because the Planning Commission lacked quorum to decide the case.

By letter dated January 15, 2019, the Planning Commission notified the parties that Donald W. Y. Goo has been appointed to the Planning Commission as a temporary appointee to assist in the completion of the contested case proceeding.

On January 15, 2019, the Planning Commission served on the parties its Proposed Findings of Fact, Conclusions of Law, and Decision and Order ("2019 Planning Commission Proposed Decision"). Once again, the 2019 Planning Commission Proposed Decision did not impose a closure date for WGSL and would permit the use of WGSL until it reached capacity.

On February 7, 2019, Intervenor Hanabusa filed exceptions to the 2019 Planning Commission Proposed Decision. ENV and Intervenor Schnitzer filed their respective exceptions on February 8, 2019. Intervenor KOCA filed its exceptions on February 11, 2019 ("Intervenor KOCA's Exceptions").

In its exceptions, Intervenor KOCA requested that the Planning Commission deny the 2008 and 2011 Applications unless it imposes several conditions, including a condition that severely restricts the waste that may be disposed at WGSL beginning on March 2, 2024, and completely closes the WGSL on or before March 2, 2027. (Intervenor KOCA's Exceptions at 9.)

The proposed condition states as follows:

3. Waste Acceptance Conditions
  - a. From the date of this Order until March 1, 2024, MSW, including sewage sludge, may not be deposited at WGSL unless it cannot be disposed of within the City by any means other than landfilling; provided, however, that (1) during periods of H-POWER scheduled maintenance when the facility may shut down one or more of the boilers, MSW that would otherwise be processed at H-POWER or other facilities may be disposed of at WGSL and (2) under emergency circumstances, as reasonably determined by the Director of the ENV, MSW that would otherwise be processed at H-POWER or other facilities may be disposed of at the WGSL.
  - b. From March 2, 2024, until March 1, 2027, WGSL shall be closed to use and all waste except (1) ash and residue from H-POWER, and (2) automobile shredder residue.
  - c. The Landfill shall stop accepting any form of waste and close on or before March 2, 2027.

Id. at Exh. 1 at 85–86 (“landfill closure condition”).

On February 28, 2019, the Planning Commission heard and denied Intervenor KOCA's Motion to Reopen the Contested Case Hearing.

Also on February 28, 2019, the Planning Commission considered the adoption of the proposed findings of fact, conclusions of law, and decision and order. Commissioner Theresa McMurdo suggested that the commission consider adopting Intervenor KOCA's landfill closure condition. Declaration of Kamilla C. K. Chan dated March 18, 2019 (“Chan Decl.”) ¶ 4.

Although the commissioners discussed the adoption of the landfill closure condition, no commissioner identified the evidence in the record that supports the proposed condition. Id. at ¶

5.

During the discussion relating to the adoption of the proposed findings of fact, conclusions of law, and decision and order, Commissioners Gifford Chang and Cord Anderson inquired about and expressed concern regarding ENV's efforts since 2012 to identify a new landfill site. *Id.* at ¶ 6.

### **III. DISCUSSION**

#### **A. Conditions Imposed In A SUP Must Be Supported By Substantial Evidence In The Record.**

The Planning Commission may permit certain unusual and reasonable uses within the agricultural district other than those for which the district is classified by approving a SUP. Haw. Rev. Stat. § 205-6(a). A SUP for land greater than fifteen acres is subject to approval by the LUC. Haw. Rev. Stat. § 205-6(d).

In approving a SUP, the Planning Commission may impose protective restrictions. Haw. Rev. Stat. § 205-6(c). A restriction must be supported by substantial evidence in the record. Haw. Rev. Stat. § 91-14(g)(5) (“Upon review of the record, the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are . . . [c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record . . .”).

#### **B. The Landfill Closure Condition Is Inconsistent With The Evidence In The Record And Not Supported By Substantial Evidence.**

##### **1. Facts Established In The Contested Case Hearings On The 2008 And 2011 Applications**

As discussed in more detail below, the record of the Planning Commission proceedings relating to the 2008 Application and 2011 Application establishes the following facts: (1) It will take more than seven years to identify and develop a landfill site; (2) WGSL is a critical part of

the City's integrated solid waste management efforts; (3) WGS� is needed for disposal of certain wastes; (4) WGS� is required as a permit condition to operate H-POWER; and (5) WGS� is needed to prevent serious health and safety issues.

a. **It Will Take More Than Seven Years To Identify And Develop A Landfill Site.**

In the 2009 Planning Commission Decision, and in each decision and proposed decision issued since 2009, the Planning Commission found that it will take more than seven years to identify and develop a landfill site. The salient findings are as follows:

- Mr. [Frank] Doyle also testified that it would take **more than seven years** to identify and develop a new landfill site. 2009 Planning Comm'n Dec. Findings of Fact ("FOF") ¶ 133 (emphasis added).
- It will take **at least seven years from site selection** for a new landfill site to be operational. 2019 Planning Comm'n Proposed Dec. FOF ¶ 133 (emphasis added); 2017 Planning Comm'n Dec. FOF ¶ 104; 2017 Planning Comm'n Proposed Dec. FOF ¶ 133.

In its findings, the Planning Commission also details the tasks ENV must complete in order to develop a new landfill site. The findings state as follows:

- Even after the City selects a new landfill site or sites, it will take ENV **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 Oahu's next landfill site or sites (e.g., conducting site surveys or investigations, analyzing alternatives including alternative sites and technologies, obtaining 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. 2019 Planning Comm'n Proposed Dec. FOF ¶ 81 (emphasis added); 2017 Planning Comm'n Dec. FOF ¶ 52; 2017 Planning Comm'n Proposed Dec. FOF ¶ 81.
- The detailed engineering studies are 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 for a qualified landfill operator), as well as the acquisition of building permits, land use approvals such as 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**. 2019 Planning Comm'n Proposed Dec. FOF ¶ 82 (emphasis added); 2017 Planning Comm'n Dec. FOF ¶ 53; 2017 Planning Comm'n Proposed Dec. FOF ¶ 82.

The record from the 2008 and 2011 Applications support the findings in the 2019 Planning Commission Proposed Decision. Relevant evidence includes the following<sup>1</sup>:

- Once a new landfill site is identified, it will take more than seven years to acquire, permit, design and construct the new landfill site. PC Tr. 1/11/12 37:1-25; 38:8-12; 4/11/12 122:6-123:12.

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<sup>1</sup> At the hearing on February 28, 2019, the Planning Commission discussed adopting the 2019 Planning Commission Proposed Decision, with ENV's exceptions, Intervenor Schnitzer's exceptions, and certain conditions proposed by Intervenor KOCA. Chan Decl. ¶ 3. Thus, ENV presumes the Planning Commission intends to adopt all the conclusions of law set forth in its proposed decision, including numbers 4 and 7, which state as follows:

4. Based on the findings set forth in its August 4, 2009 Findings of Fact, Conclusions of Law, and Decision and Order and on the findings set forth above, the Planning Commission concludes that the Applicant's 2008 application for a new State Special Use Permit and the Applicant's 2011 Application to Modify (a) are 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 the WGS� is located continues to be unsuited for agricultural purposes.
7. The subject of the remand from the Supreme Court of the State of Hawaii was the deadline for the disposal of municipal solid waste imposed by Condition No. 14 of the 2009 LUC Order. The Planning Commission never imposed such a deadline for the disposal of municipal solid waste at the WGS� at any point of the proceedings in these consolidated cases. Therefore, the Planning Commission concludes that Condition No. 14 of the 2009 LUC Order, which imposed the July 31, 2012 deadline for municipal solid waste disposal at the WGS�, was not material to its conclusions above relating to the Applicant's 2008 Application.

Based on the foregoing it appears that the Planning Commission intends to affirm the 2009 Planning Commission Decision, including all findings of fact. Therefore, the discussion of relevant evidence in this supplemental brief focuses on evidence in the record of the 2011 Application.

- It will take longer than seven to ten years to get a landfill up and running from selection to operation. PC Tr. 4/11/12 41:2-42:6.
- Once the City selects a site or sites, as acknowledged in both the 2009 Planning Commission Decision and the 2009 LUC Decision, it will take more than seven years to acquire, permit, design and construct the new landfill site(s). Even if the Landfill Advisory Committee finishes in January 2012 as anticipated, ENV will need several 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 Oahu'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 Direct Testimony of Timothy E. Steinberger dated December 13, 2011 ("Steinberger Written Testimony") ¶ 41.
- The detailed engineering studies are 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. Steinberger Written Testimony ¶ 42.
- The regulations of landfill came into effect in October 1993. Prior to that date, the regulations were not that strong, so in the 1980s a landfill could be sited and built very quickly. After the mid-1990s and in 2000 and onward, it has been a long, drawn process to site and build a landfill. PC Tr. 4/11/12 51:22-52:14.



Accordingly, there is substantial evidence to support the finding of fact that it will take more than seven years to identify and develop a landfill site.

**b. WGSL Is A Critical Part Of The City's Integrated Solid Waste Management Efforts.**

In the 2009 Planning Commission Decision, and in each decision and proposed decision issued since 2009, the Planning Commission found that the WGSL is a critical part of the City's overall integrated solid waste management effort. The salient findings are as follows:

- The proposed expansion of the landfill within the Property is needed because **WGSL is a critical part of the City's overall integrated solid waste management efforts.** 2009 Planning Comm'n Dec. FOF ¶ 91 (emphasis added, citation omitted).
- **WGSL is a critical portion 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. The ISWMP is required by State law and approved by DOH after public comments. One theme of the ISWMP is to minimize landfill disposal. 2009 Planning Comm'n Dec. FOF ¶ 95 (emphasis added); 2019 Planning Comm'n Proposed Dec. FOF ¶ 123.

The evidentiary record from the contested case hearing on the 2011 Application supports the findings in the 2019 Planning Commission Proposed Decision. Relevant evidence includes the following:

- WGSL is a fundamental component in the City's program to manage solid waste. (Steinberger Written Testimony ¶ 5.)
- The City's ISWMP provides a 25-year implementation plan for improving the City's solid waste management system. The ISWMP addresses all aspects of the present system, including reuse and recycling, the H-POWER facility, and landfilling for material that cannot be recycled or burned for energy. As the island's only landfill WGSL is a critical component of the ISWMP. (Steinberger Written Testimony ¶ 14.)

Based on the foregoing, there is substantial evidence to support the finding of fact that the WGSL is a critical part of the City's overall integrated solid waste management effort.

c. **WGSL Is Needed For Disposal Of Certain Wastes.**

In the 2009 Planning Commission Decision, and in each decision and proposed decision issued since 2009, the Planning Commission found that the WGSL is needed for disposal of material that cannot be combusted, recycled, reused or shipped. Further, the Planning Commission found that the WGSL is needed for the disposal of ash produced by H-POWER, automobile shredder residue (“ASR”) and disaster debris. The salient findings are as follows:

- The continued availability of **WGSL is required because there is material that cannot be combusted, recycled, reused or shipped.** 2009 Planning Comm’n Dec. FOF ¶ 92 (emphasis added); 2019 Planning Comm’n Proposed Dec. FOF ¶ 132; 2017 Planning Comm’n Dec. FOF ¶ 103; 2017 Planning Comm’n Proposed Dec. FOF ¶ 132.
- Items that cannot be recycled or burned at H-POWER are deposited at WGSL, such as wastewater screenings, animal carcasses, tank bottom sludge, contaminated food waste that cannot be recycled, and contaminated soil that is below certain toxicity levels. 2009 Planning Comm’n Dec. FOF ¶ 97; 2019 Planning Comm’n Proposed Dec. FOF ¶ 125; 2017 Planning Comm’n Dec. FOF ¶ 96; 2017 Planning Comm’n Proposed Dec. FOF ¶ 125.
- By 2012, when H-POWER’s third boiler is expected to be operational, the City, through its various solid waste management programs, expects to divert eighty (80) percent of the waste stream, with the **remaining twenty (20) percent being landfilled at WGSL.** 2009 Planning Comm’n Dec. FOF ¶ 101 (emphasis added).
- **WGSL is the only permitted public MSW facility on the island of Oahu and the only permitted repository for the ash produced by H-POWER.** 2009 Planning Comm’n Dec. FOF ¶ 94 (emphasis added); 2019 Planning Comm’n Proposed Dec. FOF ¶ 122; 2017 Planning Comm’n Dec. FOF ¶ 93; 2017 Planning Comm’n Proposed Dec. FOF ¶ 122.
- Continued availability of **WGSL is required for cleanup in the event of a natural disaster.** 2009 Planning Comm’n Dec. FOF ¶ 92 (emphasis added); 2019 Planning Comm’n Proposed Dec. FOF ¶ 131; 2017 Planning Comm’n Dec. FOF ¶ 102; 2017 Planning Comm’n Proposed Dec. FOF ¶ 131.
- As the decreasing MSW tonnage to WGSL shows, ENV is continuing its effort to significantly reduce solid waste disposal at the WGSL by expanding H-POWER, the waste to materials recycling programs, and developing alternative disposal options for materials presently being landfilled. Collectively, these actions have and will divert significant amounts of waste away from WGSL. In addition, new technology solutions continue to be evaluated. However, **there are still no new**

**technologies with proven reliability and performance that would completely eliminate the need for a landfill.** 2019 Planning Comm'n Proposed Dec. FOF ¶ 86 (emphasis added); 2017 Planning Comm'n Dec. FOF ¶ 57; 2017 Planning Comm'n Proposed Dec. FOF ¶ 86.

- The City's bulky item collection service is designed to provide residents with once-a-month pickup service of old appliances, furniture, etc. Recyclable items such as white goods, Freon containing appliances, tires, and used auto batteries and propane tanks are segregated and delivered to the respective recycling facilities. **The remainder of bulky item collection is disposed of at the landfill.** 2019 Planning Comm'n Proposed Dec. FOF ¶ 92 (emphasis added); 2017 Planning Comm'n Dec. FOF ¶ 63; 2017 Planning Comm'n Proposed Dec. FOF ¶ 92.
- Residents also may self-haul their bulky items to City disposal sites, including three transfer stations and six convenience centers. Recyclable materials are segregated in separate bins or storage areas for delivery to recycling facilities. **Materials that cannot be recycled is hauled to the landfill.** 2019 Planning Comm'n Proposed Dec. FOF ¶ 93 (emphasis added); 2017 Planning Comm'n Dec. FOF ¶ 64; 2017 Planning Comm'n Proposed Dec. FOF ¶ 93.
- **Despite progress made to divert waste from the landfill via recycling, burning waste for energy, and reuse, a landfill is still needed on Oahu.** 2019 Planning Comm'n Proposed Dec. FOF ¶ 129 (emphasis added); 2017 Planning Comm'n Dec. FOF ¶ 100; 2017 Planning Comm'n Proposed Dec. FOF ¶ 129.

The evidentiary record from the contested case hearing on the 2011 Application supports the findings in the 2019 Planning Commission Proposed Decision. Relevant evidence includes the following:

- The Director of ENV could not speculate that there would be a time in the future that we would be completely landfill-free because there are materials that cannot be composed, reused, or combusted. Even recycled products create a residue. Further, the City needs the landfill as a backup to H-POWER and for emergencies such as natural disasters. PC Tr. 1/11/12 141:1-25.
- Even after the third boiler is operational, certain wastes will need to be landfilled. This includes asbestos, used motor oil, lead acid batteries, combustion ash, sewage sludge, agricultural waste, medical waste, scrap tires, auto shredder residue, and sandblast grit. PC Tr. 4/11/12 118:16-122:5.
- All recyclers generate a residue. Residue is material that is not recyclable and thus, must be landfilled. PC Tr. 1/11/12 137:19-20; 138:7-25.

- Schnitzer Steel Hawaii Corp. generated about 200 tons of ASR each day, seven days a week. PC Tr. 1/25/12 76:7. ASR is not suitable for processing at H-POWER and must be landfilled. PC Tr. 1/11/12 138:23-24; 139:7-8.
- Schnitzer Steel Hawaii Corp.'s solid waste management permit requires it to dispose of the ASR in a sanitary landfill. The ASR cannot be sent to PVT, the private landfill on Oahu. PC Tr. 1/11/12 76:8-12.
- The State Department of Health is working with the City to determine alternative disposal options but there are wastes that cannot be burned, recycled, reused or shipped, and so they must be disposed of by landfilling. H-POWER's planned maintenance shut-downs and emergencies created by natural disasters require alternative disposal options. There is still a need for a landfill. PC Tr. 1/25/12 12:4-14.
- Dwight Miller testified that a landfill is needed for wastes that cannot otherwise be disposed of. PC Tr. 3/7/12 99:14-23.
- If there is a natural disaster – such as a hurricane, tsunami, or 100-year storm – that produces unmanageable debris for H-POWER or incapacitates the H-POWER facility, there will be no expeditious disposal option. Such a stoppage will have an adverse island-wide impact on all of the communities on Oahu, because the City will no longer have the ability to dispose of certain wastes in a sanitary manner. Steinberger Written Testimony ¶ 87.

Based on the foregoing, there is substantial evidence to support the finding of fact that the WGSL is needed for disposal of material that cannot be combusted, recycled, reused or shipped, and for the disposal of ash and residue produced by H-POWER, ASR, and disaster debris.

**d. WGSL Is Required As Permit Condition To Operate H-POWER.**

In the 2009 Planning Commission Decision, and in each decision and proposed decision issued since 2009, the Planning Commission found that the continued availability of WGSL is required as a permit condition to operate H-POWER. The salient findings are as follows:

- The continued availability of **WGSL is required as a permit condition to operate H-POWER.** 2009 Planning Comm'n Dec. FOF ¶ 92 (emphasis added); 2019 Planning Comm'n Proposed Dec. FOF ¶ 130; 2017 Planning Comm'n Dec. FOF ¶ 101; 2017 Planning Comm'n Proposed Dec. FOF ¶ 130.
- The continued **operation of the H-POWER facility is dependent upon continued operation of the WGSL for disposal of ash and residue.** Also,

DOH requires as a condition of H-POWER's permit that H-POWER have a **disposal alternative** – the landfill – **as a contingency for routine maintenance, natural disasters, and emergencies**. 2019 Planning Comm'n Proposed Dec. FOF ¶ 90 (emphasis added); 2017 Planning Comm'n Dec. FOF ¶ 61; 2017 Planning Comm'n Proposed Dec. FOF ¶90.

The evidentiary record from the contested case hearing on the 2011 Application supports the findings in the 2019 Planning Commission Proposed Decision. Relevant evidence includes the following:

- The WGS� serves as a back-up for H-POWER. PC Tr. 1/11/12 136:23-24.
- As a condition of the H-POWER permit, the City is required to have a permitted site available to receive waste diverted from the H-POWER facility. WGS� is the only permitted site available as a back-up for H-POWER. PC Tr. 4/11/12 124:14-125:6.
- H-POWER must undergo scheduled maintenance, which may take as long as two weeks. During that time, municipal solid waste must be disposed of at WGS�. PC Tr. 1/11/12 136:5-12.

Accordingly, there is substantial evidence to support the finding of fact that the WGS� is required as a permit condition to operate H-POWER.

e. **WGS� Needed To Prevent Serious Health And Safety Issues.**

In the 2009 Planning Commission Decision, and in each decision and proposed decision issued since 2009, the Planning Commission found that the WGS� is needed to prevent serious health and safety issues for the people on Oahu. The salient findings are as follows:

- 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. 2009 Planning Comm'n Dec. FOF ¶ 93 (emphasis added); 2019 Planning Comm'n Proposed Dec. FOF ¶ 134; 2017 Planning Comm'n Dec. FOF ¶ 105; 2017 Planning Comm'n Proposed Dec. FOF ¶ 134.
- **Closing the WGS� to MSW without alternative disposal options will endanger public health**. 2019 Planning Comm'n Proposed Dec. FOF ¶ 135 (emphasis added); 2017 Planning Comm'n Dec. FOF ¶ 106; 2017 Planning Comm'n Proposed Dec. FOF ¶ 135.

The evidentiary record from the contested case hearing on the 2011 Application supports the findings in the 2019 Planning Commission Proposed Decision. Relevant evidence includes the following:

- The ultimate purpose of keeping the landfill is for public protection because the City will always have to deal with waste that has no other disposal option. The City must be able to have a fail-safe in case something goes wrong with the other disposal methods. PC Tr. 1/11/12 158:18-25.
- If the landfill were to close on July 31, 2012, the potential health hazard is that there would be no place to dispose of municipal solid waste. If the City is forced to place its municipal solid waste somewhere else without a permit, the City would be in violation of the law. PC Tr. 4/4/12 150:16-151:4.
- The State Department of Health Solid and Hazardous Waste Branch is concerned about the imposition of the July 31, 2012 deadline at the point in time when there are no disposal options for certain types of waste which may potentially threaten human health or the environment. PC Tr. 1/25/12 12:15-19.

Based on the foregoing, there is substantial evidence to support the finding of fact that the WGS� is needed to prevent serious health and safety issues.

**2. The Landfill Closure Condition Cannot Be Approved Because It Is Inconsistent With The Evidence And Not Supported By Substantial Evidence.**

Even if an alternate landfill site could address the needs set forth above, there is nothing in the record to justify closing WGS� before it reaches capacity and incurring the otherwise avoidable costs of establishing a landfill elsewhere, along with the associated administrative, technical, regulatory, and environmental requirements. See 2011 Contested Case Hearing Exhibit “A11.”<sup>2</sup> Moreover, the record negates the possibility that a landfill could be operational within the time frame being contemplated by the Commission.

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<sup>2</sup> On December 1, 2004, the City Council selected the Waimanalo Gulch site as the City’s future landfill site. The City Council concluded that (1) the Waimanalo Gulch site has at least 15 years of capacity left, (2) the Waimanalo Gulch site is the most economical site for which all costs and revenues are known factors, (3) other sites would require large amounts of money to acquire land and develop the site and infrastructure, (4) an operating contract is already in existence, and (5) the landfill operator is committed to addressing community concerns. See 2011 Contested Case Hearing Exh. “A11.”

The record of the Planning Commission proceedings relating to the 2008 and 2011 Applications establishes that it will take more than seven years to identify and develop a landfill site. Therefore, if, beginning in 2024, the Planning Commission closes WGSL to all use and waste except ash and residue from H-POWER and ASR, the City will have no landfill available for the disposal of material that cannot be combusted, recycled, reused or shipped. This means that the City will not be able to dispose of wastes that cannot be recycled or burned at H-POWER, such as wastewater screenings, animal carcasses, tank bottom sludge, contaminated food waste that cannot be recycled, and certain contaminated soil. There is no MSW facility on Oahu that is permitted to accept these wastes that must be landfilled. Moreover, the City will not have a landfill that can accept disaster debris that may be generated in a natural disaster.

An equally devastating consequence of the partial closure of WGSL is that without the continued availability of WGSL, the City will be forced to become noncompliant with its H-POWER operating permit. The evidence establishes that the City is required to have a permitted site available to receive wastes diverted from the H-POWER facility, and that the WGSL is the only permitted site available to serve as a back-up for H-POWER. Waste is diverted from H-POWER to WGSL when the facility undergoes scheduled maintenance, which may take as long as two weeks. Waste is also diverted to WGSL in emergency circumstances.

Further, the WGSL is necessary for proper solid waste management. Closing the WGSL without alternative disposal options for all the wastes that cannot be combusted, recycled, reused or shipped will endanger public health and create serious health and safety issues for the residents of Oahu.

Finally, the evidence establishes that it will take at least seven years from site selection for a new landfill site to be operational. Therefore, a condition that partially closes the landfill

within five years and completely closes the landfill within eight years is inconsistent with the evidence in the record.

The findings of fact in the 2009 Planning Commission Decision, and in each decision and proposed decision issued since 2009, which is supported by the evidence in the record of the Planning Commission proceedings relating to the 2008 and 2011 Applications, demonstrates a continuing need to dispose of municipal solid waste at WGSF for more than seven years. Thus, the proposed closure condition cannot be approved because it is inconsistent with the evidence in the record and not supported by substantial evidence.

**C. The Planning Commission's Decision Must Be Based On The Record In The Proceedings On The 2008 and 2011 Applications.**

In accordance with Hawaii Revised Statutes § 91-9(g), "no matters outside the record shall be considered by the agency in making its decision except as provided herein." Thus, the Planning Commission may not consult sources outside the record when acting in an adjudicatory capacity. See Mauna Kea Power Co. v. Bd. of Land and Natural Res., 76 Haw. 259, 262 (1994).

At the hearing on February 28, 2019, Commissioners Gifford Chang and Cord Anderson inquired about and expressed concern regarding ENV's efforts since 2012 to identify a new landfill site. ENV would have welcomed the opportunity to inform the Commissioners about ENV's efforts to and dispel their concerns, however, the evidence in this proceeding was closed on April 23, 2012.<sup>3</sup> So, the subject of the commissioners' inquiry and concern is not part of the record of this hearing, cannot be addressed by ENV, and cannot be considered by the Planning Commission as it decides this contested case.

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<sup>3</sup> After the evidentiary record was closed on April 23, 2012, the Planning Commission considered and denied three motions to reopen the record in this proceeding. Two motions to reopen were denied on October 12, 2016, and one was denied on February 28, 2019.



#### IV. CONCLUSION

Throughout these proceedings the Planning Commission has been consistent in refusing to impose a closure deadline for WGSL. Nonetheless, these proceedings have remained before the Commission for such a prolonged period of time, based largely upon the following determination by the Hawaii Supreme Court due to a closure deadline erroneously imposed by the LUC:

Stated simply, the above-quoted Findings of Fact, Conclusions of Law, and Decision and Order by the Planning Commission, all expressly adopted by the LUC, do not support the restriction in Condition 14 imposing a termination date of July 31, 2012 for the deposit of MSW at WGSL. To the contrary, the Planning Commission's Findings of Fact clearly demonstrate the continuing need to dispose of municipal solid waste at WGSL beyond July 31, 2012. For example, the Planning Commission acknowledged Mr. Doyle's testimony that "it would take more than seven years to identify and develop a new landfill site." The Planning Commission also found that "a landfill is currently necessary for proper solid waste management," and that "WGSL is the only permitted public MSW facility on the island of Oahu[.]" Moreover, the Planning Commission's Decision and Order expressly provides that MSW may be deposited at WGSL's expanded site "until capacity as allowed by the State Department of Health is reached." ... [T]he evidence in the record as a whole does not support, much less constitute "substantial evidence" for the imposition of Condition 14. Thus, Condition 14 cannot stand.

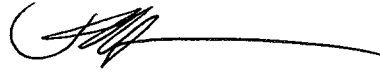
Dep't of Env'tl. Servs. v. Land Use Comm'n, 127 Haw. 5, 17 (2012). ENV submits that the same deficiencies in the record exist, and will have the same result, if the Commission entertains Intervenor KOCA's proposed landfill closure condition.

Based on the foregoing, ENV respectfully requests that the Planning Commission reject the proposed landfill closure condition because it is inconsistent with the evidence and not supported by substantial evidence. Further, in deciding this contested case, the Planning

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Commission may not consider matters outside the record. Thus, the Planning Commission cannot consider ENV's efforts since 2012 to identify a new landfill site.

DATED: Honolulu, Hawaii, March 18, 2019.



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KAMILLA C. K. CHAN  
Deputy Corporation Counsel  
Attorneys for Applicant  
DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY  
OF HONOLULU

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

For a New Special Use Permit To Supersede  
Existing Special Use Permit To Allow A  
92.5-Acre Expansion And Time Extension For  
Waimanalo Gulch Sanitary Landfill,  
Waimanalo Gulch, O'ahu, Hawai'i, Tax Map  
Key No. (1) 9-2-03: 72 And 73,

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF  
HONOLULU

To delete Condition No. 14 of Special Use  
Permit No. 2008/SUP-2 (also referred to as  
Land Use Commission Docket No. SP09-403)  
which states as follows:

“14. Municipal solid waste shall be allowed at  
the WGS� up to July 21, 2012, provided that  
only ash and residue from H-POWER shall be  
allowed at the WGS� after July 31, 2012.”

FILE NO. 2008/SUP-2

DECLARATION OF KAMILLA C. K.  
CHAN

**DECLARATION OF KAMILLA C. K. CHAN**

I, KAMILLA C. K. CHAN, hereby declare the following:

1. I am an attorney duly licensed to practice law in the State of Hawaii and am employed by the City and County of Honolulu, Department of the Corporation Counsel, as a Deputy Corporation Counsel, and I make this declaration based on personal knowledge.

2. Attached hereto as Exhibit "1" is a true and correct copy of the transcript of the proceedings in this action before the State Land Use Commission on May 24, 2017.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, March 18, 2019.



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KAMILLA C. K. CHAN

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State OF HAWAII

LAND USE COMMISSION

Hearing held on May 24, 2017

Airport Conference Center

400 Rogers Blvd., Suite 700, Room #3

Honolulu, Hawaii 96813

Commencing at 9:00 a.m.

AGENDA

I. Call to Order

II. Adoption of Minutes

III. Tentative Meeting Schedule

IV. ACTION

SP09-403 Department of Environmental Services,  
City and County of Honolulu (Waimanalo Gulch  
Sanitary Landfill), (Oahu)

V. Executive Session

VI. Adjournment

BEFORE: Jean Marie McManus, CSR #156

## 1 APPEARANCES:

2 EDMUND ACZON, Chairman  
3 JONATHAN SCHEUER, Vice Chairman  
4 ARNOLD WONG, Vice Chairman

## 4 COMMISSIONERS:

5 GARY OKUDA  
6 LINDA ESTES  
7 DAWN N.S. CHANG  
8 NANCY CABRAL

9 DIANE ERICKSON, ESQ.  
10 Deputy Attorney General

## 9 STAFF:

10 DAN ORODENKER, Executive Director  
11 RILEY K. HAKODA, Planner/Chief Clerk  
12 BERT K. SARUWATARI, Planner

13 CALVIN CHIPCHASE, ESQ.  
14 CHRISTOPHER GOODIN, ESQ.  
15 For Ko Olina Community Association and  
16 Maile Shimabukuro

17 RICHARD WURDEMAN, ESQ.  
18 For Colleen Hanabusa

19 IAN SANDISON, ESQ.  
20 AVERY MONTRO, ESQ.  
21 For Schnitzer Steele Hawaii

22 DANA VIOLA, ESQ.  
23 KATHLEEN KELLY, ESQ.  
24 Deputies Corporation Counsel  
25 For Department of Environmental Services  
City and County of Honolulu

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City and County of Honolulu

1 CHAIRMAN ACZON: Good morning. This is the  
2 May 24/25th, 2017 Land Use Commission meeting. The  
3 Chair notes for the record that there is a  
4 typographical error in Agenda item II. The date of  
5 the minutes to be considered is actually April 26,  
6 2017.

7 The first order of business is adoption of  
8 any corrections or comments on that. If not, is  
9 there a motion to adopt?

10 COMMISSIONER CHANG: I move to adopt.

11 COMMISSIONER ESTES: Second the motion.

12 CHAIRMAN ACZON: A motion has been made by  
13 Commissioner Chang and seconded by Commissioner  
14 Estes.

15 All in favor say "aye". Opposed?

16 VICE CHAIR SCHEUER: Abstain.

17 CHAIRMAN ACZON: The minutes are adopted  
18 with one abstention.

19 Commissioner Chang, do you have any -- let  
20 me go through the next agenda. The next agenda item  
21 is the tentative meeting schedule. Mr. Orodener.

22 EXECUTIVE DIRECTOR: Thank you, Mr. Chair,

23 On May 31st, we have a special meeting to  
24 handle the Lana'i remand case. That will be on Maui.

25 June 14th was set aside for this Waimanalo

1 Gulch case, if needed. June 15th is vacant.

2 June 28th and 29th on Kaua'i Lima Ola  
3 Petition.

4 And on July 19 and 20th we will be on Maui  
5 for Kau'ono'ulu FEIS acceptance.

6 July 26th, once again on Kaua'i for action  
7 on the Lima Ola matter.

8 August 9th and 10th, we have Oahu Solar  
9 Special Permit that are scheduled.

10 August 23rd and 24th is scheduled, the  
11 Kau'ono'ulu Motion to Amend on Maui.

12 And September is open.

13 October 16, HCPO, which will be on Oahu.

14 CHAIRMAN ACZON: Thank you, Mr. Orodener.

15 Commissioners, any questions on our  
16 schedule? Thank you.

17 The next agenda item meeting on Docket  
18 SP09-403 Department of Environmental Services, City  
19 and County of Honolulu, Oahu (Civil No.  
20 09-1-2719-11).

21 First, Intervenor Ko Olina Community  
22 Association and Maile Shimabukuro's Motion to Deny  
23 and Remand.

24 Second, Intervenor Ko Olina Community  
25 Association and Maile Shimabukuro's Motion to Deny



1 the Application unless certain conditions are  
2 imposed.

3 Before we move on, I want to call on  
4 Commissioner Chang.

5 COMMISSIONER CHANG: I would like to make a  
6 disclosure that a couple of years ago I was a  
7 consultant for Waimanalo Gulch on a criminal matter.

8 CHAIRMAN ACZON: Any objections from the  
9 parties?

10 MR. CHIPCHASE: No objections.

11 MR. SANDISON: No objection.

12 MS. VIOLA: No objection.

13 MR. WURDEMAN: No.

14 CHAIRMAN ACZON: We will first consider  
15 Intervenor Ko Olina Community Association and Maile  
16 Shimbukuro's Motion to Deny and Remand and take the  
17 other items in order as necessary.

18 Will the parties please identify themselves  
19 for the record?

20 MS. VIOLA: Good morning, Chair, Vice  
21 Chair, Members of the Commission, Dana Viola and  
22 Kathleen Kelly on behalf of the Department of  
23 Environmental Services, City and County of Honolulu.

24 MR. CHIPCHASE: Cal Chipchase and Chris  
25 Goodin on behalf of the Ko Olina Community

1 Association and Senator Maile.

2 MR. WURDEMAN: Good morning, Richard N.  
3 Wurdeman on behalf of Intervenor Colleen Hanabusa.

4 MR. YEE: Deputy Attorney Bryan Yee on  
5 behalf of Office of Planning. With me is Rodney  
6 Funakoshi behind me from Office of Planning.

7 MR. SANDISON: Good morning, Ian Sandison  
8 and Avery Montro on behalf of Intervenor Schnitzer  
9 Steel Hawaii.

10 CHAIRMAN ACZON: Good morning everyone.  
11 Thank you. Let me update the record.

12 On May 18, 2016, the Commission met on this  
13 matter to receive a status report and take  
14 appropriate action if necessary.

15 On May 31, 2016, the Commission received  
16 the May 2016 mandated status report from the  
17 Department of Environmental Services.

18 On June 7, 2016, the Commission received a  
19 copy of correspondence to the Honolulu Planning  
20 Commission from Deputy Corporation Counsel Kamilla  
21 Chan re: Request for follow-up status report or  
22 extension on State Special Use Permit to Supersede  
23 Existing Special Use Permit to allow a 92.5 acre  
24 expansion and time expansion for the Waimanalo  
25 Sanitary Gulch Landfill.

1           On June 14, 2016, the Commission received a  
2 copy of correspondence to the Honolulu Planning  
3 Commission from Deputy Attorney General Bryan Yee re:  
4 Request for follow-up status report or extension on  
5 State Special Use Permit to Supersede Existing  
6 Special Use Permit to allow a 92.5 acre expansion and  
7 time expansion for the Waimanalo Sanitary Gulch  
8 Landfill.

9           On June 27, 2016, the LUC received  
10 correspondence from the City and County of Honolulu  
11 Deputy Corporation Counsel Kamilla Chan re: Copy of  
12 Department of Environmental Services' Motion to Stay  
13 Proceedings at the Planning Commission to April 22,  
14 2017.

15           From July, 2016 - March 2017, the  
16 Commission received mandated status reports from  
17 Environmental Services.

18           On December 6, 2016, the Commission  
19 received copies of City and County of Honolulu  
20 Planning Commission correspondence regarding the  
21 Waimanalo Gulch Sanitary Landfill.

22           On May 1, 2017, the Commission Received  
23 Planning Commission of City and County of Honolulu,  
24 File No. 2008/SUP-2-Findings of Fact, Conclusions of  
25 Law and Decision and Order dated 5/1/2017.

1           On May 3, 2017, the Commission received the  
2 Consolidated Record from DPP-Planning Commission, an  
3 index of the record and original and copies of the  
4 2008 proceedings.

5           On May 12, 2017, the Commissioner received:  
6           Intervenors KOCA and Shimabukuro's Motion  
7 to Deny and Remand and Exhibits A through D.

8           Intervenors KOCA and Shimabukuro's  
9 Alternate Motion to Deny the Application Unless  
10 Additional Conditions are Imposed, Exhibits 1 through  
11 5.

12           On May 17, 2017, the Commission mailed the  
13 May 24-25, 2017 agenda notice to the Parties,  
14 statewide and Oahu mailing lists.

15           On May 19, 2017, the Commission received:  
16           Department of Environmental Services, City  
17 and County of Honolulu's response to Intervenors'  
18 KOCA and Shimabukuro's Motion to Deny and Remand and  
19 Exhibit 1.

20           Department of Environmental Services, City  
21 and County of Honolulu's Memorandum in Opposition to  
22 Intervenor's KOCA and Shimabukuro Alternate Motion to  
23 Deny the Application unless additional conditions are  
24 imposed, and Exhibits 1.

25           On May 22, 2017, the Commission received:

1 OP's public testimony Statement  
2 Recommending approval of SP application.

3 Intervenor Hanabusa's Joinder to  
4 Intervenors' KOCA and Shimabukuro's Motion to Deny  
5 and Remand.

6 Department of Environmental Services  
7 Amended Certificates of Service to:

8 Department of Environmental Services, City  
9 and County of Honolulu's Response to Intervenor  
10 KOCA's Motion to Deny and Remand.

11 Department of Environmental Services, City  
12 and County of Honolulu's Memorandum in Opposition to  
13 Intervenor KOCA's Alternate Motion to Deny the  
14 Application unless additional conditions are imposed.

15 On May 23, 2017, the Commission received:

16 Correspondence from Intervenors KOCA and  
17 Shimabukuro regarding Request to Settle the Proposed  
18 Form of Order Granting in part Intervenor's Motion to  
19 Deny and Remand.

20 Correspondence from Intervenor Schnitzer  
21 Steel-Statement of Position on Intervenors' Motion to  
22 Deny and Remand.

23 Let me go over our procedures for this  
24 docket.

25 First I will call for those individuals

1 desiring to provide public testimony for the  
2 Commission's consideration to identify themselves.  
3 All such individuals will be called in turn to our  
4 witness box where they will be sworn in prior to  
5 their testimony.

6 After completion of the public testimony  
7 Movant Intervenor KOCA/Shimabukuro will make its  
8 presentation on its motions.

9 After the completion of the Movant's  
10 presentation, the Department of Environmental  
11 Services will make their presentation on the motions.

12 After the completion of the Department of  
13 Environmental Services' presentation, Intervenor  
14 Hanabusa will make their presentation on the motions.

15 After the completion of Intervenor  
16 Hanabusa's presentation, we will receive any argument  
17 on the motions from Intervenor Schnitzer Steel.

18 After the completion of Intervenor  
19 Schnitzer Steel's comments, we will receive any  
20 argument from the Department of Environmental  
21 Services, City and County of Honolulu on the motions.

22 After the completion of Department of  
23 Environmental Services argument on the motions, we  
24 will receive public testimony from the State Office  
25 of Planning.

1           After we receive comments from the State  
2 Office of Planning, the Commission will conduct its  
3 deliberations.

4           After we receive public comments from the  
5 State Office of Planning, the Commission will conduct  
6 its deliberations.

7           I would also note for the parties and the  
8 public that from time to time I will be calling for  
9 short breaks.

10           Are there any questions as to our procedure  
11 for today?

12           MR. YEE: Excuse me, Chair. Bryan Yee for  
13 Office of Planning.

14           When you were going through the list, I  
15 think you were referring after Intervenor Schnitzer  
16 Steel that you were going to be receiving comments  
17 from the City and county.

18           This is I think where you typically would  
19 receive comments from the Department of Planning and  
20 Permitting of the City and County on any scheduled  
21 permit, rather than comment from one of the -- in  
22 this case, one of the Applicants for the Special  
23 Permit.

24           So I think, although you said you had  
25 received comments from Department of Environmental

1 Services, I think what you probably meant to say was  
2 you would receive a comment from the City Department  
3 of Planning and Permitting who I believe is not  
4 showing up today.

5 MR. YOUNG: I'm here.

6 MR. YEE: Oh, I'm sorry. So they may  
7 provide comments, but I think that's where their  
8 comments would occur -- their comments would occur,  
9 rather than Environmental Services.

10 CHAIRMAN ACZON: Okay, we will adjust the  
11 procedure. Thank you, Mr. Yee.

12 Are there any members of the public wishing  
13 to give testimony?

14 EXECUTIVE DIRECTOR: Thank you, Mr. Chair.  
15 No one has signed up to testify.

16 CHAIRMAN ACZON: Intervenor  
17 KOCA/Shimabukuro, would you like to reserve any time  
18 rebuttal before you start your presentation?

19 MR. CHIPCHASE: Yes, Chair.

20 CHAIRMAN ACZON: Please proceed.

21 MR. CHIPCHASE: Commissioners, as was noted  
22 in the agenda that the Chair read and you have before  
23 you, Ko Olina filed two motions.

24 First is the Motion to Deny and Remand;  
25 second is the Motion to Deny unless additional



1 conditions are imposed.

2 I'll submit to you that there is no need to  
3 move past the first motion today, the Motion to Deny  
4 and Remand. That motion raised three procedural  
5 objections, if you will, to the process and  
6 participation of the Commission in reaching a  
7 decision on the Applications.

8 The procedural errors in that process  
9 warrant remand, and every party has acknowledged that  
10 to the Commission. So we can narrow the scope even  
11 further. We raise three issues in our motions, and  
12 need to talk about two of them.

13 The Commission, as the Chair noted, has  
14 received the complete record from the Planning  
15 Commission, received it on May 3rd, a complete  
16 record. Also the Planning Commission's recommended  
17 decision signed by the Commission and stamped and  
18 made part of the record.

19 Everything has come up to this body for  
20 decision. The problem is in reaching that decision,  
21 the Planning Commission erred. And it erred in  
22 material ways.

23 The first error relates to Planning  
24 Commission Rule 2-75, which we put up on the screen.  
25 That rule creates a special procedure when less than

1 all of the Commissioners are hearing the proceedings  
2 on the hearing day.

3 VICE CHAIR SCHEUER: Procedurally, is this  
4 an exhibit, this presentation?

5 MR. CHIPCHASE: The presentation is not a  
6 separate exhibit.

7 VICE CHAIR SCHEUER: How will it be  
8 included in the proceedings?

9 MR. CHIPCHASE: It's just as a visual aid.  
10 Everything in the presentation is part of our  
11 filings, but the presentation itself is not a  
12 separate exhibit.

13 VICE CHAIR SCHEUER: Thank you for  
14 clarifying.

15 MR. CHIPCHASE: Happy to submit --

16 CHAIRMAN ACZON: We can give you time for  
17 your argument. Can you please do that?

18 MR. CHIPCHASE: Certainly.

19 CHAIRMAN ACZON: Please proceed with your  
20 argument.

21 MR. CHIPCHASE: So the Rule 2-75 creates  
22 special procedure when fewer than all the  
23 Commissioners participate.

24 COURT REPORTER: Slow down a little bit for  
25 me, please.

1 MR. CHIPCHASE: You got it.

2 So if you have a situation where a  
3 Commissioner misses a hearing day, then this  
4 procedure applies. And what this procedure says is  
5 that before the Commission reaches a decision, it has  
6 to circulate the proposed order to all the parties,  
7 allow all the parties to submit exceptions to that  
8 proposed order, and then allow argument on that order  
9 before you can adopt it.

10 So in our case, which, as you know, has  
11 spanned a long time, none of the Commissioners  
12 participated in all of the hearing dates. None of  
13 them.

14 And so it's undisputed that this procedure  
15 applied to our case. It also is undisputed this  
16 procedure was not followed. No one challenges that.

17 So as a consequence of that failure,  
18 failure to follow procedure, the matter has to go  
19 back. The decision is defective, because it was  
20 reached in an unlawful procedure.

21 The second problem with the Commission,  
22 Planning Commission decision is that they didn't  
23 follow the Land Use Commission's direction.

24 In 2012 the Land Use Commission remanded  
25 the 2008 Application to the Planning Commission and

1 directed the Planning Commission to consolidate it  
2 with the later filed 2011 Application. And then  
3 after consolidation, issue a single set of Findings  
4 of Facts, Conclusions of Law, Decision and Order so  
5 that this body only had to consider one complete  
6 document.

7           The Planning Commission got it half right.  
8 They consolidated the proceedings so that the 2008  
9 and 2011 proceedings were consolidated and made one  
10 proceeding. But then when it issued its decision, it  
11 did not issue consolidated Findings of Fact,  
12 Conclusions of Law, Decision and order. It only  
13 addressed 2011 a draft was issued consolidated  
14 Findings of Fact, Conclusions of Law, Decision and  
15 Order. It only addressed 2011 oral -- deliberately  
16 so, if you look at the transcript. Why? I'm  
17 unclear. But deliberately so. That's not what the  
18 Planning Commission was directed to do.

19           So, again, the decision is defective. No  
20 party disputes any of that, that the decision was not  
21 uniform or unified, that it is defective, and that it  
22 needs to go back.

23           And so if you look at the parties'  
24 position -- this is from ENV's response to our  
25 motion -- ENV acknowledged that it would be entirely

1 appropriate to remand for compliance with 2-75 in  
2 issuing the final decision.

3           And if you look at Schnitzer's submission,  
4 Schnitzer agrees that the decision is invalid and  
5 that this Commission, the Land Use Commission, is not  
6 in receipt of a valid legally effective decision.  
7 All of that is true.

8           The question is not whether the decision is  
9 defective, or even what the outcome ultimately is.  
10 It's remand and go back to the Planning Commission  
11 for further proceedings.

12           The only thing the parties dispute is what  
13 this body needs to say and do to get us back there in  
14 the appropriate way.

15           So our position, and the position joined by  
16 Intervenor Colleen Hanabusa, is that the appropriate  
17 vehicle is to grant the motion, our motion in part,  
18 which would be to deny the application without  
19 prejudice to refile, to continue the proceedings,  
20 to coming back before this body, deny it without  
21 prejudice and order a remand for further proceedings.

22           We believe that that's the appropriate  
23 procedure, because this body is governed by two --  
24 really one statutory provision, and one rule  
25 provision.

1           The statutory provision in 2-56(e), which  
2 we put on the screen, sets out this body's role in a  
3 Special Use Permit proceeding, what this body must  
4 do.

5           And so if you look down at the bottom of  
6 that section it directs the Land Use Commission that  
7 it shall act to do three things. Approve, approve  
8 with modification, or deny the petition. It has to  
9 do that with 45 days after receipt of the complete  
10 record.

11           Again, as the Chair read in the  
12 introduction, you have received a record. Within  
13 45 days you shall do one of these three things.  
14 "Shall" is always viewed as a mandatory term in  
15 statutory construction.

16           There are three enumerated acts. You have  
17 to do one of those three things within 45 days.

18           This statutory provision is mirrored in  
19 large part in the Planning Commission's rule on  
20 Special Permit. In 15-15-96(a), if we look at the  
21 first part of that rule, the substance of it tracts  
22 that statute, you shall act -- again, mandatory  
23 language -- within 45 days to do one of three things.

24           The only three things set out in that rule  
25 are the same three things set out in the statute:

1 Approve, approve with modification, or deny. That is  
2 the "shall act". That is the mandatory thing that  
3 you must do.

4 What the rule adds is the consequences of  
5 those actions, or rather an option as part of those  
6 actions.

7 At the bottom of the rule it provides that  
8 upon determination by the Commission, the petition  
9 may be remanded to the Planning Commission for  
10 further proceedings.

11 So we see a couple of things here. One,  
12 introduction to that power says "upon determination".  
13 The determination is the first part of that rule, and  
14 the statute, you shall act: Approve, approve with  
15 modification or deny.

16 The second thing we see in that rule is the  
17 discretionary term "may". You don't have to remand.  
18 You may remand for further proceedings. What you  
19 have to do is to act to deny -- approve, I'm sorry --  
20 approve, approve with modifications, or deny. If you  
21 do that, then you may remand. That is the structure  
22 that's set up by the statute mirrored in the rule.  
23 That's the procedure that we believe is appropriate  
24 today.

25 The other parties, I would submit for

1 optical reasons, don't like the word "deny"; don't  
2 like that you would act to deny the application. And  
3 so they've come up with various creative reasons that  
4 you should follow a different procedure, different  
5 terminology to get it back to the Planning  
6 Commission.

7           One argument advanced by ENV is that what  
8 you really have is an incomplete record because the  
9 decision was made on an unlawful procedure, your  
10 record isn't complete. And so you can just remand to  
11 complete the record. That position ignores a couple  
12 of things.

13           The first is that you do have a complete  
14 record. The record is the papers or are the papers,  
15 the exhibits, the hearing transcripts, you have all  
16 of that. Right, you have a complete record. And if  
17 you didn't, the rule would provide that the Executive  
18 Director would poll the Planning Commission, and say  
19 we don't have a complete record, send a complete  
20 record up to us.

21           That's obviously not the situation here.  
22 The record is complete. There is nothing else for  
23 the Planning Commission to send up to you. Instead  
24 what the Planning Commission has to do is redo its  
25 decision to do it right.



1 Schnitzer Steel doesn't dispute that the  
2 record is complete. Their view of it is that you  
3 don't have -- because your decision -- the decision  
4 the Planning Commission reached is legally defective,  
5 it's really like you don't have a decision. That  
6 position too is -- (coughing - inaudible).

7 One is the fact that you actually do have a  
8 decision. You have something in writing signed by  
9 all the Commissioners who participated in that --  
10 (coughing - inaudible) -- and to made part of the  
11 record sent to you. That's why we are here, is that  
12 you actually have a decision.

13 The second thing is that a legally  
14 defective decision doesn't become -- (coughing -  
15 inaudible) it's not a nonentity. It requires some  
16 action on it to dispose of it. And how you dispose  
17 of it, again, is directed by statute: Approve,  
18 approve with modification, deny. If you do those  
19 three things, then you may remand. Do one of those  
20 three things, you may remand.

21 ENV's next argument is that the rule  
22 creates a fourth option, that remand is not  
23 controlled by doing one of those three things,  
24 approve, approve with modification or deny. It  
25 stands alone as a fourth option. You cannot do any

1 of those and still remand for further proceeding.

2 A couple problems with that view as well.  
3 One is that it conflicts with the statute. The  
4 statute doesn't say: You shall approve, approve with  
5 modification, deny or remand. It says within 45 days  
6 you shall do one of these three things. The rule  
7 cannot enlarge your power. The mandatory action --  
8 it cannot conflict with that mandatory action. The  
9 mandatory action is the three things. To add a  
10 fourth would conflict with the three expressed  
11 statutory direction, within 45 days you shall do one  
12 of these three things.

13 If you do a fourth thing, you haven't done  
14 one of the three things the statute told you to do  
15 within 45 days.

16 The second problem with the ENV  
17 construction is that it doesn't track the text of the  
18 rule. The text of the rule itself doesn't set that  
19 option up as a fourth part of the mandatory within  
20 45 days you shall do. It sets up at the bottom,  
21 introduced by, upon determination, right? The  
22 determination can only be one of those three things.  
23 That's your statutory power. That's what the rule  
24 says.

25 Then it says you "may" do it. So it's not

1 even one of the mandatory acts, it's a discretionary  
2 act that follows from doing the approval, the approve  
3 with modification, or the denial.

4 The fourth argument advanced by both ENV  
5 and Schnitzer in different ways is that, well, okay,  
6 Ko Olina's reading may be literal to the statute and  
7 the rules, but it's absurd, because if you deny the  
8 Application, you immediately lose jurisdiction, or  
9 the idea that denial and remand do not co-exist.

10 The remand is simply part of the order.  
11 It's one of the consequences. You could approve,  
12 approve with modification, or deny and not remand.  
13 You could do any of those three things and not  
14 remand, and it would simply be a final decision of  
15 this Commission. There would be no further agency  
16 proceedings on it; or you could do any of those  
17 things and remand. And then there absolutely are  
18 further agency proceedings on the Application.

19 You could, for example, approve an  
20 application in part. Approve an application in part,  
21 but require additional factual evidence to support a  
22 different part or with respect to a particular  
23 condition, and you could send it back down to the  
24 Planning Commission.

25 You can do the same thing with

1 modification. You approve an order modifying that  
2 would require further actual development.

3 Or as in our case, you could deny  
4 Application because the Application was made on an  
5 unlawful procedure which nobody disputes. What then  
6 do you do with it? You can't approve this  
7 Application. It was made on unlawful procedures.  
8 You can't modify it, because you can't fix the  
9 procedure. All you can do is deny it.

10 And then when you deny it, what's the  
11 consequence? Is that the end? Is the Application  
12 dead? No. We all agree it's not dead. You send it  
13 back down for further proceedings.

14 And this concept of reversal or the vacatur  
15 of the decision and a remand is not unique. We put  
16 up on the screen the rule from Hawaii Appellate  
17 procedure, Rule 35, sets up those two distinctions.  
18 If the court on appeal of a circuit court decision or  
19 a trial court decision reverses the court, that's the  
20 end of the proceeding, because you said it's denied,  
21 done. The decision is over. We have changed it. Or  
22 you can vacate. The court can vacate and remand. We  
23 have undone the decision. It's gone. We've  
24 eliminated it.

25 But that's not the end of the proceeding.

1 We have remanded for further proceedings, for  
2 whatever reason. We had it in this case when the  
3 court vacated the 2009 order and remanded. The court  
4 didn't reverse, it vacated and remanded and sent it  
5 back here, and you sent it back down to the Planning  
6 Commission.

7 That's the right result here using your  
8 rules in just slightly different language. You don't  
9 have a vacatur option, you have a denial option.  
10 Then you have the discretionary power to remand.  
11 That we submit is the procedure that should be  
12 followed today. Thank you.

13 CHAIRMAN ACZON: Thank you.

14 Ms. Viola, please proceed with ENV's  
15 argument.

16 MS. VIOLA: The City wants to clarify its  
17 position. The City is arguing that we are not  
18 objecting to remand to the limited purpose of  
19 allowing the Planning Commission to complete the  
20 record.

21 COURT REPORTER: I'm not hearing you well.  
22 Please speak into the microphone, if you can.

23 MS. VIOLA: Again, we want to clarify that  
24 our position is that the City is not objecting to  
25 remanding for the limited purpose, allowing the

1 Planning Commission to complete the record by  
2 demonstrating compliance with Planning Commission  
3 Rule 2-75, and that LUC's directive to provide a  
4 single Decision and Order for both the 2008 and 2011  
5 application.

6 The City believes that this is the accurate  
7 interpretation of the law. Mr. Chipchase is arguing  
8 that the statute and the rule require that there are  
9 decisions to be made, but the Statute 205-16 does not  
10 provide for remand, does not articulate specifically  
11 the right to remand.

12 The remand provision is articulated in the  
13 Land Use Commission Rule 15-15-96(a). If you read  
14 those two laws together, the only reasonable  
15 interpretation to allow for remand is on the  
16 condition that the record was not complete.

17 Because once the Land Use Commission makes  
18 a decision on the merits of the case to approve,  
19 approve upon modification, or deny, that is the Land  
20 Use Commission's decision on the substantive argument  
21 before the -- that's part of the -- it's the  
22 substantive conclusion and final decision on the  
23 Application.

24 A remand would allow for the Planning  
25 Commission to further -- to conduct further

1 proceedings on the Application itself. There is a  
2 difference between the Land Use Commission  
3 considering the substance of the decision and the  
4 substance of the Application, and therefore, making  
5 the final decision, and the Land Use Commission  
6 remanding for a procedural matter to allow the  
7 Planning Commission to conduct further proceedings on  
8 the Application to present to the Land Use Commission  
9 to rule on the substance of these Applications.

10 If the Land Use Commission -- excuse me.

11 Mr. Chipchase is arguing that the remand is  
12 only part and parcel of the decision on the  
13 Application, and that doesn't really make sense,  
14 doesn't make legal sense. Because if you decide on  
15 the Application itself, that's your decision relating  
16 to the parties. It doesn't require further action by  
17 the Planning Commission.

18 He gave examples of approving in part, but  
19 if the Planning Commission is not going to make a  
20 final decision on the merits of the case, they  
21 wouldn't bifurcate the case and separate part for  
22 final decision-making and part for continuing  
23 procedural actions by the Planning Commission. They  
24 would make a final decision either to approve,  
25 approve with modifications or deny.

1           And that final decision is recognized by or  
2 further reinforced by the fact that the statute as  
3 well as the rules provides that the decision by the  
4 Planning Commission is appealable to the circuit  
5 court. So it's a final action that is appealable to  
6 a higher court.

7           And the Planning Commission -- if the  
8 Planning Commission were to take further action, that  
9 would be without a final decision by the Land Use  
10 Commission.

11           Mr. Chipchase argues that this is a  
12 creative way of explaining how to do deal with this  
13 without getting the negative declaration or  
14 determination by the Land Use Commission on the  
15 Applicant's SUP. And it's not a creative way of  
16 explaining, it's the reasonable way of explaining,  
17 and it would justify the Land Use Commission's prior  
18 acts of remanding matters, other matters for which  
19 the Land Use Commission remanded without making the  
20 decision on the Application.

21           For example, in the Petition, the Glover  
22 Petition, which is Docket No. SP14-404, the Fong  
23 Construction Petition Docket No. SP94-387, and the  
24 County of Kauai Department of Public Works Petition  
25 Docket No. SP95-388, the Land Use Commission did take



1 action to remand the matter for further proceedings  
2 before the Planning Commission, and did not make a  
3 final decision on the Application itself.

4 So the only way to justify, to explain that  
5 process and to make it -- and to explain the correct  
6 proceedings is to state that the Land Use Commission  
7 in those previous proceedings, as well as this  
8 proceeding, made the determination that the record  
9 was incomplete and therefore justified remand for  
10 further procedural matters.

11 If, as Mr. Chipchase argues, that the Land  
12 Use Commission was required to make a decision on the  
13 application in those prior proceedings, that means  
14 that in those prior proceedings, the subsequent  
15 decision by the Land Use Commission to consider the  
16 amended Decision and Order from the Planning  
17 Commission would be nullified, and the automatic  
18 approval, and the 24 conditions, and five-year  
19 deadline on the Special Use Permit would be  
20 applicable to all those previous matters because  
21 there was no denial of the petition.

22 So for those reasons, the City would argue  
23 that the only reasonable interpretation of the  
24 statute, as well as the administrative rule, is that  
25 it is reasonable for the Land Use Commission to

1 remand the matter on the grounds that an incomplete  
2 record has not been provided by the Planning  
3 Commission, and to allow the Planning Commission to  
4 complete that record by demonstrating compliance with  
5 the procedural rules and with the recommendation of  
6 the LUC for a single Decision and Order.

7 CHAIRMAN ACZON: Thank you, Ms. Viola.

8 Mr. Wurdeman, please proceed with your  
9 argument.

10 MR. WURDEMAN: Thank you very much, Mr.  
11 Chair, members of the Commission.

12 Just briefly, I certainly agree with Mr.  
13 Chipchase's arguments and his construction of both  
14 the statute and the administrative rules, HAR  
15 15-15-96(a) and what should be done by this  
16 Commission.

17 Of course, this is done without waiving our  
18 earlier objections back in 2012 that the Commission  
19 should have never remanded the record to begin with.  
20 But without waiving that objection, we agree that Mr.  
21 Chipchase's articulation of the statute and the rule  
22 is the correct one.

23 It is clearly mandatory. There's a  
24 complete record that was sent to the Commission,  
25 unlike the case that I'm unfamiliar with that ENV

1 just tried to articulate as an exception.

2 But one other point I think is important to  
3 note, that unless -- and this is more of a practical  
4 consideration, based on the five years of inactivity  
5 of the Planning Commission and not following what the  
6 Land Use Commission initially ordered it to do in a  
7 timely fashion.

8 If we just simply remand, we may be stuck  
9 again in another five-year quagmire of the Planning  
10 Commission not doing what they're supposed to do and  
11 not vacating the legal order that they entered, and  
12 then we would be faced with that dilemma.

13 And I think that that practical matter is  
14 certainly a real one given the history of this case.

15 And, again, with respect to the rule and  
16 the statute, I think that denial without prejudice in  
17 the remand is the proper course to take in this  
18 matter. Thank you.

19 CHAIRMAN ACZON: Thank you. Mr. Sandison,  
20 please proceed.

21 MR. SANDISON: Schnitzer joins in and  
22 supports the City's argument and believes that this  
23 Commission should not consider the substance of the  
24 Planning Commission's decision, and that a denial  
25 would be a final decision under the Hawaii

1 Administrative Procedures Act, and that denial would  
2 then be ripe for appeal, I believe in this case, to  
3 the Supreme Court; and that the appropriate remedy is  
4 for the Land Use Commission to remand to the Planning  
5 Commission in order to allow the Planning Commission  
6 to fix the obvious procedural defects with its  
7 current decision; and that to substantively rule with  
8 a denial would compound the existing procedural  
9 errors. A denial without prejudice would be  
10 ineffective, and there is --

11 Mr. Chipchase, in his letter of yesterday,  
12 suggests a remedy of the timing issues would be to  
13 waive 15-96(e). We believe that that is  
14 inappropriate, and that the appropriate thing for the  
15 Land Use Commission to do is to simply remand the  
16 instruction to remedy the procedural defects.

17 That is the cleanest solution. It will end  
18 up with a clean Decision and Order coming back up.  
19 Any kind of final action today will further  
20 complicate this procedure. And it by far and away  
21 the best thing to do is to send it back down without  
22 taking final action, and making a decision which a  
23 denial would be, and allowing the Planning Commission  
24 to fix the issues, and then send back a clean record  
25 for the Commission to take on the substantive issues.

1 Thank you.

2 CHAIRMAN ACZON: Thank you, Mr. Sandison.  
3 Mr. Chipchase, your rebuttal.

4 MR. CHIPCHASE: If it is all right, I would  
5 like to speak after OP has given its comments.

6 CHAIRMAN ACZON: That's fine, Mr. Yee. You  
7 want to offer a witness?

8 MR. YEE: You want to ask for Department of  
9 Planning and Permitting to see if they have any --

10 CHAIRMAN ACZON: I will -- I was going to  
11 call them next.

12 MR. YEE: When you went through the list,  
13 you mentioned them first.

14 Sure. First of all, this is a highly  
15 technical legal issue before you. Everyone seems to  
16 be in agreement on what should be done. The matter  
17 should be sent back to the Planning Commission.  
18 They're to go through a process in which a proposed  
19 order is submitted to the parties. The parties have  
20 a chance to give their objection, file briefs, make  
21 an argument.

22 And the Planning Commission needs to come  
23 out with a decision which considers all their  
24 arguments as well as provides a unified decision for  
25 the entire consolidated case. Everyone agrees.

1           The argument seems to be over whether the  
2 method that is sent back -- by which this case is  
3 sent back to them, is through a denial and remand or  
4 simply a remand. That's the dispute.

5           And if you're like my client, a lot of you  
6 are just wondering why are we arguing about this.  
7 Who cares? Right? So I don't care how it gets back  
8 to them. It doesn't matter what you call it as long  
9 as it gets back to them.

10           So let me focus on why I think the issue  
11 might be important. And I think that defines,  
12 perhaps, at least for us, the Office of Planning,  
13 what the issues are.

14           And the question really is, if you deny and  
15 remand, would that create a jurisdictional problem in  
16 looking at this again when it comes back to you.

17           And there are two jurisdictional arguments.  
18 One is, if you issue a denial, is that case then  
19 immediately appealable to the circuit court, and  
20 which would then divest anyone of jurisdiction.

21           That's probably not the bigger  
22 jurisdictional question for the Office of Planning,  
23 because we cannot imagine anyone appealing the remand  
24 where everyone seems to be in agreement that that's  
25 what should be done.

1           So where everyone is in agreement, there is  
2 no basis for an appeal. It doesn't make any sense to  
3 us that an appeal would be sought.

4           Technically it could happen, for example,  
5 if you could remand it in order -- if you found there  
6 was a violation of 25-7 and remanded it, and one of  
7 the parties disagrees that there was a violation,  
8 perhaps an appeal could have been had from that, but  
9 no one disagrees about it. Everyone agrees it should  
10 be remanded for the reasons set forth by the parties.

11           So for the Office of Planning, that's not  
12 probably not our bigger jurisdictional concern.

13           The bigger concern deals with your rule,  
14 and in 15-15-95(b) it says that once you deny a  
15 Special Permit, the LUC won't look at that Special  
16 Permit -- that Special Permit again for one year  
17 unless there are particularly good reasons to look at  
18 it again. And even then you're not going to look at  
19 it for six months. So under that rule it says a  
20 minimum of six months has to pass before you look at  
21 a Special Permit that's been denied.

22           Now, that's clearly not intended to apply  
23 to this particular case where the LUC is not looking  
24 to substance of the Special Permit, but only the  
25 process that was followed by the Planning Commission.

1           So clearly everyone thinks you should be  
2 able to look at this permit again after it comes back  
3 from the Planning Commission less than six months  
4 from today.

5           KOCA argues that what you should do then is  
6 waive this rule pursuant to, I think it's 34, Rule  
7 34, 15-15-34 in which you're allowed to waive  
8 procedural requirements.

9           The City is concerned, I think, that this  
10 might be a jurisdictional requirement, and you cannot  
11 waive jurisdictional requirement.

12           So if this provision that says you don't  
13 look at the Special Permit six months from now, at a  
14 minimum six months from now, is jurisdictional, then  
15 even if everyone agreed and stipulates, then no  
16 matter what, you can't look at it again.

17           And even if they said I'm waiving my right  
18 to argue it, they can still argue it again anyway.  
19 In fact, not only can they do that, they not only  
20 have to argue in front of you, they can wait until it  
21 goes up on appeal to circuit court and argue it  
22 there. That's the concern.

23           The Office of Planning doesn't actually  
24 think it's jurisdictional. We think it can be  
25 waived. We would ask that each of the parties



1 explicitly state whether they are agreeable to  
2 waiving it. We can glean that perhaps from  
3 Intervenor KOCA and Shimabukuro because it was part  
4 of their proposed order form, but we haven't  
5 specifically heard from Intervenor Hanabusa or  
6 Schnitzer Steel or actually either ENV.

7 But putting that to one side, the question  
8 becomes, well, what's the risk? What's -- I mean  
9 that's the other question for you. It's okay, you  
10 know, maybe we don't think there is a jurisdictional  
11 problem, but what if there is? And what's the  
12 upside/downside to going either way?

13 So in other words, if you remand without  
14 denial, what's the downside? What's the likelihood  
15 that, if we deny and remand, that someone will  
16 successfully argue the jurisdictional question before  
17 the circuit court?

18 That's a very discretionary call for you.  
19 It's not something the Office of Planning is going to  
20 give you a recommendation on specifically. All we  
21 will say is that our best understanding is that that  
22 particular rule is not jurisdictional, it can be  
23 waived, but we've been wrong before.

24 So it doesn't matter -- I mean, it's  
25 important to look at the rule and to make what you

1 think is the right decision. I understand the  
2 various arguments that the parties have made. We're  
3 happy to answer any questions about them, but  
4 otherwise we think they've been argued by each of  
5 them well.

6 The optics are irrelevant to us about what  
7 the optics are. So for us, the only issue is that  
8 last question. And with that, we will be happy to  
9 answer any questions.

10 CHAIRMAN ACZON: Thank you, Mr. Yee.

11 Call on DPP for public witness comment.

12 State your name and address for the record.

13 MR. YOUNG: Raymond Young. My address is  
14 650 South King Street, 7th Floor.

15 CHAIRMAN ACZON: Please proceed.

16 MR. YOUNG: I'm the staff planner that was  
17 assigned to this project beginning in 2008, I think.

18 The Department does not have any change in  
19 their position on this, so officially our position  
20 still stands as the record shows.

21 I would like to add that historically the  
22 Land Use Commission had a similar case with Sphere  
23 LLC, I think that was back in 2010, where the  
24 Planning Commission sent up the Special Use Permit,  
25 which was subsequently remanded by the Commission to

1 the Planning Commission for further proceedings.

2 The Planning Commission went ahead, as  
3 instructed by the Land Use Commission, took further  
4 proceedings on it, and sent the record back to the  
5 Land Use Commission for final decision. Whereupon,  
6 the Intervenor in that case argued that the remand  
7 was actually a denial.

8 And the Land Use Commission went with that  
9 argument, and therefore, concluded that they had no  
10 jurisdiction.

11 So I just wanted to point that out to you.

12 CHAIRMAN ACZON: Thank you.

13 Mr. Chipchase, rebuttal?

14 MR. CHIPCHASE: Thank you, Chair.

15 I heard something that I've never heard  
16 before today, that's a lawyer admitting he might be  
17 wrong. I've certainly never done that.

18 You know, I think OP's comments with  
19 respect to why it matters are important. And I would  
20 like to layer in a third statute, or a third reason  
21 that it matters, and that is the deemed approval  
22 statute, 91-13-5.

23 This body, like all other bodies, must act  
24 within a statutory period. The action that this body  
25 must take is directed by 205-6. So if you don't take

1 an action that is directed by 205-6 within your  
2 statutory period, there is a risk of deemed approval.  
3 That is why it matters to us, and why I think it  
4 should matter to all the parties in this proceeding,  
5 because no one wants that result.

6 Unlike what we agree with OP is a  
7 procedural rule of this Commission with respect to  
8 considering petitions for Special Use Permits that  
9 have been denied, you can't waive the application of  
10 a statute. This body can waive the application of  
11 any procedural rule governing rehearing or taking  
12 back up a Special Use Permit. And we concur that  
13 waiver is appropriate in this case because the errors  
14 below are procedural in nature, but you cannot waive  
15 the application of the statute. And that is a real  
16 issue here, and why the form of this body's decision  
17 matters.

18 The things that the Planning Commission  
19 needs to do are not accurately described as  
20 completing the record or demonstrating compliance  
21 with the rule or this Commission's order. It's not  
22 as if the Planning Commission forgot to include three  
23 or five findings that it had actually made, or  
24 someone didn't sign it. The decision itself on its  
25 face is not defective.

1           The procedure followed to get there was  
2 defective. That procedure renders the decision not  
3 incomplete, not nonexistent, but invalid. And when  
4 you're faced with an invalid decision, you deny the  
5 application. The consequence is either finality,  
6 it's over, there's no remand, or remand for further  
7 proceedings.

8           That's what we propose here, deny it  
9 because the decision was invalid, because it was  
10 reached on unlawful procedure. Remand it for further  
11 proceedings, not merely to complete the record. It's  
12 not some folder that's missing somewhere that wasn't  
13 included. They have to have further proceedings.  
14 They're going to have to adopt a draft decision.  
15 That draft decision is going to have to be complete.

16           We are going to move to recuse Chair Hazama  
17 for the comments that he made on the record, and in a  
18 practice we believe demonstrates pre-judgment before  
19 parties even submitted proposed Findings of Fact,  
20 Conclusions of Law, Decision and Order.

21           The Commission will have to act on that  
22 motion. And when it reaches a decision, it will have  
23 to publish that decision to everyone. We will have  
24 to submit exceptions to it. And there will have to  
25 be a whole other hearing on the application or on

1 that order before they can reach a decision. These  
2 are not small things. This is not a cleanup. This  
3 is a redo of the way they reached the decision. And  
4 in addition, we will move to recuse Chair Hazama.

5 Those are substantive proceedings. And  
6 substantive proceedings require you to take some  
7 action on the Petition now, to approve with  
8 modification, or as we submit, denial and to remand.

9 I'm not familiar with the other SUP  
10 petitions that were offered by ENV or by the City,  
11 Department of Planning and Permitting, so I can't  
12 really comment on whether they were exactly like this  
13 where the problem wasn't some technical issue with  
14 the decision, wasn't an incomplete record, but was  
15 actually a substantive procedural flaw in the way  
16 that they reached the decision. So I can't speak to  
17 that.

18 I will note on the Sphere LLC petition that  
19 the City explained, that would be consistent with the  
20 Land Use Commission's decision, if it was accurately  
21 reported here, would be consistent with our view is  
22 that you had to take some action before you could  
23 remand. And so the remand would effectively be  
24 denial.

25 We would submit, and I'll go on the record,

1 that the waiver of the procedural rule precluding the  
2 hearing of that application within six months is  
3 appropriate here.

4 I'll let Intervenor Hanabusa speak to  
5 whether she agrees with that.

6 So in the miracle of modern technology,  
7 we're able to pull up one of the petitions, one of  
8 the orders while the proceeding is ongoing. The  
9 Sphere Petition, which is reported to me here that  
10 you did actually deny and remand. That that was the  
11 procedure you followed in the Sphere. I don't know  
12 the substance of it, so I can't again speak to  
13 whether it's on fours with us, but it's one of the  
14 examples that was offered, and I was able to confirm  
15 online that it was a denial and a remand. That we  
16 think is the right result here.

17 I have nothing further. Happy to take any  
18 questions.

19 CHAIRMAN ACZON: Before you folks take  
20 questions from the Commissioners, I want to take a  
21 five-minute recess.

22 (Recess taken.)

23 HEARINGS OFFICER AMANO: Back on record.  
24 Commissioners, any questions for the parties?

25 MS. VIOLA: May we have the opportunity to

1 respond to some of the Commission --

2 CHAIRPERSON ACZON: Go ahead.

3 MS. VIOLA: In terms of through the miracle  
4 of modern technology able to pull up Sphere,  
5 S-p-h-e-r-e, case. If in fact it was remanded and  
6 then subsequently denial, then that would be  
7 consistent with my argument. That once the denial  
8 has occurred, once Land Use Commission has made its  
9 denial, that that's the final decision in the case.

10 They weren't allowed to remand it for  
11 further proceedings before the Planning Commission.

12 In the Glover case, in SP14-404, that the  
13 Land Use Commission has already considered, the  
14 remand was without an action on the application, and  
15 to consider additional evidence or additional  
16 testimony that the parties agreed to.

17 So in that case there was no denial and the  
18 Land Use Commission was able to remand for further  
19 proceedings before the Planning Commission, and then  
20 to reconsider the subsequently amended Planning  
21 Commission Decision and Order.

22 So in both those situations what the  
23 Planning Commission did is consistent with the City's  
24 argument that it was a procedural aspect. It didn't  
25 demand action on the application.



1           And if in fact -- I don't have the  
2           specifics of the Sphere case, but if in fact, as Mr.  
3           Chipchase has indicated, it was denial and remand and  
4           subsequently, as Mr. Young indicates, that it was  
5           determined that it was a denial period, then that's  
6           again consistent with our analysis, that once the  
7           Land Use Commission has made a final decision, that  
8           is final decision by Land Use Commission, cannot be  
9           further amended by the Planning Commission  
10          proceedings.

11           I want to also comment on Mr. Yee's point  
12          that if it is appealable, the decision is appealable,  
13          as it is pursuant the Statute 205-6 as well as  
14          15-15-96, that if it is appealable, that would  
15          basically make it a final decision.

16           It wouldn't be a final decision just  
17          because of the likelihood of a party actually  
18          appealing it. The fact of it being appealable, as  
19          provided by statute and the rule, would characterize  
20          the decision as final, not whether the likelihood of  
21          whether or not the parties would appeal it or not.

22           And I also -- in terms of evaluating the  
23          risk, if the risk in this scenario that the City's  
24          arguing is that the parties would argue whether or  
25          not the record is complete or not, it wouldn't have

1 the detrimental affect of resulting in an automatic  
2 approval as argued by Mr. Chipchase, because that has  
3 not happened in the past with Land Use Commission's  
4 previous remand without taking action on the  
5 application.

6 The alternative risk is that if the Land  
7 Use Commission does deny and the remand -- and the  
8 remand is later determined to be -- not be available,  
9 or not be an option because of the final denial, then  
10 that would divest the Land Use Commission of the  
11 jurisdiction, and there would be a final decision on  
12 the application without considering the merits on the  
13 application, and would essentially prejudice the  
14 City, because their substantive argument was never  
15 considered by the Land Use Commission.

16 So I think the risk is far greater for  
17 denial then with a determination on a procedural  
18 basis which is determining that the record is  
19 incomplete and would require further proceedings by  
20 the Planning Commission. That's all.

21 CHAIRPERSON ACZON: Thank you.  
22 Commissioner Wong.

23 VICE CHAIR WONG: Question for the City,  
24 also Department of Planning and Permitting.

25 So the first part is ENV has no problem if

1 this case going back to the City?

2 MS. VIOLA: Going back to the Planning  
3 Commission?

4 VICE CHAIR WONG: The Planning Commission,  
5 yes.

6 MS. VIOLA: The City does not object to the  
7 matter going back to the Planning Commission.

8 VICE CHAIR WONG: So what I'm concerned  
9 with is Department of Planning -- Planning Commission  
10 had this case and sent it to Land Use Commission,  
11 correct?

12 MS. VIOLA: Yes.

13 VICE CHAIR WONG: In any way was ENV  
14 reviewing this case at same time, or was watching  
15 this case?

16 MS. VIOLA: I'm not sure what you mean.

17 VICE CHAIR WONG: Let me just say.

18 What happened is during the Planning  
19 Commission hearing, was ENV ever a part of the  
20 proceeding or even sitting back as an observer?

21 MS. VIOLA: No, the department is -- the  
22 City is the Petitioner in the case, so we're actively  
23 involved at the Planning Commission level and  
24 throughout the case.

25 VICE CHAIR WONG: So the question -- couple

1 questions.

2 First is: Did you believe, ENV, that the  
3 procedures was incomplete at that time?

4 MS. VIOLA: Well, the fact of the  
5 incomplete nature, the failure to follow, or 2-75 of  
6 the Planning Commission, that wasn't apparent to the  
7 parties until the Planning Commission finalized their  
8 order and sent it to the Land Use Commission.

9 At the point when they issued the order,  
10 the parties didn't have a chance to argue before the  
11 Planning Commission. So this argument had to come  
12 before you, because the Planning Commission sent the  
13 matter up to the Land Use Commission to consider.

14 So they did not say: Here's our order, do  
15 you have any additional comments? They didn't  
16 essentially comply with 2-75.

17 So at no point at the Planning Commission  
18 level was the City able to express any concerns  
19 regarding compliance of the rules.

20 VICE CHAIR WONG: So then what happened is  
21 there was a motion that was filed -- the Planning  
22 Commission sent -- whatever their item -- to the Land  
23 Use, then we got a motion to deny and remand?

24 MS. VIOLA: Yes.

25 VICE CHAIR WONG: Correct. And that was

1 several days, weeks ago; is that correct?

2 MS. VIOLA: Yes.

3 VICE CHAIR WONG: Couldn't the City, before  
4 having this hearing, pull back this stuff before so  
5 we don't even need to have this hearing?

6 MS. VIOLA: No.

7 VICE CHAIR: Why not?

8 MS. VIOLA: The City doesn't have the  
9 ability to control the process. It's dictated by  
10 statute and rule, that once the Planning Commission  
11 makes a decision, that it has to be placed before the  
12 Land Use Commission. We don't have control over the  
13 matter at that point.

14 VICE CHAIR WONG: So they couldn't just say  
15 we want it back to clean it up?

16 MS. VIOLA: No, we couldn't do that, unless  
17 we withdrew our application, which would have  
18 consequences. If we voluntarily withdraw, we can't  
19 apply back for, I think, it's at least two -- a year.  
20 So there is consequences for us to taking action to  
21 essentially pull back the Application.

22 VICE CHAIR WONG: I'm going to  
23 hypothetical.

24 If we deny, remand, just send it back to  
25 the City, whatever way it's done, how long would that

1 take?

2 MS. VIOLA: It would depend on when the  
3 Planning Commission would schedule the proceeding.  
4 But, again, it's dictated by 2-75. So if the Land  
5 Use Commission is remanding for the sole purpose of  
6 complying with 2-75, that doesn't mean that the  
7 parties can reopen the case and provide further  
8 evidence, and this would go on for an extended period  
9 of time.

10 It just means that the Planning Commission  
11 would present their Decision and Order, their  
12 proposed Decision and Order to the parties, give the  
13 parties an opportunity to comment, and then argue  
14 orally their arguments on the exception.

15 So it's the procedural aspect, it's not a  
16 substantive rehearing of the matter.

17 VICE CHAIR WONG: But from what I heard  
18 from Chipchase, they're going to request that, I  
19 guess, Mr. Hazama is pulled away. I mean, asked to  
20 be recused or something because of his statements.

21 MS. VIOLA: Right. That's part of the  
22 procedural action. So this matter -- that's why we  
23 would clarify that again, that the City is not  
24 objecting to the remand for the limited purpose of  
25 complying with this rule and providing a single

1 consolidated opinion on the Application.

2 So it's not -- we're not -- the remand is  
3 not for the purpose of reopening the case.

4 VICE CHAIR WONG: So I guess the Planning  
5 Commission will go back, just let's say next week,  
6 this week, back to Planning Commission -- I'm being  
7 layman here. Then the Planning Commission has to  
8 receive it, then has to put it on file like how we  
9 have to -- on public -- tell public we are having  
10 this hearing. So that could be another two, three --

11 MS. VIOLA: I can't really say.

12 VICE CHAIR WONG: Like we have big docket,  
13 so it could be three months, could be four months, we  
14 don't know.

15 MS. VIOLA: Could be one month.

16 VICE CHAIR WONG: So I'm just saying that  
17 it's kind of -- I can't figure, you know -- it could  
18 be a year, I mean. So, I mean, just the timing of  
19 it. And just -- it just boggles my mind this issue  
20 that they couldn't just say we pull it back, clean it  
21 up and a give it back to you guys. You know, my son  
22 says, hey, clean this up and just give it back to me.

23 MS. VIOLA: Right. But Unfortunately the  
24 law requires that you go through certain process,  
25 which the City wouldn't have control over.

1           So I understand that it seems like it would  
2 be a simple matter to have them pull it back  
3 willingly, but since it's no longer with the Planning  
4 Commission, it's with the Land Use Commission, it's  
5 unfortunately, in your eyes, your responsibility to  
6 dictate the procedure at this point.

7           VICE CHAIR WONG: Thank you.

8           CHAIRPERSON ACZON: Anybody else,  
9 Commissioners?

10          COMMISSIONER CHANG: I guess this question  
11 is directed to probably all of the parties.

12          I'm wondering if this is more than just  
13 procedural. If the proposed order is circulated to  
14 all of the parties, could the parties -- could any  
15 changes to the proposed order substantively change  
16 the orders?

17          MR. CHIPCHASE: Of course.

18          CHAIRPERSON ACZON: Vice Chair Scheuer.

19          VICE CHAIR SCHEUER: As with Commissioner  
20 Chang, my questions are probably directed to all the  
21 parties. I'll first direct them to Mr. Chipchase.

22          If we follow the City's recommendation of  
23 merely remanding for the parties to have a chance to  
24 comment on the proposed Decision and Order, how does  
25 that affect, or how would it address the error of not



1 consolidating the two, Findings of Fact, Conclusions  
2 of Law and Decision and Order documents?

3 MR. CHIPCHASE: It be wouldn't.

4 And so what needs to happen is the Planning  
5 Commission needs to come out with a new proposed  
6 decision, actually adopt a new proposed decision.  
7 Commissioner Chang's point will even in proposal,  
8 substantively change, because it needs to address the  
9 2008 application. It's a whole new decision.

10 It's not send it back, hey, this is our  
11 decision proposed now, please comment. It's a  
12 complete readoption of a proposed decision and  
13 comments.

14 And we will absolutely argue in our  
15 objections if the outcome such as a lack of a closure  
16 condition so there's no time cap on the landfill, we  
17 will absolutely argue to the Planning Commission that  
18 that's wrong. And in oral argument present  
19 additional testimony why that is wrong. And we would  
20 expect the Planning Commission to reach a different  
21 outcome.

22 VICE CHAIR SCHEUER: I will -- let me  
23 follow up one related question first for Mr.  
24 Chipchase.

25 How could that inclusion of the 2008

1 proceedings without -- with merely just proposing an  
2 additional order not include actual procedural errors  
3 into the process without actually reopening more full  
4 procedures in the case? How would just consolidating  
5 them and issuing a new proposed consolidated Decision  
6 and Order not, for instance, harm your client by not  
7 having them a chance to take up some of those issues  
8 that are in the 2008 as opposed to 2011 proceedings?

9           Was my question clear?

10           MR. CHIPCHASE: I hope so. I hope my  
11 answer is as clear as your question.

12           The parties, upon remand, each moved to  
13 reopen evidence before the Planning Commission for  
14 exactly that reason. We believe additional evidence  
15 would be appropriate to take in the proceedings.  
16 Those motions were denied. So those are separate  
17 procedural problems that we may or may not ultimately  
18 appeal. But in terms of closure of evidence, the  
19 Planning Commission determined for its part that it  
20 is done hearing evidence.

21           What we would expect with respect to the  
22 2008 Application is that that entire record that was  
23 developed as part of that is now part of the  
24 consolidated proceeding, and indeed in our own  
25 proposed findings we relied on it and designed it a

1 number of ways.

2 We would expect the Planning Commission, at  
3 a minimum, would hold a new hearing on the proposed  
4 decision before it adopts a proposed decision and  
5 then circulates it to the parties. That proposed  
6 decision will need to incorporate Findings of Fact,  
7 Conclusions of Law from the 2008 Application.

8 We will then make our positions on that in  
9 writing, and if we believe that it is appropriate to  
10 reopen the hearings for any reasons related to those  
11 findings, we would make those motions as well.

12 VICE CHAIR SCHEUER: Ms. Viola.

13 MS. VIOLA: In response to Commissioner  
14 Wong and Commissioner Chang, as well as your  
15 question, I think that it's procedural in the fact --  
16 based on the fact that it's going to be remanded for  
17 the limited purpose of compliance with the rule.

18 So whereas Mr. Chipchase said he will  
19 provide additional testimony, I think the proper  
20 terminology is additional argument based on the newly  
21 proposed Findings of Fact, Conclusions of Law and D  
22 and O from the Planning Commission.

23 And I agree with Mr. Chipchase's  
24 characterization that the evidentiary portion of the  
25 proceeding was closed by the Planning Commission. So

1 this remand, based on the limited purpose of  
2 complying with the procedural rule would be, again,  
3 limited to the Planning Commission providing --  
4 producing a new D and O that would consolidate both  
5 cases.

6 And, yes, Commissioner Chang, that could  
7 bring up -- the Planning Commission could, upon  
8 additional consideration, or this remand  
9 consideration, they could change certain aspects of  
10 the findings and conclusions, that is a possibility.

11 But the purpose of the remand would be,  
12 again, to comply with the procedural rule. And the  
13 underlying proceeding, evidence in the underlying  
14 proceeding, evidence has been closed.

15 So, again, the purpose would be to provide  
16 amended decision that would consolidate both, allow  
17 the parties additional argument, not witness  
18 testimony, on the proposed order, then to get  
19 additional oral argument to express, emphasize their  
20 arguments.

21 COMMISSIONER CHANG: Can I ask a follow up?  
22 Counsel, does the Commission, Planning  
23 Commission have the discretion, if the matter comes  
24 back to them, to reopen?

25 MR. CHIPCHASE: Yes, Commissioner, they

1 would, because the remand would be a remand to the  
2 Planning Commission. It wouldn't be a remand for  
3 window dressing. The Planning Commission could and  
4 must hold such further proceedings as are  
5 appropriate. Part of that is going to be compliance  
6 with 2-75. Part of that is certainly going to be  
7 consolidated findings. Part of that is certainly  
8 going to be our Motion to Recuse Chair Hazama, but  
9 there shouldn't be any limitation on what the  
10 Planning Commission can do in reaching not only the  
11 right procedural -- following the right process, but  
12 reaching the right decision.

13 MS. VIOLA: But the grounds for the remand  
14 that have been agreed upon, that Mr. Chipchase has  
15 represented for all parties is agreed upon is for,  
16 again, the limited purpose of complying with the  
17 procedural rule, and to consolidate -- to produce  
18 consolidated order for both 2008 and 2011 proceedings  
19 on our application.

20 So it is not to reopen the case, that is  
21 not the intent of the remand. So it would -- based  
22 on the motions that have already been filed, the  
23 remand would be for the limited purpose of complying  
24 with the rule. The remand would not be for the  
25 purpose of reopening the case in front of the

1 Planning Commission. And that would be up to Land  
2 Use Commission to rule on the motions in this case,  
3 which is to remand for a limited purpose.

4 COMMISSIONER CHANG: Would the remand -- if  
5 it is to be one consolidation as well as permitting  
6 all the parties an opportunity to comment, is the  
7 record complete? Is the record complete if there has  
8 not been an opportunity for all the parties to review  
9 the proposed findings, as well as the consolidation,  
10 and there may be an opportunity to substantively  
11 change the provision, is the record complete?

12 MS. VIOLA: I think the record would be  
13 complete if the Planning Commission can demonstrate  
14 compliance with the rules. So the rule in this  
15 particular case, in this particular matter is  
16 compliance with the procedural Rule 2-75, and the  
17 directive from the Land Use Commission to provide a  
18 consolidated order.

19 So I think that the record would be  
20 complete upon that showing of the Planning  
21 Commission.

22 COMMISSIONER CHANG: I guess my question  
23 is, is the record complete now? If, given that there  
24 are these proposed -- they have not had an  
25 opportunity to review the proposed findings, there's

1 also the consolidation, is the record complete now?

2 MS. VIOLA: I would argue that the record  
3 is not complete.

4 CHAIRPERSON ACZON: OP did you want to add  
5 something?

6 MR. YEE: Just to that question.

7 Upon remand, the Office of Planning's view  
8 that the Planning Commission would be required to do  
9 those two items, namely to comply with that  
10 particular rule and issue a consolidated decision.

11 Whether the evidentiary hearing is held,  
12 whether there are any other matters that the Planning  
13 Commission chooses to take up, we believe should be  
14 left to discretion of the Planning Commission.

15 So the parties may think it's completed or  
16 not, if that would be an issue, the Planning  
17 Commission can take that up. We don't believe the  
18 remand should make that determination at this point,  
19 and that discretion should be left with them.

20 We would also note that this would include,  
21 for example, if another -- I believe Mr. Chipchase is  
22 arguing that he might renew a call to recuse Chair  
23 Hazama. Even if he didn't, for example, Chair Hazama  
24 might decide in light of the filings today that he  
25 could issue a written decision explaining the reasons

1 for his decision, even if there is not a new motion,  
2 simply because he wants to supplement the record and  
3 state his reasons for doing so.

4 Quite frankly, given the newness of the  
5 Mauna Kea case and the frank differences between  
6 judicial and executive decision-making processes,  
7 namely, for example, in a judicial case if a judge  
8 gets recused, you just substitute a new judge.

9 In an administrative proceeding, if a  
10 member recuses himself, that voice will be lost and  
11 the decision would be made without that member.

12 So, you know, we simply say that it would  
13 be left to the discretion of the Planning Commission  
14 as to what other matters or the method by which these  
15 matters are done.

16 MR. CHIPCHASE: For Ko Olina and Senator  
17 Shimabukuro, we agree with that view. The failure to  
18 comply with the rule and the failure to issue a  
19 single consolidated decision are the reasons that the  
20 decision you have before you is defective. The  
21 remand is an actual remand.

22 The Planning Commission has to do those  
23 things. But this body shouldn't foreclose the  
24 Planning Commission from doing other things that  
25 might be appropriate in light of those actions.



1 CHAIRPERSON ACZON: Mr. Sandison, do you  
2 have anything to say?

3 MR. SANDISON: The remand, I believe, is  
4 simple and the motion to recuse does not greatly  
5 complicate this case. The planning decision already  
6 has a proposed Decision and Order. They can  
7 circulate that.

8 The parties have all submitted their  
9 recommended Findings of Fact, Decision and Order.  
10 And simply complying with Rule 2-75 of the Planning  
11 Commission, which Planning Commission can circulate  
12 for comment, if proposed Decision and Order,  
13 undoubtedly, the issues that have been raised here  
14 today would be raised in the exceptions to that.

15 The Parties and the Intervenors would be  
16 free to make whatever motions they wanted, recusal,  
17 up to the Planning Commission's discretion, and then  
18 the parties have the opportunity for oral argument  
19 before the Planning Commission, and they would come  
20 out with a complete record, and it included -- that  
21 resolves all of these issues.

22 It's not particularly complicated. It can  
23 happen fairly quickly.

24 VICE CHAIR SCHEUER: I have a question for  
25 Mr. Chipchase.

1 I'm looking at one of the documents in our  
2 record, filing from July 19, 2012, from you on behalf  
3 your clients I believe in support of remand with  
4 instructions. And at that point in 2012, five years  
5 ago, one of the statements you made was that the  
6 landfill continues to harm the community and the  
7 community continues to oppose the landfill.

8 It's part of the record. Do you  
9 continue -- your clients continue to assert that the  
10 landfill is harming the community, the community  
11 opposes?

12 MR. CHIPCHASE: Yes.

13 VICE CHAIR SCHEUER: I guess what is  
14 disturbing to me is that these procedural errors drag  
15 on, it moves -- if your assertion in that brief is  
16 correct, the harm to this community continues to go  
17 on the more times it keeps going back in front of the  
18 Planning Commission for errors.

19 At what point does the Land Use Commission  
20 have the opportunity properly to -- we don't know why  
21 the Planning Commission made such an error, but it's  
22 clear that they made such an error, but at some point  
23 sending it back to them merely prolongs our ability  
24 to consider on a full record this serious allegation  
25 of harm.

1 MR. CHIPCHASE: I completely understand  
2 your point, Commissioner. When I wrote that in 2012,  
3 it was so long ago I didn't need glasses. So I know  
4 this case has drug on for an indeterminate period,  
5 and it's frustrating for us.

6 We would have hoped that this Planning  
7 Commission not only would have followed the right  
8 procedure, but would have reached a better decision.  
9 It didn't, and there's nothing to be done about that  
10 now except send it back.

11 If we overlooked the error, then it's an  
12 appealable error to the court however this comes out,  
13 then even that will prolong it even farther.

14 This is our chance to cut off the error,  
15 send it back on remand, denial and remand. Have them  
16 do it right, procedurally, certainly substantively,  
17 we hope, then argue, then bring it back to this body  
18 with all speed possible for final decision.

19 CHAIRPERSON ACZON: Go ahead.

20 MS. VIOLA: I'm going to track back a  
21 little bit to some of the questions regarding whether  
22 or not the remand can be limited. The City would  
23 argue the Land Use Commission can limit the basis of  
24 the remand. They can state that the purpose of the  
25 remand is to consider and to essentially remedy the

1 incomplete record, to complete the record so that  
2 Planning Commission can demonstrate compliance with  
3 its rules, specifically not to reopen the entire  
4 matter and have it drag on and to have other issues  
5 being brought up that were already resolved by the  
6 Planning Commission.

7           So I would disagree that every remand  
8 completely reopens the case. For example, again,  
9 back to the Glover decision that the Land Use  
10 Commission has recently decided upon. In that  
11 matter, the Land Use Commission remanded for the  
12 limited purpose of considering additional evidence.

13           So the Land Use Commission made that  
14 determination and did not remand to reopen the entire  
15 matter.

16           So I think I would disagree with both  
17 Office of Planning and KOCA's representation that  
18 remand in and of itself allows the reopening of the  
19 case. The Land Use Commission has the ability to  
20 limit it.

21           CHAIRPERSON ACZON: Commissioner Okuda.

22           COMMISSIONER OKUDA: Question for the City.  
23 Following up on our point about limitations on the  
24 remand. So is it the City's position that on remand  
25 the Intervenors or any other Party would be precluded

1 from raising the issue of potential recusal of Chair  
2 Hazama or anyone else who might have made public  
3 comment before hearing the evidence?

4 MS. VIOLA: No, the City would not argue  
5 that that would be precluded, because that is in the  
6 context of the final decision-making by the Planning  
7 Commission, that is not on a substantive aspect of  
8 the case.

9 So if you remand the matter back to the  
10 Planning Commission to apply the proposed Decision  
11 and Order to the parties, that they consider in the  
12 context of coming up with that order, it could be  
13 consistent with the nature of that order that KOCA  
14 could bring up the argument regarding --

15 COMMISSIONER OKUDA: Thank you.

16 CHAIRPERSON ACZON: Commissioner Estes  
17 followed by Commissioner Cabral.

18 COMMISSIONER ESTES: I think at one point  
19 the attorney for the City made -- said that the Land  
20 Use Commission followed a certain procedure, and I  
21 didn't quite get what that was, that it would divest  
22 the Land Use Commission of the final decision.

23 MS. VIOLA: If the Land Use Commission,  
24 pursuant to 15-15-96(a), if the Land Use Commission  
25 comes to the final decision on the matter by

1 approving the modification or denying, that would  
2 divest the Land Use Commission of further  
3 jurisdiction over this matter, and therefore, if it  
4 was remanded and decision came back, it would  
5 potentially not be considered remanded and newly  
6 revised Decision and Order from the Planning  
7 Commission.

8           COMMISSIONER ESTES: That sounds like a  
9 pretty good idea to me.

10           CHAIRPERSON ACZON: Commissioner Cabral.

11           COMMISSIONER CABRAL: Commissioner Scheuer  
12 opened this gate, and I wanted to somewhat support an  
13 unbelievable amount of frustration. I come from Hilo  
14 where being a simple-minded person with our landfill  
15 problems with hundreds of inches of rain a year.

16           Aside from that, I think that this has been  
17 going on for 30 years and yet it appears at this  
18 point the amount of time, effort and money -- money,  
19 money, money of lawyers and staff, members of the  
20 community, state, county, I'm sure federal has been  
21 involved, and the City and the public even coming for  
22 hearings and stuff, I just can't help but believe we  
23 probably could have built another landfill by now  
24 with the amount of money spent on legal fees.

25           I'm a practical person. I would have been

1 bankrupt 29 years ago with all of this. So my  
2 question, again, seems likes there is a catch 22.  
3 Nothing we can do right at this point without  
4 somebody challenging it. And it will just be wrapped  
5 up for another 30 years, and the landfill will  
6 continue to potentially endanger the community.

7           When I read that in the event of these  
8 different things, this huge amount of the community  
9 has to be put on notice about potential danger, I  
10 thought this is really over the top that all of the  
11 smart people in this room, with all the suits and  
12 ties and whatever, can't get it together and figure  
13 out how to solve the problem rather than how to kick  
14 the can further down the way for whatever purpose.

15           My question I guess came up, Mr. Yee  
16 brought up the idea that potentially -- I think it  
17 was Mr. Yee, if not I apologize -- if we were to do  
18 something with -- again, seems like we can do nothing  
19 right here. If we were to deny, and each party  
20 involved could sign and agree that they would  
21 withdraw or waive their right to an appeal of that  
22 denial, because that's one of the, again, catch 22,  
23 if we deny it, then all of these legal proceedings  
24 allow for certain things to happen should any one of  
25 these parties decide to go down that road.

1 I would like to maybe have whichever party  
2 wants to comment. If people would in fact waive  
3 potential right to appeal a denial in order to  
4 proceed with the remand in order to proceed with a  
5 solution with my thought that the idea is to solve  
6 the problem, not continue to discuss it for another  
7 30 years.

8 MR. YEE: You're perfectly right to ask  
9 that question, but that wasn't my question. My  
10 question was the waiver of the provisions that would  
11 prohibit the review of this matter six months after  
12 denial.

13 So you have a rule that says you don't  
14 reconsider a Special Permit denial for at least six  
15 months, or you don't look at the same permit for at  
16 least six months. That should be waived by the  
17 parties and should ask if the parties, are they  
18 agreeable to waiving the application of that rule.

19 Your question about asking to waive appeal  
20 is a much bigger question. It was not raised by me.

21 COMMISSIONER CABRAL: It's fairly clever --  
22 thank you for the clarification.

23 CHAIRPERSON ACZON: Commissioner Chang.

24 COMMISSIONER CHANG: I have two questions.  
25 One for Ms. Viola.



1           Would you agree that while you argued the  
2 Land Use Commission can limit the remand, once it  
3 goes back to the Planning Commission, the Planning  
4 Commission has the discretion to open the hearing?

5           MS. VIOLA: I would argue that in order to  
6 comply with the procedural requirement as well as the  
7 directive of the Land Use Commission, that that would  
8 not be an option for the Planning Commission. That  
9 the nature of their consideration would be limited to  
10 the grounds for which it had been remanded.

11           COMMISSIONER CHANG: Even if the  
12 consolidation and the comments by the parties to the  
13 proposed order may substantively change or raise an  
14 issue that may not have been considered, would you  
15 still argue that the Planning Commission would not  
16 have the discretion to reopen the hearing?

17           MS. VIOLA: I would argue the Planning  
18 Commission would not have discretion to reopen the  
19 hearing, because what they're being directed to do is  
20 to consider the record, underlying record in 2008 and  
21 2011 proceedings, and to provide Decision and Order  
22 based on that record as directed by the Land Use  
23 Commission.

24           So that would not open up the Planning  
25 Commission's discretion -- but that would not allow

1 the Planning Commission the discretion to reopen the  
2 case.

3 COMMISSIONER CHANG: Do you advise the  
4 Planning Commission?

5 MS. VIOLA: No, I do not.

6 COMMISSIONER CHANG: This is a question for  
7 Mr. Chipchase.

8 You raised the question of default  
9 entitlement. If the record is not deemed complete  
10 and the matter is remanded back, would you still  
11 argue that there is a potential default entitlement  
12 under 91-13.

13 MR. CHIPCHASE: I believe the risk doesn't  
14 go away by characterizing the record as incomplete.  
15 And I think Ms. Viola's comments on the Planning  
16 Commission's ability to reopen the proceedings, even  
17 if it determined that was appropriate, that the City  
18 clearly views the record as complete, so complete  
19 that even if the Planning Commission wanted to reopen  
20 it, it couldn't. That is a complete record. That is  
21 what you have received. And you received a decision  
22 on that.

23 So going back and characterizing the record  
24 as incomplete, particularly when the City would not  
25 even allow the opportunity for the Planning

1 Commission to reopen it if it wanted to, raises in my  
2 mind a very real risk if you don't do one of the  
3 three things that the statute says you should do  
4 within 45 days, that it is deemed approval. And I  
5 think all of the parties would rather not run that  
6 risk.

7 MS. VIOLA: I'm characterizing the record  
8 as complete for consideration of substantive matter,  
9 the substantive arguments of the parties. The  
10 evidence and the testimony has already been compiled  
11 and the matter closed for both proceedings. So the  
12 substantive record has been completed.

13 What has not been complied with is the  
14 procedural requirement, the additional steps of  
15 allowing the parties to do additional argument.  
16 That's the distinction I'm making. The remand would  
17 allow for further procedural activity, whereas a  
18 substantive argument would require a decision by the  
19 Land Use Commission on the application itself.

20 COMMISSIONER CHANG: And your argument is  
21 that the procedural defects would not result in a  
22 potential substantive change requiring reopening of  
23 the hearing?

24 MS. VIOLA: Yes.

25 MR. WURDEMAN: If I may. What the City,

1 ENV, is asking for is that we just have a pro forma  
2 rubber stamp process on remand. Just have the  
3 parties jump through the hoops. Give no weight to  
4 what it means to object and to make arguments, and to  
5 just send the same decision essentially back to the  
6 Commission. And that certainly shouldn't be the  
7 case, and that's something that the supreme court of  
8 the state wouldn't tolerate as far as due process  
9 goes.

10 And the Planning Commission, that Rule 2-75  
11 of the rules of the Planning Commission exist for a  
12 reason. Exist because the parties should be allowed  
13 to make the appropriate objections and to make  
14 arguments and to allow the Planning Commission to  
15 consider those and respond accordingly.

16 And I believe they certainly do have the  
17 ability to, and the discretion to consider other  
18 matters as you're asking about, Commissioner Chang,  
19 and they should have that to ensure that due process  
20 is followed and this is done right.

21 It shouldn't be just sent back on remand to  
22 rubber stamp everything just to send it back. That's  
23 a serious due process violation that the City, ENV,  
24 is requesting from this Land Use Commission.

25 CHAIRPERSON ACZON: Let me ask the

1 Commissioners if they have additional questions.

2 Commissioner Okuda.

3 COMMISSIONER OKUDA: Slightly related to  
4 this. Will the City waive any claim that a remand  
5 without denial could be considered a deemed approval?

6 MS. VIOLA: Yes, the City would concede  
7 that a remand without a denial would not result in an  
8 automatic approval, would not trigger 19-13.5, that  
9 we represent that based on the law that we would be  
10 unable to make that argument.

11 If I could, I just wanted to address  
12 something Mr. Wurdeman said. I don't believe that  
13 the proceeding that the City is recommending would  
14 result in rubber stamping.

15 As the City has acknowledged, based on  
16 Commissioner Chang's questions, the exceptions could  
17 result in a change in the Findings of Fact,  
18 Conclusions of Law, D and O by the Planning  
19 Commission.

20 So we are not just stating -- just going  
21 through the process for purpose of going through the  
22 motions, there is a possibility that the Planning  
23 Commission could change their findings and their  
24 conclusions and their order based on the arguments of  
25 the parties. But the arguments are limited to the

1 record that is below, it's not going to be the  
2 opportunity of the parties to reopen the case and  
3 prolong the proceeding any further.

4 The exceptions are essentially based on the  
5 proceedings below and the fact that the matter has  
6 already been closed.

7 CHAIRPERSON ACZON: Vice Chair Scheuer.

8 VICE CHAIR SCHEUER: I wanted go back to  
9 what I understood your response to be to a question  
10 from Commissioner Chang, this is regarding whether  
11 the allegation of Mr. Hazama properly participated in  
12 the proceedings.

13 I believe Ms. Chang asked, and you answered  
14 affirmatively that the Land Use Commission, when this  
15 matter comes back before us, should we remand it, as  
16 you are suggesting, we could actually bring up the  
17 question of whether or not Mr. Hazama had properly  
18 participated in the proceedings?

19 MS. VIOLA: Yes.

20 VICE CHAIR SCHEUER: So that is a very  
21 different reading, sort of narrow reading that we can  
22 merely affirm, deny, remand or approve with  
23 modification, because that's --

24 MS. VIOLA: But at this point when the  
25 matter is before the Land Use Commission presently

1 with the option to remand before them, we're saying  
2 that you cannot deny, approve, or modification, take  
3 action on the application in order to remand.

4           So if it's remanded and the matter of Chair  
5 Hazama, the appropriateness of whether or not he  
6 should recuse himself, if that becomes a matter that  
7 they consider -- the Planning Commission considers,  
8 and becomes part and parcel of their newly  
9 recommended D and O, then that would be before the  
10 Land Use Commission appropriately in the next round.

11           VICE CHAIR SCHEUER: But if the Planning  
12 Commission chose to not consider or to deny a motion  
13 by KOCA on Chair Hazama's remand, and then a new  
14 Decision and Order was sent up to Land Use  
15 Commission, would we be allowed to inquire on that  
16 that matter whether he had properly participated?

17           MS. VIOLA: I would anticipate that if  
18 Chair Hazama does not recuse himself, that matter  
19 would be brought to the attention by a motion by KOCA  
20 similar to what you already have before you.

21           VICE CHAIR SCHEUER: But they couldn't  
22 bring a motion to us on Chair Hazama's participation?

23           MS. VIOLA: Yes.

24           VICE CHAIR SCHEUER: You believe they  
25 could?

1 MS. VIOLA: Yes.

2 MR. YEE: I believe it is not brought to  
3 you specifically or solely as to whether or not Chair  
4 Hazama should have participated. It is brought to  
5 you as -- the decision should be denied or the  
6 Special Permit should be denied because Chair Hazama  
7 inappropriately participated in the decision-making.  
8 So you don't simply decide whether or not Chair  
9 Hazama should have participated, you decide whether  
10 or not that participation affected whether or not  
11 you're going to approve or deny the application.

12 VICE CHAIR SCHEUER: So assuming, Mr. Yee,  
13 we deny at that point, they have at least six months  
14 until they could come before us again?

15 MR. YEE: Well, they -- yes, it goes to  
16 appeal to the Supreme Court, but in the meantime they  
17 could file a new action.

18 VICE CHAIR SCHEUER: And in the meantime  
19 they still don't have a valid Special Use Permit,  
20 correct?

21 MR. YEE: That be would be correct. And so  
22 if you are asking what is the unhappy choice you have  
23 before you --

24 VICE CHAIR SCHEUER: I have a few -- go  
25 ahead.



1 MR. YEE: So that would be -- I mean  
2 arguably could you deny and remand? We would face  
3 those questions, you know, if and when we reach it.

4 But you wouldn't simply decide to remand,  
5 it would be -- simply decide as to whether or not  
6 Chair Hazama properly participated, you would be  
7 deciding in the context of the decision itself.

8 CHAIRMAN ACZON: Commissioner Okuda.

9 COMMISSIONER OKUDA: This is related to the  
10 completeness of the record.

11 So are we being told that the record is  
12 complete except for these procedural issues?

13 MS. VIOLA: Yes. Our position is that the  
14 record is incomplete based on these procedural  
15 issues.

16 COMMISSIONER OKUDA: But the evidentiary  
17 substantive portions of the record are complete, is  
18 the City's representation?

19 MS. VIOLA: Yes.

20 COMMISSIONER OKUDA: Is it the City's  
21 position that the matters related to Chair Hazama's  
22 participation is relevant to affirming, in anyway  
23 affirming or supporting the decision or not relevant  
24 to that?

25 MS. VIOLA: Well, the response that I gave

1 to this question I think when you asked something  
2 similar before is that in the context of remanding  
3 the matter for the Planning Commission to make a  
4 decision and order, then it would be appropriate at  
5 that time -- or it would be allowable at that time  
6 for KOCA to argue whether or not Chair Hazama should  
7 recuse himself or not. So that's the context of that  
8 argument.

9 COMMISSIONER OKUDA: There's no dispute  
10 that Chair Hazama did make the statements alleged by  
11 Mr. Chipchase's client, or Mr. Chipchase and his  
12 papers to the present; is that correct?

13 MS. VIOLA: No. I would disagree. Chair  
14 Hazama would disagree with that representation about  
15 it as well. So that matter has not been resolved.

16 COMMISSIONER OKUDA: Would we have  
17 transcripts?

18 MS. VIOLA: And Chair Hazama said that  
19 those statements were taken out of context.

20 MR. CHIPCHASE: If I may.

21 COMMISSIONER OKUDA: We're not making any  
22 judgment about who's telling the truth or not telling  
23 the truth, because obviously that record is not  
24 before us. But if -- please don't take my question  
25 to indicate my feelings one way or the other in this

1 matter, but just to clarify my thought process here.

2 If, for example, any one of us  
3 Commissioners would make a statement to the Star  
4 Advertiser stating that we vehemently oppose the  
5 continuation of the Waimanalo Gulch Landfill before  
6 the matters are brought to us, would the City believe  
7 that that's a basis to demand the recusal of  
8 whichever Commissioner made that type of public  
9 statement?

10 MS. VIOLA: Again, it would depend on the  
11 context. If that Commissioner, upon questioning,  
12 would further explain that even though they might  
13 have that preconception, that they are open to  
14 evidence, consideration of the record, everything  
15 before them to make an unbiased opinion, then that  
16 argument that they should be recused should be  
17 weakened.

18 COMMISSIONER OKUDA: I understand that, and  
19 this goes to the record, because what I saw in the  
20 record -- and I might have misread something -- but I  
21 didn't see any transcript of what took place in the  
22 executive session of the Planning Commission with  
23 respect to Chair Hazama; is that correct or not  
24 correct?

25 MS. VIOLA: The executive session is

1 privileged discussion, so that wouldn't be part of  
2 the transcript.

3 COMMISSIONER OKUDA: Would not be part?

4 MS. VIOLA: Yes.

5 COMMISSIONER OKUDA: If there is a remand,  
6 is the City going to object to Chair Hazama being  
7 allowed to be cross-examined by parties in interest  
8 about exactly what he told the media or anyone else  
9 about his views on the instant matter before the  
10 Planning Commission rendered its decision?

11 MS. VIOLA: At this point in time the City  
12 would prefer not to commit to any position except  
13 what we have indicated in our papers is that we don't  
14 agree with the grounds for that remand, that we do  
15 not believe that Chair Hazama had to recuse himself.

16 But in terms of our proceedings alone, I  
17 would reserve the right to essentially determine how  
18 to proceed when that issue faces us before the  
19 Planning Commission.

20 COMMISSIONER OKUDA: Okay. So he might be  
21 allowed to make a statement about what he said, but  
22 he may not be allowed to be subjected to examination  
23 to determine the -- I don't want to say the  
24 truthfulness of the statement -- but how much weight  
25 he would give to the voracity of the statement?

1 MS. VIOLA: That would be up to the  
2 Commission.

3 COMMISSIONER CHANG: Just one final  
4 question to the City.

5 In general, would you agree that when we  
6 say the record is complete, we're usually talking  
7 about the evidentiary record?

8 MS. VIOLA: I would say no. I would say  
9 that in this circumstance, based on the law as it's  
10 stated in 205-6 (e) and the rules, it also repeats  
11 the basis for the remand, that there is some  
12 discretion by the Land Use Commission to determine  
13 what constitutes complete record.

14 Because the statute does not specifically  
15 provide for remand as the rule does, the only way to  
16 read the ability to remand with the statute is to  
17 state that the prerequisite to making a decision has  
18 not been satisfied, therefore, the record is not  
19 complete. So the record in terms of complying with  
20 all the evidentiary requirements, as well as the  
21 procedural requirements.

22 So that would be a reasonable  
23 interpretation of the statute and the rules, reading  
24 them both together.

25 So in this situation it wouldn't

1 necessarily be limited to only the evidentiary  
2 portion, but would extend to the complete matter  
3 including procedural compliance by the Planning  
4 Commission.

5 COMMISSIONER CABRAL: Again, to the City  
6 and county.

7 According to the information I have in  
8 December of 2004 it was indicated that the landfill  
9 would be full to capacity in 15 years, which would  
10 bring it up to 2019, which is coming critically  
11 close. I don't know the current status on that fill,  
12 but also there was a number of time limitations on  
13 when it should be closed.

14 Is anyone looking for a new site at this  
15 time? Or are we just all spending time on this case?  
16 Is there any effort in a new site going on?

17 MS. VIOLA: One piece of evidence regarding  
18 the capacity of the landfill, there is other evidence  
19 in the underlying proceeding that would essentially  
20 argue very adamantly that it doesn't expire in 2019.

21 COMMISSIONER CABRAL: That was what the  
22 county council selected on their statement that it  
23 was projected it would be filled in 15 years, so that  
24 was coming from the council.

25 MS. VIOLA: I'm pointing out that's one

1 statement. That there is other evidence in the  
2 record, as well as the updates that provided to the  
3 Land Use Commission that talks about the continued  
4 diversion of waste which would extend the life of the  
5 landfill.

6 So that one statement is not necessarily  
7 accurate at this time, as the Land Use Commission ENV  
8 Annual Report to the Land Use Commission would  
9 indicate.

10 COMMISSIONER CABRAL: So that means no one  
11 is looking for another site?

12 MS. VIOLA: No, that's not true either.

13 CHAIRPERSON ACZON: Commissioner Cabral --  
14 Commissioner Wong.

15 COMMISSIONER CABRAL: Thank you.

16 VICE CHAIR WONG: Chair, I wanted to move  
17 for executive session to consult with the board's  
18 attorney on questions and issues pertaining to the  
19 board's powers, duties, privileges in regards to this  
20 motion in front of us.

21 CHAIRPERSON ACZON: Is there any second?

22 COMMISSIONER CABRAL: I'll second.

23 CHAIRPERSON ACZON: Moved by Vice Chair  
24 Wong and seconded by Commissioner Cabral to go into  
25 executive session.

1           VICE CHAIR SCHEUER: We have not dispensed  
2 with our asking substantive questions.

3           CHAIRPERSON ACZON: We can go back and ask  
4 additional questions.

5           It's been moved and seconded. Those in  
6 favor say "aye". Opposed? Motion carried.

7           (Executive session.)

8           CHAIRPERSON ACZON: We're going to continue  
9 with Commissioners questions.

10          Vice Chair Scheuer.

11          VICE CHAIR SCHEUER: Moving aside from the  
12 procedural morass, which we are in, I have a question  
13 for Ms. Viola.

14          On the substance of the record, the  
15 Planning Commission has given proposed Condition No.  
16 3 to delay closure of the landfill until I think it's  
17 December 2022.

18          MS. VIOLA: I think the December date is to  
19 identify alternative site. I believe that the  
20 deadline applies to the designation of an alternative  
21 landfill site, but the deadline for landfill is to  
22 capacity.

23          VICE CHAIR SCHEUER: So the Hawaii Supreme  
24 Court found that the Land Use Commission had erred  
25 earlier in this proceeding by not having enough



1 substantive information supporting our proposed  
2 closure date in 2012.

3 MS. VIOLA: I believe that the Supreme  
4 Court ruled that the Land Use Commission abused its  
5 discretion because the Findings of Fact didn't  
6 support the deadline.

7 VICE CHAIR SCHEUER: Do you believe the  
8 Findings of Fact in the record, and which you say is  
9 all but procedurally complete, have support for that  
10 new date of 2022?

11 MS. VIOLA: Well, the deadline is to  
12 capacity, so not until 2022. That designation is to  
13 identify alternative landfill that should be  
14 operative at the point when Waimanalo Gulch reaches  
15 capacity.

16 But I believe that the record supports the  
17 landfill operating at full capacity, and I do believe  
18 that the record also supports the designation of many  
19 alternative sites.

20 VICE CHAIR SCHEUER: And you believe the  
21 record supports that a determination by  
22 December 31st, 2022 of a new site would provide  
23 sufficient time for a new landfill on that site to be  
24 opened and operational by the time that the existing  
25 landfill is filled to capacity?

1 MS. VIOLA: No, I don't agree that that is  
2 what the record supports. The record supports the  
3 designation of the landfill, it doesn't support the  
4 creation or the establishment of a landfill when  
5 there is an existing landfill available.

6 VICE CHAIR SCHEUER: But this landfill can  
7 operate under the proposed order until its capacity?

8 MS. VIOLA: Yes.

9 VICE CHAIR SCHEUER: Is there any of date  
10 in the record that suggests when that capacity might  
11 be reached?

12 MS. VIOLA: No, that date is dependent on  
13 the physical capacity of the landfill.

14 VICE CHAIR SCHEUER: Is there a range of  
15 date?

16 MS. VIOLA: There is a range of date I  
17 think indicated in the updated reports to the Land  
18 Use Commission, because that date is not specifically  
19 determined, because as with technology, with advances  
20 by the department diverting waste from the landfill,  
21 the life of the landfill is extended. So it's a  
22 moving deadline based on the continued reduced use of  
23 the landfill.

24 VICE CHAIR SCHEUER: What I'm trying to get  
25 at, is there a specific date for choosing of a new

1 landfill on December 31st, 2022, that's presumably  
2 related to having a new landfill available by the  
3 time in which the existing landfill has reached  
4 capacity under the --

5 MS. VIOLA: Yes. But that 2022 deadline is  
6 not the date where the City is going to identify the  
7 site that is going to be present at that point  
8 available to use.

9 VICE CHAIR SCHEUER: I understand that,  
10 that's not my question.

11 My question is: Is there in the record  
12 substantial evidence that shows that that date, plus  
13 whatever time it would need to take from going from  
14 site selection to having an operational landfill  
15 sufficient, will that come late enough -- or early  
16 enough before the filling of Waimanalo gulch?

17 MS. VIOLA: So your question, if I may  
18 restate:

19 Is the 2022 deadline sufficient to allow  
20 for the City to have an operative landfill when  
21 Waimanalo gulch reaches capacity?

22 VICE CHAIR SCHEUER: Is there evidence in  
23 the record that that is the case?

24 MS. VIOLA: Yes, there is evidence in the  
25 record to support the landfill being operative until

1 it reaches capacity, and the designation of an  
2 alternative landfill; there is also evidence in the  
3 record that the City would be capable of identifying  
4 another potential site.

5 VICE CHAIR SCHEUER: Well, are you going to  
6 help me, Mr. Yee?

7 MR. YEE: So the Findings of Fact in the  
8 Decision and Order sets forth a 2022 date by which  
9 the landfill -- the alternative landfill is to be  
10 identified, the replacement landfill.

11 The Findings of Fact also state it will  
12 take seven or more years between the time to identify  
13 a site, the time you can have an operative  
14 replacement landfill.

15 I think the question is: So then by  
16 December 31st, 2029, is there something in the record  
17 that says that the replacement landfill would, by  
18 December 31st, 2029, will there still be capacity in  
19 the existing Waimanalo Gulch Sanitary Landfill, or  
20 would that capacity have been reached one, two, three  
21 years earlier, so that there would be a gap between  
22 when the Waimanalo Sanitary Landfill is filled.

23 VICE CHAIR SCHEUER: You're getting at the  
24 gist of my question.

25 MR. YEE: The Findings of Fact don't

1 explain that. Perhaps it's somewhere else in the  
2 record. That would -- and there is also nothing in  
3 the Findings of Fact that explain why December 31st,  
4 2022 is the selected date or time.

5 So you don't know if it's related to the  
6 amount of time they need to find an alternative site?  
7 Is it related to the fact of when the Waimanalo Gulch  
8 Sanitary Landfill will reach capacity? That's not  
9 explained in the Decision and Order.

10 Presumably when this is remanded, the  
11 Planning Commission will have an opportunity to  
12 either supplement the record or explain in their  
13 Findings of Fact the basis for that decision.

14 VICE CHAIR SCHEUER: Thank you.

15 I have more for you, Ms. Viola.

16 The record -- the Planning Commission  
17 denied further evidentiary proceedings request by  
18 KOCA.

19 MS. VIOLA: Both KOCA and the City -- the  
20 City requested to reopen the record to submit new  
21 evidence as well.

22 VICE CHAIR SCHEUER: So when was the last  
23 time new evidence was entered into this record?

24 MS. VIOLA: It was before the Planning  
25 Commission. I don't know the specific date, but

1 before the Planning Commission closed the record and  
2 before they made the decision.

3 VICE CHAIR SCHEUER: But it's been a number  
4 of years?

5 MS. VIOLA: Yes.

6 VICE CHAIR SCHEUER: So regarding some  
7 questions earlier from Hawaii Island Commissioner,  
8 any further efforts, if there have been any, by the  
9 City to identify new sites that are not in the record  
10 right now?

11 MS. VIOLA: Well --

12 VICE CHAIR SCHEUER: Since the evidentiary  
13 portion of the record was closed.

14 MS. VIOLA: That's a little bit of a trick  
15 question, because the evidentiary portion of this  
16 case has been closed, however, pursuant to the 2008  
17 SUP, the City is required to provide annual reports  
18 to the Land Use Commission on the landfill, on its  
19 capacity, on waste diversion, on siting, finding a  
20 new site, all of those issues.

21 So the City has been providing to the Land  
22 Use Commission, as well as Planning Commission and  
23 the parties, updated annual reports to reflect that  
24 information.

25 So in terms of the underlying proceeding,

1 that updated information on the landfill is not  
2 included.

3 VICE CHAIR SCHEUER: So you would believe  
4 that the Land Use Commission could properly consider  
5 any of the information in the annual reports in  
6 addition to the information contained in the record?

7 MS. VIOLA: Yes.

8 VICE CHAIR SCHEUER: Do any of the other  
9 parties, the Intervenors, have the chance to review  
10 or question anything that's in your annual reports as  
11 part of these proceedings?

12 MS. VIOLA: No.

13 VICE CHAIR SCHEUER: That's it.

14 MR. WURDEMAN: May I make a comment?

15 CHAIRPERSON ACZON: Go ahead, Mr. Wurdeman.

16 MR. WURDEMAN: These same questions that  
17 are being asked by the Vice Chair are the same kind  
18 of questions that were asked by the Land Use  
19 Commission back in 2009. And the evidence in the  
20 record at that time was a statement made by City  
21 representative that it would take at least seven  
22 years to find a new site.

23 And in considering that, the Commission  
24 entered, as part of its order, a requirement that on  
25 or before November 1, 2010, that the City start

1 making those efforts.

2 All of the information that I've seen to  
3 date, other than just any initial selection site, is  
4 the City talking about alternative waste management  
5 at its current site.

6 I think, honestly, other than just them  
7 making this initial site, it appears to me that  
8 they've made absolutely no efforts whatsoever to look  
9 for alternative sites since the Land Use Commission,  
10 back in 2009, required them to do so.

11 So that's my understanding of what is going  
12 on with that.

13 CHAIRPERSON ACZON: Anybody else?

14 COMMISSIONER CHANG: Just a followup  
15 question.

16 So without reviewing, the parties -- I know  
17 the parties have not had an opportunity to submit  
18 comments on the proposed Decision and Order. Were  
19 those going to be some of the comments to the  
20 proposed Decision and Order's inadequacy of the  
21 record to address specifically the Land Use  
22 Commission's previous instructions to the Planning  
23 Commission on remand?

24 Was that the basis for both KOCA and the  
25 City's motion to reopen the record to include



1 specific evidence related to those kinds of  
2 questions?

3 MR. CHIPCHASE: Commissioner, part of our  
4 motion to reopen, and my memory is a little -- a  
5 portion of it certainly was to address the progress  
6 on selecting a new site. We believe that that's a  
7 critical question. Has the City sit done what  
8 they're supposed to do and made an effort for a new  
9 site, new landfill -- not just identifying a new  
10 landfill, the condition for a decade now has been to  
11 identify a site. And the record was closed in this  
12 matter in 2012. So when we went back, we had a  
13 motion pending to reopen before.

14 When we went back, we renewed it. The City  
15 also brought a motion to reopen to submit additional  
16 evidence. And we took a position supportive of  
17 reopening provided that we had an opportunity to  
18 submit evidence on this point and to potentially  
19 introduce witnesses. Across-the-board the Planning  
20 Commission denied reopening.

21 CHAIRPERSON ACZON: Anybody else? Since  
22 there is no further questions, Commissioners, what's  
23 your pleasure?

24 COMMISSIONER ESTES: Cut and run.

25 CHAIRPERSON ACZON: Vice Chair Wong.

1           VICE CHAIR WONG: I move to approve in part  
2 and deny in part the motion to deny the remand filed  
3 by the Ko Olina Community Association and Maile  
4 Shimabukuro. I believe this matter cannot be both  
5 denied and remanded.

6           If the matter is denied, based upon HRS  
7 205-6, 205-19 and 91-14, it can only be appealable.  
8 Accordingly, the matter shall be remanded to the  
9 Planning Commission for further proceedings in  
10 accordance with HAR 15-15-96(a) to address the  
11 following:

12           1) to clarify whether the Planning  
13 Commission followed Section 2-75 of the Rules of the  
14 Planning Commission in issuing its Findings of Fact,  
15 Conclusions of Law and Decision and Order.

16           2) clarify the basis of the Planning  
17 Commission's proposed additional Condition No. 3,  
18 which specifies a December 31st, 2022 date by which  
19 the Applicant is to identify an alternative site that  
20 will be used upon the WGSL reaching its capacity and  
21 the implications it has on the closure date of the  
22 WGSL to use and all waste and the subsequent  
23 commencement of operations at the alternative  
24 landfill site;

25           3) clarify whether the record needs to

1 include updated information on the operation of WGSJ,  
2 the landfill site selection process, and the waste  
3 diversion efforts of the City and County of Honolulu;

4 4) assuming the Planning Commission  
5 eventually approves this matter, clarify the  
6 effective date of the Planning Commission's Findings  
7 of Fact, Conclusions of Law, and Decision and Order,  
8 and;

9 5) clarify whether the Planning Commission  
10 is ruling on both the 2008 Application and the 2011  
11 Application in its Findings of Fact, Conclusions of  
12 Law and Decision and Order.

13 My motion is based on the review of the  
14 Motion to Deny and Remand, the oral and written  
15 arguments of the parties, and the record in this  
16 matter, including the Planning Commission's Findings  
17 of Fact, Conclusions of Law, and Decision and Order.

18 With respect to KOCA/Shimabukuro's argument  
19 in their Motion to Deny and Remand that the  
20 participation of the Planning Commission Chair,  
21 including voting on the matter, violated their rights  
22 to due process, I believe that this issue is not  
23 within the jurisdiction of the Land Use Commission,  
24 and therefore denied as a basis of the remand.

25 COMMISSIONER CABRAL: I'll second that.

1                   CHAIRPERSON ACZON:   Seconded by  
2 Commissioner Cabral.  There is a Motion to Remand to  
3 Planning Commission for further proceeding to address  
4 the five specific items.

5                   Commissioners, we are in discussion.

6                   COMMISSIONER CHANG:  Just an addition.  I  
7 would urge the parties, and specifically going back  
8 to the Planning Commission, that there be a timely  
9 action on this.  I realize that over the last five  
10 years much of that time has been spent in trying to  
11 settle, but we realize that just didn't happen.

12                  So while we cannot dictate to the Planning  
13 Commission its time period and its own schedule, we  
14 would urge the Planning Commission to take timely  
15 action on this matter.

16                  COMMISSIONER OKUDA:  Mr. Chair, I plan to  
17 vote in favor of the motion, if I can state the two  
18 reasons for it.

19                  One, it is based on the expressed  
20 representation that has been made that this remand  
21 will not be constituted or argued to be any type of  
22 automatic approval of any pending matter; and also  
23 that no one has disagreed with that position.

24                  So I take silence to be essentially an  
25 admission by silence.

1           And the second thing is, while I do agree  
2 that the issue of potential recusal of the Chair of  
3 the Planning Commission is not a basis for the  
4 remand, I'd just like to state for the record that,  
5 at least for me, I recognize what the Hawaii Supreme  
6 Court stated in Mauna Kea versus Board of Land and  
7 Natural Resources 136 Hawaii 376 at page 389 where,  
8 even though the Hawaii Supreme Court was speaking or  
9 citing from cases dealing with judicial decisions, it  
10 was discussing what an administrative agency, that  
11 being the Board of Land and Natural Resources, did in  
12 that case. And I quote what the Hawaii Supreme Court  
13 stated here that:

14           In the administration of justice by a court  
15 of law, no principle is better recognized as  
16 absolutely essential than that every cause, be it  
17 criminal or civil, and the parties involved therein,  
18 are entitled to -- and the Supreme Court quoted from  
19 United States Supreme Court case here:

20           Cold neutrality of an impartial judge.

21           And so recognizing our Supreme Court's  
22 admonition of having the cold impartiality of the  
23 decision-maker, even though I recognize the motion  
24 does not cover that, I'm aware of the admonition of  
25 the Hawaii Supreme Court. And those are my

1 statements for the record.

2 CHAIRPERSON ACZON: Thank you, Commissioner  
3 Okuda.

4 Anybody else? Vice Chair Scheuer.

5 VICE CHAIR SCHEUER: I'm trying to be as  
6 polite as I can in echoing Commissioner Chang's  
7 communication of the sense of urgency on the parties,  
8 particularly on the Planning Commission.

9 I think parties who believe they have been  
10 aggrieved in this matter have waited far, far too  
11 long for some kind of meaningful finality.

12 I think for a member of the general public,  
13 when they understand that they get a ticket leaving  
14 their car parked in a meter for too long, but the  
15 county can operate a landfill for years without a  
16 permit, does not encourage people's general faith in  
17 government and in our operations. I'll stop there.

18 CHAIRPERSON ACZON: Thank you, Vice Chair  
19 Scheuer.

20 Commissioner Cabral.

21 COMMISSIONER CABRAL: I would like to  
22 express that same concern. As I read through all of  
23 this, and again, I'm in a small business, I almost  
24 feel like it's been somewhat of a shell game or some  
25 intentional -- one has to wonder if there's not

1 conversations over the water cooler, that, oh, well,  
2 we'll just keep pushing this around legally and we  
3 will never have to close this landfill or deal with  
4 it.

5 And so I think that since this will come  
6 before us again, I would urge the Planning Commission  
7 to deal with this in a really responsible and timely  
8 manner. Thank you.

9 CHAIRPERSON ACZON: Thank you, Commissioner  
10 Cabral.

11 Anybody else? Hearing no further  
12 discussions, Mr. Orodener, please poll the  
13 Commissioners.

14 EXECUTIVE DIRECTOR: Thank you, Mr. Chair.  
15 The motion is to deny in part and grant in part  
16 instructions to the Planning Commission for further  
17 proceedings.

18 Commissioner Wong?

19 VICE CHAIR WONG: Aye.

20 EXECUTIVE DIRECTOR: Commissioner Cabral?

21 COMMISSIONER CABRAL: Aye.

22 EXECUTIVE DIRECTOR: Commissioner Mahi is  
23 absent.

24 Commissioner Chang?

25 COMMISSIONER CHANG: Aye.

1 EXECUTIVE DIRECTOR: Commissioner Scheuer?

2 VICE CHAIR SCHEUER: Aye.

3 EXECUTIVE DIRECTOR: Commissioner Estes?

4 COMMISSIONER ESTES: Aye.

5 EXECUTIVE DIRECTOR: Chair Aczon?

6 CHAIRPERSON ACZON: Aye.

7 EXECUTIVE DIRECTOR: Thank you, Mr. Chair.

8 Oh, wait a minute. My apology. Sorry I missed you,  
9 sorry.

10 Commissioner Okuda?

11 COMMISSIONER OKUDA: Yes.

12 EXECUTIVE DIRECTOR: My apologies. Thank  
13 you.

14 Mr. Chair, the motion passes.

15 CHAIRPERSON ACZON: Thank you. Since the  
16 Motion to Remand was voted on by the Commissioners,  
17 the other option items on this document are rendered  
18 moot. Than you very much.

19 Next item on the agenda is an executive  
20 session. Motion?

21 COMMISSIONER CABRAL: I'll move to go into  
22 execute session for other matters.

23 CHAIRPERSON ACZON: Any second?

24 VICE CHAIR WONG: Second.

25 CHAIRPERSON ACZON: Moved and seconded.



1 All in favor say "aye". Opposed? Motion carries.

2 (Executive session.)

3 (The proceedings adjourned at 12:03 p.m.)

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CERTIFICATE

STATE OF HAWAII                    )  
  ) SS.  
COUNTY OF HONOLULU            )

I, JEAN MARIE McMANUS, do hereby certify:

That on May 24, 2017, at 9:00 a.m., the proceedings contained herein was taken down by me in machine shorthand and was thereafter reduced to typewriting under my supervision; that the foregoing represents, to the best of my ability, a true and correct copy of the proceedings had in the foregoing matter.

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

Dated this 24th day of May, 2017, in Honolulu, Hawaii.

S/S Jean Marie McManus  
JEAN MARIE McMANUS, CSR #156

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

For a New Special Use Permit To Supersede  
Existing Special Use Permit To Allow A  
92.5-Acre Expansion And Time Extension For  
Waimanalo Gulch Sanitary Landfill,  
Waimanalo Gulch, O'ahu, Hawai'i, Tax Map  
Key No. (1) 9-2-03: 72 And 73,

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL  
SERVICES, CITY AND COUNTY OF  
HONOLULU

To delete Condition No. 14 of Special Use  
Permit No. 2008/SUP-2 (also referred to as  
Land Use Commission Docket No. SP09-403)  
which states as follows:

"14. Municipal solid waste shall be allowed at  
the WGSL up to July 21, 2012, provided that  
only ash and residue from H-POWER shall be  
allowed at the WGSL after July 31, 2012."

FILE NO. 2008/SUP-2

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A COPY OF THE **DEPARTMENT OF  
ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU'S MOTION  
FOR LEAVE TO FILE SUPPLEMENTAL BRIEF** was duly served by hand-delivery to the  
following on the date below, addressed as follows:

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DEPARTMENT OF PLANNING AND PERMITTING  
City and County of Honolulu  
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Honolulu, Hawai'i 96813

DATED: Honolulu, Hawai'i, March 18, 2019.

  
KAMILLA C. K. CHAN  
Deputy Corporation Counsel

16-09965/729301