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DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

DEPT OF PLANNING
AND PERMITTING
CITY & COUNTY OF HONOLULU
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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,

FILE NO. 2008/SUP-2

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU'S MEMORANDUM IN
OPPOSITION TO INTERVENORS
KO OLINA COMMUNITY ASSOCIATION
AND MAILE SHIMABUKURO'S MOTION
TO REOPEN THE CONTESTED CASE
HEARING; DECLARATION OF
KAMILLA C. K. CHAN; EXHIBITS "1"
THROUGH "3"; CERTIFICATE OF
SERVICE

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.”

DEPARTMENT OF ENVIRONMENTAL SERVICES,
CITY AND COUNTY OF HONOLULU’S MEMORANDUM IN OPPOSITION
TO INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE
SHIMABUKURO’S MOTION TO REOPEN THE CONTESTED CASE HEARING

Applicant DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF HONOLULU (“Applicant” or “ENV”), by and through its attorney, KAMILLA C. K. CHAN, Deputy Corporation Counsel, respectfully submits this Memorandum in Opposition to Intervenor Ko Olina Community Association and Maile Shimabukuro’s (collectively, “Intervenor KOCA”) Motion to Reopen the Contested Case Hearing, dated November 22, 2017. The motion should be denied because the evidentiary record is complete, and the information Intervenor KOCA seeks to add to the evidentiary record is not relevant to the contested case hearing. Further, the unwarranted reopening of this contested case hearing will unduly delay the proceedings, which is contrary to the LUC’s direction and will prejudice Applicant.

BRIEF SUMMARY OF PROCEDURAL HISTORY AND RELEVANT FACTS

This matter is a consolidation of two contested case proceedings 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 (“WGS�”) 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”).

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”). ENV did not object to any of the conditions imposed by this Commission.

The State Land Use Commission (“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 WGSJ after July 31, 2012, and allowed only ash and residue from the H-POWER facility to be placed at the WGSJ 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 SUP proceedings for decision-making.

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

On October 12, 2016, the Planning Commission heard ENV's Motion to Reopen the Contested Case Hearing for the Limited Purpose of Taking Official Notice of Facts, filed on September 30, 2016, and Intervenor KOCA's Motion to Reopen the Contested Case Hearing to Admit Limited Documentary Evidence After the Hearing Closed, filed on April 27, 2012. The Planning Commission denied both motions. See Planning Commission Transcript ("PC Tr.") 10/12/16 13:9-14:17, 18:10-19:14.

On January 25, 2017, ENV, Intervenor Schnitzer Steel Hawaii Corp. ("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 Colleen Hanabusa ("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.¹

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 ...

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.

¹ On February 17, 2017, ENV filed a Motion to Strike Intervenor Colleen Hanabusa's Renewal of Submission of Proposed Findings of Fact and Conclusions of Law. On March 1, 2017, the Planning Commission granted ENV's motion. Intervenor Hanabusa's original filing, submitted in 2009, remains part of the record. See Planning Commission Transcript 12:1-25, 13:1.

See 2017 Planning Commission Decision at 30-31. See also 2009 Planning Commission Decision at 24 (providing that the term of the SUP is “to 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 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 Application and 2011 Application was remanded to the Planning Commission.

On June 20, 2017, Intervenor KOCA filed a Motion for Recusal or Disqualification of Chair Dean Hazama. On June 26, 2017, ENV filed its response to the motion for recusal. On the same date, Intervenor Hanabusa filed her Renewal of Objections to Chair Dean Hazama's Participation and Votes in the Instant Case and Joinder to Intervenor KOCA's Motion for Recusal or Disqualification of Chair Dean Hazama, filed on June 20, 2017.

At a meeting on August 16, 2017, the Planning Commission considered (1) 2017 LUC Order, (2) Intervenor KOCA's Motion for Recusal or Disqualification of Chair Dean Hazama, and (3) Intervenor Hanabusa's Renewal of Objections to Chair Dean Hazama's Participation and Votes in the Instant Case and Joinder to Intervenor KOCA's Motion for Recusal or Disqualification of Chair Dean Hazama, Filed on June 20, 2017. Chair Hazama declined to recuse himself from the proceedings and no other member of the Planning Commission moved to have him recused. See PC Tr. 08/16/17 8:18 – 9:16. The Planning Commission expressed its intent to issue a proposed revised Decision and Order in accordance with Planning Commission Rule § 2-75. Id. at 9:15-20.

Prior to the conclusion of the August 16, 2017 Planning Commission hearing, counsel for Intervenor KOCA stated an intent to promptly file a motion to reopen the evidence in this proceeding. Id. at 9:24-25.

On October 19, 2017, ENV received notice that the Planning Commission placed this continued contested case hearing on the agenda for its October 25, 2017 meeting. See

Decl. of Kamilla C. K. Chan (“Chan Decl.”) ¶3 and October 25, 2017 Notice of Hearing, attached hereto as Exh. “2”. Intervenor KOCA objected and asserted that its counsel was not available and that the notice provided was insufficient. See Intervenor KOCA’s Objections to Adoption of Proposed Findings of Fact, Conclusions of Law, and Decision and Order, dated October 23, 2017. No action was taken on this motion. On October 23, 2017, the Planning Commission notified the parties that this continued contested case hearing was cancelled because it did not have quorum. See Chan Decl. ¶4 and Notice of Cancellation, attached hereto as Exh. “3”.

On November 22, 2017, more than five months after these proceedings were remanded, and more than one month after the Planning Commission provided public notice of its intention to adopt the proposed findings of fact and conclusions of law, and issue its decision and order, Intervenor KOCA filed the instant motion to reopen the contested case hearing.

On November 29, 2017, the Planning Commission issued the agenda for its December 6, 2017 meeting. The adoption of the proposed findings of fact, conclusions of law, and a decision and order in this continued contested case hearing is again on the agenda.

ARGUMENT

1. The Motion To Reopen The Contested Case Hearing Is Not Warranted Because The Evidentiary Record Is Complete.

The evidentiary record in this consolidated proceeding is complete. The Planning Commission closed the evidentiary portion on April 23, 2012, and the existing evidentiary record in this proceeding accurately reflects information available at the time the record was closed.

Planning Commission Rules provide:

The commission may reopen a contested case hearing which has been declared closed, but before it renders its decision, for the express purpose only of admitting new parol and documentary evidence as the same shall be otherwise relevant to

the issues in the contested case with notice to all parties. The parties shall be allowed reasonable time in which to submit rebuttal.

Rules of the Planning Commission (“RPC”) § 2-71(f).

In October 2016, the Planning Commission considered two similar requests to reopen. The Planning Commission denied ENV’s Motion to Reopen the Contested Case Hearing for the Limited Purpose of Taking Official Notice of Facts and Intervenor KOCA’s Motion to Reopen the Contested Case Hearing to Admit Additional Documentary Evidence to Correct an Error That Was Discovered After the Hearing Closed. See PC Tr. 10/12/16 13:9-14:17, 18:10-19:14. There is no new reason to reopen the contested case hearing.

Contrary to Intervenor KOCA’s assertion, the 2017 LUC Order remanding the matter to the Planning Commission for further proceedings does not warrant reopening the record to include updated information. The record was remanded to the Planning Commission for further proceedings to **clarify** the following:

(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).

ENV asserts that the Planning Commission can rely on the existing complete evidentiary record in this proceeding to address the five clarifications requested by the LUC on remand.

Requested clarification (1), which asks this Commission to clarify whether it followed RPC § 2-75, is a purely procedural matter. Requested clarification (2) asks this Commission to clarify its basis and intentions in setting the December 31, 2022 deadline in Condition No. 3, which does not require any further factual findings. Requested clarification (3) asks for the Commission's determination as to whether the record needs updated information to support its 2017 Planning Commission Decision, which the Commission previously decided in denying the parties' requests to reopen, a decision for which there is no justification to reconsider. Requested clarifications (4) and (5) ask this Commission to clarify the intended application of its decision and order, which would not be affected by any additional factual information. Accordingly, reopening the contested case hearing would not be proper under RPC § 2-71(f) because there is no documentary evidence that would be relevant to the clarifications specifically requested by the LUC, which define the limited scope of these remanded proceedings.

It should be noted that there is no reason to infer that the LUC intended or desired that the contested case hearing be reopened. To the contrary, ENV clarified to the LUC that a remand would not automatically reopen the contested case hearing, and that the Planning Commission would in fact lack the discretion to reopen the proceedings if it exceeded the scope of the LUC's remand. Intervenor KOCA's repeat and untimely attempt to reopen these proceedings should be again denied.

2. The Information At Issue Is Not Relevant To This Contested Case Proceeding.

As discussed above, the scope of these remanded proceedings is limited to the clarifications specifically requested by the LUC. Intervenor KOCA seeks to add to the record

information relating to ENV's progress toward identifying² and developing one or more new landfill sites, as material to ENV's compliance with Condition No. 4. See KOCA's Motion to Reopen at 5. However, such information has no bearing on any of the issues presented in this remand. Condition No. 4 of the 2009 LUC Order states:

4. On or before November 1, 2010, the Applicant shall begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGS�. The Applicant's effort to identify and develop such sites shall be performed with reasonable diligence, and the Honolulu City Council is encouraged to work cooperatively with the Applicant's effort to select a new landfill site on Oahu. Upon the selection of a new landfill site or sites on Oahu, the Applicant shall provide written notice to the Planning Commission. After receipt of such written notice, the Planning Commission shall hold a public hearing to reevaluate 2008/SUP-2 (SP09-403) and shall determine whether modification or revocation of 2008/SUP-2 (SP-9-403) is appropriate at that time. The Planning Commission shall make a recommendation to the Land Use Commission.

See 2009 LUC Order at 6.

If the LUC wanted this Commission to address the status of ENV's compliance with Condition No. 4 on remand, it could have, and would have, said so. Instead, its request for clarification as to whether the record needs to include updated information more generally regarding the landfill site selection process cannot reasonably be construed as an invitation to introduce new information on compliance with Condition No. 4.

ENV's compliance with Condition No. 4 is also irrelevant to the LUC's review of the 2017 Planning Commission Decision, which included a different site selection requirement and time frame.

² Intervenor KOCA erroneously asserts that "the ENV's progress toward *selecting* and developing a new landfill site is material to ENV's compliance with a condition" See Intervenor KOCA's Memorandum in Support of Motion to Reopen at p. 5 (emphasis added). Condition No. 4 of the 2009 LUC Order requires ENV to begin to *identify* (not select) and develop one or more new landfill sites that shall either replace or supplement the WGS�. See 2009 LUC Order at 6.

Finally, ENV's compliance with Condition No. 4 is entirely inapposite to these proceedings. These proceedings, as remanded by the Supreme Court through the LUC, are to determine whether the LUC would have reached the same conclusion (approving the SUP) without the imposition of Condition No. 14. ENV's compliance with the valid provisions of the SUP during the pendency of these proceedings has no logical bearing on the purpose of this remand. Moreover, considerations of ENV's compliance in rendering a final decision would undermine this Commission's interest in finality because compliance issues and information can constantly expand and change. Instead, the enforcement of conditions imposed on Applicant should be handled independently of this contested case hearing in accordance with Condition No. 12 of the 2009 LUC Order. Condition No. 12 states:

12. Enforcement of the conditions to the Planning Commission's approval of 2008/SUP-2 (SP09-403) shall be pursuant to the Rules of the Planning Commission, including the issuance of an order to show cause why 2008/SUP-2 (SP09-403) should not be revoked if the Planning Commission has reason to believe that there has been a failure to perform the conditions imposed herein by this Decision and Order.

See 2009 LUC Order at 8.

Therefore, information relating to ENV's efforts to identify and develop a new landfill site is not relevant to the issues presented on remand, nor germane to this contested case proceeding, and Intervenor KOCA's request to reopen should be denied as improper and unjustified pursuant to RPC § 2-71(f).

Similarly, the request to reopen the contested case hearing to update information relating to ENV's waste diversion efforts and the current operation of the WGS³ should be denied

³ Intervenor KOCA argues, without basis, that the LUC's remand for further proceedings to "clarify whether the record needs to include updated information on the operation of the WGS" means that the contested case hearing should be reopened to update information relating to "the December 2010 and January 2011 releases of waste and leachate from the WGS." There is nothing in the 2017 LUC Order or May 24, 2017 transcript to suggest that the

because such information is not relevant to this remand proceeding. The LUC's request for clarification does not justify, let alone compel reopening of the record.

3. Reopening this Contested Case Hearing Will Further Delay the Proceedings, Contrary to the Direction of the LUC and to the Prejudice of ENV.

The WGS� is an operating landfill, and information relating to the operation of WGS�, the landfill site selection process, and ENV's waste diversion efforts is constantly evolving. It is unreasonable to expect the Planning Commission to reopen this proceeding to admit new evidence as the WGS� continues its operations.⁴ At some point, the evidentiary portion of this case must close, and the Planning Commission must be allowed to render its decision. The existing record in this proceeding is complete and accurately reflects information available as of April 23, 2012, when the evidentiary record closed.

Moreover, reopening this contested case hearing to admit additional evidence on issues that are not relevant to this proceeding will unduly delay the proceedings before the Planning Commission. As discussed above, the LUC ordered the Planning Commission to clarify whether the record needs to include updated information. The record in this matter is complete and no additional evidence is necessary for the Planning Commission to address the issues on remand.

The LUC expressed concern that remanding the record would cause additional, lengthy delays. See LUC Tr. 05/24/17 at 49:24-25, 50:1-25, 51:1-25, attached hereto as Exh. "1".

Further, the LUC clearly wants the Planning Commission to take timely action on the 2008 and

LUC contemplated the need to update the record to include specific information related to the aforementioned storm events.

⁴ The case cited by Intervenor KOCA – Byers v. Dir., Dept. of Workforce Servs., No. E-14-52, 2014 WL 2804905 at *1 (Ark. Ct. App. Jun. 18, 2014) – does not stand for the broad proposition advanced by Intervenor KOCA. Moreover, the abuse of discretion in Byers was based on the specific facts in the case, where additional evidence submitted by the appellant was dated and received by appellant one day after the contested case hearing, and timely submitted to the appellate board in accordance with the board's instructions.

2011 Applications. Commissioners Dawn N.S. Chang, Jonathan Scheuer, and Nancy Cabral urged timely action by stating as follows:

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

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

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

I think parties who believe they have been aggrieved in his matter have waited far, far too long for some kind of meaning finality.

COMMISSIONER CABRAL: I would like to express that same concern. As I read through all of this, and again, I'm in a small business, I almost feel like **it's been somewhat of a shell game or some intentional -- one has to wonder if there's not conversations over the water cooler, that, oh, well, we'll just keep pushing this around legally and we will never have to close this landfill or deal with it.**

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

See LUC Tr. 05/24/17, 96:6-15, 98:5-11; 98:25, 99:1-8 (emphasis added).

In addition to expressing a desire that the Planning Commission act in a timely manner, the above-quoted comments indicate a perception among members of the LUC that ENV stands to benefit from, and has been responsible for, delaying the proceedings while other parties continue to suffer. Thus, ENV reasonably believes that unwarranted delays in this remanded proceeding will prejudice ENV.

Further, Intervenor KOCA's failure to bring this motion until **after** this Commission announced its intention to issue proposed findings of fact, conclusions of law, and a decision and order, should not be indulged. At a hearing before the Planning Commission on August 16, 2017, counsel for Intervenor KOCA represented that a motion to reopen evidence in this proceeding would be promptly filed. See PC Tr. 08/16/17 9:23-25. Yet, it took more than three months for the 3-page motion and 8-page supporting memorandum to be filed.

ENV contends that the existing record is sufficient for the Planning Commission to conclude this matter. In fact, it was prepared to take action on proposed findings of fact, conclusions of law, and a decision and order, as evidenced by the agenda for its October 25, 2017 meeting. The agenda item was later cancelled because the Planning Commission could not achieve quorum.⁵ Intervenor KOCA used this additional delay in the contested case hearing – which coincidentally, Intervenor KOCA sought⁶ — to file its motion to reopen. Intervenor

⁵ On October 23, 2017, ENV received notice that the continued contested case proceeding was cancelled due to lack of quorum. See Chan Decl. at ¶ 4.

⁶ On October 23, 2017, Intervenor KOCA filed Objections to Adoption of Proposed Findings of Fact, Conclusions of Law, and Decision and Order, alleging that the notice was insufficient and counsel was not available for the

KOCA's untimely motion should not now cause the Commission to postpone and reconsider its proposed findings of fact, conclusions of law, and decision and order. This unwarranted, lengthy delay in filing the motion to reopen will further prolong this proceeding and prejudice ENV.

For these reasons, the Planning Commission should deny the motion to reopen.

CONCLUSION

It is imperative that the Planning Commission proceed immediately and decide this case. The reopening of this contested case hearing is not warranted because the existing evidentiary record is complete. Further, the information Intervenor KOCA seeks to add to the evidentiary record is not relevant to this contested case hearing. Finally, the unwarranted reopening of the contested case hearing will excessively delay the proceedings, which is contrary to the LUC's direction and will prejudice ENV. For the foregoing reasons, ENV requests that the Planning Commission prevent further delay and deny the motion to reopen.

DATED: Honolulu, Hawaii, December 4, 2017.



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

hearing. No action was taken on this motion. The Planning Commission cancelled the hearing on the continued contested case hearing, which was on the October 25, 2017 agenda, because it did not have quorum.

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,

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SERVICES, CITY AND COUNTY OF
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To delete Condition No. 14 of Special Use
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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

DECLARATION OF KAMILLA C. K.
CHAN

DECLARATION OF KAMILLA C. K. CHAN

I, KAMILLA C. K. CHAN, hereby declare as follows:

1. I am one of the attorneys for the Department of Environmental Services, City and County of Honolulu, in this action and 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.

3. On October 19, 2017, I received notice by email that the Honolulu Planning Commission ("Planning Commission") placed this continued contested case hearing on the agenda for its October 25, 2017 meeting. Attached hereto as Exhibit "2" is a true and accurate copy of the transmittal email and October 25, 2017 Honolulu Planning Commission agenda.

4. On October 23, 2017, I received an email from Planning Commission staff, which provided notice that due to a lack of quorum, the continued contested case hearing was cancelled and would not be heard on October 25, 2017. Attached hereto as Exhibit "3" is a true and accurate copy of the transmittal email and cancellation notice.

I declare under penalty of perjury that the foregoing facts are true and correct to the best of my knowledge and belief.

DATED: Honolulu, Hawaii, December 4, 2017.



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

5 COMMISSIONERS:

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

10 DIANE ERICKSON, ESQ.
11 Deputy Attorney General

12 STAFF:

13 DAN ORODENKER, Executive Director
14 RILEY K. HAKODA, Planner/Chief Clerk
15 BERT K. SARUWATARI, Planner

16 CALVIN CHIPCHASE, ESQ.
17 CHRISTOPHER GOODIN, ESQ.
18 For Ko Olina Community Association and
19 Maile Shimabukuro

20 RICHARD WURDEMAN, ESQ.
21 For Colleen Hanabusa

22 IAN SANDISON, ESQ.
23 AVERY MONTRO, ESQ.
24 For Schnitzer Steele Hawaii

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

Bryan YEE, ESQ.
RODNEY FUNAKOSHI, Planner
Office of Planning
State of Hawaii

RAY YOUNG, planner
Department of Planning and Permitting
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 refileing, 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 WGS� reaching its capacity and
21 the implications it has on the closure date of the
22 WGS� 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 WGSL,
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. Orodenker, 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

1 STATE OF HAWAII)
2) SS.
3 COUNTY OF HONOLULU)

4 I, JEAN MARIE McMANUS, do hereby certify:

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

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

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

17
18
19 S/S Jean Marie McManus
20 JEAN MARIE McMANUS, CSR #156
21
22
23
24
25

Chan, Kamilla C K

From: Takara, Gloria C
Sent: Thursday, October 19, 2017 2:41 PM
To: Arsima Muller Esq. (amuller@carlsmith.com); Cal Chipchase, Esq. ; Christopher Goodin, Esq. ; Viola, Dana M O; Ian Sandison, Esq. ; Chan, Kamilla C K; Richard N. Wurdeman, Esq.
Subject: Planning Commission's Oct. 25, 2017 agenda - Halawa TOD & WGSL contested case hearing
Attachments: PC's October 25, 2017 PC agenda - Halawa TOD and WGSL contested case hearing.pdf

To All,

Attached is Planning Commission's Oct. 25, 2017 agenda.

Thank you,

Gloria Takara
Planning Commission –
768-8007

CITY AND COUNTY OF HONOLULU
PLANNING COMMISSION

Meeting of the Planning Commission

DATE: Wednesday, October 25, 2017
TIME: 1:30 p.m.
PLACE: Mission Memorial Conference Room, Mission Memorial Building,
550 South King Street, Honolulu, Hawaii

AGENDA

APPROVAL OF MINUTES: The minutes of the August 30, 2017 and September 27, 2017 meetings, as previously circulated, to be approved by the Commission.

PUBLIC HEARING:

Public hearing notice published in the Honolulu Star-Advertiser on October 13, 2017.

HALAWA AREA TRANSIT-ORIENTED DEVELOPMENT (TOD) PLAN (FK)

Request: Recommendation to adopt a community-based plan that focuses on the area surrounding the future Aloha Stadium rail transit station in Halawa.

CONTINUED - CONTESTED CASE HEARING:

EWA-STATE SPECIAL USE PERMIT AMENDMENT APPLICATION – 2008/SUP-2 (RY)
WAIMANALO GULCH SANITARY LANDFILL (WGSL)

Applicant: Department of Environmental Services, City and County of Honolulu
Landowner: City and County of Honolulu
Location: 92-460 Farrington Highway, Honouliuli, Ewa, Oahu
Tax Map Key: 9-2-3: 72 & 73
Existing Use: Landfill and open space
State Land Use: Agricultural District
Existing Zoning: AG-2 General Agricultural District
Land Area: 200.622 Acres
REQUEST:

- 1) 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
- 2) 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 31, 2012, provided that only ash and residue from H-POWER shall be allowed at the WGSL after July 31, 2012.”

FOR ACTION

1. Adoption of Proposed Findings of Fact, Conclusions of Law, and Decision and Order

EXECUTIVE SESSION

To consult with the Commission's attorney on the authority, duties, privileges and immunities pertaining to Section 205-6 of the Hawaii Revised Statutes, as amended, and Chapter 2, Subchapters 4 and 5 of the Rules of the Planning Commission, in accordance with HRS 92-5(a)(4).

ADJOURNMENT

If you require special assistance, auxiliary aid and/or service to participate in this event (i.e., sign language interpreter, interpreter for language other than English, or wheelchair accessibility), please call 768-8000, or email your request to info@honoluluodpp.org at least three business days prior to the event.

Chan, Kamilla C K

From: Takara, Gloria C
Sent: Monday, October 23, 2017 2:08 PM
To: Arsima Muller Esq. (amuller@carlsmith.com); Cal Chipchase, Esq. ; Christopher Goodin, Esq. ; Viola, Dana M O; Ian Sandison, Esq. ; Chan, Kamilla C K; Richard N. Wurdeman, Esq.
Subject: Planning Commission's 10-25-17 mtg. (cancelled - WGS� continued contested case hearing)
Attachments: WGS� lack of quorum @ 10-25-17 mtg.pdf

To All,

Thank you.

Gloria Takara
Planning Commission
768-8007

CITY AND COUNTY OF HONOLULU
PLANNING COMMISSION

Meeting of the Planning Commission

DATE: Wednesday, October 25, 2017
TIME: 1:30 p.m.
PLACE: Mission Memorial Conference Room, Mission Memorial Building,
550 South King Street, Honolulu, Hawaii

**WGSL CONTINUED
CONTESTED CASE
HEARING IS CANCELLED
FOR LACK OF QUORUM
AND WILL BE
RESCHEDULED AT A
LATER DATE**

AGENDA

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Public hearing notice published in the Honolulu Star-Advertiser on October 13, 2017.

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Request: Recommendation to adopt a community-based plan that focuses on the area surrounding the future Aloha Stadium rail transit station in Halawa.

CONTINUED - CONTESTED CASE HEARING: *** **CANCELLED** ***

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FOR ACTION

1. Adoption of Proposed Findings of Fact, Conclusions of Law, and Decision and Order

EXECUTIVE SESSION

To consult with the Commission's attorney on the authority, duties, privileges and immunities pertaining to Section 205-6 of the Hawaii Revised Statutes, as amended, and Chapter 2, Subchapters 4 and 5 of the Rules of the Planning Commission, in accordance with HRS 92-5(a)(4).

ADJOURNMENT

If you require special assistance, auxiliary aid and/or service to participate in this event (i.e., sign language interpreter, interpreter for language other than English, or wheelchair accessibility), please call 768-8000, or email your request to info@honoluludpp.org at least three business days prior to the event.

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
MEMORANDUM IN OPPOSITION TO INTERVENORS KO OLINA COMMUNITY
ASSOCIATION AND MAILE SHIMABUKURO'S MOTION TO REOPEN THE**

CONTESTED CASE HEARING was duly served by hand-delivery to the following on the date below, addressed as follows:

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City and County of Honolulu
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Honolulu, Hawai'i 96813

DATED: Honolulu, Hawai'i, December 4, 2017.



KAMILLA C. K. CHAN
Deputy Corporation Counsel