ERRATA

PLANNING COMMISSION
CITY AND COUNTY OF HONOLULU
MISSION MEMORIAL CONFERENCE ROOM
550 SOUTH KING STREET
HONOLULU, HAWAII 96813

WEDNESDAY, APRIL 11, 2019

The following corrections were made to the adopted April 11, 2019 Waimanalo Gulch Sanitary Landfill (WGSL) minutes:

(1) Page 5, line 17, replace bare with bear
(2) Page 14, line 9, replace hirdle with hurdle
Taken at Mission Memorial Conference Room,
Mission Memorial Building, 550 South King Street, Honolulu, Hawaii, 96813, commencing at 1:45 p.m., on March 7, 2018, pursuant to Notice.

APPEARANCES:
Planning Commissioners present:

Theresa C. McMurdo, Vice Chair
[Acting Chair]
Cord D. Anderson
Ken K. Hayashida
Wilfred A. Chang, Jr.
Gifford K. F. Chang

Planning Commissioners recused:

Kaiulani K. Sodaro, Chair
(prior notice given)
Arthur B. Tolentino
(prior notice given)
Steven S. C. Lim
(prior notice given)
Arthur D. Challacombe
(prior notice given)
Deputy Corporation Counsel:

Rozelle A. Agag

(Advisory to the Commission)

Planning Commission staff:

Gloria Takara,

Secretary-Hearings Reporter

For the City and County of Honolulu, Department of
Environmental Services:

Kamilla C. K. Chan, Esq.
Deputy Corporation Counsel
City and County of Honolulu
530 South King Street, Room 110
Honolulu, Hawaii 96813

For Intervenor Ko Olina Community Association and Senator
Maile Shimabukuro:

Calvert G. Chipchase, Esq.
Christopher T. Goodin, Esq.
Cades Schutte LLP
1000 Bishop Street, Suite 1200
Honolulu, Hawaii 96813
For Intervenor Schnitzer Steel Hawaii Corp.:

Avery C. Matro, Esq.
Carlsmith Ball LLP
ASB Tower, Suite 2200
1000 Bishop Street
Honolulu, Hawaii 96813

For Intervenor Colleen Hanabusa:

Richard N. Wurdeman, Esq.
1003 Bishop Street, Suite 720
Honolulu, Hawaii 96813
PROCEEDINGS

Vice Chair McMurdo: We're going to call the meeting to order. [bangs gavel] Today is Wednesday, March 7th and this is a continuation of the contested case hearing, but first we will approve the minutes of December 6th, 2017. Does anyone have any changes to the minutes, any comments? [no response] No. If there are no objections the minutes are approved.

Before we continue on to the agenda, we'd like for the record, Commissioners. We need to attest that we have reviewed the transcripts of the proceedings in this matter. That we have received, studied and examined and understand the evidence and the entire record from both the 2008 and 2011 application proceedings. We'd like to individually make and attestation for each one of you for both today's hearing and for clarity for the December 7, 2017 meeting.

Commissioner Anderson: Yes, no.
Member Anderson: A simple yes will do it?
Vice Chair McMurdo: Yes.
Member Anderson: Yes.
Vice Chair McMurdo: Commissioner Hayashida.
Member Hayashida: Yes.
Vice Chair McMurdoo: Commissioner Chang.

Member G. Chang: Yes.

Vice Chair McMurdoo: Oh, the other Chang?

Member W. Chang: Yes.

Vice Chair McMurdoo: And for me, yes. Now that we have that out of the way. If there are no objections, Commissioners, I'd like to take the agenda out of order and start with agenda Item No. 2. Interveners Ko Olina Community Association and Maile Shimabukuro's Motion to strike Schnitzer's February 18th proposed findings and responsive papers. Are there any objections to starting with that?

Member G. Chang: None.

Vice Chair McMurdoo: All right. And then we will combine the first and third together.

Ms. Matro: Good afternoon, Commissioners. Avery Mancho on behalf of Intervener Schnitzer Steel.

Vice Chair McMurdoo: Okay.

Mr. Chipchase: Commissioners, Cal Chipchase and Chris Goodin on behalf of Intervenor's Ko Olina Community Association and Senator Maile Shimabukuro.

Ken Williams who's the general manager of this association is present today as well.

Vice Chair McMurdoo: We'll hear first from the movers.
Mr. Chipchase: Sure. Commissioners, the idea behind the motion is simple. Schnitzer is part of its exceptions submitted an entirely new set of Findings of Fact, Conclusions of Law, Decision and Order. The time to do that, the time for the parties to propose Findings of Fact, Conclusions of Law, and a Decision and Order have long since passed. And, so that portion of the objections, that portion of Schnitzer's exceptions should be stricken and not considered.

Vice Chair McMurdo: Okay. And Schnitzer's.

Ms. Matro: Thank you, Commissioners. We will defer to the Commission's discretion, as far as this issue. I believe Schnitzer made it very clear in our exceptions that the purpose of Exhibit A was to illustrate this Commission's need to fully consider and articulate this Commission's consideration of the 2009 record created during the 2008 contested case appeal. I believe the Supreme Court has made it abundantly clear that agencies need to fully articulate their considerations of the full record in their Findings of Fact. Most recently in the decision in Kilakila and that was merely the purpose of Schnitzer's Exhibit A was to illustrate the difference between merely saying we incorporate our findings from 2009 into this current decision and fully articulating the reasons for each and every Finding of Fact that this Commission issues. And that
was merely the purpose of Schnizter's Exhibit A. It was not put forth an entirely new proposed Findings of Fact and Conclusions of Law. And, so for those reasons, I think our reasoning for including it is clear, but we will defer to the Commission on that ground.

Mr. Chipchase: Chair, if I may just very briefly.

Chairman: Sure.

Mr. Chipchase: I utterly respect those reasons and Schnizter is correct. I mean that is an error in the proposed decision circulated by the Commission is now fully articulating those things. So, Schnitzer's effort highlights that failing of the decision. The corrective mechanism is not for Schnitzer to submit an alternative form for the Commission to adopt. Corrective action is for the Commission to start over and to circulate a proposed decision that does those things that Counsel just articulated.

Chairman: Okay. Are there any other comments?

Anyone from the public that would like to make a comment? [colloquy between DCC Agag and Vice Chair McMurdo]. Okay. Hearing none, thank you

Chairman: At this time I'd recommend to the Commissioners that we grant Ko Olina Community Association's motion to strike Schnitzer's February 2018 proposed findings. Is there a motion to that effect?
Member Anderson: I make a motion.

Vice Chair McMurdoo: Any second?

Member G. Chang: Second.

Vice Chair McMurdoo: Okay. Is there any

Member G. Chang: None.

Vice Chair McMurdoo: Anyone in favor?

All Commissioners: Aye.

Vice Chair McMurdoo: It's passed. So, we granted
KOCA's motion. Thank you.

Mr. Chipchase: Thank you.

Vice Chair McMurdoo: Now, we're going to take Item
No. 1 and No. 3 together. We will be giving each party 15
minutes each to cover your arguments for each.

Mr. Chipchase: Chair, if I might beg some
indulgence on that time. I am respectful of the
Commissioner's time, utterly. We have invested many years
and a lot in this process, and I'd like a little more time
than that to present, particularly considering that a number
of the Commissioners--I believe all the Commissioners
actually would consider both proceedings, did not attend
every hearing. Understand the attestation but sometimes
helps to see some of the evidence that's been introduced. I
think it also helps when we're dealing with very complicated
conditions to be able to compare them--
Vice Chair McMuro: Okay.

Mr. Chipchase: ...and so for those reasons, I'd ask for more time.

Vice Chair McMuro: Now, in terms of your--You'll be speaking for your side?

Mr. Chipchase: Yes.

Vice Chair McMuro: So, you'll have 30 minutes for your side and each, 15 minutes each.

Mr. Chipchase: Very good. Thank you, Chair.

Vice Chair McMuro: We'll start with the applicant.

Ms. Chan: Kamilla Chan for the applicant, the City and County of City of Honolulu. The City request that the Planning Commission adopt its Proposed Findings of Fact, Conclusion of Law, Decision and Order, subject to the City's exceptions.

First, the City believes that proposed condition No. 1 should be supplemented to include the basis of the December 31, 2022 date that's been put into the decision which is a deadline for the City to identify an alternative landfill site that is to be used upon Waimanalo Gulch reaching capacity. As drafted, we believe that it may not adequately address the concern that was expressed by the LUC. The City also request that the Planning Commission make other corrections to the proposed decision, which would
include Finding of Facts, paragraphs 65 and 66, which is just a minor correction to call it exceptions instead of exemptions, as well as Proposed Conclusion of Law No. 1, which we believe was intended to cite to the most current version of the charter.

And, we would also recommend correcting Proposed Condition No. 2, which inaccurately refers to the type of permit that the City has for Waimanalo Gulch. It's a solid waste management permit, not hazardous waste.

The City concurs with the Planning Commission's approach to issuing its proposed decision and order by incorporating, by reference the 2009 LUC order and approving the application to modify that decision and deleting Conditions No. 4 and 14 and adding the conditions that have been added in the 2017 proposed decision. We do not believe that the Decision needs to be a complete integration of the two. We think it's adequate the way it has been handled in the proposed decision. There's a number of things in the proposed decision that make it clear that it's resolving both the 2008 and 2011 applications. For example, Conclusions of Law No. 4 states that the conclusion is based on the findings set fourth in the August 4th, 2009 Findings of Fact, Conclusions of Law and Decision and Order and on the findings set fourth in the 2017 proposed decision.

Conclusions of Law No. 7 also states that the
Planning Commission never imposed that closure deadline that was struck by the Supreme Court. And accordingly, the Planning Commission then logically and reasonably concludes that Condition No. 14 was not material to its decision and proceeds to approve the application to modify the permit. That's a second application was filed in 2011. And, so we think that it addresses all the things that have been requested by the LUC.

The Planning Commission's proposed decision as it stands right now addresses four of the five points that the LUC has requested for clarification. Paragraphs 64, 65, and 66 address compliance with Rule 2-75, which goes to the first item that the LUC wanted to be clarified.

Conclusion of Law, No. 6 addresses the question about whether the record needs to include updated information. It's clear that the Planning Commission is concluding that it denied the parties motions to reopen the case and to supplement the record because it had sufficient evidence to render that decision.

The Planning Commission also addresses No. 4 and No. 5 of the LUC's request for clarification. Regarding the effective date of the decision, it's clear with the way you're addressing it, that it would be the effective date of the original order back in 2009.
And for No. 5, again, throughout the decision it's very clear that both applications are being addressed. The only one that we believe needs to be clarified is No. 2, which I've already covered, but just to state the basis for that closure deadline. There is no violation of due process in this case. We are clearly still in the process of this contested case hearing. There has been no permit issued, no decisions made, so to go to the allegations about a violation of due process or prejudgment of the case, we don't believe that any of that is true here.

Intervenors KOCA and Maile Shimabukuro are seeking to have a closure deadline. I think they call it a staged approach to closure of the landfill. That position is not supported by the evidence. It's in the record. The evidence clearly establishes that there are wastes that still need to be landfilled. That includes things like automobile shredder residue, ash from H-Power, large animal carcasses, medical sharps and at the time of the hearing it was also sludge from the wastewater treatment plants that were being sent to the landfill. There are also circumstances where items that normally disposed at H-Power need to be sent to the landfill for disposal. And that could be for a number of reasons including scheduled maintenance at
H-Power. Each year they shut down the boilers. I believe it's two weeks at a time for servicing. There's also unexpected closures that occur. They need to shut down completely and have waste diverted to the landfill. There's also situations where there's debris from hurricanes, tsunamis, just large storms even that cannot be accommodated at H-Power and would need to be sent to the landfill.

So, there's abundant evidence in the record that there's an ongoing need for the landfill, and we're not at a point where we could operate without one.

There's also abundant evidence in the record that the technology is just not there yet, despite ENV's ongoing efforts to find ways to divert more waste from the landfill.

The Planning Commission has taken a consistent position, at least since 2009 that the duration of the special use permit is to capacity.

In 2009, the Planning Commission determined that the term or length of the new SUP shall be until the Waimanalo Gulch Landfill reaches capacity as compared to a definite time period of "x" number of years. At that time, Commissioner Komatsubara explained that he believed that the focus should not be solely on picking a date. And, it was very clear that it allowed
Waimanalo Gulch to operate until it reached capacity
even though it would have an obligation to start
looking for a new site.

He also went to say that he'd rather not say it to
certain date and that he'd rather focus an effort to find a
new site and have the applicant come in to explain what it
has been doing to find a new site.

Consistent with that, the proposed decision
continues to allow Waimanalo Gulch to operate to capacity,
and it also imposes a deadline by which it needs to identify
a new site. But it was very clear on the record, even at
the March 1st, 2017 hearing that Waimanalo Gulch would
continue to operate to capacity. The identification of a
landfill site by the date that's put in to the decision did
not mean that Waimanalo Gulch was to be closed. And, I
think that's further clarified in the December proposed
decision that was issued.

The fact that there is no time limit measured by a
number of years doesn't make that condition or that term to
be invalid in any way. The LUC's rules provide to the
Planning Commission shall establish, if appropriate, a time
limit for the duration of the proposed use which shall be a
condition of the special permit. So, even if a time limit
should be imposed, there's no requirement that be measured
by months or years. For this circumstance having it be
until landfill reaches capacity is still a deadline in the SUP.

I also wanted to point out that a permit that allows Waimanalo Gulch to operate to capacity is not an unlimited use of the landfill. There are restrictions on the type of waste that can be accepted at Waimanalo Gulch and that includes restrictions that are imposed by the Department of Health regulations, by the landfill special use permit, and even by our operator, Waste Management of Hawaii's own procedures. They have limits on what can be put in there.

So, in summary the closure deadline that's being proposed by KOCA and Ms. Shimabukuro is just not supported by the facts and the evidence in this case.

Vice Chair McMurdoo: Thank you.

Ms. Matro: Thank you, Commissioners. Again, Avery Matro for Schnitzer Steel. And Schnitzer would agree with the City's point, except for their point regarding the integration of the 2009 record, for the reason stated before. Schnitzer believes that this Commission will air and not explicitly making those findings part of its issue decision now. Again, although the City points to the reference to the 2009 records and the Conclusions of Law, the Hawaii Supreme Court has made it clear that a conclusion requires evidence to support it and findings of appropriate
definitiveness to express it. And, therefore, this Commission cannot simply refer back to an entire record as the basis for supporting certain conclusions. It needs to explicitly and definitively point at the specific findings that support those conclusions. And, so Schnitzer would urge this Commission to thoughtfully consider the 2009 record and incorporate their previous findings of fact into its issued decision here. Thank you.

Vice Chair McMuro: Thank you. Okay.

Mr. Chipchase: Chair, before my clients begin, Mr. Wurdeman who represents Colleen Hanabusa who would like to offer a few words to the Commission from her perspective.

Vice Chair McMuro: Okay.

Mr. Wurdeman: Thank you. Richard N. Wurdeman on behalf of Intervenor Colleen Hanabusa. And the Commission has before our objections to the Findings of Fact, Conclusions of Law, Decision and Order that has already been issued by this Commission dated December 6, 2017 in violation of its own rules. We do believe that since the Commission did take that step prematurely that it's already predisposed and made these proceedings today essentially meaningless in making its final rule. And I cite Mauna Kea Anaina Hou Supreme Court case and the dozens of authorities referenced in that decision by this body predisposing of this issue. As also raised in the filing of the objections
from intervenor Colleen Hanabusa there's been a complete
disregard of the 2008, 2009 record, which is the whole basis
for the SUP. The subsequent record was for deletion of
Condition 14, that's what the application was, but we
object, and we believe that this body has also permitted
reversible error by completely disregarding the entire
record and not making specific Findings of Fact, Conclusions
of Law, that we can even address in exceptions, and it's
making a decision with none of that. And Schnitzer is to an
extent right. I mean this is something that this body needs
to do. So, with that we have our objections and if you have
any further questions, I'm happy to answer them.

Vice Chair McMurdо: Thank you.

Mr. Chipchase: Thank you, Chair. We have a
PowerPoint presentation that goes along with my comments. I
will say just a brief word about what you just heard, and I
don't intend to repeat it in my presentation and that is the
failure to incorporate specific findings related to 2009 is
reversible error. You have three parties coming to you and
saying that. I think all parties come from the perspective
that we would rather not do this over again. That is go
up to the LUC and come back down. So, my theme is
essentially that. Let's just do things the right way. We
should result that follows the proper procedure does what we
need to do. And as part of that we believe incorporates
appropriate conditions.

Mr. Goodin is slow with the projector. If we don't mind me setting it up here. He'll be as quick as he possibly can.

Vice Chair McMurdoo: Okay. All right.

Mr. Chipchase: Thank you.

[pause]

Vice Chair McMurdoo: Why don't we have a 5-minute recess for you to put that all together.

Mr. Chipchase: That's a wonderful idea, Chair.

Vice Chair McMurdoo: All right.

[Chairwoman McMurdoo calls for a 5-minute recess and reconvenes]

[PowerPoint presentation by Mr. Chipchase]

Chairwoman: All right. Call meeting to order again.

Mr. Chipchase: Thank you, Chair. Thank you for indulgence. We've taken this hearing seriously, of course, because this is a serious matter. The application is a serious matter. Because of the serious time and effort that everyone of us has invested in. If we loo at the history of these proceedings, we see that there have been more than 20 hearings. It's actually closer to 25 hearings, and that doesn't include the LUC, that doesn't include the Courts. Those are just hearings before this body. During those
hearings nearly 20 witnesses testified under oath. People who came and were sworn and testified here. Not in public testimony but under oath before you. And there are more than 300 exhibits in the record. Some of those exhibits like the Environmental Impact Statement are a couple thousand pages. I mean this is a heavy, heavy record in a heavy manner that has been going on for a long time. Respecting the effort that all the Commissioners have invested and all the parties have invested, we submit that we need to do things right. Part of doing things right is you heard today is properly incorporating findings from the 2009 decision. The other parties have covered that, and I won't repeat it.

The other part of it is follow the balance of the procedures that this Commission has in place and the instructions from the LUC on remand, but also looking at the conditions imposed. Because the conditions imposed will tell us whether the use that the City is asking for permission to engage in or to continue is reasonable and unusual, is appropriate under the standards that we have.

Looking first at the procedure and looking at the LUC's remand instructions. You heard a little bit from the City about Condition 2 and what needs to be added to Condition 2 to satisfy the LUC's remand instruction. With respect to the City, I don't think that goes nearly far enough. The instruction asks the Commission to clarify the
basis for its condition requiring ENV to identify a new site on December 31, by December 31, 2022. That instruction is not followed anywhere in the proposed decision. There's no reference to the source of that date, and there's no reference to the evidence on which it could be based or was based, and indeed there's no evidence in the record that supports that specific date. The next instruction I want to look at is remand instruction 3, which directed the Commission to clarify whether the record needs to include updated information on the operation of the landfill, the landfill site selection process and the waste diversion efforts of the City and County of Honolulu.

The proposed decision does not do any of that and it is not sufficient simply to deny motions to reopen. The instruction was to clarify whether, not simply to reject and that is what the Commission has done. So, if we look at the evidence in this case, we see that it closed in April 2012, nearly six years ago. What has been happening for the last six years. There's several important points that are fundamental to the Commission's decision that we don't have any evidence on for six years. The first is how long will the landfill be there? The Commission proposes to adopt the condition that allows the landfill to operate until it reaches capacity. When is that? Does any Commissioner here know or have any idea when the capacity of the landfill will
be reached. There's nothing in the record on that point. There's certainly no new and updated information from the last six years taking into account capacity, taking into account the expansion landfill, taking into account waste diversion. When will that be?

What does that condition, that closure date of capacity actually mean?

The second thing that we don't know anything about, at least over the last six years is what continued effect does the landfill have on the community? The record is replete with evidence of landfills impact on the community, the violations, the spills, the litter, the trash, the debris, the truck noise, the odors. And we'll look at a little bit of that today. What has been happening for the last six years. We don't know. There's nothing in the record on any of that. Nor is there anything at all in the record on what the City has been doing to identify and develop a new site. The City is obligated, has been for a long time obligated by this body and by the LUC to identify and develop a new landfill site. What has the City been doing for the last six years in fulfillment of that condition. We don't know. To effectuate the LUC's remand instruction. KOCA brought a motion to reopen, to reopen evidence on a series of a specific points, not to reopen generally, not to redo the entire proceedings, but to
address a series of specific points. As of this moment right now, that motion has still not even been acted upon; not been scheduled for hearing, not been heard and not decided. It is not enough just to have a blanket denial of that motion in the order. We're entitled to be heard on and with respect we should have been heard on it before we got to this point in the Commission's proceedings.

The last remand instruction that I wanted to look at is with respect to the effective date, and that's instruction 4. You heard the City's view on that. Well, it's obvious from the context. If you cobble everything together it's clear what they mean. With respect, it isn't, it isn't. The instruction is to clarify an effective date. There is no effective date in the order. So, is it effective when signed? Is it effective retroactively somehow? Is it effective as when the prior decision was invalidated? We don't know and without that kind of information the decision just doesn't address what the LUC--LUC said it needed it to address before it could consider the Commission's proposed decision It's an error not to address all of those remand instructions clearly. And, it's an error not to follow procedure that has its deciding motions to reopen, hearing them and deciding what to do with evidence before we proceed to decision making. It's also an error to proceed with attestation the way the Commission did
in this case. The rule is Rule 2-76, and we put it up on the screen. And as you will see with the italalized word. The attestation needs to come before a decision. In this case at the last hearing, the Chair announced the proposed decision had been adopted and then all parties signed it, and then it went out to the parties for exception. Today the Commission attempted to correct that oversight by retroactively attesting to the fact of having reviewed the record prior to the adoption of the decision in December. The rule doesn't work that way. It's black or white. It needs to be done before. So, that alone renders the decision invalid. It means us going back up and coming back down to do it over again. With respect, we simply we want to follow the right procedures, to do everything right. To develop a complete record. To answer the LUC's questions and to follow the procedures that are proper in the adoption of the decision, so that when it goes up, wherever it goes, it doesn't come back for technical reasons.

The other part of doing it right is the substance of the decision.

Male from the back of the hearings room: Excuse me. Sorry to interrupt this meeting, but is there a Christopher Goodin here?

[Mr. Goodin walks to the back of the hearings room]
Mr. Chipchase: Chris was getting some handouts that, I think will be useful in some of my comments, and so I appreciate your indulgence there as well.

You know, getting into the substance of the decision, of course, there are the Findings of Fact, Conclusions of Law and we filed our exceptions and the City filed its exceptions, and Schnitzer and Ms. Hanabusa. I'm not going to go through all of those, you know. You know, all the differences of views on what the evidence shows, what the finding should be, what the conclusion should be. You have our written submissions. What I'd like to talk about instead today with you is the Decision and Order. The part that imposes the conditions on the operation of the landfill because it's that part that authorizes the use and in authorizing the use puts the restrictions on it. And principally those restrictions are designed to protect the community and the environment and ensure that the landfill is a good neighbor if it's going to be our neighbor at all. And, so in looking at those conditions, I want to start by talking about what the City is requesting here. The City is seeking effectively in these combined proceedings a new special use permit for the landfill. The landfill is decidedly not an agricultural use. This is agricultural land and that's why all of you have to make a decision. The LUC will have to make its decision as well. In that
request its asking for a 200-acre site. So, it's grown from its original conceptions, and it just continued to grow. It's bigger then it was on the initially proposed and to allow the disposal of municipal solid waste, ash and residue. So, basically everything as you heard today that they're allowed to take under their permits and other regulations. Take it all and landfill it. At least give us the ability to do that. And then to allow us to do that for the duration of the landfill. Whatever that might be, however, much we can squeeze into (inaudible), that is how long we want the landfill to remain open. We won't tell you how long that will be. There is nothing in the record as to how long that will be, just let us do it until it reaches capacity. Well, it's a special use permit and the City is the applicant. So, the City has the burden of proof. And its burden is to show that the proposed use is unusual and reasonable. Inherit in the concept of what a special use is, is that it is not effectively a permanent use. If you want to make what is effectively a permanent use, there's a whole other procedure called the boundary amendment, for which this matter would, you know, involve extensive hearings and extensive other proceedings.

Instead of that, they're asking for a special use permit. In the contemplation of that, that it's limited in some way temporally that it doesn't go on forever or it really is a
boundary amendment. And the Supreme Court and the Land Commission's rules are clear that you cannot have a special use permit that is effectively a boundary amendment, that effectively accomplishes what you would need to do and show to achieve a boundary amendment. The guidelines then for a special use permit, taken into account that this is not an ag use, and it's not a boundary amendment. It's something unusual and reasonable that we're putting on to this land. And those guidelines are incorporated in the Planning Commission rules. There are five of them. I'd like to just focus on two of them today. The first is that the use is not contrary to, so that it's consistent with the objectives of state Land Use law and those objectives are found in a variety of documents, statutes, regulations, planning documents, the state plan. And the state plan being chiefly among them, includes three important concepts.

The first is that agency should make land use decisions that avoid costly or reputable environmental damage. So, focusing on the environment. The second is that agency should make decisions that achieve desired quality and surface ground and coastal water. So, focusing on the quality of our water. And the last is that agency should make decisions that reduce the threat to life and property from flooding and other man induced hazards and disasters. So, don't approve things that are going to make things worse
for people.

The Planning Commission must take these objectives into account when it makes its decision. The second guideline that I wanted to highlight and will spend much More time talking about today is this idea of adverse effect. The concept of adverse effect. A proposed special use cannot have an adverse effect on the community. It's so ingrained in the idea of special uses that the Commission is empowered to impose conditions to mitigate against that adverse effect. So, you have a use, it might have an adverse effect to impose conditions to address that. And that takes us to our discussion today. What are the conditions in the order and what should they be to ensure that you've met your obligations under the guidelines including mitigating any adverse effect on the community. We've broken the conditions down into four categories. Operations, reporting and enforcement, diversion of waste and closure. I'll go through them as quickly as I can. Starting with operations. And with this we're really talking about the day-to-day operation landfill. I mean, keep in mind landfills open seven days a week. And as to ash, it's 24-hours a day. So, this is a constant consistent presence from the community everyday of their lives. How is it operating and how can we make it operate in a way that has the least impact on the community. To that end, we have Condition
2.c. Condition 2.c is very similar to Planning Commission incorporated Condition 7. When the Commission adopted this decision, it included and incorporated almost all, just one condition left out. The closure condition from the Land Use Commission's prior order. And, so when we look at incorporated that's the idea is that you've pulled into your decision many of the conditions, most of the conditions that the LUC had. And this condition, your Condition 7, incorporated our Condition 2.c deals with this idea of operating in compliance with the law. So, it's a landfill.

It's got a lot of laws. Operate in compliance with it. Your condition identifies the City and County of Honolulu and the State Department of Health. With respect, we would say why stop there? Those are the only laws that as the Land Use decision, you would require compliance with. Shouldn't you require compliance with all of the laws that govern this landfill. Because it's only in operating in compliance with the law that the landfill could be a reasonable use. It doesn't meet all the laws. If it's not in compliance with all of the laws, it's not a reasonable use. And, so we would add the EPA, which the evidence shows has extensive regulatory jurisdiction hearing, (inaudible) of the landfill a number of times, and any other state or federal law that applies to the landfill. The other thing that we would do, is say that a violation of those laws is a
violation of this order. What good does it do to say you
have to comply with all laws. If there's no consequence in
the special use proceeding for violating those laws, what
have you done to ensure a reasonable use, if they can
violate the laws, but you can't take back their permit. You
cannot say that is a violation of what we authorized you to
do. So, we would add those concepts in to the regulatory
compliance condition. And it's consistent with what we've
seen in this case. These aren't abstract ideas. Like, oh
the landfill might be a bad neighbor. The landfill has been
a bad neighbor. The landfill has violated the law, and
we've included a snapshot of what the evidence shows in this
case as to those violations, culminating with the state's
testimony that if all the landfills in the state. No other
landfill had racked up more violations in a 5-year period
then this landfill. It needs to comply with the law or it's
not being a reasonable use. It's not being a good neighbor.

The second condition that I wanted to talk about
under operations is Condition 2.d which is like your
incorporated Condition 1. And this is get all your permits.
So, comply with all the laws, get all your permits. You
have that idea. You go get your permits. You just limit
the scope of the permits they need to get. With respect, we
would say any permit you need, state, federal, municipal,
whatever it is, go get them. Because it's only in getting
those permits that you could possibly be of reasonable use
of agricultural land, you could possibly be a good neighbor.
The next condition that I wanted to talk about is
2.e. And this deals with dust control. It's very similar
to your Condition 2 requiring a dust control plan. What we
have said is that it's fine to require planning. We think
that's great, and appreciate it. But the plan should be
incorporated as part of the decision you're making.
The evidence in this case shows that dust is a real problem
for the community, for the neighbors, for the people right
across the street. So, consistent with that problem, you
guys have required a dust control plan. That's great.
Having it incorporated as part of the order, so that you
have something you can enforce. So, if they don't address
the dust that you've told them to address, you can do
something about, and that's what we've proposed in our
condition. That takes me to Condition 2.f which deals with
visual blight. There's no comparable condition in the
proposed decision. The idea here is to develop a
landscaping plan, and implement it that takes no account the
surrounding environment and addresses erosion. Visual
blight is a real impact on the community. It is a negative
effect of this landfill. There was testimony to that effect
and the photograph of evidence is uncontested. That's your
view. It's a visual blight. That is an adverse effect on
the community. Let's address that. There's no reason not
to make the City address that in the form of a landscaping
plan.

Quickly wrapping up the other conditions that I
wanted to talk about with operations. We have 2.g and 2.j
which deal with the trucks coming in and out.
Trucks, City and commercial trucks come in and out of the
landfill all day. And the consequences of that are traffic
and litter and some noise. Develop a schedule to make sure
they come at appropriate times. To make sure that you don't
have truck stacking on the highway and make them tie their
loads, so that litter isn't blowing off the trucks and onto
the highway and into people's yards, and parks and open
spaces. Simple good neighbor operational conditions that we
believe should be part of this body's decision making sure
that it is a reasonable use that it's not adversely
affecting the community.

Similar to that is Condition 2.h, which is
intended to mitigate noise and odor. The evidence shows
that noise and order are a problem. That they adversely
affect the community. Let's address those by requiring a
plan to do so. Make them address the adverse effects that
they're causing.

Lastly, is wind blown waste, Condition 2.i that we
propose. Wind blown waste is a problem. It blows into
people's yards, it blows onto the highway. It blows all
over. Develop and implement a schedule to pick it up.
It shouldn't be up to the community to pick up waste
developed by use that's supposed to be reasonable. It's
supposed not to have an effect on the community. It's
supposed to be a good neighbor.

If we turn from operations to reporting and
enforcement. So, we move from the day-to-day use of the
landfill to keeping the public informed and enforcing the
things that you guys have imposed. You have adopted or you
have proposed to adopt Condition 1.c which is our condition.
We appreciate that. We think that goes a long way to
effective reporting to the community. With respect, I
believe, that there are two other reporting conditions that
I would like to see modified in part.

The first is Condition 1.f, which is very much
like your Condition 15. The only difference is that when the
City publishes these reports, we would ask that they provide
a copy to Ko'Olina. We've been in these proceedings for a
long, long time and represent a lot of people and
businesses. It is helpful to us to be able to get the
information out to our constituents for the senator whom I
represent to get the information out to her to constituents.
It's great to do reporting. It means nothing if the public
isn't informed, and all we're asking for is to give us a
copy.

Very similarly on Condition 1.g. Condition 1.g is like your Condition 16, which requires a public hearing. As written, you have required the hearing every three months. We would say the public hearing could be every six, that it could be less frequent, so it's more substantive, but we would like notice of it. Reasonable notice. And, I think we proposed 14 days before the hearing. So, that people can actually go to it. So that they can plan for it. So they can attend. So these public hearings are not just the City talking to a couple of people, but the community can be involved. So, if the senator can get it out. So, if the neighborhood boards can get it out. So, if the association can get it out. And the reporting condition can actually mean something.

Well, reporting is necessary and as you see up on the screen, the boards and the senator have been deeply involved. The boards consistently voting to close. The senator constituents consistently recommending closure. And, so they need to be kept informed. And this reporting is most meaningful if there's a mechanism to enforce as well. And so what we have asked is at our Condition 1.e is to give us the ability to come back before you in order to show cause. If you impose all of these conditions to make sure that it's a good neighbor, that it's being a reasonable
use, but we can't enforce them. We can't do anything if
they're not. What good does it do? To authorize the
landfill that can remain open until capacity. It never has
to come back before you under your proposed decision. But
nobody can enforce anything. You would have to still
respond today? Issue an order to show cause. Let the people
who are on the ground who deal with it everyday, who hear
from people every day. At least have the ability to come
back before you and say we believe there's been a violation.
We would like you to issue an order to show cause. We think
that's consistent with your responsibility, the community
and with our participation in the case and our presence in
the community.

I'd like to move from reporting and enforcement to
diversion. And, here, I think we get into thornier things.
I think that what we've proposed in operations and reporting
and enforcement is non-controversial things. These are just
basic things to make sure it's a reasonable use. Diversion
of waste is a little more difficult, but I'd like you to
understand where we're coming from. The diversion of waste
as a concept is already in your order, and its been in the
orders for a long time. And that's in the form of this
alternative waste condition. Your Condition 2, what would
be our Condition 2.b. If the City can't just use the
landfill as its first and only stop. We have a
responsibility, the community to the environment to the land
to try to do better than just burying trash. And, so City
you look at alternative means. And the City has done a lot
recently to move toward better alternatives to landfiling.
There's no question about it, and they deserve credit for
it. The problem that we have with the condition is that it
doesn't incorporate with the City has set itself it's
willing to do. The City said in a stipulation that it signed
and KoOolina signed that it would take these actions to
diversify the waste stream to keep trash out of Waimanalo
Gulch, specific items. Specific action points at specific
times. That stipulation, those ideas should be incorporated
into the waste diversion condition. So, it's not just a
general statement to look for alternatives, but to hold the
City to what it said it would do, specific reasonable
objectives that the City has already signed off on. Those
objectives should be incorporated as part of an order that
says, you need to look at alternatives. Don't just landfill
as the first resort, look at these alternatives. Ask the
City to do, make the City do what it said it would do.

The diversion of waste through alternative means
is great, but it doesn't operate effectively in isolation.
There also must be a limitation on waste coming into the
landfill. And what we have proposed at Condition 3.a is
that limitation. That if you can landfill it by some other
means, you have to do that. Unless there's an emergency or H-Power shutdown for maintenance or any other reason. Effective as of the date of the order, if you can dispose of it by other means, you have to do that. This condition did come from us. We did not make this condition up. This is a condition that the City imposed or the City asked this Commission to impose on itself in 2012. When the City submitted findings and conclusions in 2012, it included this condition. This is a direct quote that "waste, if it can be disposed of through other means, will be disposed of through other means. Unless there's an emergency or there's an H-Power shutdown." The City asked you to impose that on because it saw the evidence that it had been introduced in this case, and knew that a condition like that, limiting the waste stream is reasonable. Six years later, this body is proposing to do less for the community to allow a more intense use then the City itself asked the Commission to impose in 2012. Effective January 21, 2014. So, four years ago, this condition, that limitation on waste should have began. It hasn't yet. We would ask that it begins an effective date of the order.

The last topic, and I appreciate your time with me is closure. Okay. We've addressed the operations. We've addressed reporting. We've addressed enforcement. We've limited the waste stream. All of those things go to having
the smallest impact as possible. The best neighbor possible. The most reasonable use possible. How long does that use remain. How long does it continue and that brings us to closure. Your Condition 1 would allow the landfill to continue to operate until it reaches capacity.

With respect, I don't believe that a condition that allows operation to capacity is consistent with a special use. A special use is durational. It isn't permanent and capacity does not provide a duration. Particularly on a record where there is no evidence of what that capacity is. None of us--I don't know. As we sit here today have any idea, 10 years, 15 years, 20 years, 50 years. We don't know. And you cannot impose or you cannot grant a special use permit that has no identified end date. Not even a theoretical end date. I suppose as a theoretical in a sense of capacity, we don't know that means in the context of this order.

So, as you can see on the screen, that contravenes both Land Use Commission rules and Hawaii Supreme Court precedent because it effectively operates as a boundary amendment. And the LUC's attorney, in prior proceedings, on the same permit, explained to the Court exactly that. That if you give the county unfettered indefinite use of a special use permit, you've effectively approved a boundary amendment. That effective approval of boundary amendment through a special use process, violates Supreme Court
precedent, violates statutes and rules, violates Chapter 205. There must be an end date. Recognizing the tension here. The tension that you guys have to balance the development of the site, the use of the site and replacement of the site. Condition 4, directs the City and has long directed the City to identify and develop a new landfill site to supplement or replace Waimanalo. That has been on the books for a long, long time. As we have seen, the City will not identify and develop a new land fill site as long as it can operate Waimanalo. It just won't. Nothing in the record that we have indicates any reasonable diligence by the City. The date on the screen is 2010. It's 2018. Nothing in the record that we have indicates any reasonable diligence by the City to identify and develop a site. Now submit it, if we reopen evidence, we will see nothing in the real reopened evidence demonstrates reasonable diligence to identify and develop a new site. You need both conditions working together. A closure condition and an obligation to identify a new site. So, the question really then is how long will it take to identify and develop a new site. The best evidence in the record is 5 years. That comes from Mr. Miller, who's admitted as an expert in landfill site selection design and from Frank Doyle, when he testified was the acting director of ENV. They both identified 5 years as a reasonable time, even an outside time, in Mr. Doyle's
case, to identify and develop a new landfill site. So, how have we approached it in our proposed decision and order. We have approached it as counsel for the City explained in a staged way. The first stage is this diversion condition, this waste limitation condition that we've talked about. Effective date to the order, going to a period of almost six years from now, you cannot accept anything that you can landfill. We've talked about how that is consistent ultimately more generous then the condition the City proposed in 2012. Even today the City recognizes the need for waste diversion condition. This is from the City's proposed findings and conclusions. Its current ones in 2017. It would make that waste diversion condition effective December 31, 2026. So, even the City today would impose a waste diversion condition. It would stretch it out 13 years after its original proposed condition with no explanation. The real reason for stretching it out is the City thinks that everybody has forgotten what the evidence showed. In 2012, the evidence was very fresh. There was an obvious need to impose a waste diversion condition as soon as possible for the City that was 2014. Now that the evidence has been sitting for a while, the City thinks it can propose a longer duration. But even that longer duration is better than the order the Commission has proposed. The Commission's order has no waste diversion restriction. So, even today the
applicant is saying, we will accept a waste diversion restriction. It's too far off from the future, but we will accept it. And the Commission has not proposed to impose that. With respect that is not doing everything you can to mitigate the adverse effect of the landfill. So, where would we go after Stage 1, waste diversion condition. For us, that would be Stage 2. And Stage 2 is to further restrict the waste. Six years from now, the waste would be further restricted to just ash and automobile shredder residue. Because those waste streams are really hard to divert. There's presently a method to divert them. And, so they would have an additional of duration or disposition landfill to let us get up to speed with technology. To move things along and to let the City get farther along with the development and siting of a new landfill.

And that would bring us to Stage 3, which would be finally the closure of the landfill about 9 years from now. That's more than enough time. It's almost double what the experts have said, would be needed to site and develop a new landfill site. Close it. And when you do, when you close it, it will be almost 40 years after the landfill open. Remember, we're not coming here on a new application for a new use. We're coming here on a series of successive applications continuing, continuing, continuing the life of this landfill. At some point enough is enough. And on all
of the prior applications, the City represented it would
close it, that we were temporary, that it would not go on
forever. Somewhere along the line the City abandoned those
promises to this body, to the LUC, to the community and
wanted to continue the landfill forever. With respect, a
40-year landfill operation. It's very difficult to say that
is an unusual and reasonable use, temporarily limited and
therefore entitled to be a special use.

Vice Chair McMurdo: You need to summerize.

Mr. Chipchase: I am. Chair, I'm wrapping up, and I
appreciate it. The community has dealt with
these issues for a long time, 40 years will be long enough.

Thank you.

Vice Chair McMurdo: Thank you, Mr. Chipchase.

Commissioners, do you have any questions for the parties?

Ms. Chan, can I ask you about some of the issues
that have been brought up.

Ms. Chan: Sure.

Vice Chair McMurdo: With regard to capacity

Ms. Chan: Yes

Vice Chair McMurdo: ...and some of the conditions
that you, ENV says they would accept. Can you address
those.

Ms. Chan: Okay.

Vice Chair McMurdo: With regard to what
Mr. Chipchase has brought up.

Ms. Chan: Yes, thank you, Chair. To clarify, the purpose of that stipulation that Mr. Chipchase referenced, and I think may have mischaracterized is that stipulation was something that we have been discussing in terms that we reached in order to stay the proceedings. At that point in time the parties were attempting to, I think in good faith to negotiate a joint proposed findings of fact. Those negotiations obviously fell through and that's why we're here today. But that was the terms of the stipulation. Those are commitments that ENV was entering into for that time period up until, I believe April of 2017. We were trying to give ourselves some time to work out some very difficult issues. So to say that the City should somehow be held to that now, I think is a mischaracterization of what we were doing.

As far as the capacity of the landfill, with the situation now where the evidence is up through 2012, there is further diversion efforts that are not captured in the evidence in this proceeding. Because of the, I think good work that my clients have done to further divert waste from the landfill that has extended the duration that the capacity would last. I think that could be addressed in different ways, not
necessarily in the way that KOCA is requesting, but to
the extent that this Commission would want the
Department to report annually on its current capacity
at the landfill. I think that's something that can be
done. That is something that they regularly track. I
don't want anyone to be mislead to think that the
Department sits there ideally not considering what
their current operations are and how much they're
putting in the landfill and what space is available.
That is something that they're very vigilant about, and
I think the evidence shows that as well.

Vice Chair McMurd: Thank you. Commissioners, do
you have any other questions?

Ms. Chan: Oh, if--I'm sorry. I forgot one more
thing. The conditions that KOCA is proposing [siren,
pause]. The conditions that they're proposing
especially the ones that go to incorporating other
obligations that the City has under its other permits,
with all due respect, I think these Commissioners that
sit here today know what their role is in approving the
special use permit. What KOCA is requesting you do is
to broaden the scope of your authority and to become
the regulators of conditions that we are required to
comply under other regulations and under other bodies,
including the Department of Health. And, I think thats
completely inappropriate to incorporate that into this permit.

Vice Chair McMurdoo: What about the good neighbor conditions they're proposing?

Ms. Chan: Such as, which one specifically?

Vice Chair McMurdoo: Dust control, noise and odor, litter

Ms. Chan: If you take a look in the evidence, those are things that we're already obligated to do under the solid waste management permit, I believe. Those are things that ENV has already addressed. Dust control, even the trucks--You know, getting back to the diversion efforts and the decreased reliance on the landfill that we've experienced with the expansion at H-Power. There are fewer trucks going up there. So, there are things that ENV has done and is continuing to do to mitigate its impact on the community.

Vice Chair McMurdoo: So, ENV wouldn't object if these conditions were included?

Ms. Chan: We believe that they're not necessary in this permit and shouldn't be there since they're already addressed elsewhere.

Vice Chair McMurdoo: Okay. Any other questions? [no response] Am I the only one who has questions?

Member G. Chang: So, basically the presentation provided, you would disagree with majority of the
presentation?

Ms. Chan: Correct. We stand by our previous arguments and our filings that we believe that the proposed decision and order from December with the few exceptions and modifications that we're requesting. We would be in support of that.

Vice Chair McMurdо: Okay. Commissioners, any other questions? [no response] No. All right. Thank you very much for your presentations and information. We really appreciate all your time. The Commissioners will now go into closed session to deliberate.

[colloquy between Vice Chair McMurdо and DCC Rozelle Agag.]

We will be deliberating for action, Items 1 and 3 together. But we will be--We plan to do the actual decision-making in public with another date. Do we have a date for continued--Everybody available March 21st? We will be deliberating today and the decision-making will be made just for that day.

Mr. Chipchase: Chair, I don't believe that I'm available March 21st. I'm sorry for that.

Vice Chair: The others--Next dates are April 4, April 18, or April 18.

Mr. Chipchase: Either would be fine.

Vice Chair McMurdо: Either one. Ms. Chan, are
you available?

Ms. Chan: I'm available in March, and I would urge
this Commission to act as quickly as possible. I think
the April dates would be fine as well.

Vice Chair McMurd: Commissioners, are you
available? Which dates do you prefer?

Member W. Chang: I have a conflict on the 18th.

Vice Chair McMurd: So, the 4th then. Everybody
available April 4th?

All Commissioners: Yes.

Vice Chair McMurd: Okay. So, we will do
decision-making on April 4th. Mr. Wurdemann [from the
audience]?

Mr. Wurdeman from the audience: That's fine.

That works for me, Chair.

Vice Chair McMurd: And everyone is okay with
April 4th?

Ms. Matro: Yes. Schnitzer is fine. Thank you.

Vice Chair McMurd: Anyway--So, everyone is
excused right now. We will be doing our deliberations,
and then we will meet again on April 4th.

Mr. Chipchase: So, we'll distribute what
Mr. Goodin interrupted us to bring us and take down our
board. Before I do that, I have to, I have to object
to deliberations in a non-public forum.
I don't believe that you may close the door to the public, in particular the parties, for any reason except to consult with your counsel about legal matters, to solicit legal advice. And, so I do believe that deliberation, the discussion needs to be done in public.

Vice Chair McMurdo:

Okay.

Ms. Chan: If I may just respond to that, we would disagree with KOCA. This is a contested case proceeding, and so I think that's fine.

Vice Chair McMurdo: Okay. It is a contested case hearing, and so we're allowed to deliberate with our counsel. All right. Thank you very much.

Mr. Chipchase: Thank you.

Ms. Matro: Thank you.

Ms. Chan: Thank you.

Mr. Chipchase: Thanks everyone.

I appreciate your time.

Mr. Wurdemann from the audience: Thank you.

Vice Chair McMurdo: We'll take a 5-minute recess to just have the room cleared.

[At 2:44 p.m., Vice Chair McMurdo calls for a 5-minute recess and reconvenes at 2:49 p.m.]  

[At 2:49 p.m., Commissioners and DCC Rozelle Agag
convene in closed session]

[At 3:28 p.m., Commissioners and DCC Rozelle exits closed session and those not participating in closed session re-enters the conference room]

Vice Chair McMurodo: All right. We're back from closed session. If there no objections, we move to adjourn.

ADJOURNMENT

There being no further business before the Planning Commission, the meeting was adjourned by Vice Chair McMurodo at approximately 3:30 p.m.

--000--

I certify that the foregoing is a true and correct transcription of the proceedings, prepared to the best of my ability, of the meeting held on Wednesday, March 7, 2018.

Gloria Takara
Secretary-Hearings Reporter

Adopted on: April 11, 2019