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DEPT OF PLANNING
AND REPORTING
CITY & COUNTY OF HONOLULU

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

For a New Special Use Permit To Supersede
Existing Special Use Permit To Allow A 92-5-
Acre Expansion And Time Extension For
Waimanalo Gulch Sanitary Landfill,
Waimanalo Gulch, O'ahu, Hawai'i, Tax Map
Key: 9-2-03: 72 And 73,

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

INTERVENOR SCHNITZER STEEL
HAWAII CORP.'S EXCEPTIONS TO THE
PLANNING COMMISSION'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION AND ORDER;
EXHIBIT A; 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.”

**INTERVENOR SCHNITZER STEEL HAWAII CORP.'S EXCEPTIONS TO THE
PLANNING COMMISSION'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER**

COMES NOW Intervenor Schnitzer Steel Hawaii Corp. ("Schnitzer"), by and through the undersigned attorneys, and hereby submits the following exceptions to the Planning Commission's proposed Findings of Fact, Conclusions of Law, and Decision and Order, filed December 6, 2017, pursuant to the Rules of Planning Commission, City and County of Honolulu § 2-75.

I. STANDARD OF REVIEW FOR REVERSAL OR MODIFICATION OF ADMINISTRATIVE FINDINGS, CONCLUSIONS, DECISIONS, OR ORDERS

To prevent judicial reversal or modification of administrative findings of fact under § 91-14(g), Hawaii Revised Statutes ("HRS"), the Planning Commission should, upon review of the record, reverse or modify findings that are "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *In re Gray Line Hawaii Ltd.*, 93 Hawai'i 45, 53, 995 P.2d 776, 784 (2000). A finding of fact is clearly erroneous when: (1) the record lacks substantial evidence to support the finding or determination, or (2) despite substantial evidence to support the finding or determination, the Planning Commission is left with the definite and firm conviction that a mistake has been made. *In re Water Use Permit Applications*, 94 Hawai'i 97, 119, 9 P.3d 409, 431 (2000).

Similarly, conclusions of law should be reversed or modified where the Planning Commission finds they are in violation of constitutional or statutory provisions, in excess of the statutory authority or jurisdiction of the Commission, or affected by other error of law. *Sierra Club v. Office of Planning*, 109 Hawai'i 411, 414, 126 P.3d 1098, 1101 (2006)(internal citation and quotations omitted). Rather, a conclusion of law "that is supported by the [finding of facts]

and that reflects an application of the correct rule of law will not be overturned.” *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 119, 839 P.2d 10, 29 (1992).

II. BACKGROUND

This matter is a consolidation of two separate, but related, applications before the Planning Commission, City and County of Honolulu (the “Planning Commission”): (1) the Department of Environmental Services, City and County of Honolulu’s (“Applicant” or “ENV”) December 3, 2008 Application for State Special Use Permit (“SUP”), seeking to supersede an existing SUP and allow a 92.5 acre expansion of the Waimanalo Gulch Sanitary Landfill (“WGSL” or the “Landfill”) and extend its time of use (the “2008 Application”), being re-considered by the Planning Commission pursuant to an order of remand from the State of Hawaii Land Use Commission (“LUC”); and (2) ENV’s June 28, 2011 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 (the “2011 Application”).

On April 28, 2017, the Planning Commission issued its Findings of Fact, Conclusions of Law, and Decision and Order (“April 2017 Planning Commission Decision”), adopting ENV’s Proposed Findings of Fact, Conclusions of Law, and Decision and Order submitted January 27, 2017, except for those finding of facts before 2011. On May 1, 2017, the LUC received the April 2017 Planning Commission Decision.

On May 12, 2017, KOCA filed a Motion to Deny and Remand, and an Alternative Motion to Deny the Applications Unless Additional Conditions are Imposed, arguing that denial of the applications was necessary because the Planning Commission improperly issued the April 2017 Planning Commission Decision before allowing the parties an opportunity to submit their objections. On May 22 and 23, 2017, ENV and Schnitzer, respectively, filed responses with the

LUC, agreeing that the Rules of the Planning Commission required the Planning Commission to permit the parties to file exceptions to its proposed Findings of Fact, Conclusions of Law, but opposing KOCA's assertion that denial was required. Rather, both ENV and Schnitzer argued that remand was warranted to cure the procedural defect in the April 2017 Planning Commission Decision.

On May 24, 2017, the LUC considered KOCA's Motion to Deny and Remand and ordered that the motion be granted in part and denied in part. The LUC remanded the record in the 2008 Application and the 2011 Application to the Planning Commission for further proceedings to:

- 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.
- 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� to use and the subsequent commencement of operations at the alternative landfill site.
- 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.
- 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.
- 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.

("2017 LUC Order").

On December 6, 2017, pursuant to the LUC's order, the Planning Commission issued the instant Proposed Findings of Fact, Conclusions of Law, Decision and Order ("2017 Proposed Planning Commission Decision"). Parties were given until February 8, 2018 to submit their

exceptions and a hearing was held on March 7, 2018. After the parties presented their arguments, the Commission indicated that it would go into executive session to deliberate and announce its decision on April 4, 2018.

On April 2, 2018, the parties were informed that the April 4, 2018 continued contested case hearing date was cancelled due to lack of quorum. On November 20, 2018, the parties were informed that a new commissioner had been assigned to the proceeding. A revised Proposed Findings of Fact, Conclusions of Law, Decision and Order (“2019 Proposed Planning Commission Decision”) was issued on January 15, 2019. Parties were given until February 8, 2019 to submit their exceptions.

III. EXCEPTIONS

As a general matter, Schnitzer objects to the Planning Commission’s continued omission of the 2008 Application record. On August 4, 2009, after a full contested case hearing, the Planning Commission issued a Findings of Fact, Conclusions of Law, Decision and Order granting the 2008 Application (“2009 Planning Commission Decision”), a true and accurate copy of which is attached hereto as Exhibit A. However, although the instant proceeding is meant to address and resolve both the 2008 Application and the 2011 Application, the Planning Commission has not endeavored to reconcile and integrate the 2009 Planning Commission Decision in its 2019 Proposed Planning Commission Decision. It is not sufficient to simply conclude as a matter of law, based upon the 2009 Planning Commission Decision, that the 2008 Application met the test set forth in Section 2-45 of the Rules of the Planning Commission. 2019 Proposed Planning Commission Decision at 36. “An agency’s findings must be sufficient to allow the reviewing court to track the steps by which the agency reached its decision.” *Kilauea Neighborhood Ass’n v. Land Use Com’n of State of Hawaii*, 7 Haw.App. 227, 230, 751 P.2d 1031, 1034 (Haw.App. 1988); *see also Nani Koolau Co. v. K & M Const., Inc.*, 5 Haw.App. 137,

141, 681 P.2d 580, 585 (Haw.App. 1984)(“A conclusion of law which is supported by the trial court’s findings of fact and which reflects an application of the correct rule of law will not be overturned.”). As there is no mention of the 2009 Planning Commission Decision in the findings of fact — much less a description of what the decision contained — the findings are insufficient to support such a conclusion.

Nor is it sufficient to merely order that the 2009 LUC Order, which adopted the 2009 Planning Commission Decision, “is incorporated by reference” and “any inconsistent finding, conclusion, or condition” is superseded. 2019 Proposed Planning Commission Decision at 39. It is the function of the fact finder to resolve the conflicting evidence based on the credibility of the witnesses and the weight of the evidence. *See Anders v. State*, 60 Haw. 381, 391, 590 P.2d 564, 570 (1979). By abdicating the function of determining which prior findings of fact and/or conclusions of law are “inconsistent” to the reader, the Planning Commission is not fulfilling its function as finder of fact. Per the consolidation of County Special Use Permit File No. 2008/SUP-2 and the proceedings on Applicant’s 2011 Application, the Planning Commission bears the onus of issuing a single decision resolving both proceedings, including resolving conflicting evidence.

To that end, Schnitzer urges the Planning Commission to include the following in its ultimate decision:

- A sub-section under “Procedural Matters,” entitled “2008 Application,” which incorporates 2009 Planning Commission Decision Findings of Fact (“2009 FOF”) #2-38.
- Under the same sub-section, Findings of Fact which detail the 2009 Planning Commission Decision, LUC’s Order Adopting the City and County of Honolulu Planning Commission’s Findings of Fact, Conclusions of Law, and Decision and Order with Modifications, and the subsequent appeal.

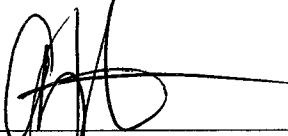
- Under sub-section “Consolidation of Proceedings and other Procedural Matters,” Findings of Fact which detail the 2017 Proposed Planning Commission Decision and the hearing held on the same.
- Under section “Proposal for Special Use Permit,” 2009 FOF #39.
- A section entitled “Description of the Property,” which incorporates 2009 FOF #41-52
- A section entitled “Surrounding Uses,” which incorporates 2009 FOF #53-61
- A section entitled “Stability, Controlled Blasting and Berms,” which incorporates 2009 FOF #62-72
- A section entitled “Storm Water and Leachate,” which incorporates 2009 FOF #73-76
- A section entitled “Gas Collection and Control System and EPA Notice of Violation,” which incorporates 2009 FOF #77-81
- A section entitled “Traffic,” which incorporates 2009 FOF #82-83
- A section entitled “Archaeological and Cultural Resources,” which incorporates 2009 FOF #84-88.
- A section entitled “State and County Land Use Law and Regulations,” which incorporates 2009 FOF #103-109.

Additionally, Schnitzer objects to the Planning Commission’s failure to explicitly address the concerns raised by the LUC in the 2017 LUC Order. In the order, the LUC plainly requested five points of clarification from the Planning Commission, yet the 2019 Proposed Planning Commission Decision does not refer to, much less address, the 2017 LUC Order in its conclusions of law, decision, or order. This lack of acknowledgement is a noticeable oversight and could call into question the extent to which the Planning Commission complied with the 2017 LUC Order.

To that end, Schnitzer urges the Planning Commission to refer to the 2017 LUC Order in its Conclusions of Law and explicitly address the following in turn:

- 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.
- 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 WGSL to use and the subsequent commencement of operations at the alternative landfill site.
- Clarify whether the record needs to include updated information on the operation of the WGSL, the landfill site selection process and the waste diversion efforts of the City and County of Honolulu.
- 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.
- 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.

DATED: Honolulu, Hawaii, February 8, 2019.



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AVERY C. MATRO

Attorneys for Intervenor
SCHNITZER STEEL HAWAII CORP.

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of

DEPARTMENT OF ENVIRONMENTAL
SERVICES, CITY AND COUNTY OF
HONOLULU

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: 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
LUC DOCKET NO. SP09-403

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was duly served
upon the parties identified below by hand delivery on the date set forth below:

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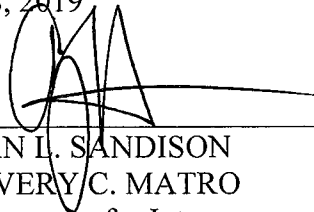
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DATED: Honolulu, Hawaii, February 8, 2019



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BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

RECEIVED
CORPORATION COMMISSION
CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

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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, Oahu, Hawaii,)
Tax Map Key Nos. (1) 9-2-003:072 and 073.)

FILE NOS. 2008/SUP-2 (RY) AND 86/SUP-5

FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER

I certify that this is a full, true and
correct copy of the original document
on file with the Planning Commission,
City and County of Honolulu.

Patricia J. Kalapa
August 4, 2009
DATE

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER**

This matter came on for a contested case hearing before the Planning Commission, City and County of Honolulu (the "Planning Commission"), on June 22, 2009, June 24, 2009, July 1, 2009, July 2, 2009 and July 8, 2009. Based on the record in this matter, including the evidence presented at the contested case hearing, the credibility of the witnesses testifying at the hearing, and the proposed findings of fact, conclusions of law, and decisions and orders submitted by the parties and their respective responses thereto, and the written arguments of the parties, the Planning Commission hereby makes the following findings of fact, conclusions of law, and decision and order:

FINDINGS OF FACT

PROCEDURAL MATTERS

1. The Waimanalo Gulch Sanitary Landfill ("WGSL" or the "landfill") is located at 92-460 Farrington Highway, Honouliuli, Ewa, Oahu. See Planning Division Master Application Form included within the Special Use Permit Application filed on December 3, 2008.

2. On November 23, 2006, the Office of Environmental Quality Control, State of Hawaii ("OEQC"), published notice in *The Environmental Notice* that the Environmental Impact Statement ("EIS") Preparation Notice for the expansion of WGSL was available for public review and comment. See Letter from David Tanoue, Director of the Department of Planning and Permitting, to Karin Holma, Chair of the Planning Commission, dated May 1, 2009 ("DPP Recommendation") at 6.

3. On October 13, 2008, the *Final Environmental Impact Statement, Waimanalo Gulch Sanitary Landfill Lateral Expansion, Waimanalo Gulch, Oahu, Hawaii, TMKs: (1) 9-2-003: 072 and 073*, dated October 2008 ("2008 FEIS"), for the expansion of WGSL, was accepted on behalf of the Mayor by the Department of Planning and Permitting ("DPP"). Id.; Exhibit "7" to the Department of Environmental Services, City and County of Honolulu's July 6, 2009 Memorandum in Opposition to Intervenor's Motion to Dismiss the Application.

4. On October 23, 2008, OEQC published notice of the 2008 FEIS Acceptance in *The Environmental Notice*, in accordance with the Hawaii Environmental Policy Act ("HEPA"), Hawaii Revised Statutes ("HRS") Chapter 343. See DPP Recommendation at 6.

5. On December 3, 2008, the Department of Environmental Services, City and County of Honolulu ("Applicant" or "ENV"), filed a State Special Use Permit Application ("Application"), with DPP pursuant to HRS Section 205-6, and Rules of the Planning Commission, City and County of Honolulu ("RPC"), Subchapter 4, Rules Applicable to State Special Use Permits. See Application. The Application, designated as Special Use Permit Application File No. 2008/SUP-2, is for a new Special Use Permit ("SUP") for the use of the approximately 200.622-acre property (the "Property"), identified by Tax Map Key ("TMK")

Nos. (1) 9-2-003: 072 and 073, in Waimanalo Gulch, Oahu, Hawaii. See Application at Figure 1-1 and Planning Division Master Application Form. The Application seeks to expand the current operating portion of the Property, approximately 107.5 acres, by approximately 92.5 acres (the "Project"). See Application at Planning Division Master Application Form and p. 1-2.

6. The Applicant concurrently seeks to withdraw its existing SUP permit for approximately 107.5 acres, Special Use Permit File No. 86/SUP-5, and the conditions imposed therein, if the Application for the new SUP permit is granted. See April 2, 2009 memorandum from Applicant to DPP; Transcript ("Tr.") 7/2/09, 20:4-10; DPP Recommendation at 3, 24.

7. The Applicant has also filed a petition with the Land Use Commission, State of Hawaii, for a district boundary amendment to reclassify the Property from the State Agricultural District to the Urban District, which may be withdrawn if the Application is granted.

See Application at p. 2-2, fn.1.

8. The Planning Commission's public hearing to consider ENV's application was scheduled for May 6, 2009. On April 3, 2009, a notice of the hearing of the matter was published in the *Honolulu Star-Bulletin*.

9. On April 16, 2009, Ko Olina Community Association ("KOCA"), Colleen Hanabusa, and Maile Shimabukuro (collectively, "Intervenors") filed a Petition to Intervene in this matter. On April 24, 2009, Applicant filed a Memorandum in Opposition to Intervenors' Petition to Intervene.

10. On May 1, 2009, DPP transmitted its report and recommendation for approval of the Application to the Planning Commission. See DPP Recommendation.

11. On May 1, 2009, the Planning Commission conducted a site visit to the Property and to the H-POWER facility.

12. At the public hearing on May 6, 2009, at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii, the Planning Commission heard public testimony. The Planning Commission was also scheduled to hear argument regarding Intervenor's Petition to Intervene. At Intervenor's request, however, the Planning Commission continued the public hearing and consideration of Intervenor's Petition to Intervene to May 20, 2009.

13. On May 7, 2009, Todd K. Apo ("Apo") filed a Petition to Intervene in this matter. On May 18, 2009, Applicant filed a Memorandum in Opposition to Apo's Petition to Intervene.

14. On May 19, 2009, Intervenor's filed a Motion to Recuse Commissioner John Kaopua.

15. On May 20, 2009, the public hearing was continued at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. At the continued public hearing, the Planning Commission heard and granted Intervenor's Petition to Intervene. Pursuant to RPC Subchapter 5, the matter was noted as a contested case. The Planning Commission also began hearing argument regarding Apo's Petition to Intervene and continued that matter to June 10, 2009.

16. On June 5, 2009, Applicant filed a Memorandum in Opposition to Intervenor's Motion to Recuse Commissioner John Kaopua.

17. On June 10, 2009, the hearing was continued at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. The Planning Commission heard and granted Intervenor's Motion to Recuse Commissioner John Kaopua. The Planning Commission denied Apo's Petition to Intervene on the grounds that it was untimely filed, that Apo's position regarding that Application was substantially the same as the position of

the Intervenor, and that the proceeding will be inefficient and unmanageable if Apo was allowed to intervene. See Findings of Fact, Conclusions of Law, and Order issued on July 27, 2009. Thereafter, the Planning Commission closed the public hearing on the Application.

18. On June 15, 2009, Intervenor filed their List of Witnesses, listing 42 potential witnesses including Apo. Applicant also filed its List of Witnesses, listing six potential witnesses.

19. On June 22, 2009, the contested case hearing began on the Application at Kapolei Hale, 1000 Uluohia Street, Kapolei, Hawaii. The Applicant submitted Exhibits "A1" through "A31," which were accepted into the record by the Planning Commission. See Tr. 6/22/09, 29:2-13. The Applicant presented its first two witnesses: Brian Takeda, who was qualified as an expert in the field of urban and regional planning, and Hari Sharma ("Sharma"), who was qualified as an expert in the field of geotechnical and geo-environmental engineering. Id. at 33:5-8; 234:7-12. Intervenor offered, and the Planning Commission received into the record, Exhibits "B1" and "B4." Id. at 81:6-11; 226:14-15.

20. On June 24, 2009, the Planning Commission resumed the contested case hearing on the Application at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. The examination of Sharma was completed. The Applicant presented its third witness Joseph R. Whelan ("Whelan").

21. On June 29, 2009, Intervenor filed a Motion to Dismiss the Application, contending that the 2008 FEIS did not cover the entire 200.622-acre site and therefore, ENV's Application had to be dismissed.

22. On July 1, 2009, the Planning Commission resumed the contested case hearing on the Application at Kapolei Hale, 1000 Uluohia Street, Kapolei, Hawaii. The examination of

Whelan was completed. The Applicant presented its fourth and fifth witnesses: Richard Von Pein, who was qualified as an expert in the field of landfill design and geotechnical engineering, and Frank Doyle, Chief of the Division of Refuse, City and County of Honolulu. See Tr. 7/1/09, 93:2-8; 176:4-9. Applicant offered, and the Planning Commission accepted for the record, Exhibit "A32." Id. at 168:16-17.

23. On July 2, 2009, the Planning Commission resumed the contested case hearing on the Application at the City Council Chambers, Third Floor, 530 South King Street, Honolulu, Hawaii. The Applicant offered no further witnesses and concluded its case-in-chief. See Tr. 7/2/09, 4:15-17. Intervenors began their case-in-chief and presented the following seven witnesses: Abbey Mayer; Josiah Hoohuli; William J. Aila, Jr.; Daniel Banchiu; Cynthia Rezentes; Maeda Timson; and Apo. The Applicant offered, and the Planning Commission received into the record, Exhibits "A33" and "A34." Id. at 32:20-25; 240:7-13. Intervenors offered, and the Planning Commission received into the record, Exhibit "B5." Id. at 185:21-23. Other documents were referenced by the Planning Commission and the parties as Exhibits "B2" through "B3." Intervenors rested their case. Id. at 279:15.

24. On July 6, 2009, Applicants filed a Memorandum in Opposition to Intervenors' Motion to Dismiss the Application.

25. On July 8, 2009, the Planning Commission resumed the contested case hearing on the Application at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. Applicant presented David M. Shideler as a rebuttal witness, who was qualified as an expert in archaeology and historical cultural resources. See Tr. 7/8/09, 11:15-21. Applicant offered, and the Planning Commission received into the record, Exhibits "A35," "A36," and "A37." Id. at 8:25-9:5, 65:14-22, 68:6-13. Intervenors made their witness, Apo,

available for additional questions by Commissioner Beadie Dawson. The examination of Apo was completed.

26. On July 8, 2009, the Planning Commission also heard and denied Intervenors' Motion to Dismiss the Application on the grounds that the Planning Commission does not have jurisdiction to consider the sufficiency of the 2008 FEIS and that Intervenor Hanabusa had previously filed the appropriate matter contesting the sufficiency in State circuit court. The Planning Commission scheduled decision-making for the Application on July 31, 2009, at the City Council Committee Meeting Room, Second Floor, 530 South King Street, Honolulu, Hawaii. Id. at 110:15-25; 111:1-5, 20-21.

EXHIBITS AND WITNESSES

27. The Applicant offered, and the Planning Commission received into the record; Exhibits "A1" to "A37," without objection.

28. Intervenors offered, and the Planning Commission received into the record, Exhibits "B1," "B4," and "B5," without objection.

29. The Applicant called the following witnesses: Brian Takeda, who was qualified as an expert in the field of urban and regional planning; Hari Sharma, who was qualified as an expert in the field of geotechnical and geo-environmental engineering; Joseph R. Whelan; Richard Von Pein, who was qualified as an expert in the field of landfill design and geotechnical engineering; Frank Doyle; and David M. Shideler, who was qualified as an expert in the field of archaeology and historical cultural resources.

30. Dr. Sharma prepared a report entitled "Engineering Report for Landfill Expansion; Waimanalo Gulch Sanitary Landfill," dated March 12, 2008, which is Exhibit "A29." See Tr. 6/22/09, 235:4-25.

31. Intervenor called the following witnesses: Abbey Mayer; Josiah Hoohuli; William Aila, Jr.; Daniel Banchiu; Cynthia Rezendes; Maeda Timson; and Todd Apo. Intervenor did not move to qualify any of these persons as expert witnesses.

32. Intervenor Ko Olina Community Association, Colleen Hanabusa, and Maile Shimabukuro did not testify and did not submit any written testimony during the contested case hearing.

33. Mr. Doyle testified that the Applicant will begin in 2010 efforts to identify and develop a new landfill site to supplement WGS. See Tr. 7/1/09, 251:18-24.

34. Mr. Doyle also testified that it would take more than seven years to identify and develop a new landfill site. *Id.* at 260:16-22; 261:3-22.

POST-HEARING SUBMISSIONS BY THE PARTIES

35. On July 17, 2009, Applicant filed the Department of Environmental Services, City and County of Honolulu's Post-Hearing Brief and the Department of Environmental Services, City and County of Honolulu's Proposed Findings of Fact, Conclusions of Law, and Decision and Order; and Certificate of Service.

36. On July 17, 2009, Intervenor filed the Post Hearing Brief of Intervenor, Certificate of Service and Intervenor's Ko Olina Community Association, Colleen Hanabusa and Maile Shimabukuro Proposed Findings of Fact and Conclusions of law and Decision and Order, and Certificate of Service.

37. On July 29, 2009, Applicant filed that certain Department of Environmental Services, City and County of Honolulu's (1) Response to Post-Hearing Brief of Intervenor and (2) Exceptions to Intervenor's Proposed Findings of Fact, Conclusions of Law, and Decision and Order; Declaration of Gary Y. Takeuchi; Exhibits "1" - "3"; and Certificate of Service.

38. On July 29, 2009, Intervenor filed that certain Reply Brief of Intervenor, Certificate of Service.

PROPOSAL FOR SPECIAL USE PERMIT

39. A special use permit is being sought for the continued use of the Property as a landfill. See Application at 1-1. The 107.5-acre portion of the Property currently used as a landfill is proposed to be expanded by the remaining approximately 92.5 acres. Id. Of the approximately 92.5 acres in the expansion area, approximately 37 acres will be utilized for landfill cells. See Exhibit "A1" at 3-1, 4-4, 11-1. In addition, the expansion area will include the development of landfill-associated support infrastructure, including drainage, access roadways, a landfill gas collection and monitoring system, leachate collection and monitoring systems, stockpile sites, a public drop-off center, and a landfill gas-to-energy system and other related features. Id.; see also Application at Part I.

40. The SUP will cover the entire Property. See Application at Part I.

DESCRIPTION OF THE PROPERTY

41. The Property is owned by the City and County of Honolulu ("City") and operated by Waste Management of Hawaii, Inc ("Waste Management"). See Tr. 7/1/09, 179:4-8.

42. The state land use district designation for the Property is Agricultural District. See DPP Recommendation at 1; Application at Planning Division Master Application Form.

43. The existing City zoning district for the Property is AG-2, General Agricultural District. See Application at Planning Division Master Application Form; DPP Recommendation at 1.

44. The Ewa Development Plan recognizes the existing landfill. See Exhibit "A5"; DPP Recommendation at 1.

45. Existing uses of the property are landfill and open space. See DPP Recommendation at 2.
46. Elevations at the Property range from a low of 70 feet above mean sea level (msl) to 940 feet (msl) in the northern portion. Except for areas of fill, the steep-sloped valley contains dryland grasses and an abundance of rock outcrops. See DPP Recommendation at 8.
47. The area is fairly dry. According to an on-site rain gauge, located at the weather station, the average rainfall at WGSL is approximately 15 inches per year. See Application at 2-27; DPP Recommendation at 9.
48. The soil found at the Property consists primarily of Rock Land (rRK) with small amounts of Stony Steep Land (rSY). See Application at 2-30.
49. According to the Agricultural Lands of Importance ("ALISH") to the State of Hawaii system, the Property is not classified as Prime Agricultural Land, Unique Agricultural Land or Important Agricultural Lands. See Figure 8-2 of Exhibit "A1."
50. The University of Hawaii Land Study Bureau overall master productivity rating for the Property is "E," which indicates very poor crop productivity potential. See Application at 2-31.
51. The Federal Emergency Management Agency, Flood Insurance Rate Map, identifies the landfill property as within "Zone D," an area in which flood hazards are undetermined, but possible. See Figure 5-9 of Exhibit "A1."
52. The Property is not located within the Special Management Area. See Figure 8-3 of Exhibit "A1."

SURROUNDING USES

53. Surrounding uses to the Property include the Hawaiian Electric Company Kahe Power Plant to the west, single-family dwellings and the Ko Olina Resort to the south, and vacant lands to the north and east. See Figure 7-3 of Exhibit "A1."

54. Farrington Highway is located south of the Property. Id.

55. The region east of Property comprises the Makaiwa Hills development, which is scheduled for development. See Tr. 6/22/09, 64:6-8; Figure 7-3 of Exhibit "A1." WGSL has been in operation since 1989. See Tr. 7/1/09, 179:9-10. In 2008, the Makaiwa Hills parcel was rezoned for single family, mixed and apartment use by Ordinance 8-26, Bill 47 (2008). See Exhibit "A36."

56. The Makaiwa Hills developer's intention, according to its Final EIS dated October 2007 (the "Makaiwa Hills EIS"), is to proceed with development from makai (south) proceeding in a mauka (north) direction, as well as proceeding from east to west. See Tr. 6/22/09, 167:6-25. The Makaiwa Hills EIS indicates that construction of the western portion of its development closest to WGSL will not proceed until 2015. Id. at 167:25-168; Exhibit "A37" at p. 4-60.

57. WGSL plans to initiate closure of the existing landfill cells in the area nearest Makaiwa Hills' proposed residences prior to 2015. See Tr. 6/22/09, 168:1-8; 188:17-25, 189:1-14. In particular, cell E2 and portions of cells E1, E3, and several other MSW cells (labeled Closure Sequence "A" in Exhibit "A12") are anticipated to be covered, capped, and closed by 2012. See Exhibit "A12"; Tr. 6/24/09, 91:7-92:1.

58. There is a ridgeline between Makaiwa Hills and WGSL. See Tr. 6/22/09, 191:12-18. The area of Makaiwa Hills nearest to WGSL's landfill cells in the proposed

expansion area is identified as open space on the Makaiwa Hills property and will not be developed. Id. at 191:4-8; Exhibit "A11."

59. The current landfill access road proceeds up to the scalehouse, past the ash cells, veers due west to the west side of the Property, and travels up the western side of the Property and into the proposed expansion area. See Tr. 6/24/09, 89:5-16. This course takes the road away from the eastern boundary of the Property and away from Makaiwa Hills. Id.

60. Waste Management documents and responds to complaints received about the operations of WGS. Id. at 100:9-101:3. Waste Management received and investigated six complaints in 2007, three complaints in 2008, and three complaints to date in 2009. Id. at 101:4-7.

61. Daniel Banchiu, general manager of JW Marriott, Ihilani ("Marriott"), testified for Intervenor at the July 2, 2009 hearing on the Application. See Tr. 7/2/09, 99:1-13. The Marriott operates a hotel at the Ko Olina resort. Id. at 99:21-24. He testified that he is aware of view and odor complaints from his guests but that the Marriott has not notified Waste Management about any complaints. Id. at 100:14-101:12; 110:1-10. He also testified that guests complained of views of a smokestack in the distance. On cross-examination, however, he admitted that he has never been to the landfill and that the smokestack could be located at some other facility--perhaps a facility with a smokestack. Id. at 106:1-25; 107:1-12. WGS does not have a smokestack, but the Kahe Power Plant, which is adjacent to the Property, does. See Exhibit "A1" at p. 5-93.

STABILITY, CONTROLLED BLASTING AND BERMS

62. Pursuant to federal and state regulations governing landfills, a seismic hazard evaluation was performed to determine seismic slope stability of the landfill. See Tr. 6/22/09 at

238:21-239:5. Consistent with accepted industry practice, the Project was analyzed for a design earthquake of magnitude 7.0, with an acceleration of 0.25 G. Id. at 240:1-9.

63. Under the Resource Conservation and Recovery Act ("RCRA"), Subtitle D, Seismic Design Guidance document, the acceptable displacement of landfills due to a seismic event is 12 inches. Id. at 248:25-249:13. The seismic deformation analysis of the design for the expanded landfill showed that seismic deformations were six inches or less, meeting the seismic stability criteria. Id. at 249:14-23.

64. The use of controlled blasting at the Property, which is very common in many landfill excavations, will not affect the stability of WGSL because the imparted energy of controlled blasting is so small and significantly less than 0.1 G. Id. at 240:12-23; 250:3-16; 253:3-7. Monitoring probes installed by the Hawaiian Electric Company near the western Property boundary to measure vibrations from controlled blasting efforts at the currently permitted landfill did not detect any measurable readings. See Tr. 6/22/09, 252:1-15.

65. In order to alleviate community concerns about controlled blasting, a blast test program will be implemented at the Property, wherein distance, velocity, and frequencies transmitted by controlled blasting will be monitored. Id. at 251:7-16; 252:16-253:2. According to Dr. Hari Sharma, if the controlled blasting affects the landfill or any of the structures nearby, adjustments will be made. Id. at 251:7-16. There are no concerns regarding stability during the blast test program itself. Id. at 251:17-19.

66. A slope stability study was also prepared for the proposed Project. Id. at 244:2-4; 250:15-17. The proposed design meets the required factors of safety of 1.3 and 1.5 for short-term and long-term conditions, respectively. Id. at 245:18-246:11.

67. The impact of accumulated leachate on stability was also studied. According to Dr. Sharma and Richard Von Pein, even under extreme circumstances of leachate accumulation, using worst case scenarios that have never been experienced, the landfill would remain stable. See Tr. 6/24/09, 61:2-24; Tr. 7/1/09, 170:16-25, 171:1-15.

68. Whenever new cells are designed, a seismic deformation analysis and slope stability analysis must be performed to determine how the design impacts the existing cells. See Tr. 6/24/09, 9:19-23.

69. Berms are included in the design for several reasons, including for diversion of the surface water to make sure leachate is contained within the landfill and to create airspace while ensuring stability. See Tr. 6/22/09, 236:18-237:2; Tr. 6/24/09, 24:13-20; Tr. 7/1/09, 100:12-15.

70. A small Ash Toe Berm was a part of the original design for WGSL. See Tr. 7/1/09, 142:12-15; 142:21-143:3. The Ash Toe Berm was expanded in 2005 to address a small area where the factor of safety was less than 1.5. Id. at 142:17-20.

71. The E1 and West Berms were a part of the 2002 design for the 14.9-acre landfill expansion. Id. at 168:19-170:1; Exhibit "A32."

72. The West Berm will be extended further into the canyon under the proposed design for the expansion. See Tr. 6/22/09, 237:3-23; Tr. 6/24/09, 36:25-38:11.

STORM WATER AND LEACHATE

73. Leachate is rain water that falls on open landfill cells. See Tr. 7/1/09, 14:11. The bottom of the individual landfill cell is contoured to direct leachate to a low point ("sump") and has a multi-layered composite liner system. Id. at 15:4-13; 101:2-25; 102:1-4; Exhibit "A1" at Figure 4-3. Within the sump is a permanent riser that contains a pump, which pumps the

leachate in a hard pipe up to the surface, where it is then pumped into a tank for disposal at a wastewater treatment facility. Id. at 15:4-13, 17:12-15. The wastewater treatment facility accepts the leachate for treatment after determining it meets the requirements of the wastewater treatment facility's own permits and would not violate the Clean Water Act. Id. at 18:6-15; Tr. 6/22/09, 144:7-19, 147:2-5. Each of the leachate sumps is equipped with an automated pump that activates at a preset level below the compliance level. Id. at 105: 9-12. There is an alarm that lets Waste Management know if the pump is no longer functioning. Id. at 105:13-16. In addition, Waste Management physically monitors the sumps. Id. at 105:13-16; 16:23-17:2.

74. Drainage for the Property is intended to capture storm water and divert it around the landfill if it originates off site (surface run-on) or into the existing sedimentation basin if it originates onsite (surface run-off). Id. at 13:16-25; Tr. 6/22/09, 119:17-25. The sedimentation basin is designed to allow storm water to settle so that dissolved solids that come off the landfill can settle out in that basin. See Tr. 7/1/09, 77:21-24. The water is eventually discharged to the ocean subject to State of Hawaii Department of Health ("DOH") permitting requirements under the national pollution discharge elimination system ("NPDES"). Id. at 77:19-78:6. A third-party company takes samples to ensure compliance with certain discharge limits. Id. at 78:7-79:5. In addition, DOH inspects Waste Management's ditches and slopes. Id. at 78:7-15.

75. Leachate does not come into contact with storm water. Id. at 76:21-23. The storm water or surface water system is separate from the leachate collection system. Id. at 76:25-77: 8; 97:15-98:8.

76. Groundwater in the area of the Property is monitored for leachate contamination. Id. at 98:12-17.

GAS COLLECTION AND CONTROL SYSTEM AND EPA NOTICE OF VIOLATION

77. On April 4, 2006, the Environmental Protection Agency ("EPA") issued a Notice of Violation to WGSGL, which included the late installation of a landfill gas collection and control system (the "GCCS") and alleged violations of reporting requirements. Id. at 19:3-8; Appendix B, Volume II of III, of Exhibit "A1." Both issues were resolved by August 2005. Tr. 7/1/09, 19:3-8. There are currently 40 gas wells at the Property. Id. at 22:18-25.

78. The GCCS collects landfill gases that are formed from the decomposition of the waste material. The gas is burned off at the onsite flare pursuant to a DOH-issued air quality permit. Id. at 23:6-11.

79. In installing the GCCS, elevated temperatures above the EPA's standard operating temperature of 131° Fahrenheit were discovered at WGSGL. See Tr. 7/1/09, 112:7-10; 113:25-114:2. Waste Management has submitted a demonstration to the EPA establishing that WGSGL can be safely operated at higher than the standard operating temperatures. Id. at 112:11-15.

80. The EPA Notice of Violation is pending resolution of two outstanding issues that evolved from the Notice of Violation: the temperature issue and a monetary settlement. Id. at 106:2-13.

81. The EPA has not issued any notice of violation for the elevated temperatures at WGSGL. See Tr. 6/24/09, 21:18-22:1. There is no evidence that there has ever been, or that there is currently, a landfill fire at WGSGL. See Tr. 7/1/09, 108:8-14. If there was combustion at WGSGL, Waste Management would implement its contingency plan, including turning off the gas wells in the area of the fire, thereby depriving the combustion area of needed oxygen, which is standard procedure for handling landfill oxidation events. Id. at 107:8-25; 108:1-7.

TRAFFIC

82. A traffic impact report ("TIR") was prepared for the Project. See Tr. 6/22/09, 51:6-17; Appendix I of Exhibit "A1." The TIR analyzes the amount of existing traffic transiting Farrington Highway on both the eastbound and westbound approaches, as well as the volume of traffic entering and coming out of the Property. Id.

83. The TIR concluded that even with the expansion of the landfill, the volume of traffic would not be expected to increase dramatically. Traffic going in and out of the landfill is less than approximately one percent of the total volume of traffic in the region. See Tr. 6/22/09, 51:18-24.

ARCHAEOLOGICAL AND CULTURAL RESOURCES

84. An *Archaeological Inventory Survey, Waimānalo Gulch Landfill Expansion*, 2008 ("AIS") and a *Cultural Impact Assessment (Draft), Waimānalo Gulch Landfill Expansion*, 2008 ("CIA") were prepared for the Property. See Appendices G and H of Exhibit "A1," respectively.

85. One historic property, State Inventory of Historic Properties ("SIHP") # 50-80-12-6903, was identified by the study. See AIS (Appendix G of Exhibit "A1") at 45. SIHP# 50-80-12-6903 consists of three large upright boulders potentially utilized as trail or boundary markers. Id.

86. Applicant proposes to address SIHP# 50-80-12-6903 within a mitigation/preservation plan to be reviewed and accepted by the State Historic Preservation Division, Department of Land and Natural Resources, State of Hawaii ("SHPD"). See Tr. 6/22/09, 49:21-50:5; Exhibit "A3." Specifically, Applicant has proposed to temporarily relocate the upright stones to Battery Arizona, and return the upright stones as close as possible to their current locations after the landfill has been closed. See Tr. 6/22/09 at 49:5-20; Exhibit "A3."

87. SHPD has reviewed Applicant's proposed mitigation and determined that there is no effect to historic properties, as stated in a letter from Nancy McMahon, Deputy State Historic Preservation Officer of SHPD, to David Tanoue, Director of DPP, dated April 2, 2009. See Tr. 6/22/09, 49-20-51:1; Exhibit "A4."

88. No native Hawaiian customary and traditional rights or practices at the Property were identified. See CIA (Appendix "F" of Exhibit "A1") at 79.

PURPOSE AND NEED

89. According to Joseph Whelan, as of March 16, 2009, there was approximately 12 month of landfill airspace capacity remaining in the municipal solid waste ("MSW") portion of the current SUP area, and approximately 24 months of landfill airspace capacity remaining in the ash portion of the current SUP area. See Tr. 6/24/09, 81:22-82:6; 83:1-14.

90. On December 1, 2004, the City Council adopted Resolution No. 04-349, CD1, FD1, which selected the Property as the site for the City's landfill. See Exhibit "A20."

91. The proposed expansion of the landfill within the Property is needed because WGS� is a critical part of the City's overall integrated solid waste management efforts. See Tr. 7/1/09, 181:4-8.

92. Continued availability of WGS� is required as a permit condition to operate H-POWER and to engage in interim shipping of waste, for cleanup in the event of a natural disaster, and because there is material that cannot be combusted, recycled, reused, or shipped. Id. at 181:9-18; 182:2-4, 10-17; 197:2-22.

93. Therefore, a landfill is currently necessary for proper solid waste management, the lack of which would potentially create serious health and safety issues for the residents of Oahu. See Application at 2-6.

94. WGS� is the only permitted public MSW facility on the island of Oahu and the only permitted repository for the ash produced by H-POWER. Id. at 181:20-183:4.

95. WGS� is a critical portion of the City's overall Integrated Solid Waste Management Plan ("ISWMP"), which looks at all of the factors that make up solid waste management, including reuse and recycling, the H-POWER facility, and landfilling for material that cannot be recycled or burned for energy. Id. at 178:10-18; 181: 7-18. The ISWMP is required by State law and approved by DOH after public comments. Id. at 182:18-183: 25. One theme of the ISWMP is to minimize landfill disposal. Id. at 184:1-3.

96. Currently, approximately 1.8 million tons of waste is produced on Oahu per year. This does not include material deposited at the PVT Landfill. Id. at 179:11-23. Approximately, 340,000 tons of MSW in 2006, and approximately 280,000 tons of MSW in 2008, were landfilled at WGS�. Id. at 179:16-17. These amounts fluctuate based on such things as recycling and the economy. Id. at 179:18-19. Approximately 170,000 to 180,000 tons of ash from the H-POWER facility is deposited at WGS� each year. Id. at 179:24-25; 180:1-4.

97. Other items that cannot be recycled or burned at H-POWER are deposited at WGS�, such as screenings and sludge from sewage treatment plants, animal carcasses, tank bottom sludge, contaminated food waste that cannot be recycled, and contaminated soil that is below certain toxicity levels. Id. at 180:10-21.

98. The WGS� Oversight Advisory Committee consists of citizens primarily from the leeward communities, who meet periodically to discuss concerns with Waste Management and the Applicant regarding WGS� operations. Id. at 184:9-18.

99. The Community Benefits Advisory Committee advises the City on the spending of money for grants and improvements throughout the Waianae Coast. In fiscal year 2008, there

was approximately \$2 million appropriated in the City budget, and for fiscal year 2009, approximately \$2.5 million, for this program. Id. at 184:19-25, 185:1-7.

100. The City is actively reducing waste volume that is directed to the landfill. The H-POWER plant is expanding and its capacity is expected to increase by an additional 300,000 tons of MSW per year by late 2011 or early 2012. Id. at 185:8-25. The expanded H-POWER facility will be able to burn items that the current facility cannot and which are therefore currently being sent to the landfill. Id. at 186: 17-25, 187: 1-12. The City is in the process of completing the full implementation of its island-wide, curbside recycling program by May 2010. Id. at 186:7-13. The City has a program of community recycling bins to encourage schools to recycle cardboard, as well as plastic bottles and cans. Id. at 187:13-18. The City is currently in the process of procuring a new green waste recycling facility that will accept food waste and sewage sludge. Id. at 188:22-25. The City has a facility at the Sand Island Wastewater Treatment Plant that turns bio-solids into fertilizer pellets, with the goal of reusing 100 percent of the material for such uses as golf course fertilizer. Id. at 189:5-18. The City is also requesting technology demonstration proposals to explore alternate technologies. Id. at 194:11-25. ENV has looked at these technologies, like plasma arc and gasification, and to date they are not ready in the size the City needs, and are only demonstration technologies. Id. at 192:8-25; 193:1-25; 194:1-10.

101. By 2012, when H-POWER's third boiler is expected to be operational, the City, through its various solid waste management programs, expects to divert eighty (80) percent of the waste stream, with the remaining twenty (20) percent being landfilled at WGSL. Id. at 201:9-16. Id. at 195: 4-8.

102. In order to ensure there will be no cessation of waste disposal at the Property, construction of a new cell in the expansion area to be used when the capacity of the currently permitted cells is exhausted would need to begin on or around November 1, 2009, due to the amount of time that it takes for cell construction, liner placement, forming, etc. See Tr. 6/24/09, 84:8-20. Before construction can begin, an operating permit is required from DOH. Because the DOH operating permit can only be processed after a SUP or boundary amendment is granted, and given the time it takes to process the operating permit, the SUP or boundary amendment must be granted in August or September of 2009 so that construction can be timely started. See Tr. 6/24/09, 99:11-23.

STATE AND COUNTY LAND USE LAW AND REGULATIONS

103. The Project complies with the guidelines as established by the Planning Commission. See Tr. 6/22/09, 68:3-13; Application at 2-1 through 2-28.

104. The Project is consistent with various provisions of the Hawaii State Plan. See Tr. 6/22/09, 69:4-6; Application at 2-2 through 2-8.

105. The Project is consistent with the energy functional plan. GSL is a generator of naturally occurring methane and other landfill gases, and these gases are planned to be recovered by the City for use in the generation of electricity through a landfill gas-to-energy system. See Exhibit "A1" at p. 8-9; Tr. 6/22/09, 70:1-12.

106. The Project is consistent with the recreational functional plan. The Property will be reclaimed for other purposes that include outdoor recreation; for example, Kakaako Waterfront Park once served as a landfill in Honolulu. See Exhibit "A1" at p. 8-10; Tr. 6/22/09, 70:13-71:2.

107. The Project is consistent with the City's general plan. WGS� is an important public facility that will provide a necessary facility to meet future population needs and accommodate growth in the region; WGS�'s eventual closure will allow the Property to be reclaimed for other public uses; and WGS� is needed in the event of a natural disaster. See Tr. 6/22/09, 71:8-25; 72:1-25; Exhibit "A1" at pp. 8-25 through 8-28.

108. The Project is consistent with the Ewa Development Plan because the facilities map contained therein designates the landfill with the appropriate symbol. See Tr. 6/22/09, 73:9-74:11; Exhibit "A1" at pp. 8-28 through 8-29.

109. The Project is consistent with City zoning because a landfill is considered a "public use" under the Land Use Ordinance, and "public uses and structures" are deemed permitted uses in every City zoning district, without the need for a permit. See Application at 2-28 through 2-29; Tr. 6/22/09, 75:5-22.

110. The parties stipulated that Commissioner Rodney Kim can participate via telephone in decision making for this contested case.

PROPOSED FINDINGS OF FACT OR CONDITIONS

Any proposed findings of fact or conditions submitted by the Applicant or Intervenors that are not expressly ruled upon by the Planning Commission by adoption herein, or rejected by clearly contrary findings of fact, are hereby denied and rejected.

LABELING OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

To the extent that any of the foregoing Findings of Fact are more properly deemed to be Conclusions of Law, they are incorporated herein as Conclusions of Law. Should any of the following Conclusions of Law be more properly deemed Findings of Fact, they are incorporated herein as Findings of Fact.

CONCLUSIONS OF LAW

The Planning Commission hereby concludes as follows:

1. The Planning Commission has jurisdiction to hold public hearings and make recommendations on all proposals to adopt or amend the general plan, development plans and zoning ordinances, and to approve special use permits for unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified in accordance with the RPC. Section 6-1506(b), Revised Charter of the City and County of Honolulu 1973 (2000 Edition); Hawaii Revised Statutes Section 205-6(a).

2. Hawaii Revised Statutes Section 91-10(5) provides that:

[T]he party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

The Applicant has the burden of proof to show by a preponderance of the evidence that the Application meets the provisions of Section 2-45 of the RPC.

3. The Applicant seeks a new State Special Use Permit. Chapter 2, Subchapter 4 of the RPC sets forth the rules applicable to State Special Use Permits. Section 2-45 of the RPC provides as follows:

Test to be applied. Certain "unusual and reasonable" uses within agricultural districts other than those for which the district is classified may be permitted. The following guidelines are established as guidelines in determining an "unusual and reasonable" use:

(a) Such use shall not be contrary to the objectives sought to be accomplished by the state land use law and regulations.

(b) That the desired use would not adversely affect the surrounding property.

(c) Such use would not unreasonably burden public agencies to provide public roads and streets, sewer, water, drainage and school improvements, and police and fire protection.

(d) Unusual conditions, trends, and needs have arisen since the district boundaries and regulations were established.

(e) That the land upon which the proposed use is sought is unsuited for uses permitted in the district.

4. Based on the findings set forth above, the Planning Commission concludes that the Applicant's request for a new State Special Use Permit (a) is not contrary to the objectives sought to be accomplished by the state land use law and regulations; (b) would not adversely affect surrounding property as long as operated in accordance with governmental approvals and requirements, and mitigation measures are implemented in accordance with the Applicant's representations as documented in the 2008 FEIS; and (c) would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvements, or police and fire protection. The Planning Commission further concludes that the same unusual conditions, trends, and needs that existed at the time the original Special Use Permit was granted continue to exist and that the land on which WGSL is located continues to be unsuited for agricultural purposes.

5. The Planning Commission concludes that the Applicant has met its burden of proof with respect to the provisions set forth in Section 2-45 of the RPC.

DECISION AND ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, it is the Decision and Order of the Planning Commission to DENY Intervenors' Motion to Dismiss Application. It is the further Decision and Order of the Planning Commission to APPROVE Applicant's Special Use Permit Application File No. 2008/SUP-2 ("2008/SUP-2"), for a new SUP for the existing and proposed expansion of WGSL, located at Tax Map Key Nos. 9-2-3: Parcels 72 and 73, totaling approximately 200.622 acres, until capacity as allowed by the State Department of Health is reached, subject to the following conditions:

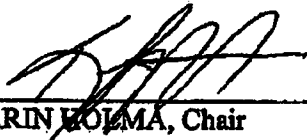
1. On or before November 1, 2010, the Applicant shall begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGSL. The Applicant's effort to identify and develop such sites shall be performed with reasonable diligence, and the Honolulu City Council is 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 and shall determine whether modification or revocation of 2008/SUP-2 is appropriate at that time.
2. The Applicant shall continue its efforts to use alternative technologies to provide a comprehensive waste stream management program that includes H-POWER, plasma arc, plasma gasification and recycling technologies, as appropriate. The Applicant shall also continue its efforts to seek beneficial reuse of stabilized, dewatered sewage sludge.
3. The Applicant shall provide, without any prior notice, annual reports to the Planning Commission regarding the status of identifying and developing new landfill sites on Oahu, the WGSL's operations, and Applicant's compliance with the conditions imposed herein. The annual reports also shall address the Applicant's efforts to use alternative technologies, as appropriate, and to seek beneficial re-use of stabilized, dewatered sewage sludge. The annual reports shall be submitted to the Planning Commission on June 1 of each year subsequent to the date of this Decision and Order.

4. Closure Sequence "A" for the existing landfill cells at WGSL as shown on Exhibit "A12" must be completed, and final cover applied, by December 31, 2012.
5. WGSL shall be operational only between the hours of 7:00 a.m. and 4:30 p.m. daily, except that ash and residue may be accepted at the Property 24-hours a day.
6. The Applicant shall coordinate construction of the landfill cells in the expansion area and operation of WGSL with Hawaiian Electric Company, with respect to required separation of landfill grade at all times and any accessory uses from overhead electrical power lines.
7. The operations of the WGSL under 2008/SUP-2 shall be in compliance with the requirements of Section 21-5.680 of the Revised Ordinances of the City and County of Honolulu 1990, to the extent applicable, and any and all applicable rules and regulations of the State Department of Health.
8. The Planning Commission may at any time impose additional conditions when it becomes apparent that a modification is necessary and appropriate.
9. Enforcement of the conditions to the Planning Commission's approval of 2008/SUP-2 shall be pursuant to the Rules of the Planning Commission, including the issuance of an order to show cause why 2008/SUP-2 should not be revoked if this Commission has reason to believe that there has been a failure to perform the conditions imposed herein by this Decision and Order.
10. The Applicant shall notify the Planning Commission of termination of the use of the Property as a landfill for appropriate action or disposition of 2008/SUP-2.

IT IS ALSO the Decision and Order of the Planning Commission to APPROVE the withdrawal of Special Use Permit File No. 86/SUP-5 upon 2008/SUP-2 taking effect and that all conditions previously placed on the Property under Special Use Permit File No. 86/SUP-5 shall be null and void.

Dated at Honolulu, Hawaii, this 4th day of August, 2009.

PLANNING COMMISSION
CITY AND COUNTY OF HONOLULU

By 
KARIN HOLMA, Chair

By 
RODNEY KIM, Vice Chair

By _____
BEADIE K. DAWSON, Member

By 
HAROLD J. DIAS, JR., Member

By _____
VICKI GAYNOR, Member

By 
ANDREW M. JAMILA, JR., Member

By (RECUSED)
JOHN S. KAOPUA, III, Member

By 
KERRY M. KOMATSUBARA, Member

By 
JAMES C. PACOPAC, Member

FILE NOS. 2008/SUP-2 (RY) AND 86/SUP-5, IN THE MATTER OF THE APPLICATION
OF DEPARTMENT OF ENVIRONMENTAL SERVICES, CITY AND COUNTY OF
HONOLULU - FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND
ORDER

BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAII

In the Matter of the Application of)	FILE NO. 2008/SUP-2 (RY) AND 86/SUP-5
DEPARTMENT OF ENVIRONMENTAL)	CERTIFICATE OF SERVICE
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, Oahu, Hawaii,)	
Tax Map Key Nos. (1) 9-2-003:072 and 073)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER** was served upon the following by certified mail, return receipt requested, postage prepaid, on August 4, 2009 :

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DATED: Honolulu, Hawai'i, August 4, 2009

Patricia J. Kalapa
PATRICIA J. KALAPA
Secretary-Reporter
Planning Commission