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LAND USE COMMISSION  
STATE OF HAWAII

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Attorneys for Intervenor  
**SCHNITZER STEEL HAWAII CORP.**

BEFORE THE LAND USE COMMISSION  
OF THE 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

INTERVENOR SCHNITZER STEEL  
HAWAII CORP.'S COMMENTS TO  
INTERVENORS KO OLINA  
COMMUNITY ASSOCIATION AND  
MAILE SHIMABUKURO'S OBJECTIONS  
TO THE PLANNING COMMISSION'S  
FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND DECISION AND ORDER,  
DATED JUNE 10, 2019

CERTIFICATE OF SERVICE

HEARING:

Date: October 9, 2019

Time: 9:00 a.m

**INTERVENOR SCHNITZER STEEL HAWAII CORP.'S COMMENTS TO  
INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE**

**SHIMABUKURO’S OBJECTIONS TO THE PLANNING COMMISSION’S  
FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND DECISION AND ORDER, DATED JUNE 10, 2019**

Intervenor Schnitzer Steel Hawaii Corp. (“**Schnitzer**”), by and through its attorneys, WATANABE ING LLP, hereby respectfully submits its Comments to the Intervenor Ko Olina Community Association and Maile Shimabukuro’s (collectively, “**KOCA Intervenor**”) Objections to the Planning Commission’s Findings of Fact, Conclusions of Law, and Decision and Order, dated June 10, 2019 (the “**2019 D&O**”) to raise three specific points: (1) the Land Use Commission (“**LUC**”) may issue a special use permit with a fixed termination event; (2) any deadline for closure of the Waimanalo Gulch Sanitary Landfill (“**WGSL**”) must be supported by the evidence in the record; and (3) the WGSL remains necessary to dispose of certain waste streams in the City and County of Honolulu.

**I. INTRODUCTION**

This matter is a consolidated case relating to the LUC Docket No. SP09-403, County Special Use Permit File No. 2008/SUP-2 (“**2008 Application**”), which the LUC remanded to the Planning Commission for the expressed purpose of consolidation with the proceeding on Department of Environmental Services, City and County of Honolulu’s (“**ENV**”) application to modify the LUC's Order filed on June 28, 2011 (“**2011 Application**”).

On June 6, 2017, the LUC issued its Order Granting in Part and Denying in Part Intervenor Ko Olina Community Association and Maile Shimabukuro’s Motion to Deny and Remand, which remanded the proceedings to the Honolulu Planning Commission (“**Planning Commission**”), to:

- (1) clarify whether the Planning Commission followed Section 2-75 of the Rules of the Planning Commission in issuing its Findings of Fact Conclusions of Law, and Decision and Order;
- (2) clarify the basis of the Planning Commission's proposed additional Condition No. 3, which specifies a December 31, 2022, date within which the Applicant is to identify an alternative site that will be used upon the WGSL reaching its capacity and the implications it has on the closure date of the WGSL to use

and the subsequent commencement of operations at the alternative landfill site; (3) clarify whether the record needs to include updated information on the operation of the WGS�, the landfill site selection process, and the waste diversion efforts of the City and County of Honolulu; (4) assuming the Planning Commission eventually recommends approval of the matter, clarify the effective date of the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order; and (5) clarify whether the Planning Commission is ruling on both the 2008 Application and the 2011 Application in its Findings of Fact Conclusions of Law, and Decision and Order.

Order Granting in Part and Denying in Part Intervenor Ko Olina Community Association and Maile Shimabukuro's Motion to Deny and Remand, filed herein on June 6, 2017.

On December 12, 2017, the Planning Commission entered its Findings of Fact, Conclusions of Law, and Decision and Order. On February 5, 2018, the parties each separately filed their exceptions to the December 12, 2017 Decision and Order.

On January 15, 2019, the Planning Commission, again, entered its Findings of Fact, Conclusions of Law, and Decision and Order. In February 2019, the parties each separately filed their exceptions to the January 15, 2019 Decision and Order.

On June 10, 2019, the Planning Commission, once again, entered its 2019 D&O. The LUC set a hearing on the 2019 Order for October 9, 2019.

## **II. DISCUSSION**

### **A. The Proposed Special Use Permit Is Limited in Scope and Duration**

The 2019 D&O would grant a Special Use Permit for the continued operation of the WGS�. Under the proposed permit, "the WGS� shall continue to operate until it reaches capacity." 2019 D&O Condition No. 1. In other words, the special use permit would terminate—*i.e.*, expire—once the WGS� reaches its capacity.

The LUC has authority to issue a permit that terminates upon a triggering event rather than on a fixed date. While the Hawaii Supreme Court has held that the LUC may not issue a

permanent special use permit process to circumvent boundary amendment procedures, that is not the case here. However, that precedent is inapposite here because the proposed permit for the WGSL, by its very nature, will not be permanent.

In Neighborhood Bd. No. 24 (Waianae Coast) v. State Land Use Commission, 64 Haw. 265, 639 P.2d 1097 (1982), the City and County of Honolulu sought a special use permit to turn 103 acres of land designated for agricultural uses into an amusement park. Id. 64 Haw. at 266, 639 P.2d at 1099. The court recognized that “**unlimited use** of the special permit to effectuate essentially what amounts to a boundary change would undermine the protection from piecemeal changes to the zoning scheme guaranteed landowners by the more extensive procedural protections of boundary amendment statutes.” Id. 64 Haw. at 272, 639 P.2d at 1102-03 (citations omitted). The court there recognized that building an amusement park would permanently change the use of the land away from agricultural uses because there would be no closure date or event. Thus, the court found that the proposal was more appropriate as a district boundary amendment petition, not a special use permit and reversed the LUC’s order granting the permit. Id. at 272, 639 P.2d at 1103.

Neighborhood Bd. is distinguishable from the present case. The basis for the Hawai‘i Supreme Court’s rejection of the special use permit in Neighborhood Bd. was the perpetual nature of the special use permit. There was no expiration date or other triggering event that would terminate the special use permit for the operation of an amusement park. In contrast, the proposed use for the continued operation of WGSL is inherently finite. The proposed special use permit for WGSL will terminate once the landfill has reached capacity.<sup>1</sup> Nothing in

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<sup>1</sup> In Department of Environmental Services, City and County of Honolulu v. Land Use Comm’n, 127 Hawai‘i 5, 9, 275 P.3d 809, 813 (2012) the Hawai‘i Supreme Court recognized that the Land Use Commission granted use of the WGSL until it was at capacity and chose not to

Neighborhood Bd. bars issuance of the proposed special use permit that terminates upon a triggering event, rather than a set date. Rather, the proposed special use permit with a clearly defined use (operation of WGS�) and limited duration (until WGS� reaches capacity) is consistent with the court’s mandate in Neighborhood Bd.

**B. The LUC’s Decision Must Be Supported By the Evidence**

Any decision made by the LUC must be supported by the evidence in the record. “While the [Land Use Commission] is authorized to impose restrictive conditions in its approval of [Special Use Permits], its decision to impose such a restriction must be supported by substantial evidence in the record.” Department of Environmental Services, City and County of Honolulu v. Land Use Comm’n, 127 Hawai‘i 5, 13, 275 P.3d 809, 817 (2012) (“**WGS� I**”). The Hawai‘i Supreme Court already vacated the special use permit once because the LUC imposed a closure date that was not supported by the evidence on the record. In so ruling, the court found that the evidence “clearly demonstrate[s] the continuing need to dispose of municipal solid waste at the WGS� beyond July 31, 2012.” Id., 127 Hawai‘i at 17, 275 P.3d at 821. As a result, the Hawai‘i Supreme Court vacated the LUC’s decision and remanded the case to the LUC with explicit instructions to withdraw the closure date.

In the remanded proceedings, the Planning Commission has now fixed the error in the 2019 D&O. As discussed below, the evidence again demonstrates that there is a continuing need to dispose of certain types of waste in WGS�. Furthermore, the evidence shows that keeping WGS� operational is a critical component of the State’s infrastructure security plans (*e.g.*, during severe weather events) as well as a requirement for H-POWER’s solid waste management permit. See 2019 D&O Finding of Fact (“**FOF**”) ¶¶ 84, 87, 88, 271, 272. For the LUC to once

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comment on it. This suggests that the Hawai‘i Supreme Court has already recognized that the use of the WGS� until it is at capacity is permissible.

again impose an arbitrary closure date for ENV to meet would mean ignoring the evidence in the record that demonstrates the ongoing need for WGSL and repeating the same reversible error that the Hawai‘i Supreme Court previously found in WGSL I.

**C. The WGSL is Necessary to the City and County of Honolulu**

On O‘ahu, there is currently only a single landfill that is permitted to accept certain waste, such as ash, from H-POWER and Schnitzer. See Written Direct Testimony E. Steinberger dated December 13, 2011 ¶ 14. The evidence shows that presently, there is no other practical or economically feasible alternative means to dispose of that waste. Moreover, the evidence shows that WGSL is critical to the City and County’s operations in the event normal waste disposal methods are unavailable due to inclement weather, natural disasters, or other emergencies. See 2019 D&O FOF ¶ 272. There is evidence in the record to support a finding that it would take several more years to identify alternatives to site a new landfill. See 2019 D&O FOF ¶ 208-223. And it will take seven more years for the City and County to then select the site and develop it for operation. See 2019 D&O FOF 274. Until the City and County identifies and opens a new landfill site, the WGSL—to the extent it still has capacity—cannot be closed as it is the only practical solution for disposal of certain types of waste and as a backup in the event of emergencies or operational outages at H-POWER.

**III. CONCLUSION**

The Hawai‘i Supreme Court has already remanded this case once because the LUC adopted conditions that were beyond the scope of the evidence. If the LUC were to again impose an arbitrary deadline for closure, it would only result in the Hawai‘i Supreme Court once again vacating the permit and remanding this case to the LUC, further delaying the conclusion of this matter.

DATED: Honolulu, Hawai'i, September 25, 2019.



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Attorney for Intervenor  
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CERTIFICATE OF SERVICE

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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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DATED: Honolulu, Hawaii, September 25, 2019.



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