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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

Application to Modify SUP No.
2008/SUP-2 (SP09-403) by Modifying (1)
Condition No. 1 of the Planning
Commission's Findings of Fact,
Conclusions of Law, and Decision and
Order, dated June 10, 2019, and (2)
Condition No. 5 of the LUC's Findings of
Fact, Conclusions of Law, and Decision
and Order Approving with Modifications
the City and County of Honolulu
Planning Commission's
Recommendation to Approve Special Use
Permit, certified on November 1, 2019

FILE NO. 2008/SUP-2

INTERVENORS KO OLINA
COMMUNITY ASSOCIATION AND
MAILE SHIMABUKURO'S
SUBMISSION OF PROPOSED
FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER

[PROPOSED] FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
DECISION AND ORDER

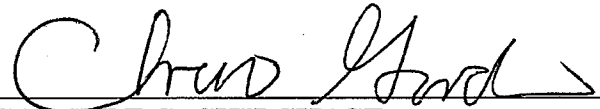
CERTIFICATE OF SERVICE

INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND MAILE SHIMABUKURO'S'S SUBMISSION OF PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER

Intervenors Ko Olina Community Association and Maile Shimabukuro hereby submits their proposed findings of fact, conclusions of law, and decision and order.

DATED: Honolulu, Hawai'i, December 22, 2023.

CADES SCHUTTE
A Limited Liability Law Partnership



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

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

On December 22, 2022, Applicant Department of Environmental Services of the City and County of Honolulu (“ENV” or the “Applicant”) filed an application for an Order modifying the State Special Use Permit (“SUP”) No. 2008/SUP-2 (SP09-403), which superseded State SUP No. 86/SUP-5, and approved the SUP for the Waimanalo Gulch Sanitary Landfill (“WGSL” or “the landfill”) subject to certain conditions. Specifically, the Applicant sought to modify the conditions that set a December 31, 2022 deadline for Applicant to identify an alternative landfill site.

Pursuant to Planning Commission Rule § 2-77(a), and based on the record in this proceeding, including the evidence and arguments presented at the contested case hearings; the credibility of the witnesses testifying at the hearings; the respective proposed findings of fact, conclusions of law and decisions and orders submitted by the parties; the parties' respective responses thereto; and the other written submissions and arguments of the parties, the Planning Commission hereby makes the following findings of fact, conclusions of law and decision and order.

Where appropriate, findings of fact shall operate as conclusions of law and conclusions of law shall operate as findings of fact. Pursuant to Planning Commission Rule § 2-77(b), “[a]ny proposed findings of fact or conditions submitted by the petitioner or other parties that are not expressly ruled upon by the planning commission, or rejected by clearly contrary findings of fact, are deemed to be denied.”

FINDINGS OF FACT

Modification Application Procedural History

1. This proceeding concerns the modification of a condition to a SUP. The WGS� is a municipal solid waste landfill located on State agricultural land, and because a landfill is not a classified use within the agricultural district, it requires a SUP as an unusual and reasonable use. *See* Hawai'i Revised Statutes (“HRS”) § 205-6.

2. On June 10, 2019, the Planning Commission issued its Findings of Fact, Conclusions of Law, Decision and Order (“**2019 Planning Commission**

Order") modifying SUP No. 2008/SUP-2, with conditions. Condition No. 1 is as follows:

1. On December 31, 2022, the Applicant shall identify an alternative landfill site that may be used upon WGS� reaching its capacity at a future date. This identification shall have no impact on the closure date for the WGS� because the WGS� shall continue to operate until it reaches capacity. This identification does not require the alternative landfill to be operational on December 31, 2022 but is intended to require the Applicant to commit to the identification of an alternative landfill site that may replace WGS� when it reaches capacity at a future date. The identification of an alternative landfill site by December 31, 2022 is based on the evidence presented and that, as the Planning Commission discussed in 2017, a five year timeframe was sufficient time for the Applicant to identify an alternative landfill site before the WGS� nears capacity. Upon identification of the alternative landfill site, the Applicant shall provide written notice to the Planning Commission and the LUC.

3. The State of Hawai'i Land Use Commission ("LUC") then received and considered the 2019 Planning Commission Order and the record underlying it, and on November 11, 2019, the LUC issued its findings of fact, conclusions of law, and decision and order ("**2019 LUC Order**") (the 2019 Planning Commission Order and 2019 LUC Order collectively, the "**2019 orders**") adopting with modifications the Planning Commission's recommendations to approve the SUP for the WGS� and imposing conditions, including Condition No. 5:

5. By no later than December 31, 2022, the Applicant shall identify an alternative landfill site that may be used upon closure of WGS�. Upon identification of the alternative landfill site, the Applicant shall provide written notice to the Planning Commission and the LUC.

4. The Applicant did not appeal the 2019 orders.

5. The Applicant failed to meet those conditions because it did not identify an alternative landfill site by December 31, 2022.

6. Instead, on December 22, 2022, the Applicant filed an application to extend the deadline to site a new landfill by two years, from December 31, 2022 to December 31, 2024 (the “**Modification Application**”).

7. Only the site selection deadline is at issue in these Modification Application proceedings. All other conditions remain in full force and effect.

8. On June 9, 2023, Intervenors Ko Olina Community Association and Maile Shimabukuro (collectively, “**KOCA**”) filed their “(1) Motion to Recognize Them as Existing Parties or in the Alternative (2) Petition to Intervene,” which contended that KOCA was already a party given that KOCA had previously been granted intervenor status on March 20, 2009 and alternatively petitioned to intervene if KOCA was not already deemed a party.¹

9. On June 13, 2023, Intervenor Schnitzer Steel Hawaii Corp. (“**Schnitzer**”) filed a petition to intervene.²

10. On June 19, 2023, ENV filed a response to KOCA’s June 9, 2023 motion that contended KOCA should not be recognized as existing parties because the Modification Application initiated a new proceeding but took no position on KOCA’s alternative argument that it should be granted intervenor status.

11. On June 19, 2023, ENV also filed a response to Schnitzer’s Petition to Intervene that took no position on Schnitzer’s intervention.

¹ KOCA also filed an Objection to Notice of Hearing that was subsequently withdrawn at the August 9, 2023 hearing. 08/09/23 Tr. at 10:8–24.

² Schnitzer also filed a Motion for Enlargement of Time that was subsequently withdrawn at the August 9, 2023 hearing. 08/09/23 Tr. at 13:23–14:5.

12. The Planning Commission held a public hearing on the Modification Application on June 28 and August 9, 2023.

13. On August 9, 2023, the Planning Commission considered KOCA's June 9, 2023 motion. The Planning Commission confirmed KOCA's status as party intervenor and granted KOCA's petition to intervene. The Planning Commission found with respect to KOCA's intervenor status that: the 2019 Planning Commission and Land Use Commission decisions and orders are still in effect and controlling; these proceedings are limited to ENV's request to modify or change the December 31st, 2022 deadline; and for the purpose of determining intervenor status, these proceedings are a continuation of the proceedings that led up to the 2019 Planning Commission and LUC Decisions and Orders. With respect to KOCA's petition to intervene, the Commission found that: KOCA has been granted intervenor status and in past proceedings and met the requirements to intervene under the Planning Commission rules; there are no new facts that would change KOCA's interests or status in the special use permit proceeding; there's no opposition to KOCA's participation as a party in these proceedings; ENV has taken no position with regards to KOCA's intervenor status; and there is no evidence to deny KOCA's intervenor status since its position is substantially different from the other parties involved and that of the public also KOCA's participation will not render the proceedings inefficient or unmanageable. Tr. 08/09/23 at 7:20–9:23.

14. On August 9, 2023, the Planning Commission also considered Schnitzer's June 13, 2023 petition to intervene. The Planning Commission granted

Schnitzer's petition to intervene. The Planning Commission found: Schnitzer was granted intervenor's status in past proceedings and met the requirements to intervene under Planning Commission rules; there is no opposition to Schnitzer's participation as a party in these proceedings; there are no new facts that would change Schnitzer's interest or status in the special use permit; ENV has taken no position with regards to Schnitzer's intervenor status; and there is no evidence to deny Schnitzer's intervenor status since its position is substantially different from other parties involved and that of the public. Tr. 08/09/23 at 11:7–13:11.

15. A contested case hearing on the Modification Application was held before the Planning Commission on August 9, October 18, and November 1, 2023.

16. The Applicant presented one witness: Roger Babcock, Jr., Director of the Department of Environmental Services for the City and County of Honolulu. Tr. 10/18/23 (Babcock) at 11:15–19.³

17. Intervenor Schnitzer presented two witnesses: Nicolas Garofolo, regional general manager for Hawaii for Schnitzer, and Scott Sloan, corporate environmental vice president for Schnitzer Steel Industries Inc. Tr. 10/18/23 (Garofolo) at 69:12–17; Tr. 10/18/23 (Sloan) at 86:2–16.

18. Intervenor KOCA presented two witnesses: Ken Williams, general manager of KOCA, and expert witness Dwight Miller, who the Planning Commission continued to recognize as an expert in solid waste management

³ Citations to the contested case hearing testimony is denoted "Tr. [Date] (Witness Last Name) at [Page]:[Line]."

including landfill siting and design. Tr. 11/01/23 (Williams) at 8:16–18; Tr. 11/01/23 (Miller) at 32:12–16.

19. The Planning Commission received Applicant’s Exhibits A1 through A18, Schnitzer’s Exhibits S-1 through S-19, and KOCA’s Exhibits K1 through K475 into evidence. Tr. 10/18/23 at 9:23–10:3.

WGSL History

20. Although the Modification Application only concerns the site selection deadline, ENV does not write on a blank slate. The 2019 LUC Order details the history of the WGSL from initial permitting in 1987 to 2019, and the Modification Application must be viewed in that context. 2019 LUC Order at FOF 1–262; 274–93.

21. In the history of the WGSL, the City and County of Honolulu (“City”) has promised the West O’ahu community several times that the WGSL will close. It has failed to keep those promises. 2019 LUC Order at FOF 282–85.

22. When the landfill was initially permitted, its projected lifespan from when it became operational (in 1989) was approximately eight years. In other words, it was expected to close by 1997. 2019 LUC Order at FOF 276; Tr. 11/01/23 (Williams) at 14:13–19.

23. In 2003, the City proposed a fifteen year extension, but reduced its request to five years based on community opposition. During the proceedings on that expansion request, the Applicant expressed its “commitment” that it would close the WGSL in 2008. 2019 LUC Order at FOF 281–85; Tr. 11/01/23 (Williams) at 15:3–25.

24. A five-year extension was approved on the condition that the landfill close by May 8, 2008 and a new site be selected by June 1, 2004. 2019 LUC Order at FOF 286; Tr. 11/01/23 (Williams) at 16:1–3.

25. However, the City Council passed a resolution to select the existing WGS� as the “new” landfill site, and the Applicant sought an extension to the deadline to close the WGS� again. 2019 LUC Order at FOF 289–90.

26. Then, a one-year extension was approved on the condition that the landfill close in 2009. 2019 LUC Order at FOF 291; Tr. 11/01/23 (Williams) at 16:21–25.

27. In 2008, ENV asked for another extension and expansion. The 2008 application (which underlies the instant proceedings) was granted on the condition that the landfill stop accepting municipal solid waste (“MSW”) by July 31, 2012. 2019 LUC Order at FOF 69, 293; Tr. 11/01/23 (Williams) at 17:8–17.

28. However, the Applicant appealed and separately sought to modify that condition, the proceedings from which led to the December 31, 2022 site selection deadline the Applicant now seeks to modify yet again. *See generally* 2019 LUC Order.

29. The Applicant’s current permit obligations require that the WGS� shall close by no later than March 2, 2028, which condition remains in full force and effect. 2019 LUC Order at Condition No. 1. Tr. 11/01/23 (Williams) at 18:6–10.

30. Although there have been several prior site selection processes undertaken by the City, none of these processes have resulted in the identification of a new landfill site.

31. In 2003, the mayor convened a Blue Ribbon Landfill Site Selection Committee that evaluated and recommended four possible landfill sites. *See Ex. K58.*

32. In 2011, the City formed another Landfill Site Selection Committee, that generated a report in September 2012 ranking eleven possible landfill site locations. *See Ex. K264.*

33. The City then retained a consultant to review and analyze those sites. The consultant issued its report in 2017. Tr. 10/18/23 (Babcock) at 54:19–24; Ex. K444.

34. The Applicant did not know why it took five years for the consultant to issue a report, nor could the Applicant explain why it had not selected a new site between receipt of the consultant's report in 2017 and 2020. Tr. 10/18/23 (Babcock) at 58:25–59:14.

No-Pass Line, Act 73 & 2021 Site Selection Process

35. The Hawai'i State Legislature passed Act 73 in 2020, and it took effect upon its approval, on September 15, 2020. Ex. A14.

36. Act 73 imposes new conditions on the siting of a landfill, including a half mile buffer between the landfill and residential properties, schools, and

hospitals, and the exclusion of all conservation lands from eligibility for landfill siting. Tr. 10/18/23 (Babcock) at 14:11–17; Ex A14.

37. Separately, the Board of Water Supply (“BWS”) has created a “no-pass line” or “no-pass zone” around the island of O‘ahu. The no-pass line is an approximate boundary that demarcates an area mauka of which generally lacks cap rock or other geological features to protect groundwater. The no-pass zone is conservative in that it is an estimate that does not account for the individual geological features at a particular site, and just because a site falls within the no-pass zone does not necessarily mean it is unsuitable for a landfill. Tr. 11/01/23 (Miller) at 35:2–36:16.

38. In previous site selection efforts, the City has opted for a less conservative, but more realistic, approach to groundwater protection that considers individual landfill sites’ impact on groundwater in consultation with the BWS. Tr. 10/18/23 (Babcock) at 60:8–61:4; Tr. 11/01/23 (Miller) at 35:17–36:10.

39. On September 24, 2021, the City created the Landfill Advisory Committee (“LAC”) to evaluate six proposed landfill sites and make a recommendation to the City on where the next landfill should be. Tr. 10/18/23 (Babcock) at 29:25–30:8.

40. The LAC issued its final report in June 2022, which did not recommend any of the six sites because they were located within the no-pass zone and instead recommended that the Applicant explore amending Act 73, examine

federal sites, and/or consider exercising eminent domain. Ex. K265; Tr. 10/18/23 (Babcock) at 32:18–34:2.

41. ENV briefed the BWS on October 24, 2022 on the status of landfill site selection, then followed up with a letter on November 3, 2022 asking for the BWS’s official position. The BWS responded on November 16, 2022 that it was opposed to any of the six landfill sites considered by the LAC because of their placement within the no-pass zone. 10/18/23 Tr. (Babcock) at 35:17–27:19.

42. However, the Applicant has been aware of the no-pass zone as a landfill siting consideration since at least 2003. 10/18/23 Tr. (Babcock) at 60:14–17.

Impact on Community

43. Although the WGS� serves the whole island, its neighbors in the West O’ahu community bear the brunt of the landfill’s harms.

44. Since the WGS� opened in 1989, its neighbors have coped with environmental impacts including odor, litter, dust, visual blight, and traffic. Tr. 11/01/23 (Williams) at 19:11–14.

45. The community has also experienced the worst-case scenario when it comes to being neighbor to a landfill. In 2011, the WGS�’s operator prematurely opened a cell before necessary drainage systems were installed. After a severe storm, waste from that cell entered the stormwater drainage system, causing garbage—including medical waste, blood samples, and sharps—to drain into the ocean and onto the beaches of the westside, all the way from Pokai Bay to White

Plains Beach. The community was forced to clean up the dangerous waste itself. Tr. 11/01/23 (Williams) at 20:7–22:22; 2019 LUC Order at FOF 336–44.

46. The Planning Commission received numerous letters from West O‘ahu community members opposing further extensions to the landfill’s operations and encouraging the Planning Commission to impose more oversight over ENV and hold it accountable for moving on its obligations. *See* Exs. K266–K355.

47. The community situated nearest the landfill has been adversely affected by the landfill’s continued operations and continues to be impacted by living near an active landfill, notwithstanding the Applicant’s numerous promises to the community over the years that it will close the WGS�.

No Reasonable Diligence

48. On August 4, 2009, the Planning Commission issued Findings of Fact, Conclusions of Law, and Decision and Order granting the Applicant’s original 2008 Application in which the Planning Commission, among other things, imposed a condition on the Applicant to “begin to identify and develop one or more new landfill sites that shall either replace or supplement the WGS�. The Applicant’s effort to identify and develop such sites shall be performed with **reasonable diligence . . .**” 2019 LUC Order, FOF 59 (emphasis added).

49. The 2019 LUC Order found that “a minimum of five to seven years is a reasonable time within which a landfill can be sited and developed if the Applicant proceeds with reasonable diligence.” 2019 LUC Order, FOF 424.

50. The 2019 LUC Order further found that “as of the date of this Order, the March 2, 2028 closure date imposed below affords more than seven years to site and develop a new landfill and as such, constitutes a reasonable amount of time.” 2019 LUC Order, FOF 425.

51. The 2019 LUC Order further found that “when calculated from October 22, 2009 (the most recent date upon which the Applicant knew or should have known that it needed to exert reasonable diligence in identifying and developing a new landfill site to replace or supplement the WGSL) to the March 2, 2028 closure date imposed below, the Applicant will have been afforded a minimum of 18 years to site and develop a new landfill.” 2019 LUC Order, FOF 426.

52. ENV has not acted with reasonable diligence to site and develop a new landfill.

53. First, ENV has known of its obligation to identify a new landfill site with reasonable diligence since at least October 22, 2009, but more than 14 years have passed—which is more than a reasonable amount of time—and no new site has been identified.

54. Second, ENV did not move urgently after the 2019 Order to identify a new site. Despite having in-hand an ample supply of analysis and data from previous site-selection processes and a 2017 report from the City’s consultant (which report took five years to generate) at the moment the 2019 LUC Order came down, ENV did not convene a new site selection committee until September 2021—two years after the 2019 LUC Order, and one year after Act 73 took effect.

55. ENV further did not involve BWS in the site selection process for another year, until October 2022, and did not ask the BWS for its official position on the landfill sites in consideration until less than two months before the permit's deadline, despite the no-pass zone being an established consideration since at least 2003.

56. Third, ENV did not move urgently after understanding the limitations of Act 73 to explore all possible options to siting a new landfill under its constraints.

57. Director Babcock testified that ENV has focused its efforts on federal sites. ENV will not consider seeking to amend Act 73 unless it is unable to acquire a federal site. Tr. 10/18/23 (Babcock) at 49:4–50:1.

58. Reasonable diligence to site a new landfill by the required deadline and under the circumstances created by Act 73 would necessitate looking at **all** options. Tr. 11/01/23 (Miller) at 41:10–14.

59. Moreover, Director Babcock was unable to provide any information on the City's progress towards finding an appropriate federal site because only the Mayor and his staff have been involved with the conversations with the federal government. Tr. 10/18/23 (Babcock) at 50:14–51:9.

60. Not only does focusing exclusively on federal sites to the detriment of other solutions fail to show reasonable diligence, the Applicant's exclusion of critical stakeholders, like ENV leadership, from the negotiation and decision-making process with the federal government (to the extent that process is moving forward) fails to show reasonable diligence. Tr. 11/01/23 (Miller) at 39:15–40:9.

61. Siting a landfill on federal lands is a time-consuming and work-intensive process. Tr. 11/01/23 (Miller) at 38:15–39:14.

62. Director Babcock identified the four federal sites currently being discussed. But besides the location of the sites, the Planning Commission has no information on how far negotiations with the federal government have progressed; when a decision is expected to be reached; how long a federal site would take to develop; the conditions, if any, the federal government would impose on the site's development or use; or even if the federal government is likely to agree to siting a landfill on one of the four identified federal sites at all. Tr. 10/18/23 (Babcock) at 50:2–51:9.

63. Because the Applicant has failed to act with reasonable diligence since the 2019 Order, the Planning Commission finds that it is necessary and appropriate to impose additional conditions on the extension sought in these proceedings in order to ensure that the Applicant is accountable in meeting its deadlines.

64. The reporting conditions imposed below were requested by KOCA. ENV did not object to the reporting conditions. Tr. 10/18/23 (Babcock) at 63:4–7; Tr. 11/01/23 (Williams) at 26:18–23.

CONCLUSIONS OF LAW

1. Subject to HRS § 205-6, the Planning Commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. *See* HRS§ 205-6(a).

2. The WGS� requires a State special use permit for its operations.

3. Pursuant to Planning Commission Rule § 2-45, the following guidelines have been established for purposes of determining whether a proposed use is “unusual and reasonable”:

(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 roads and streets, sewers, 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 the uses permitted within the district.

4. The 2019 Orders approving the WGS� to continue to operate as an “unusual and reasonable use” within the State agricultural district imposed a condition that the Applicant shall identify an alternative landfill site that may be used upon closure of WGS� by no later than December 31, 2022.

5. The Applicant did not identify an alternative landfill site by December 31, 2022 and is therefore out of compliance with its special use permit.

6. Further, the Applicant has been under an obligation to identify a new landfill with “reasonable diligence” since at least October 22, 2009.

7. The Applicant has not performed its site selection obligations with reasonable diligence.

8. All parties acknowledge that it is important for the island of O‘ahu to have an operational landfill. No party opposes granting the Applicant additional time to site a new landfill.

9. However, given the limited extension provided, the Applicant must move urgently to identify a new landfill site.

10. Moreover, given the Applicant’s history of failing to meet deadlines, additional oversight by the Planning Commission is necessary and appropriate to ensure that the Applicant proceeds with “reasonable diligence” and is held accountable for meeting the siting deadline and complying with all other conditions in its special use permit.

11. Requiring the Applicant to report at least quarterly, in person, to the Planning Commission to report the efforts it has taken and plans to take to identify an alternative landfill site by December 31, 2024; to explain how its landfill siting efforts have been reasonably diligent; and to answer questions from the Commission and the community; is a necessary and appropriate condition to ensure that the extended siting deadline is met.

DECISION AND ORDER

Having duly considered the record of proceedings, the oral arguments of the parties, and the record and files herein, it is the decision and order of the Planning Commission to APPROVE the Applicant’s December 22, 2022 application to modify Special Use Permit No. 2008/SUP-2, subject to the following provisions and conditions:

1. Condition No. 1 in the 2019 Planning Commission Order is modified to read as follows and it is recommended that Condition No. 5 in the 2019 LUC Order be modified to read as follows: By no later than December 31, 2024, the Applicant shall identify an alternative landfill site that may be used upon closure of WGS. Upon identification of the alternative landfill site, the Applicant shall provide written notice to the Planning Commission and the LUC.

2. The Applicant shall report quarterly to the Planning Commission, in-person, to report the efforts it has taken and plans to take to identify an alternative landfill site by December 31, 2024; to explain how its landfill siting efforts have been reasonably diligent; and to answer questions from the Commission and the community.

3. All other conditions to Special Use Permit No. 20080/SUP-2 as stated in the 2019 orders remain in full force and effect.

DATED: Honolulu, Hawai'i, _____, 202__.

PLANNING COMMISSION
CITY AND COUNTY OF
HONOLULU
STATE OF HAWAII

By: _____
Pane Meatoga III
Chair

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was duly served
electronically on the following persons:

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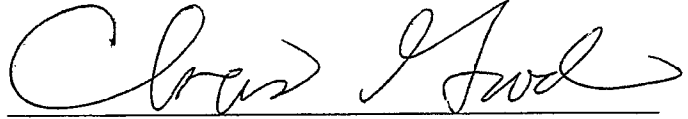
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DATED: Honolulu, Hawai'i, December 22, 2023.

CADES SCHUTTE
A Limited Liability Law Partnership

A handwritten signature in black ink, appearing to read "Calvert G. Chipchase", written over a horizontal line.

CALVERT G. CHIPCHASE
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