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DEPT OF PLANNING
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CITY & COUNTY OF HONOLULU



Attorneys for Intervenor
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BEFORE THE PLANNING COMMISSION
OF THE CITY AND COUNTY OF HONOLULU

STATE OF HAWAI'I

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
LUC DOCKET NO. SP09-403

INTERVENOR SCHNITZER STEEL
HAWAII CORP.'S RESPONSE TO
INTERVENORS KO OLINA
COMMUNITY ASSOCIATION AND
MAILE SHIMABUKURO'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND DECISION AND ORDER;
CERTIFICATE OF SERVICE

HEARINGS:
Date: August 9, 2023
Time: 1:30 PM

Date: October 18, 2023
Time: 9:00 AM

Date: November 1, 2023
Time: 1:00 PM

**INTERVENOR SCHNITZER STEEL HAWAII CORP.'S RESPONSE TO
INTERVENORS KO OLINA COMMUNITY ASSOCIATION AND
MAILE SHIMABUKURO'S PROPOSED FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION AND ORDER**

Comes now, Schnitzer Steel Hawaii Corp. ("Schnitzer"), by and through its attorneys, Watanabe Ing LLP, and hereby submits its Response to Intervenor Ko Olina Community Association and Maile Shimabukuro's ("KOCA") Proposed Findings of Fact, Conclusions of Law, and Decision and Order, filed on December 22, 2023, pursuant to the Rules of Planning Commission, City and County of Honolulu § 2-74.

Citations to the evidence in the record provided by Schnitzer within its Response are not intended to be exhaustive, but merely illustrative of evidence supporting Schnitzer's exceptions. Citations to the record in these exceptions are noted by "Tr." with a date and page number for testimony during the contested case hearings. References to exhibits are denoted by "A___" for the City and County of Honolulu, Department of Environmental Services ("ENV"), "S___" for Schnitzer, and "K___" for KOCA.

I. STANDARD OF REVIEW FOR REVERSAL OR MODIFICATION OF ADMINISTRATIVE FINDS, 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 (2000). A finding of fact or a mixed determination of law and 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. *See Kienker v. Bauer*, 110 Hawai'i 97, 105 (2006); *In re Water Use Permit Applications*, 94 Hawai'i 97, 119 (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. *Id.*

II. DISCUSSION

This matter relates to the Department of Environmental Services, City and County of Honolulu's ("ENV") December 22, 2022 Application (the "2022 Application") to the Planning Commission, City and County of Honolulu (the "Planning Commission"). The 2022 Application seeks to modify (1) Condition No. 1 of the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order, dated June 10, 2019 ("2019 PC Decision") and (2) Condition No. 5 of the Land Use Commission's ("LUC") 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 ("2019 LUC Decision"), such that the December 31, 2022 deadline for ENV to identify an alternative landfill site will be extended by two years to December 31, 2024. The 2022 Application came on for contested case hearing before the Planning Commission on August 8, 2023, October 18, 2023, and November 11, 2023.

On or around December 22, 2023, ENV, KOCA, and Schnitzer filed their respective Proposed Findings of Fact, Conclusions of Law, and Decision and Order.

A. EXCEPTIONS TO KOCA'S PROPOSED FINDINGS OF FACT

Schnitzer submits the following exceptions to the proposed findings of fact ("PFOFs") submitted by KOCA. Schnitzer's exceptions are noted in indented narrative following any finding or other assertion by KOCA which is disputed by Schnitzer. The paragraph numbers referenced herein are as provided in KOCA's proposed Findings of Fact, Conclusions of Law and Decision and Order:

21. In the history of WGS�, the City and County of Honolulu ("City") has promised the West O'ahu community several times that the WGS� will close. It has failed to keep those promises. 2019 LUC Order at FOF 282-85.

INFLAMMATORY AND ARGUMENTATIVE. This statement fails to provide that WGS� is still scheduled to close well before it reaches capacity. Prior extensions were requested for good cause. The Planning Commission and LUC considered and granted those extensions for the reasons set forth in the respective orders concerning each application. Furthermore, this proposed Finding is inappropriate because it is argumentative and falls outside the scope of the instant Application.

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.

MISLEADING. The events referred to in PFOF 34 occurred prior to Dr Babcock's tenure. Dr. Babcock did not become Director of ENV until 2022. *See* Tr. 10/18/23, 59:15-18. Accordingly, Dr. Babcock testified that he did not have any understanding as to why it took five years for the consultant to issue its report. Furthermore, Dr. Babcock declined to speculate on the reason why the City did not select a site between 2017 and 2020. *See* Tr. 10/18/23, 59:3-14.

The testimony was as follows:

KOCA: Do you have an understanding as to why it took five years for the consultant to issue its report?

[Dr. Babcock]: I do not.

KOCA: By the time of the LUC's Order the City had the consultant's report for two years, and by the time of 2020, June 2020 status report that we have up on the screen, the City had the consultant's report for almost three years. Do you know why three years after having the consultant's report in hand, the City had still not selected a new site?

[Dr. Babcock]: I can't speculate on that.

KOCA: Can you tell us why in the eight years between the end of the Landfill Advisory Committee's work in 2012 and the 2020 status report, the City had not selected a new site?

[Dr. Babcock]: I can't speculate.

CORP: Just for the record, Director Babcock was Director of ENV starting from 2022.

See Tr. 10/18/23, 58:25-59:16.

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.

INCOMPLETE AND MISLEADING. This statement mischaracterizes the timeline of the communications and interactions between BWS and the Landfill Selection Committee ("LAC") and minimizes the effects of the Red Hill Fuel Leak on BWS' position regarding siting a landfill in the No Pass Zone.

In late November 2021, while the LAC was evaluating Applicant's six proposed landfill sites, a petroleum release from the Red Hill Bulk Fuel Storage Facility contaminated the Red Hill drinking water well. *See* Tr. 10/18/2023, 14:23-15:8; *see also* 2022 Application, at 2. The Red Hill facility's close proximity to Oahu's main drinking water aquifer caused widespread public health and environmental concerns about contamination of the island's drinking water. *See* Tr. 10/18/2023, 14:23-15:8, Tr. 11/1/2023, 50:20-22, 2022 Application, at 2. It also resulted in BWS' heightened scrutiny towards the siting of uses, such as landfills, that had the potential to further contaminate Oahu's drinking water resources. *See* Tr. 10/18/23, 15:4-13; *see also* 2022 Application, at 9 and Exhibit D of the 2022 Application, and DPP Recommendation, at 5.

PFOF 41 fails to mention that in December 2021, during the emergency response to the Red Hill release, BWS representatives attended the LAC's meeting to express BWS's concerns about locating a landfill near potable water and the potential for landfill leachate to leak into the aquifer. *See* Tr. 10/18/23, 15:4-13; *see also* 2022 Application, at 9 and Exhibit D of the 2022 Application, and DPP Recommendation, at 5. BWS advocated against the LAC recommending any of the six proposed sites for those reasons. *See* Tr. 10/18/23, 15:9-13. The LAC agreed with the BWS. ENV subsequently undertook further discussions with BWS to attempt to gain BWS support for landfill sites within the No Pass Zone. KOCA PFOF 41 documents those further discussions, but not those that occurred before October 24, 2022.

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.

MISLEADING. This does not take into account the heightened environmental considerations as a result of the Red Hill crisis. *See supra* Schnitzer response addressing KOCA PFOF 42.

Furthermore, while the Applicant may have been aware of the existence of the No Pass Zone, prior guidance from the Mayor's Advisory Committee on Landfill Site Selection ("MACLSS") instructed the Applicant to conduct a "more encompassing" assessment to include sites located within the No Pass Zone. *See* Ex. K264 at 1-3.

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

UNSUBSTANTIATED. This statement is not supported by substantial evidence. As stated by Mr. Miller, siting a landfill is a lengthy process that requires consideration of multiple variables. *See* Tr. 11/01/23, 33:1-38:3, and 41:11-14. In this case, Dr. Babcock testified that additional landfill siting considerations arose following the 2019 Planning Commission and LUC Decisions. *See* Tr. 10/18/23, 14:3-15:25. These additional landfill siting conditions, Act 73 and the No Pass Zone in the wake of Red Hill, and their impacts on the siting process could not have anticipated when the 2019 Decisions were issued. *See supra* Schnitzer Response to KOCA PFOF 41 and *infra* Schnitzer Response to KOCA PFOF 54. ENV's efforts to site and develop an alternative landfill despite the foregoing confluence of unanticipated variable are also chronicled in ENV's Semi-Annual Reports to the Planning Commission and LUC. *See* Exhibit A7-A13. Those Semi-Annual Reports document ENV's diligent and persistent efforts to evaluate landfill sites following the passage of Act 73 and communicate with the BWS' following BWS' presentation at the LAC's December 14, 2021 meeting. *See id.*

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.

UNSUBSTANTIATED AND MISLEADING. This statement is misleading and is not supported by substantial evidence. The LUC Decision was not issued until November 2019. Act 73 was signed into law in September 2020. Once Act 73 went into effect, ENV evaluated and applied the restrictions imposed by Act 73 to the information and available sites they gathered. *See* Tr. 10/18/23, 14:15-15:4, 26:3-22, 28:1-29:17, A7-A13, A-18; *see also* 2022 Application, at 5-7, and DPP Recommendation, at 5. Per ENV's Third Semi-Annual Report to the Planning Commission and LUC, dated July 14, 2021, "an initial review of the available sites in Fall 2020 reduced the number of potential future landfill sites to four (Keeau, Upland Kahuku 1 and Upland Pupukea 1 and 2) based on sites short-listed in the 2017 landfill siting report. However, additional review in January 2021 determined that a more thorough review and evaluation of new locations island-wide with respect to Act 73 is warranted. The City is currently engaged in completing a review of available locations and is developing a new Mayor's Advisory Committee on Landfill Site Selection." *See* A9, at 4. All of the foregoing events occurred between the issuance of the 2019 Order and the convening of the LAC in 2021. Accordingly, contrary to what KOCA's PFOF would suggest, ENV did move urgently during this time period.

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.

UNSUBSTANTIATED AND MISLEADING. This proposed finding is contradicted by the record. BWS was involved in the site selected process prior to October 2022, including at the LAC's December 14, 2021 meeting. *See supra* Schntizer Response to KOCA PFOF 41; *see also* Tr. 10/18/23, 15:4-13, 2022 Application, at 9 and Exhibit D of the 2022 Application, and DPP Recommendation, at 5.

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.

UNSUBSTANTIATED AND MISLEADING. *See supra* Schnitzer Response addressing KOCA PFOF 54 (regarding the timeline of ENV's actions following the issuance of the 2019 LUC Decision) and Schnitzer Response to KOCA PFOF 41 (providing an accurate timeline of the effect of the Red Hill Fuel Leak on ENV's landfill siting process).

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.

UNSUBSTANTIATED AND MISLEADING. A potential acquisition of federal land by the County is beyond the authority of the Applicant. Those discussions are appropriately being conducted by the Mayor's office directly. There is no evidence in the record to suggest that Dr. Babcock's omission from meetings between the Mayor's office and the federal government is a lack of diligence on Applicant's part. Rather, the Mayor's direct involvement shows that the issue is a top priority.

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.

UNSUBSTANTIATED AND MISLEADING. As stated throughout these Objections, the evidence shows that ENV has acted diligently to identify alternative landfill sites, but for reasons beyond its control, those sites were rejected by the LAC. The parties agree that as a result, the Applicant needs an extension of time to identify new potential landfill sites. *See* Tr. 10/18/23, 14:3-16:5; Tr. 11/01/23, 27:17-28:4, 51:20-54:25. The parties do not object to KOCA's request for additional reporting as a condition of the extension to address the concerns raised by KOCA. *See* Tr. 10/18/23, 63:4-7.

B. EXCEPTIONS TO KOCA'S CONCLUSIONS OF LAW

Schnitzer submits the following exceptions to the proposed conclusions of law

("PCOL") submitted by KOCA:

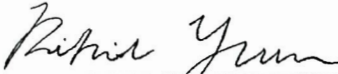
7. The Applicant has not performed its site selection obligations with reasonable diligence.

UNSUBSTANTIATED. This PCOL is not supported by substantial evidence. Schnitzer objects to PCOL 7 on the basis that the record supports that ENV used reasonable diligence to identify alternative landfill sites and reasonably relied on guidance from the MACLSS to consider sites that were in the BWS No Pass Zone. *See supra* Schnitzer Response to KOCA PFOF 42 and 52. The record also shows that ENV could not have accounted for Act 73, the Red Hill environmental crisis, and the effects of Red Hill on BWS' resulting position on siting landfills within the No Pass Zone. *See supra* Schnitzer Response to KOCA PFOF 41 and 54. The record also shows that both the Mayor himself and ENV acted diligently and with urgency to get the BWS to reconsider and are continuing to act diligently and with urgency to identify new alternative sites. *See supra* Schnitzer Response to KOCA PFOF 41, 52, 54, 55, 56, and 60.

III. CONCLUSION

For the foregoing reasons, Schnitzer respectfully requests that KOCA's Proposed Order be rejected to the extent that it conflicts with Schnitzer's Proposed Order, and requests that Schnitzer's Proposed Order be adopted.

DATED: Honolulu, Hawai'i, January 9, 2024.



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

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 on the date set forth below:

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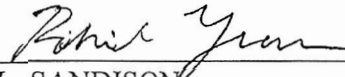
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