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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



CONTESTED CASE HEARING

Ewa - State Special Use Permit to Modify SUP No. 2008/SUP-2
(SP09-403), Waimanalo Gulch Sanitary Landfill

Taken at Fasi Municipal Building, 6th Floor
Conference Room, 650 South King Street, Honolulu, Hawaii
96813, commencing at 9 a.m., February 7, 2024, pursuant to
Notice.

1 APPEARANCES:

2

3 Planning Commission:

4 PANE MEATOOGA III, Chair

5 RYAN KAMO, Vice Chair

6 HILARIE ALOMAR, Member

7 KAI NANI KRAUT, Member

8 JOY KIMURA, Member

9

10 For the Planning Commission:

11 ROZELLE A. AGAG, ESQ.

12 Deputy Corporation Counsel

13 Department of the Corporation Counsel

14 530 South King Street, Room 110

15 Honolulu, Hawaii 96813

16

17 For the City and County of Honolulu, Department of

18 Environmental Services:

19 JEFFREY HU, ESQ.

20 KAMILLA C.K. CHAN, ESQ.

21 Deputies Corporation Counsel

22 City and County of Honolulu

23 530 South King Street, Room 110

24 Honolulu, Hawaii 96813

25

1 APPEARANCES: (cont'd)

2

3 For Ko Olina Community Association and Senator Maile

4 Shimabukuro:

5 CALVERT G. CHIPCHASE, ESQ.

6 KATHERINE E. BRUCE, ESQ.

7 Cades Shutte LLP

8 Cades Schutte Building

9 1000 Bishop Street, Suite 1200

10 Honolulu, Hawaii 96813

11

12 For Schnitzer Steel Hawaii Corp.:

13 IAN L. SANDISON, ESQ.

14 JOYCE W.Y. TAM-SUGIYAMA, ESQ.

15 RIHUI YUAN, ESQ.

16 Watanabe Ing LLP

17 First Hawaiian Center

18 999 Bishop Street, Suite 1250

19 Honolulu, Hawaii 96813

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1 CONTESTED CASE HEARING

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CHAIR MEATOQA III: All right. [bangs gavel]

4

Aloha everyone and welcome fellow Commission members to the February 7th, 2024 meeting of the Planning Commission.

5

6

For our listeners and for the record I'm Chair Pane Meatoga

7

III. The following members are physically present here in

8

the Conference Room, Vice Chair Ryan Kamo, Commissioner

9

Hilarie Alomar, Commissioner Kai Nani Kraut, Commissioner

10

Joy Kimura and myself. Everyone is in-person. Present here

11

today is the Planning Commission and DIT staff to manage and

12

support the WebEx and audiovisual platform.

13

Also joining with us today is the Commissioner attorney,

14

deputy corp counsel Rozelle Agag.

15

COUNSEL AGAG: Good morning, everyone.

16

CHAIR MEATOQA III: Couple of housekeeping

17

matters. For those present in the Conference Room bathrooms

18

are located on the ground floor next to the elevators; 3:30

19

p.m. King Street becomes a tow away zone, and we have this

20

Conference Room until 4:30 p.m.

21

At this time, I'd like to officially open the

22

hearing. For the record it is now 9:07. And just as a

23

reminder for us Commissioners we need to identify ourselves

24

first before we speak or make any motions.

25

With that being said the first item on the agenda

1 is the continued contested case hearing for the Waimanalo
2 State Special Use Permit 2008/SUP-2, Waimanalo Gulch
3 Sanitary Landfill.

4 Good morning, everyone. Please make your
5 appearance for the record starting with ENV.

6 COUNSEL HU: Good morning, Chair and good morning
7 Planning Commission. Deputy corporation counsels, Jeffrey
8 Hu and Camilla Chan on behalf of the City and County of
9 Honolulu, ENV.

10 CHAIR MEATOGA III: Thank you. We will go on to
11 Schnitzer.

12 COUNSEL TAM-SUGIYAMA: Good morning, Joyce
13 Tam-Sugiyama and Rihui Yuan for Schnitzer Steel.

14 CHAIR MEATOGA III: Okay. And KOCA.

15 COUNSEL CHIPCHASE: Good morning, Chair and
16 members.

17 Cal Chipchase and Katherine Bruce for Ko Olina Community
18 Association and Senator Maile Shimabukuro.

19 CHAIR MEATOGA III: Okay. Thank you.
20 Before we begin, does anyone have any housekeeping matters
21 to discuss?

22 COUNSEL HU: No, Chair,

23 COUNSEL CHIPCHASE: No, Chair.

24 CHAIR MEATOGA III: Thank you. Commissioner Alomar
25 was not in attendance for the October 18th and November 1st,

1 2023 contested case hearing dates. Commissioner Alomar, can
2 you attest for the record that you have read and reviewed
3 the transcripts, records and documents for the October 18th
4 and November 1st, 2023 contested hearing dates, and you
5 understand the material and documents that were made
6 available to you?

7 ALOMAR: Yes. Commissioner Alomar, yes.

8 CHAIR MEATOGA III: Thank you. I do have another
9 housekeeping matter. I would like to get confirmation on
10 the record from the parties that on January 9th all parties
11 stipulated to the extension of time for the Planning
12 Commission to render its written Decision and Order from
13 February 29th, 2024 to March 28th, 2024.

14 COUNSEL HU: That's correct, Chair.

15 COUNSEL CHIPCHASE: Yes, Chair.

16 COUNSEL TAM-SUGIYAMA: Yes, Chair.

17 CHAIR MEATOGA III: Thank you. All right. If
18 nothing else we shall begin. The evidence portion of this
19 contested case hearing is closed and the parties have
20 provided to the Planning Commission with their proposed
21 Findings of Facts, Conclusions of Law, Decision and Order
22 for the Planning Commission to consider. The parties also
23 have filed responses and objections to each others proposed
24 Decision and Orders for the consideration by this
25 Commission. We will now hear oral arguments from each of

1 the parties before the Planning Commission deliberates on
2 this matter. Each party will have 30 minutes for your oral
3 arguments. We will start with the petitioner, Department of
4 Environmental Services. Please begin.

5 COUNSEL HU: Thank you, Chair.

6 I'm not going to use--I don't have too much to say.

7 I have four points to address.

8 First one would be the reasonable diligence
9 standard that KOCA has raised throughout its briefing, and
10 so this is in the Findings of Fact in KOCA's proposed
11 Findings of Fact, paragraphs 63 through 64; Conclusions of
12 Law, paragraphs 6, 7, and 10. And we've raised this in our
13 filings already, but I just want to reassert that the
14 reasonable diligence is not an applicable standard that
15 needs to be applied by the Planning Commission here. This
16 was not imposed. This was not a condition that was imposed
17 by the LUC in the 2019 Decision and Order.

18 Again, the permit conditions found in the 2019 LUC
19 Decision and Order on pages 102 to 107, which is also in
20 Exhibit B of the ENV's application. In other words the
21 Planning Commission does need to make a finding or
22 determination as to whether ENV acted with reasonable
23 diligence in its siting process. And the Planning
24 Commission does need to make this finding in order to
25 require the additional in-person reporting condition that

1 KOCA is requesting right now.

2 Again, ENV does not object to the proposed
3 condition of the additional in-person reporting
4 requirements. In fact, ENV already holds quarterly meetings
5 in front of the public on the west side, so this not
6 anything new.

7 Lastly, even if the Planning Commission decides to
8 make a finding as to whether or not ENV acted with
9 reasonable diligence, ENV points to the records, points to
10 Dr. Babcock's testimony that ENV has performed the latest
11 landfill siting process with reasonable diligence.

12 My second point that I want to raise is, I guess
13 KOCA's characterization that ENV failed to meet
14 identification deadline and that ENV is out of compliance
15 with its Special Use Permit. And this is in their proposed
16 Findings of Fact, paragraph 5, and Conclusion of Law
17 paragraph 5. So ENV does not see this the same way as KOCA
18 because ENV knew of the upcoming deadline, did everything it
19 could to try to meet it, and then before the deadline lapsed
20 ENV filed the applicable legal procedure set forth in the
21 Planning Commission's rules by timely seeking an extension.
22 And that's why we're here today.

23 And, my third point is in KOCA's objections to
24 ENV's proposed Decision and Order and this is on page 3.
25 KOCA wants to insert the language "to the extent that any of

1 these findings or conclusions conflict with the LUC's
2 November 1, 2019 Findings of Fact, Conclusions of Law,
3 Decision and Order, the 2019 Order shall control."

4 And, so I have a little problem with this language
5 here because I think there might be some unattended
6 consequences. There might be new Findings of Fact that
7 replace old data and, of course, we would want the new facts
8 to supplement or supersede the old data. And, so for
9 example the estimated time before the landfill potentially
10 reaches full capacity is revised from time-to-time as the
11 City diverts waste from the landfill or utilizes new
12 technology to recycle waste. So the new data should replace
13 new data. Even though the new data might conflict with the
14 old data. So in any case we have language in ENV's proposed
15 Order on page 20 that kind of addresses what, I think KOCA's
16 concern is about and inconsistencies. So we would point to
17 that and offer our language stating that the current
18 Findings supplement the existing Findings, Conclusions and
19 conditions in the 2019 Decisions and Orders. So we think
20 that's a better language to use.

21 And, my last point would be which I kind of raised
22 is the capacity. We think the landfill capacity issue
23 should be included in the Findings of Fact. Most recently
24 we have testimony from Dr. Babcock that 2036 is the
25 estimated date when the landfill would potentially reach

1 capacity given the current fill rates. And, we believe this
2 is useful information that the Planning Commission and the
3 LUC has historically always asked for. And, so again, we
4 think it should be included in the Findings of Facts.

5 Thank you.

6 CHAIR MEATOGA III: Okay. Thank you very much.

7 [colloquy between deputy corp counsel Agag and
8 Chair Meatoga III]

9 Commissioners, any questions?

10 VICE CHAIR KAMO: Not at this time.

11 CHAIR MEATOGA III: Okay. Hearing and seeing none,
12 we'll move to Schnitzer.

13 COUNSEL TAM-SUGIYAMA: Good morning,
14 Commissioners. The proposed Findings of Fact, Conclusions
15 of Law, Decisions and Order submitted by the parties all
16 have one important thing in common. They all propose that
17 this Commission approve the City's Application to modify the
18 permit to extend the site selection deadline and to impose
19 the requirement that the City provide quarterly in-person
20 reporting to the Planning Commission regarding the status of
21 the site selection efforts. Those two points are not in
22 dispute.

23 Where the parties materially differ is the
24 characterization of the City's efforts since the 2019 Order
25 and the Findings of Fact, Conclusions of Law, mainly whether

1 the City has been acting diligently.

2 Schnitzer Steel Hawaii Corp. respectfully submits
3 that the answer to that question is yes, and ask that this
4 Commission adopt its proposed Findings of Fact, Conclusions
5 of Law, Decision and Order.

6 The legal and regulatory landscape looks very
7 different now than it did when the current permit was issued
8 in 2019. Zoning and environmental laws and policies have
9 evolved. As the state and the county strive to balance
10 community needs like public infrastructure with the
11 obligation to protect our natural resources.

12 Schnitzer's proposed Findings document those legislative and
13 policy changes and how they affected the City site selection
14 process since the Order was issued in 2019. They are also
15 the only Findings that include the evidence presented by
16 Schnitzer concerning the importance of the landfill to Oahu.

17 The legislative and policy changes affecting sight
18 selection were precipitated by two events that occurred
19 after the 2019 Order. The passage of Act 73 in 2020 and the
20 Red Hill fuel leaks in 2021.

21 Act 73 prohibits the siting of a landfill within
22 1/2 a mile of a residential, school or hospital property.
23 In effect, a significant portion of the island was
24 eliminated from consideration for a new landfill. While the
25 City was evaluating the effects of Act 73, we had the Red

1 Hill fuel leak in 2021. There is no dispute that the Red
2 Hill fuel leaks and the impact on drinking water and the
3 aquifer were looming over the Board of Water Supply's
4 consideration of the six proposed sites in the No Pass Zone.

5 In light of the Board of Water Supply's refusal to
6 support a landfill within the No Pass Zone, the Landfill
7 Advisory Committee voted not to recommend any of those six
8 sites. The City had no choice but to start over. The
9 question before this Commission is whether a further
10 extension is warranted now in light of intervening events
11 since the 2019 Order. And all the parties agree that an
12 extension should be granted. KOCA's primary criticism in
13 its Findings is that the City has allegedly failed to act
14 with reasonable diligence. And that criticism in its
15 proposed Findings are based primarily on events that
16 happened well before Act 73 or the Red Hill fuel leak. They
17 argue that the City should've selected the site a long time
18 ago.

19 Respectfully, this Commission and the Land Use
20 Commission already took the City's past site selection
21 efforts into account when it set the December 31st, 2022
22 deadline in this 2019 Order.

23 KOCA also faults the City for failing to look at
24 "all options under the circumstances created by Act 73."
25 And that's in KOCA's proposed Findings of Fact 58.

1 The City does not have unlimited resources to
2 pursue every possibility to see what works. Negotiated
3 transfer of federal lands, eminent domain, lobbying the
4 legislature to amend or repeal a statute, all still while
5 analyzing potential sites under the existing regimens and
6 continuing its waste divergent efforts to reduce reliance on
7 a landfill, on top of its other administrative and agency
8 functions.

9 The City has to decide how to allocate its limited
10 resources, its manpower and its time. Based on the facts
11 available at that time, the City felt the quickest way to
12 move site selection forward would be for the Board of Water
13 Supply to support the sites. That is consistent with an
14 agency trying to be diligent and efficient. But hindsight
15 is 20/20. It is easier said that knowing how it turned out
16 and tell the City that it was waste of time to try and
17 convince the Board of Water Supply to accept those six
18 sites. But just because the City was unsuccessful in
19 convincing the Board of Water Supply to support the
20 proposed sites in the No Pass Zone, does not mean the City
21 was not diligent.

22 KOCA's proposed Findings also sight to
23 Dr. Babcock's testimony saying that "ENV will not consider
24 seeking to amend Act 73 until it has secured a federal
25 site." One, discussing the City's alleged lack of

1 reasonable diligence.

2 Yet, in KOCA's objections to Schnitzer's
3 Conclusion of Law No. 7, KOCA also complains tha under Act
4 73 Waimanalo Gulch could not be sited where it is today, and
5 they deserve those same protections. KOCA wants to have it
6 both ways to benefit from the policy considerations
7 underlying Act 73 for closing Waimanalo Gulch while
8 demanding that the City advocate amending 73, Act 73, to
9 weaken those same policy considerations for other
10 communities to site the new landfill.

11 Act 73 was enacted in part so that what happened
12 and is happening to the KOCA residents does not happen again
13 to another residential community, hospital or school. Is
14 entirely reasonable for the City to take the position that
15 it will not seek to amend Act 73 unless it acquires a
16 federal site. Once the City has secured that federal site
17 that will allow the City to tailor the amendment it needs as
18 narrowly as possible to preserve the protections in Act 73
19 while allowing a new landfill to move forward. To seek an
20 amendment at this juncture would be putting the cart before
21 the horse.

22 KOCA also takes issue with how the City and
23 Schnitzer describes the Board of Water Supply no pass zone
24 arguing that it is a conservative and approximate boundary
25 and not law. KOCA also argues that the City has known about

1 the no pass boundary since 2003. All of those arguments
2 miss the point. The fact that the No Pass Zone is not a
3 legal boundary is why the City proposed those sites in the
4 first place.

5 The City was operating under site selection
6 guidelines in effect since at least 2013 that specifically
7 instructed the City to include potential sites within the No
8 Pass Zone. And that is in Schnitzer's proposed Findings of
9 Fact No. 93.

10 And, yes, the City knew about the no pass boundary
11 since 2003, but neither the City nor this Commission could
12 have predicted was the Red Hill fuel leak in 2021 and the
13 Board of Water Supply, and thus the Landfill Advisory
14 Committee's firm stance against any landfill sites within
15 the No Pass Zone as a result.

16 KOCA's argument that the boundaries conservative
17 and not law is irrelevant before this Commission. It is the
18 Board of Water Supply that they need to convince.
19 The evidence do support the conclusion that the City did the
20 best it could do in difficult circumstances.

21 Schnitzer, therefore, ask this Commission to adopt
22 its proposed Findings of Fact, Conclusions of Law, Decision
23 and Order that best mirrors that evidence. Thank you.

24 CHAIR MEATOGA III: Thank you. Questions from
25 Commissioners. [no response] Okay. Seeing none, we will

1 forward with KOCA.

2 COUNSEL CHIPCHASE: Thank you, Chair,
3 Commissioners. We have a slide show that we need permission
4 to air.

5 DIT CIELESS: Do you have a flash drive?

6 COUNSEL BRUCE: Could I share by--I'm on the
7 WebEx--

8 DIT CIELESS: Oh, yeah, as long as you have your
9 audio muted you can share it through--

10 COUNSEL BRUCE: Okay, great. It's Katherine Bruce.

11 DIT CIELESS: Let me make it project.

12 COUNSEL BRUCE: Thank you.

13 CHAIR MEATOGA III: If you don't mind before we
14 get started we will have a period after you, if there's any
15 rebuttals from anyone.

16 COUNSEL CHIPCHASE: Very good, Chair. So while
17 Kathy is pulling that up on the screen, I'll address a few
18 comments that were made by Counsel for the City and counsel
19 for Schnitzer. The City mentioned the reasonable diligence
20 standard. To be clear to the Commission, there's no
21 standard articulated in the conditions, no statement that
22 the City needs to meet a reasonable diligence standard,
23 instead the reasonable diligence language comes from
24 Findings, specifically the LUC's Findings, replete through
25 the LUC's Orders are statements about the City's obligation

1 to and whether the City did act with reasonable diligence,
2 but the Land Use Commission did not stop there and that's
3 why it's relevant here.

4 The Land Use Commission specifically found that if
5 the City had acted with reasonable diligence it had more
6 than enough time to site and develop a new landfill. That
7 finding, which the City does not seek to change, informed
8 the deadlines that were set for the City, both closure as
9 well as site selection, the deadline that we're addressing
10 here.

11 Because the City seeks to modify one of those
12 deadlines, the site selection, the contexts that lead to
13 that deadline informed whether that deadline--

14 DIT CIELESS: Sorry, sir, I just lost audio.
15 Sorry, Chair.

16 CHAIR MEATOGA III: No problem. [pause]

17 COUNSEL CHIPCHASE: I was thinking technology is
18 great, accept when it isn't.

19 DIT CIELESS: Okay. I think we're back. Maybe
20 your papers are overlapping the mikes a little bit.

21 COUNSEL CHIPCHASE: Testing, testing.

22 DIT CIELESS: Yes, thank you.

23 COUNSEL CHIPCHASE: You're welcome. Thank you for
24 catching that. The context then of those deadlines exists
25 within those findings. Findings as to whether the City had

1 acted with reasonable diligence and the finding is to
2 whether the City had sufficient time if it acted with
3 reasonable diligence. The City is here asking for more
4 time. So whether the City has acted with reasonable
5 diligence in the time that it had historically and since
6 2019 remains relevant.

7 The second item that the City noted was the
8 finding that it's out of compliance with the LUC's Order.
9 That finding is really indisputable. The LUC require as a
10 condition of the SUP, that the City identify a new site by
11 December 31, 2022. We sit here in February 2024, and there
12 is no site. We sit here today under an Order as of yet has
13 not been amended. There is no extension of time as we sit
14 here today. Therefore, the City is out of compliance.
15 The fact that the City applied for an amendment nine days
16 before the deadline. The Application was filed on December
17 22, 2022, nine days before the deadline does not change the
18 fact that 14 months later and nearly 14 months later we
19 still don't have a new site, and the City is out of
20 compliance.

21 The amendment, if approved, would bring the City
22 into compliance with the Order as amended. As of today, the
23 City is out of compliance.

24 The third point that the City raised was to object
25 to the language in KOCA's proposed Order that the extent

1 findings conflict the LUC's Order controls. That language
2 is necessary for two reasons. One, the narrowest of the
3 issue before the Planning Commission, we are amending an LUC
4 Order or proposing an amendment to the LUC Order. And
5 that's the second reason.

6 The Planning Commission on its own does not amend
7 the LUC's Orders. The Planning Commission recommends the
8 amendment of LUC Orders. For whatever we do today, whatever
9 the Planning Commission does today or when it makes its
10 decision will go up to the LUC to be reviewed, modified,
11 approved or rejected. If there are to be changes to
12 findings relevant to the narrow issue, the LUC will make
13 them and enter them and then those findings will control.
14 But as we sit here today and as we address the decision that
15 the Planning Commission needs to make, its findings cannot
16 supersede or conflict with the LUC.

17 Counsel referenced its language on page 20 of its
18 proposed Order as being enough. And Counsel described that
19 language as providing that these findings would supplement
20 the LUC's decision. With respect to Counsel that's not at
21 all what its proposed Order says. It says that these
22 Findings of Fact, Conclusions of Law and additional
23 condition shall supersede any inconsistent finding,
24 conclusion or condition on the Planning Commission and the
25 LUC's 2019 Decisions and Orders.

1 So rather than supplement the LUC's decision, the
2 City would have the Planning Commission supersede the LUC's
3 decision wherever it conflicted. Planning Commission does
4 not have that authority. The LUC's Findings and Conclusions
5 ultimately control over any conflict.

6 The fourth point that Counsel for the City raised
7 is to confirm that there is no objection to the quarterly
8 reporting obligation before this Commission. To be
9 technical the City did object to one sentence or one clause
10 in KOCA's proposed Condition. In the spirit of resolution
11 we're prepared to agree to strike that clause. And so with
12 that deletion of language that KOCA had proposed, and I'll
13 put it up on the screen when we get to the slide show, we're
14 all in agreement then on the proposed Condition for
15 quarterly reporting.

16 We're about to start the slide show and before
17 we do I'll just briefly touch on comments that Schnitzer's
18 counsel made. I didn't--In the slide show you will see that
19 we don't spend really any time talking about Schnitzer's
20 proposed Findings and Conclusions, and that is because
21 they're so out of balance with the proceeding before this
22 Commission and the evidence before the Commission, that
23 they're really not relevant for consideration.
24 The considerations are the City's proposed Findings and
25 Conclusions, KOCA's proposed Findings and Conclusions or

1 some variant that the Commission adopts. I'll just note a
2 couple of the points that Counsel made this morning that
3 emphasize, highlight my conclusion, my assessment.

4 Counsel for Schnitzer explained that the City's
5 resources are so limited they couldn't possibly view all the
6 things that they would've needed to do for the different
7 options for setting a new site under the limitations that
8 they have. There's nothing in the record to that effect.
9 Dr. Babcock did not say one word about not having the
10 ability to because of a constraint on resources pursue
11 different options. He did not say we could not do these
12 things. He said we did not do these things.

13 And with respect to the example that Counsel
14 highlighted in Act 73, Dr. Babcock's testimony was simply
15 that he thought it would be hard to amend Act 73. So they
16 didn't pursue it. Not that they couldn't, not that they
17 didn't have the resources, not that they tried but failed,
18 that it was too hard. So counsel's description of the
19 evidence, Schnitzer's proposed Findings simply have no basis
20 in the record that is before the Commission.

21 That is true too with respect to the BWS, with the
22 Board of Water Supply. There is no evidence that the City
23 determined the quickest way to site a new landfill was to
24 gain BWS's support. That is simply not in the record.
25 There's no evidence that's why it went before BWS; there's

1 no evidence that's why they deferred to the no pass line
2 that BWS had said even though they had not done so in the
3 past. So for those reasons and the other reasons expressed
4 in our objections to Schnitzer's proposed Findings, we don't
5 touch on them in the PowerPoint presentation.

6 I think we're up and ready now, Kathy.
7 We will go, and I don't have that much more left as we go
8 through it, but I think it's helpful to bring us back to the
9 beginning and to see both the context of why we're here and
10 some of the proposed language that we're fighting about.

11 The first is why we're here and as everybody
12 agrees we're here to modify the Land Use Commission's
13 Decision and Order from 2019. But the only modification
14 that the City has sought is the December 31, 2022 deadline
15 to identify a new site. They would move that to December
16 31, 2024. Otherwise, the City has not sought any amendment.
17 So what we're looking at in our Findings and Conclusions are
18 Findings and Conclusions relevant to that extension, to
19 moving a deadline that the LUC set.

20 The other condition that was agreed to, of course,
21 is the reporting condition with respect to quarterly
22 reporting before this Commission.

23 When we started this journey it feels like ages
24 ago, I explained why Ko Olina was a party, why we took the
25 time and resources for all these years to participate and

1 why we're doing it now if the only issue was an extension of
2 a deadline.

3 The first was to remind the Commission--

4 COUNSEL HU: I'm sorry, can I just make a quick
5 objection here. It sounds like another closing argument,
6 and it doesn't really relate to the proposed Findings of
7 Fact. So I'm just going to make an objection on the record.

8 COUNSEL CHIPCHASE: I respect that, and I
9 appreciate it. It actually does because context matters for
10 everything that we do, whether it's the Commission or the
11 parties. And this is just context for our proposed Findings
12 which the City has proposed.

13 The landfill requires a Special Use Permit.
14 It's in the agricultural district. The landfill has adverse
15 impacts on its neighbors and the landfill has been ordered
16 to close. The fourth reason that we participated in these
17 proceedings was to hold the City to its word.

18 The fact that the landfill requires an SUP means
19 that the City and the LUC can't approve the use unless the
20 desire to use would not adversely affect the surrounding
21 property. And so we see that in Planning Commission Rule
22 2-45, subsection B. Since there was extensive evidence and
23 is extensive evidence in the existing LUC's 2019 Decision of
24 adverse impact to the community. The only way that the LUC
25 could grant the City's request to extend the Special Use

1 Permit would be finding that the adverse impact to the
2 community would be mitigated through conditions. And so we
3 see that a Finding of Fact 4-30 where the LUC finds the
4 expansion of the Waimanalo Gulch Sanitary Landfill will not
5 adversely affect surrounding properties as long as its
6 operated in accordance with the conditions imposed below and
7 Conclusion of Law 13. The LUC further concludes that the
8 conditions imposed below are necessary or appropriate in
9 granting the approval including but not limited to ensuring
10 adherence to representations made by the Applicant. So
11 those conditions are essential to the finding that the
12 community would not be adversely affected. And that finding
13 is essential to approving the SUP. The City is here seeking
14 to modify a condition. One of the conditions that was
15 necessary to determine that the community would not be
16 adversely affected. That's Condition 5, the landfill site
17 selection condition. And being out of compliance with that
18 condition, failing to identify a new site by the deadline.
19 The City has failed to follow the mitigation that the LUC
20 required in order to extend the operation of the landfill.

21 As I said when we addressed comments from the
22 City's Counsel today, that condition and the closure
23 deadline were based on findings that if the City had acted
24 with reasonable diligence it could have sited and developed
25 a new landfill within the time that it had been available.

1 Since the City is acting or seeking to extend that time at
2 least for site selection, whether the City has historically
3 acted with reasonable diligence and is continued to act with
4 reasonable diligence in siting a landfill are relevant
5 determining whether an amendment of that condition is
6 appropriate.

7 So we see replete in the LUC's findings that
8 reference to reasonable diligence. And that takes us to
9 today and what I said at the beginning was the fourth reason
10 that Ko Olina had agreed to participate or wanted to
11 participate in these proceedings. The City has emphasized
12 that it's only here to modify the site selection deadline of
13 December 31, 2022. Its proposed Findings suggest otherwise.
14 Its proposed Findings suggest that this is the first step in
15 future petition to extend the closure deadline for the
16 landfill.

17 So if we look, for example, at ENV's proposed
18 Finding 58, assuming current fill rates, Waimanalo Gulch
19 Sanitary Landfill is expected to reach full capacity in
20 2036. That has nothing to do with whether the City needs an
21 additional two years to site a landfill, but it might have
22 something to do with a future request to extend the deadline
23 to close the landfill.

24 And so the City threw its proposed Findings and
25 Conclusion is looking to stack the deck today on a seemingly

1 minor amendment in order to lay the ground work for a future
2 application to extend the landfill or at least that's how it
3 appears from many of the City's proposed Findings.

4 So we've listed up on the screen, those Findings
5 and Conclusions that we believe are not necessary for the
6 narrow issue before the Land Use Commission--before the
7 Planning Commission, but instead would relay the ground work
8 for a future petition to amend.

9 In contrast, we set up on the screen, Ko Olina's
10 Conditions and Findings, KOCA's Conclusions and Findings are
11 necessary because they all relate to how quickly and how
12 reasonably and how diligently the City has acted
13 historically and since the LUC's decision in 2019. All of
14 those findings are relevant to whether the City should be
15 relieved of or be able to modify a condition that was
16 necessary to mitigate the harm to the community. It does
17 not matter that the parties agree or do not oppose the
18 extension. Certainly that makes the Commission's ultimate
19 conclusion easier, but that conclusion still needs to be
20 based on the evidence. It still needs to be based on facts,
21 and it still needs to be based on the law. The facts and
22 the law that Ko Olina had set out accurately reflect the
23 record and accurately reflect the findings of this
24 Commission needs to make in order to approve the extension.

25 We put up a couple of those examples on the

1 screen. Finding of Fact 42, for example, deals with the
2 awareness of the no-pass zone. Since the City has pointed
3 to No Pass Zone as a limitation, iteration of trying to be
4 aware, almost 21 years at least is relevant to whether there
5 should be an extension of time. The same is true with
6 Finding of Fact 47 and the other Findings of Fact that Ko
7 Olina had set out.

8 That takes us to the conditions. All the parties
9 agree that LUC's proposed Condition 5 should be modified to
10 extend the time to site a new landfill. The City has also
11 sought to modify Planning Commission Finding, Planning
12 Commission Condition 1. There are two problems with that.
13 The first is Planning Commission Condition 1 doesn't exist
14 except its historical footnote. And the Planning Commission
15 issued its Findings of Fact, Conclusions of Law and Decision
16 and Order. They were proposed, they went up to the LUC for
17 consideration and Condition 1 was rejected. The LUC did not
18 adopt Condition 1, so therefore Condition 1 and the rest of
19 the Planning Commission's Findings and Conclusions do not
20 exist. They're simply part of the procedural history.
21 There's nothing to amend.

22 The second problem is that the proposed Condition
23 1 or Planning Commission Condition 1 that the City seeks to
24 amend and therefore retain is direct conflict with the LUC's
25 Order. That Condition 1 states that the Waimanalo Gulch

1 Sanitary Landfill may continue to operate until it reaches
2 capacity, but the LUC has ordered that it close by March
3 2028. So if the LUC has ordered that it close by March 2028
4 and the City or the Planning Commission in its proposed
5 condition says that the landfill may operate until it
6 reaches capacity. We have a conflict.

7 The LUC's Order is the only controlling Order.
8 We can't create a conflict, but the Planning Commission
9 reinvigorating a condition that the LUC rejected.

10 Finally, we put up on the screen the condition
11 with respect to quarterly reporting. We struck through the
12 one clause that the City had objected to in its papers. So
13 as revised, I believe all the parties are in agreement with
14 the text of and the substance of the proposed condition.

15 Where do we go from here? What we would urge the
16 Commission to do is to adopt Ko Olina's proposed Findings of
17 Fact, Conclusions of Law, Decision and Order, because they
18 reflect the record, because they reflect the decision as
19 actually before the Commission, and because they're
20 consistent with the LUC's 2019 Order which remains the
21 controlling Order for the landfill. Thank you.

22 CHAIR MEATOGA III: Thank you. Any questions from
23 the Commissioners? [no response] Okay. Hearing and seeing
24 none, we will go back for any rebuttals with the remaining
25 time that you have here.

1 COUNSEL HU: Thank you, Chair. I know I only
2 raised four points, but you know I would point to my filing
3 for more objections to KOCA's proposed Findings of Fact,
4 Conclusions of Law. KOCA's Counsel raises the issue about
5 ENV being out of compliance with its permit because we--or
6 we should've filed for an extension earlier because we filed
7 it maybe seven days before the deadline. First of all, we
8 cannot predict how quickly these amendments are going to be
9 approved by, you know the Planning Commission and the LUC,
10 if they get approved or not. So how would we be able to get
11 a "proper" in KOCA's eyes, proper amendment granted in time.
12 Would we have to file something two years in advance even
13 though at that point we're still on track to meet our
14 deadline. And if we do that, then KOCA is going to come
15 back with arguments like "hey, why is ENV requesting an
16 extension right now. It's so early."

17 And another thing I want the Planning Commission
18 to be careful here about making a finding that ENV is out
19 compliance with this permit because that might lead to
20 lasting issues that are going to effect the entire
21 community. What does an out of compliance permit mean?
22 Does that mean that we have to cease running the landfill at
23 this moment in time? It's going to affect everybody.
24 It's going to affect KOCA, it's going to affect KOCA's
25 resorts, its clients, I mean KOCA itself. So I want the

1 Planning Commission to be careful about before deciding on
2 the issue.

3 And again it's ENV's position that, you know we're
4 not out of compliance. We're following the legal
5 procedures. That is what's set out in the rules here, and
6 we're properly following those.

7 I guess another point I want to rebut is, or what
8 I want to kind of just mention is that after the Planning
9 Commission issues its Decision and Order, the LUC is going
10 to take that and, you know either amend it or adopt it as is
11 or amend it so that it becomes the LUC's own language. So
12 issues about, you know the Planning Commission's Findings
13 are going to conflict with the LUC's prior decisions.
14 That's not going to matter because LUC is going to take that
15 language and make it into its own. And so this in regards
16 to the thing about the Findings of Facts that supplement or
17 supersede the old Finding of Facts issue that I spoke to
18 earlier. And this is also goes to the Condition No. 1 issue
19 that Counsel just raised towards the end of his arguments.

20 Thank you. That's all I have for now. Thank you.

21 CHAIR MEATOGA III: Okay. Thank you. Any
22 questions from the Commissioners? [no response] Okay. All
23 right. We'll go to Schnitzer.

24 COUNSEL TAM-SUGIYAMA: Thank you. I'm going to
25 address a couple of things. KOCA's counsel had said that

1 there was no evidence that the City had decided that trying
2 to change the Board of Water Supply's mind was the best way
3 to go. I would direct the Commission to Schnitzer's
4 proposed Findings of Fact 102 through 104 the detail efforts
5 that the City including the Mayor himself undertook to try
6 and change the Board of Water Supply. Actions speak louder
7 then words. And those Findings reflect the actions the City
8 took, and they support a conclusion that the City felt that
9 the best path forward was to pursue meetings and
10 conversations and try to change the Board of Water Supply's
11 mind about supporting sites in the No Pass Zone.

12 KOCA's counsel also took exception to my comments
13 about the City not having unlimited resources, but that is
14 not anywhere in the record. First, that was a rebuttal to
15 KOCA's criticisms in its findings specifically proposed
16 Findings of Fact 58 that the City failed to explore "all
17 options." That is not a reasonable standard to hold the
18 City to and that is where the issue of whether or not the
19 City has unlimited resource comes into play. It is not an
20 appropriate basis for finding a lack of diligence simply
21 because the City doesn't have unlimited resources to explore
22 all options, every possibility under the sun.

23 I also want to note that Schnitzer's proposed
24 Order does ask this Planning Commission to amend its prior
25 Condition 1 in its 2019 Decision, and it recommends to the

1 Land Use Commission to revise Conditions 5 and 7, and I
2 think that would address the procedural issues that KOCA's
3 Counsel has raised.

4 CHAIR MEATOGA III: Okay. Thank you. Any
5 questions first for Schnitzer?

6 KRAUT: Yes. That last comment about addressing
7 the procedural issues. Do you guys agree with that
8 statement?

9 COUNSEL CHIPCHASE: No. Commissioner, I don't
10 agree with that statement.

11 CHAIR MEATOGA III: Any other questions? [no
12 response] Okay. KOCA for any closing, rebuttals?

13 COUNSEL CHIPCHASE: Yes, thank you, Commissioners.
14 Very briefly, the fact that the City filed an Application to
15 amend the condition or amend the permit before the
16 expiration of deadline has allowed the City to continue
17 operating. Nobody opposes that or takes issue with that.
18 The hypothesized fears is really not a reality. The City
19 moved the petition in time to be able to continue operating.
20 It doesn't change the fact that the day that turn lapsed the
21 City became out of compliance. It doesn't alter that fact
22 at all.

23 And as far as when the City should have filed, I
24 can say without hyperbole that nine days before the
25 deadline, right before Christmas surely did not give anyone

1 enough time to think that actually it would've been
2 processed and approved in time that the extension granted
3 before the condition or before the deadline expired.
4 Whatever we want to say, six months, two years, nine months,
5 we know nine days didn't do it. No fault the City for that
6 necessarily, it made the Application or petition in time to
7 keep operating, surely, but it could not have thought that
8 the Commission would've processed and the LUC would've
9 processed and approved the extension before the new year.
10 And so it is out of compliance and the finding is
11 appropriate.

12 In terms of the conflict between the 2019 LUC's
13 decision and anything we might do here, the City and
14 Schnitzer expressed that while all those things will work
15 themselves out because the LUC will ultimately adopt its own
16 Decision and Order. With respect if that were true the City
17 would've not proposed its own Findings and Conclusions that
18 these Findings and Conclusions supersede any conflicting
19 Findings and Conclusions by Land Use Commission. In other
20 words it was all going to work out and this is just a
21 proposed Decision that will have no effect until the LUC
22 operates. If that is all that matter, that legal principal,
23 then there's no reason to have language in there saying that
24 these Findings and Conclusions supersede what the LUC has
25 done. It does matter. It does matter because this Decision

1 is going up to the Land Use Commission. Because it is going
2 up as a recommendation by the City in the modification of
3 the Land Use Commission's Orders.

4 And so which findings and which conclusions
5 control in that period is relevant not only to the parties
6 in the case but to the LUC's consideration of them. That is
7 true with respect to Condition 1, and Commissioner Kraut you
8 asked the question whether that language resolve the
9 conflict. It certainly does not.

10 We're here only on the City's Application to
11 extend the deadline to site a landfill. There's no place in
12 the Decision for a condition that allows the landfill to
13 remain open until it reaches capacity. Whether that's a
14 proposed addition or an actual addition, that's not why the
15 City petitioned the Planning Commission to amend the permit.
16 It's only to extend the deadline to select a new landfill.
17 It also doesn't resolve the conflict because as I said that
18 Planning Commission's decision that went up and was
19 considered by the LUC is not the permit at issue. It
20 doesn't exist except as a footnote, except as a procedural
21 history. The only thing to be amended is the LUC's Order
22 and that Order does not contain any reference to keeping the
23 landfill open until it reaches capacity, on a contrary it
24 sets a closure deadline.

25 Briefly on Schnitzer's points. What I said about

1 the absence of evidence for its findings remains true.
2 Counsel explained that they're implying motivation from the
3 actions that they have seen. But the finding is why the
4 City took those actions and there's no evidence in the
5 record that explains that the motivation Schnitzer has
6 implied is the reason the City took the actions. We can all
7 agree on the actions. We've heard the evidence. They're
8 factual as to why the City did what it did. The evidence
9 does not reflect, does not contain any reference to the
10 motivation that Schnitzer would imply.

11 With respect to the other points that Counsel
12 raised in so far a rebuttal to KOCA's point. A rebuttal
13 still has to be grounded in the evidence. A rebuttal
14 doesn't count unless it's based on the record. Schnitzer's
15 efforts to rebut KOCA's Finding isn't based on the record,
16 therefore, it doesn't rebut anything, and KOCA's Finding is
17 accurate.

18 If the City for Dr. Babcock had introduced such
19 evidence before the Commission, we'd be in a different
20 position. We'd address what was rebutted or we'd address
21 the motivation. The City had that opportunity. There's no
22 limitation on how long Dr. Babcock testified, whether other
23 witnesses could testify, whether any documents could be
24 submitted. I believe we stipulated to every document that
25 any parties submitted. No where in that testimony, no where

1 in those documents are the motivations, the implications,
2 the rebuttals that Schnitzer would seek to have to this
3 Commission fined. And so the Commission's findings would
4 not be based on substantial evidence because it's not there.

5 And so I come back to where I ended before my
6 rebuttal. KOCA's Findings and Conclusions most accurately
7 reflect the reason we're here, the history that brought us
8 here and the findings that are necessary to support the
9 City's request.

10 Thank you.

11 COUNSEL AGAG: This will be the last rebuttal for
12 petitioner.

13 COUNSEL CHIPCHASE: And just so there's no
14 procedural issue, I completely agree and have no objection
15 to the City having the last word.

16 COUNSEL HU: The City rests, thank you.

17 COUNSEL AGAG: So KOCA will you be submitting the
18 slide to the Commission for consideration?

19 COUNSEL CHIPCHASE: Yes, Counsel.

20 COUNSEL AGAG: Is there any objection to that?

21 COUNSEL HU: No objection.

22 COUNSEL TAM-SUGIYAMA: No objection.

23 CHAIR MEATOGA III: All right. I guess we'll move
24 forward. Thank you for your presentations. The Planning
25 Commission will move into deliberation.

1 COUNSEL CHIPCHASE: Very good.

2 COUNSEL HU: Thank you.

3 COUNSEL AGAG: So we can go off now.

4 [Webex ends]

5 [Restart of WebEx]

6 ALOMAR: Excuse me, excuse me.

7 CHAIR MEATOGA III: Sorry. We're just making an
8 announcement about--So just for those of you on WebEx the
9 Planning Commission is going to go into deliberation. This
10 may take a day, it may take longer but because of that we
11 want to make sure that those of you on WebEx know that we
12 may continue this deliberation until a further date in the
13 future and have another meeting date possibly.

14 COUNSEL AGAG: We will be providing notice.

15 CHAIR MEATOGA III: And we will provide notice for
16 the public so that they may participate. So with that said,
17 thank you.

18 [Meeting adjourned]

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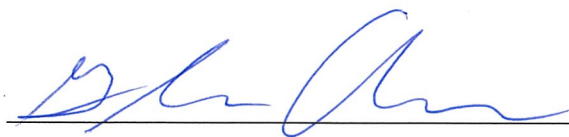
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1 I certify that the foregoing is
2 a true and correct transcription
3 of the proceedings, prepared to
4 the best of my ability, of the
5 meeting held on Wednesday,
6 February 7, 2024.

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8 _____

9 Gloria Takara
10 Secretary-Reporter
11 Planning Commission

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