

LAND USE COMMISSION
STATE OF HAWAII

Hearing held on October 10, 2019
Commencing at 9:00 a.m.

Airport Conference Center
400 Rogers Blvd., Suite 700, Room #IIT#3
Honolulu, Hawaii 96819

AGENDA

VI. CONTINUED ACTION

SP09-403 Department of Environmental Services
(Waimanalo Gulch Sanitary Landfill Remand-O'ahu
Civil No. 09-1-2719-11 To consider the Findings
of Fact, Conclusions of Law, and Decision and
Order of the City and County of Honolulu
Planning Commission Approving the City and
County of Honolulu Department of Environmental
Services' Application for a New Special Use
Permit to Supersede the Existing Special Use
Permit to Allow an Expansion and Time Extension
for the Waimanalo Gulch Sanitary Landfill and
to Modify Special Use Permit No. 2008/SUP-2 by
Modifying the Land Use Commission's Order
Approving the City and County of Honolulu
Planning Commission's Findings of Fact,
Conclusions of Law, and Decision and Order with
Modifications Dated October 22, 2009.

VII. Adjournment

BEFORE: Jean Marie McManus, CSR #156

1 APPEARANCES:

2 JONATHAN SCHEUER, Chair
3 NANCY CABRAL, Vice Chair
4 DAWN N.S. CHANG
5 EDMUND ACZON
6 DAN GIOVANNI
7 GARY OKUDA
8 LEE OHIGASHI
9 ARNOLD WONG

10 STAFF:

11 LORI TANIGAWA, ESQ.
12 Deputy Attorney General

13 DANIEL ORODENKER, Executive Officer
14 RILEY K. HAKODA, Planner/Chief Clerk
15 SCOTT DERRICKSON, AICP/Planner
16 BERT SARUWATARI, Planner
17 RASMI AGRAHARI, Planner

18 BRIAN YEE, Deputy Attorney General
19 MARY ALICE EVANS, Director
20 AARON SETOGAWA, Planner
21 For State Office of Planning

22 KAMILLA CHAN, ESQ.
23 City Corporation Counsel
24 For Department of Environmental Services

25 IAN SANDISON, ESQ.
Watanabe Ing LLP
For Schnitzer Steel

CALVERT CHIPCHASE, ESQ.
CHRISTOPHER GOODIN, ESQ
Cades Schutte LLP
For KOCA and Senator Maile Shimabukuro

RICHARD N. WURDEMAN, ESQ.
For Colleen Hanabusa

DINA WONG, ESQ.
Deputy Corporation Counsel
Department of Planning and Permitting

1 CHAIRPERSON SCHEUER: Aloha mai kakou, good
2 morning.

3 VICE CHAIR CABRAL: Aloha.

4 CHAIRPERSON SCHEUER: We are coming out of
5 recess. It is Thursday, October 10th, the second day
6 of hearing on Docket Special Permit 09-403,
7 Department of Environmental Services Waimanalo Gulch
8 Sanitary Landfill Remand.

9 Where we left off yesterday was that the
10 Office of Planning had still -- had presented, and
11 the Commissioners were still asking questions of the
12 counsel of the Office of Planning.

13 And then by request from the parties, there
14 was a request to brief on additional issues raised
15 during yesterday's questioning.

16 We will go in the same order that we went
17 with the original presentation. So beginning with
18 the Applicant, Environmental Services, followed by
19 Schnitzer Intervenor, and then through to KOCA,
20 Hanabusa, Office of Planning.

21 Is that acceptable to the parties?

22 MR. CHIPCHASE: Yes, Chair.

23 CHAIRPERSON SCHEUER: Thank you.

24 Commissioners, we were asking questions of
25 Mr. Yee. Are there further questions for Mr. Yee?

1 If not, I, briefly, Mr. Yee, have two
2 primary questions at this time.

3 One is, while I understand that if I heard
4 you correctly, that the Office of Planning does not
5 agree with the proposed amendments to conditions
6 offered by KOCA.

7 Do you agree or disagree that there is
8 sufficient justification and basis in the record to
9 adopt a definitive date for closure in the record?

10 MR. YEE: Just to clarify. I think the
11 Office of Planning said that we took no position on
12 KOCA's proposed conditions. We noted some concerns
13 regarding and expressed, I guess, the thought that
14 perhaps LUC should consider how far it wants to go
15 into the operations of the landfill.

16 Having said that, your question was whether
17 there was sufficient evidence to determine -- agree
18 with the proposed KOCA conditions.

19 I think there is -- I think it's fair to
20 say there is evidence upon which the LUC rely. We
21 are not expressing the opinions whether it is
22 sufficient evidence. And much of that depends, of
23 course, upon certain judgment calls that are to be
24 made, if given the fact we're not taking a position,
25 we would respectfully reframe from commenting on the

1 sufficiency of the evidence.

2 CHAIRPERSON SCHEUER: Okay. Thank you.
3 And my second question, Mr. Yee, and again, please
4 feel free if I have misunderstood your opening
5 remarks.

6 My question is based on my understanding of
7 your opening remarks which suggested to me that you
8 were saying that if this Commission were to deny the
9 permit, that we would be responsible for the health
10 and safety consequences of closure of the landfill
11 and an unavailability of the landfill.

12 Yet later during questioning, you stated
13 you did not take a position on whether or not there
14 is even a permit at this time. And those two
15 positions to me seem somewhat contradictory to each
16 other, because the former position that we are
17 somehow responsible, if we chose to deny, seems to
18 assume that there is an existing legal permit in
19 place.

20 So could you please clarify that question?

21 MR. YEE: Sure. Currently the landfill is
22 operating, and no one has argued to any court that
23 the existing -- that there is a need for an
24 additional permit for approval in order to continue
25 operating.

1 So under the existing status quo, the
2 landfill is operating, and no one has contested the
3 legality of that operation.

4 If this Land Use Commission were to deny
5 the permit, the arguments that ENV has raised as to
6 why it is allowed to continue to operate become much
7 more problematic.

8 I do want to note that if I said the LUC
9 was responsible, I perhaps overstated. I did want to
10 say that if the LUC denied, there would be public
11 health and safety consequences.

12 Responsibility is more of a loaded term,
13 and it implies fault, which that is not something I
14 wanted to discuss or assign blame.

15 But we all have a role to play in the
16 causation of the consequences. So it would be
17 perhaps incorrect for me to say responsibility and
18 assign blame to any particular party for that result,
19 but that would be the result.

20 CHAIRPERSON SCHEUER: So, you know, I'm
21 willing to concede that I am unaware of anybody
22 having filed an action in a court of law to say that
23 the current permit is illegal or doesn't exist, but,
24 you know, I do rely on what I think is a really plain
25 reading of the supreme court's language in ENV versus

1 LUC which I read before, and I'll read again.

2 Based on all the evidence in the record, it
3 would appear that Condition 14 was a material
4 condition to the LUC's approval having held that
5 Condition 14 cannot stand because it is inconsistent
6 with the evidence shown in the record and not
7 supported by substantial evidence. The LUC's
8 approval of SUP-2 also cannot stand because Condition
9 14 was a material condition to LUC's approval.

10 Am I missing something, or is the supreme
11 court saying that SUP-2 does not stand?

12 MR. YEE: It is my understanding -- well,
13 let me backtrack at that.

14 During the LUC updates, status updates on
15 this matter, I will agree that the land use -- that
16 the Office of Planning expressed to the Land Use
17 Commission a desire to have a speedy resolution,
18 because of our concern as to the uncertainty about
19 the status of the SUP.

20 Having said that, it is my understanding of
21 ENV's position that the existing approval by the Land
22 Use Commission is sufficient to constitute a valid
23 SUP for purposes of moving forward, and that the
24 existing process is simply a review of an existing
25 permit that is required by the Land Use Commission

1 and the Planning Commission.

2 From that the Office of Planning has not
3 taken a position on the ultimate result of that, but
4 a dismissal of the SUP at this time or denial of the
5 SUP at this time makes ENV's argument about the
6 continuing validity of the SUP more problematic.

7 That is why we said it would be a public
8 health and safety problem.

9 CHAIRPERSON SCHEUER: But, again, and as I
10 questioned the counsel for ENV, I don't understand
11 that there's any other way to read this language from
12 the supreme court than to say that SUP-2 does not
13 actually stand.

14 But if there's another way, if I'm missing
15 something in the remainder of the case or something
16 outside, I'm open to that.

17 MR. YEE: I think the argument essentially
18 is the Land Use Commission gave its approval. And
19 since it gave its approval, even though that approval
20 needs to be reviewed now for purposes of determining
21 whether it would or would not continue to give that
22 approval, the existing approval still exists. I
23 believe that's the argument.

24 I mean, I'm willing to be further educated
25 by the ENV on this question, but that's my

1 understanding.

2 CHAIRPERSON SCHEUER: Thank you very much,
3 Mr. Yee. I appreciate the responses.

4 Commissioner Okuda?

5 COMMISSIONER OKUDA: Thank you, Mr. Chair.

6 Following up on the Chair's questions. And
7 I think the answer to this question is either yes,
8 no, or we don't know. Okay.

9 So is the Waimanalo Gulch Landfill
10 operating with or under a valid existing enforced
11 permit?

12 MR. YEE: I think it follows Commissioner
13 Cabral's reference, I think third base. I don't
14 know.

15 COMMISSIONER OKUDA: You don't know, okay.

16 Isn't that one of the important things that
17 the Land Use Commission should consider here, whether
18 or not this landfill has been operating with -- and I
19 can't say with possible significant consequences to
20 the community, because we really don't know, because
21 it's not in the record one way or the other.

22 But isn't that something that we should
23 know that's material to our decision whether or not
24 this landfill is operating under a valid permit or
25 whether the City is just operating this landfill

1 regardless of whether there's a valid permit?

2 MR. YEE: With respect, no. The issue
3 before you is whether to approve a particular SUP
4 permit.

5 COMMISSIONER OKUDA: Yeah, okay. So in
6 other words, isn't it relevant using the definition
7 of the word "relevant," you know, like under the
8 Hawaii Rules of Evidence, isn't it relevant in trying
9 to evaluate the representations and the credibility
10 of representations being made to us by a party in an
11 action, whether or not the party follows the law in
12 other circumstances or doesn't follow the law?

13 Or to put it more in plain English, isn't
14 it relevant in making a decision to determine whether
15 we can believe people's representations when they
16 don't follow the law?

17 MR. YEE: The way you've raised it sort of
18 begs the particular question. But that exact same
19 question can be rephrased as should we or should we
20 not consider the credibility of an agency if it is
21 willing or unwilling to protect the public health and
22 safety?

23 COMMISSIONER OKUDA: No, no. That's not --

24 MR. YEE: The reason is because those two
25 issues are -- have attention. There is a question --

1 COMMISSIONER OKUDA: Let me stop you, Mr.
2 Yee. Please don't rephrase my question because I
3 phrased the question in a way so I can try to
4 understand what the question is. It's just a simple
5 question of relevance.

6 If somebody has a history of violating the
7 law, please explain to me why we should trust that
8 party's representation that they're somehow going to
9 follow the law in the future.

10 MR. YEE: In this particular case, no, it's
11 not relevant because it is more important --
12 regardless of whether or not there is a question as
13 to the continuing validity of the SUP permit. It is
14 more important that the landfill continue to operate.
15 And so it does not reflect poorly upon the
16 credibility of ENV, even if you believe that the SUP
17 permit is invalid because the ENV, I think, made the
18 correct choice in continuing to operate a facility
19 that is needed for the County's public health and
20 safety.

21 COMMISSIONER OKUDA: So in other words, if
22 a bureaucrat, who is not elected by the community,
23 makes a determination that it's more important for
24 public safety, however that public safety is defined,
25 it's okay to violate the law?

1 MR. YEE: There are avenues of redress for
2 disagreements as to what is or isn't allowed under
3 the law, and whether there's an uncertainty,
4 government officials have to make calls about which
5 way to go, and what legal risk to take, and part of
6 that analyses is public health and safety. So if the
7 government official makes that determination, then
8 the government official, of course, is subject to
9 criticism by those who disagree, but it's also -- but
10 I think you can also legitimately argue there may be
11 a question, you think one way, I think another, I'm
12 willing to take the risk if somebody wants to sue me
13 on this and I will defend it, but until then I'm
14 taking the position to protect public health and
15 safety to continue to operate the landfill.

16 I'm trying to answer your question. And in
17 doing so I'm in many ways overstepping my bounds as
18 the Office of Planning attorney, but I'm trying to be
19 responsive to your question and give you what I think
20 would be the response.

21 COMMISSIONER OKUDA: Okay. Because I'm
22 asking this question because I personally believe the
23 Chair has accurately read from the decision which
24 I've read over many times in preparation for this
25 proceeding. And, you know, we try to -- well, I

1 believe the Chair has accurately read the part of the
2 decision, and I believe that following the rule of
3 law is very important in how we make the decisions.

4 And my final question along that line is:
5 What authority can you cite whether it's case,
6 citation, learned treatise or what have you, that a
7 government official has the right to disregard the
8 law if there's a public -- if that government
9 official in his or her capacity determines there is a
10 public health or safety issue?

11 MR. YEE: I've gone over what I think ENV's
12 argument would be. And ENV presumably has good faith
13 belief that what they're doing is legally correct.

14 COMMISSIONER OKUDA: Well, I know. My
15 question is give me a citation to a case, a statute
16 or rule that says that.

17 MR. YEE: I will give you them -- I mean, I
18 haven't obviously prepared for that particular
19 question. But I will say off the top of my head, if
20 someone goes in for an injunction, in order to stop
21 an action because they argued that action is illegal,
22 it is a legitimate argument for the public health
23 that following the law in that fashion immediately
24 would be a public health and safety problem, and that
25 the injunction should therefore not be granted.

1 COMMISSIONER OKUDA: And let me tell you
2 this. The standard for injunction is the case
3 Robinson versus Ariyoshi. One of the cases. And
4 it's a three-part test. And I submit to you that's
5 not on the three-part test.

6 But I have no further questions, Mr. Chair.

7 CHAIRPERSON SCHEUER: Thank you. And if I
8 may -- well, Commissioner Aczon.

9 I just want to be clear since these two
10 discussions. I do not question for a second whether
11 or not -- I do not want it to appear on the record
12 that I'm suggesting that the City, because of the
13 lack of a SUP, should have suddenly stopped operating
14 the landfill and have trash pile up on the streets of
15 Honolulu.

16 But I think there was another alternative
17 to say, you know what, we don't legally have a permit
18 here, and we need to get a new one.

19 To draw an analogy, if the emperor has no
20 clothes, I'm not stripping him naked to say that he
21 has no clothes. And if the emperor is saying, well,
22 give me a jacket and I'll be fully closed, I have the
23 right to say, well, no, you're actually totally
24 naked. You need a full set of clothing.

25 CHAIRPERSON SCHEUER: Commissioner Aczon?

1 COMMISSIONER ACZON: Again, this is my last
2 question just comment based on the hearing, the
3 discussion who's on first. So we are going to be
4 going around, and we going to be asking who's on
5 first. So nobody knows whether we have -- that they
6 have a permit or the approval is valid or not. We
7 can go another two days talking about it, and we
8 never resolve it. So obviously, the only people that
9 get answers is the court. So everybody here has
10 different opinions.

11 So who has that authority to make those
12 decisions? I don't think anybody here. So the
13 Commission thing now is there is a problem. It's
14 upon this Commission to resolve the problem and move
15 forward.

16 So I think we need to move forward, look at
17 what we have now, and make a decision whether it is
18 valid or not, or we going to approve this request.
19 That's all I have to say.

20 CHAIRPERSON SCHEUER: Thank you,
21 Commissioner Aczon.

22 Commissioner Chang.

23 COMMISSIONER CHANG: Good morning, Mr. Yee,
24 I just want to follow up on a line of questioning
25 that I had with you yesterday regarding the boundary

1 amendment. And that in your opinion the boundary
2 amendment was not appropriate because you felt that
3 there was an opportunity that the property could be
4 restored for agricultural use.

5 Where in the record has Office of Planning
6 ensured that their -- that the property will be
7 restored for purposes of agricultural use?

8 MR. YEE: Just so that I leave ourselves --
9 in case this ever comes up, I believe I said was the
10 Office of Planning is not assuring you that we would
11 support a DBA. So I basically said we may have
12 concerns, and I'm giving you our options.

13 Having said that, I did express concerns
14 about why there may be problems with making this into
15 an urban -- should it be Urban after the landfill
16 closure, which doesn't answer your question. I just
17 wanted to correct that initial statement.

18 The question I think was why we have tried
19 to make sure that this is restored, and that's a fair
20 question. I don't think the Office of Planning has
21 focused on that. And if that's an additional
22 condition that the Commission wanted to impose, they
23 could do so.

24 COMMISSIONER CHANG: So I appreciate that.
25 Because I think what I at least heard from KOCA and

1 Hanabusa, that even the City did initially apply for
2 a boundary amendment, but that indeed may be the more
3 appropriate process. The difficulty we're having is
4 we are looking at this under the criteria of a SUP
5 doesn't quite fit, but we are trying to do the best
6 that we can. So the boundary amendment seems to be a
7 more, at least for several in the room, a more
8 appropriate vehicle to do that.

9 And I think should OP have the opportunity
10 to ensure that those -- again, that your position
11 that that's included in any future conditions for
12 such a project, like this or any other SUP where you
13 believe that a boundary amendment is not appropriate.

14 MR. YEE: Thank you.

15 CHAIRPERSON SCHEUER: Are there any further
16 questions for the Office of Planning at this time?
17 Okay. Seeing none.

18 ENV, are you prepared?

19 MS. CHAN: Yes.

20 CHAIRPERSON SCHEUER: All right. And, Mr.
21 Yee, are you still giving up five minutes to ENV?

22 MR. YEE: Yes, we are.

23 CHAIRPERSON SCHEUER: Fifteen minutes. And
24 you may begin.

25 MS. CHAN: Thank you.

1 There has been some discussion about the
2 Land Use Commission's options with this application,
3 you know, whether to approve, approve with
4 modification or deny. I just wanted to point out the
5 consequences of denial. It wouldn't only impact what
6 ENV is able to landfill at Waimanalo Gulch if we were
7 no longer allowed to use the facility, but it would
8 also put the department in a position to determine
9 whether to continue to operate H-Power in violation
10 of its solid waste management permit, or, you know,
11 to do that and figure out a way to deal with the ash
12 and other materials that are there.

13 If the facility were to shutdown and we're
14 talking about all of the other waste that's collected
15 by the department as well as the waste that's hauled
16 there by commercial haulers. So if H-Power is not
17 operating, we'd have to figure out what to do with
18 that as well.

19 Mr. Sandison touched upon the ASR that must
20 be landfilled, and that would give other waste
21 streams that would have nowhere to be disposed as
22 well as other recyclers who are not able to recycle
23 100 percent of their materials that they collect.

24 Now, another option that was discussed
25 yesterday was the possibility of remanding this

1 application back to the Planning Commission, and this
2 case was last remanded to the Planning Commission in
3 June of 2017, so it's taken us over two years to get
4 back to this point. And part of that delay was, I
5 believe, unavoidable clearly by the parties and by
6 the Commission.

7 At some point in April of 2017, I believe
8 or 2018, the Commission had one of its five
9 Commissioners who was already not recused from the
10 case become recused, and with that there wasn't even
11 the ability to call a hearing to have quorum to do
12 that.

13 And there is time involved in appointing a
14 temporary Commissioner. I believe in this case it
15 took about four months, and then that person needed
16 time to review the very lengthy record in this case.

17 Under City ordinances, I have the citation.
18 In section 3-1.5b, the appointment of a temporary
19 Commissioner ends at the end of the adoption of the
20 Final Decision and Order in a contested case. So I
21 would submit that at this point the temporary
22 commissioner that volunteered its time and served to
23 issue the 2019 decision in this case is no longer
24 considered a temporary commissioner.

25 So just practically speaking, if this case

1 were remanded one more time, we would be looking at
2 potentially another commissioner needing to be
3 appointed. I believe that there's still a need for
4 that in this case. I don't think there's been any
5 new commissioners appointed to the Planning
6 Commission who would not be recused.

7 So we would be looking at, best guess,
8 another couple of years in order for them to be able
9 to find someone that's able to serve and also to get
10 up to speed and determine the record or review the
11 record so that they can make a decision in this case.

12 Now, I know Mr. Chipchase went through the
13 history of Waimanalo Gulch, but I noticed on some of
14 the slides that were presented yesterday there was
15 some information presented and I think some other
16 things that I would like to clarify, because they
17 appear in the permits but not in the slides that were
18 presented and not in the discussion.

19 So the first Special Use Permit for
20 Waimanalo Gulch was issued in 1987. That's the one
21 that covered roughly 60 acres, and the slide that was
22 shown mentioned that the new landfill is to initially
23 serve the Leeward community. And I believe it went
24 on to state that it was for disposing raw refuse and
25 is projected to have an eight-year life. That's

1 straight out of the permit.

2 The rest of the paragraph that was not
3 mentioned was the fact that the Petitioner
4 anticipates that when the proposed H-Power facility
5 becomes operational in 1988, most of the raw refuse
6 will be diverted to this facility, and the property
7 will be used for disposal of ash from H-Power and
8 other noncombustibles.

9 That's finding of fact -- oh, I'm sorry,
10 I'm going to have to check on the number.

11 It just -- all of the prior permits for
12 this facility are part of the evidence in the 2011
13 proceeding, so this is Exhibit A5 for this particular
14 permit.

15 In this permit it was also acknowledged
16 that in the Findings of Fact that even with the
17 resource recovery facility, that's H-Power, that ash
18 would need a site for final disposal. And so the
19 notion that further diversion is through H-Power
20 would potentially slow down the drawdown of our
21 capacity at that facility.

22 So that the projected eight-year life span,
23 the useful life of that, the eight years, could be
24 doubled. So that was already part of the discussion
25 and acknowledged in that original permit.

1 That permit also notes that the land upon
2 which the proposed use is sought is unsuited for the
3 uses permitted within the district, topography, soil
4 conditions, and general condition of the site renders
5 the site unfeasible for agricultural application.

6 There's been some discussion as well about
7 the number of times the permit's been amended, so I
8 wanted to touch upon the reasons for some of those
9 extensions.

10 So the first one was in 1989, that was a
11 proposed 26-acre expansion that was to include an
12 area that was inadvertently left out of the original
13 special permit. This 1989 permit is Exhibit A6 in
14 the 2011 proceeding. And the Finding of Fact I just
15 referenced is No. 18.

16 The expansion area doubles the construction
17 of the administration building, the weigh station,
18 drainage structures and access roads is all the
19 ancillary things that were to actually to operate the
20 facility.

21 I just want to be clear to the purpose of
22 some portions of that landfill. It's not all
23 landfill.

24 Then in 2003, this is Exhibit A7, the City
25 proposed a 21-acre expansion, and at the public --

1 I'm sorry, at the Planning Commission hearing, there
2 were public testifiers, including two council members
3 who supported the expansion and subject to certain
4 conditions as well, but not all the testimony was
5 against the landfill.

6 One of the conditions in that permit was to
7 require the Blue Ribbon Site Selection Committee to
8 make its recommendation for a new landfill site to
9 the City Council, and they set a deadline on that of
10 June 1st, 2004.

11 In a subsequent order, Frank Doyle mentions
12 that in previous testimony, the 2003 testimony that
13 Mr. Chipchase referred to yesterday, that in his
14 previous testimony regarding the expansion of the
15 Waimanalo Gulch Landfill, the Applicant represented
16 that it would continue to seek alternative disposal
17 sites and other technologies and waste recovery
18 programs, including the expansion of H-Power to
19 reduce the amount of waste that is disposed of in the
20 landfill. And that's consistent with planning
21 objectives, it would discontinue landfill activities
22 at Waimanalo Gulch by May 1st, 2008.

23 But in accordance with Council Resolution
24 04-75(b)(1), the Applicant, ENV, was asked by the
25 Council to appear before this Commission and request

1 an extension of the deadline to select the landfill
2 site --

3 COURT REPORTER: You need to slow down a
4 little bit.

5 MS. CHAN: -- to December 1st, 2004.

6 And, b, clarification from this Commission
7 as to whether Waimanalo Gulch may be considered by
8 the council as one of the available landfill sites.

9 So in that proceeding, the Commission
10 clarified that it had jurisdiction only with regards
11 to the extension of the time by which they had to
12 fill out the site, and not as to whether Waimanalo
13 Gulch could be considered as a future site.

14 So subsequent to that, City Council
15 Resolution 04-348 CD(1) SU(1), which is Exhibit A-11,
16 council selected Waimanalo Gulch as the City's future
17 landfill site. The Blue Ribbon Committee did make
18 recommendations of four sites to council, but the
19 State Office of Information Practices weighed in on
20 this and concluded that the Blue Ribbon Committee's
21 final report was void due to violations in the state
22 Sunshine law.

23 Therefore, because the Blue Ribbon
24 Committee's recommendations were merely advisory, and
25 because of the violations of the Sunshine law,

1 council believed that it could -- it would not be
2 restricted to selecting the sites that were on that
3 list.

4 There are policy considerations that come
5 into play in determining selection of a site and all
6 those things related to that, and council recognized
7 that there were new emerging waste disposal methods
8 and processes that would reduce the amount of solid
9 waste that needed to be landfilled, and that the City
10 at that time had already proposed its island-wide
11 recycling program.

12 So in council's resolution, they select
13 Waimanalo Gulch as a site for the City's landfill,
14 and they list their reasons.

15 No. 1, Waimanalo Gulch has at least
16 15 years of capacity left. And that's back in
17 2003/2004.

18 Waimanalo Gulch site is the most economical
19 site for which all cost and revenues are known
20 factors because we were already operating at that
21 site.

22 No. 3, other sites would require large
23 amounts of money to acquire land and develop the site
24 and infrastructure.

25 No. 4, an operating contract is already in

1 existence;

2 And No. 5, the landfill operator is
3 committed to addressing community concerns.

4 So that brings us to 2008 where the City's
5 proposed an extension of its waste acceptance
6 deadline which was about May of 2008 and they sought
7 a two-year extension, and it was for the purpose of
8 conducting and finalizing its EIS for the further
9 expansion based on council's resolution, so to
10 utilize the full 200 acres at that property.

11 Thank you for allowing me to clear up some
12 of those issues related to Waimanalo Gulch's
13 permitting history.

14 I also wanted to touch upon the fact that
15 allowing the City to use Waimanalo Gulch to capacity
16 may actually have some positive benefits. It may be
17 an incentive for the City to divert waste and to not
18 rely on landfilling. And that remaining at the site
19 continues to meet the policy considerations set forth
20 by council in its 2004 resolution, and the reduced
21 reliance on the landfill also means that the
22 potential for the adverse impacts goes down because
23 the trucks are not coming up to the landfill as
24 frequently.

25 There is far less waste, and the types of

1 waste that's being landfilled there are not the types
2 that are going to, you know, for example, be picked
3 up by the wind and blown around.

4 So they're also not typically the types of
5 waste that are more objectionable in terms of odors.
6 These are really talking about primarily ash and ASR,
7 and then the rest of the uses are very small, minimal
8 amounts of waste going there.

9 The recent diversion of flooding was
10 mentioned yesterday as well, that there were a few
11 days earlier this week where sludge and things
12 diverted to the landfill, so I wanted just to point
13 out that the reason for that diversion is because
14 there was scheduled maintenance of the third boiler.

15 Every five years they're required to do to
16 certain types of maintenance so that they can operate
17 the rest of the months out of the year. And so it
18 was a very short duration to allow for that, and I
19 just wanted to clarify the reason for that.

20 The City also objected to some of the
21 additional conditions that KOCA had proposed.
22 Certain conditions are not appropriate for a SUP, for
23 example, conditions, I believe 1.e, and 1.f were
24 mentioned yesterday. And the reason we had objected
25 to those is because they extend certain authorities

1 to KOCA as an Intervenor that would really not be
2 appropriate to be granted to an Intervenor in a case.

3 Other conditions such as proposed Condition
4 2.d would expand the reach of the condition to
5 include any on-site or off-site improvements or
6 activities without any basis in the record.

7 Proposed Condition 2.f which was the one
8 that would require landscaping would really serve no
9 functional purpose at the landfill and causes
10 concerns for ENV.

11 We raised this before the Planning
12 Commission that there is certain operational needs in
13 order for -- that would govern what the landfill is
14 allowed to plan and where they planned it, and
15 whether that would interfere with things like their
16 MPDES permit.

17 So we already have certain other
18 obligations, under the solid waste management permit,
19 and we believe that that's properly part of that
20 permit and that the oversight would lie with DOH.

21 CHAIRPERSON SCHEUER: It's been 15 minutes.
22 Are you closing?

23 MS. CHAN: Sure, thank you.

24 So just generally we would object to the
25 conditions that are already part of other permits

1 that we have and other legal obligations. There are
2 other authorities that I believe properly oversee
3 those conditions. And so for that reason, it would
4 be inappropriate to have it incorporated into this
5 permit and subject us to additional liability.

6 Thank you.

7 CHAIRPERSON SCHEUER: Thank you, Ms. Chan.
8 Commissioners?

9 Commissioner Aczon?

10 COMMISSIONER ACZON: You mentioned that
11 based on the council's conditions of the -- ENV is
12 proposing Conditions 1.e, 2.d and 2.f. any
13 additional?

14 MS. CHAN: There were more, yes.

15 COMMISSIONER ACZON: You were cut off last
16 time.

17 MS. CHAN: Yeah. There were a number of
18 them. Which would include 2.d, 2.f, 2.c -- sorry,
19 I'm going backwards, 2.e, 2.g, h, i, and j, number 4
20 and 5, 1.e. 1.f, 1.g, and Condition No. 3 as well,
21 and I think that's still a partial -- I'm sorry.

22 COMMISSIONER ACZON: Thank you.

23 CHAIRPERSON SCHEUER: Commissioner Chang.

24 COMMISSIONER CHANG: Thank you.

25 Good morning. Just a few -- I guess I want

1 to be clear just for myself. I guess your opening
2 statement was there is several consequences. I want
3 to really be clear that it's not LUC that is shutting
4 down the landfill.

5 MS. CHAN: Correct, and I did not intend to
6 imply that.

7 COMMISSIONER CHANG: Okay.

8 MS. CHAN: I was explaining what would
9 occur should that happen.

10 COMMISSIONER CHANG: Because your statement
11 was, should we exercise one of the options being
12 denial, that we would be shutting down the landfill.
13 So I just want to be really clear that it is not LUC
14 that is shutting down the landfill, but it is the
15 City's -- how would I say it -- failure to adhere to
16 those -- to either, to get the appropriate permit or
17 authorization, so I just want to be very clear about
18 that.

19 MS. CHAN: May I clarify one thing?

20 I think with all due respect, that's the
21 reason that we have continued to pursue this
22 consolidated case, you know, without conceding our
23 position regarding the status of the permit. But
24 even if you were to argue that we hadn't, you know, a
25 need to have a permit in place, we would like to have

1 this case resolved and we would like to have it
2 resolved expediently.

3 COMMISSIONER CHANG: And I assure you, I
4 think the LUC would like that resolution as well.
5 But you made a comment that the site is infeasible
6 for agricultural use, but yet the County has not come
7 before here for a boundary amendment.

8 By making that admission, why hasn't the
9 County pursued a boundary amendment, which is clearly
10 the most appropriate mechanism for you to continue
11 this activity?

12 MS. CHAN: There have been other references
13 in the other prior permit as well which echoes one of
14 the things that the Office of Planning has referenced,
15 and it's the return of that land to agricultural use
16 once the landfilling has ended.

17 COMMISSIONER CHANG: And where in the
18 record is there assurance that that is going to
19 occur?

20 MS. CHAN: I don't believe that there's
21 assurances that that would occur, just that by
22 operation of the landfilling activity though it's no
23 longer occurring, the fact that we would not had a
24 special use permit to continue to operate a, you
25 know, a nonagricultural use, that it would open it up

1 for other activities, I mean, such as parks, for
2 example, that are, you know, have --

3 COMMISSIONER CHANG: Okay. How are you
4 going to restore the site -- I mean, where is the
5 assurance that we have that the site will be restored
6 in a condition that would permit those alternative
7 uses that you suggest?

8 MS. CHAN: That would be up to the City to
9 figure out how they would be using it. I don't
10 believe that that's necessarily an assurance in the
11 permit or in the prior permit.

12 COMMISSIONER CHANG: But don't you think
13 that would be an appropriate condition to include to
14 raise LUC's level of confidence that the City is
15 going to ensure that that property will be
16 appropriately used for something other than -- that
17 could go back to some agricultural use?

18 MS. CHAN: Well, you know, I don't know
19 that it would need to be spelled out in that fashion,
20 because presumably we would no longer have a SUP for
21 this landfilling purpose, so we would not be using it
22 as a landfill.

23 And from there it opens it up to the City
24 to determine what permissible uses it can do with
25 land that's classified in the Agricultural District.

1 What I'm suggesting is that it not be
2 restricted to, as I mentioned, a park. I'm not
3 familiar with what other uses might be out there,
4 other than state parks, golf courses, you know,
5 things of that nature.

6 But there would be other uses that are
7 appropriate for an agricultural use as opposed to say
8 urban, and so leaving it in that classification, I
9 would submit is actually appropriate given the fact
10 that the landfilling activity does come to an end at
11 a point in time.

12 COMMISSIONER CHANG: And that's your
13 representation here, but I guess it would be more
14 appropriate for purposes of both the Land Use
15 Commission as well as the community to have that part
16 of the record.

17 And I guess my other point is that I don't
18 think that -- at least I'm not questioning the
19 policies of the City, but it's more whether they are
20 engaging the community and whether they are
21 fulfilling their obligations to the community by
22 informing them and providing the community an
23 opportunity to participate in at least being informed
24 of the Planning Commission's decisions and being
25 engaged in them. That's what I'm hearing here.

1 So you don't need to answer that, but that
2 is my opinion. I think if you want to restore the
3 faith of the public, that is a very important
4 component. Thank you.

5 CHAIRPERSON SCHEUER: Thank you,
6 Commissioner Chang.

7 Commissioners?

8 Commissioner Ohigashi.

9 COMMISSIONER OHIGASHI: Correct me if I'm
10 wrong, you stated that in the record sometime in 2003
11 Mr. Doyle stated that there was 15 years of capacity;
12 is that correct?

13 MS. CHAN: No, I stated that that was
14 the -- one of the recitations in the City Council
15 resolution that was passed.

16 COMMISSIONER OHIGASHI: And that's part of
17 the record in this case?

18 MS. CHAN: That is, yes.

19 COMMISSIONER OHIGASHI: And does part of
20 the record in this case indicate a capacity, is that
21 the only part of the record that indicated the
22 capacity of landfill?

23 MS. CHAN: No, it's not. I mean, the
24 capacity and the way that we determine the rate at
25 which we use the capacity that's --

1 COMMISSIONER OHIGASHI: Can you point out
2 in the record before -- that was before the Planning
3 Commission in 2012, any of the capacity studies that
4 were done in 2012, you know, prior to the 2012 date?

5 MS. CHAN: What would constitute a capacity
6 study?

7 COMMISSIONER OHIGASHI: I'm not sure. I'm
8 just asking what's in the record.

9 MS. CHAN: You want me to determine that?

10 COMMISSIONER OHIGASHI: You said there are
11 other references to capacity within the record so --

12 MS. CHAN: I would be happy to pull
13 together those citations. I would just need a little
14 bit more time to be able to do that.

15 COMMISSIONER OHIGASHI: Okay. So you're
16 not able to do that right now?

17 MS. CHAN: I would need to be able to go
18 through my binder, sir. I have the citations with
19 me. I can be --

20 COMMISSIONER OHIGASHI: Assuming that that
21 is in the record, that 15 years is in the record, and
22 that is the only part of the record that we have to
23 deal with concerning capacity, so as of 2012, the
24 record would stand that the capacity of the landfill
25 would be 15 years as of 2003. Is that my

1 understanding of what --

2 MS. CHAN: Based on the evidence that I
3 have referred to, that would be the conclusion.
4 However, there was other discussions about ongoing
5 diversion efforts that would extend that. So it's
6 not a firm date.

7 COMMISSIONER OHIGASHI: But it was in the
8 council resolution that you base the identification
9 of this spot that it was at a 15-year capacity, so
10 the council must have had some kind of basis for it.

11 MS. CHAN: Correct.

12 COMMISSIONER OHIGASHI: And it's in the
13 record?

14 MS. CHAN: Correct.

15 CHAIRPERSON SCHEUER: Commissioner Wong.

16 COMMISSIONER WONG: Thank you.

17 Following up on that line of thought about
18 capacity. Okay.

19 So there was a request to give the City no
20 timeliness but by capacity to keep Waimanalo Gulch
21 open, is that correct, in the petition, the request?

22 MS. CHAN: I'm sorry.

23 COMMISSIONER WONG: The request for the --
24 this Special Use Permit, someone -- I can't remember
25 who -- said in lieu of a time like five years,

1 instead put it by capacity. So when Waimanalo Gulch
2 reached capacity, you'll close it. Am I reading it
3 --

4 MS. CHAN: That's correct, the 2009
5 proceeding, right.

6 COMMISSIONER WONG: Okay. Going on -- now,
7 that's 2009, right?

8 MS. CHAN: Uh-huh.

9 COMMISSIONER WONG: Okay. So going on
10 Commissioner Ohigashi's statement that in the record
11 there was something about capacity for only 15 years
12 at that point in time.

13 MS. CHAN: That was one of the reasons that
14 council selected it as its landfill, yes.

15 COMMISSIONER WONG: Okay. So I'm trying to
16 get to this point. If let's say we're talking about
17 hearing now this point in time, to date, let's say a
18 capacity will reach its limit in 20 years. Okay.
19 This is just hypothetical. Then let's say next year,
20 oh, we found a new diversion problem, but it weighs
21 -- it's going to increase it to 25 years instead of
22 20 years.

23 Shouldn't a DBA be better than a special
24 use if you're going to keep it open to 25 years?

25 MS. CHAN: The City's position on that is

1 no, that it would be -- that it's still a use that
2 would come to an end and that the land could be used
3 for other purposes that are consistent with its
4 classification so, no.

5 COMMISSIONER WONG: Okay. So the Waimanalo
6 Gulch opened what year?

7 MS. CHAN: 19 -- probably in '87, so like
8 late '80s.

9 COMMISSIONER WONG: Okay, so '80s. And
10 we're in 2009, other than 20 -- sorry, age. Now,
11 2020 is just a rough. There's no -- okay, I can't
12 remember that. I'm not a math guy.

13 But what I'm saying is that's a long time
14 for a special use permit. What is existing right
15 now, okay, that's my feeling. A Special Use Permit
16 in my mind is for a finite time -- not, you know,
17 it's almost like having a -- my house for a lease and
18 they're going to say, oh, you know what, let's keep
19 this lease on until I -- until the house breaks down,
20 and I would keep it up with that one term I quoted my
21 house -- you know, I mean, it's kind of funky instead
22 of suggesting -- you know, I'm going to outright buy
23 the fee for this, I'm sorry -- I'm just -- every year
24 technology changes. There's another diversion; you
25 can divert more and more and more.

1 But the way I see it is, I see a special
2 use permit as a finite time while DBA has, you know,
3 whenever the DBA changes. That's my feeling. You
4 don't need to answer that. I'm just stating for the
5 record. I just wanted to make it clear. Thank you.

6 CHAIRPERSON SCHEUER: Thank you,
7 Commissioner Wong.

8 Commissioner Cabral.

9 VICE CHAIR CABRAL: I think that's my
10 concern, too. I'm still trying to figure out who's
11 on first and what's on second. But all of these
12 dates and all of this times, so it's -- is there
13 statements when it got permitted that was going to be
14 only there for eight, and then somewhere you said it
15 got doubled to 16, and then it really opened up to be
16 '88, and that's 31 years ago. Then it turned into
17 instead of a date somewhere it was eight years, and
18 then 16, and then instead of it being a date, now
19 it's when it reaches capacity and capacity was 15
20 years back in '03, and now it's 15 years -- now it's
21 20 years from today.

22 So it seems like this bog just keeps
23 getting pushed further out. And I think that's where
24 the community and everybody is like, whoa, and I
25 think that's why -- obviously why we're sitting here,

1 too, is to try and reel this in and help everybody
2 get clear guidance, and then even the City and County
3 clearance on when action has to happen.

4 Because if it's 20 years from now or
5 capacity are two different things, because in 15
6 years, they may find some nuclear way that we can
7 have the ash and the rubbish that's under there
8 compressed even tighter, so suddenly we can go 50
9 more years, you know, and so I think that -- and then
10 it concerns me also that there isn't any plan to what
11 you're going to do at the end of this.

12 You know, you're talking some ideas on this
13 clearly, but there's no real clear plan that if we
14 end this in 20 years from today or we end it in
15 2009 that -- I mean, not nine, 2029, that then we
16 would have some kind of a plan that it's going to get
17 covered up. You're going to put a cow on it -- I
18 mean, into the cattle thing.

19 So, you know, something should be able to
20 be planned for that I think would give the community
21 some kind of assurance that it's not just getting
22 left out there because it's Waianae, you know, which
23 is what we heard yesterday.

24 I'm so falling in line with my other
25 Commissioners that this lack of absolute deadlines or

1 dates is partly scaring me, too, that this could go
2 on and on indefinitely. I won't even be here for
3 that long. Thank you.

4 CHAIRPERSON SCHEUER: Thank you,
5 Commissioner Cabral. That would be a long LUC term.
6 Commissioner Aczon.

7 COMMISSIONER ACZON: I'm sorry, one quick
8 question.

9 I'm just kind of worried how do you measure
10 capacity by time or quantity like a cesspool with
11 100-gallon capacity. You can put a timeline on that?
12 100-gallon, I believe when it reach 100 gallon, it's
13 at capacity.

14 MS. CHAN: You know, we like to think that
15 the refuse site is more pleasant than talking about
16 sewage, the other side of ENV. But like that's a
17 good analogy that I think it's easier to envision
18 what the capacity of a cesspool is, but really the
19 same principles would apply as to how capacity of the
20 landfill is determined, because you're talking about
21 how much space you have.

22 And where you may not be able to see it
23 because it's an open space. It's like an enclosed
24 vessel in that sense where there's only so much that
25 can be built, and that's it.

1 And so the figures that ENV and its
2 operator Waste Management submit to DOH talk about
3 remaining capacity, that calculation is based on what
4 that finite amount is.

5 And, you know, with ENV's diligent efforts
6 to ensure that all the things that don't have to be
7 permanently landfilled get diverted elsewhere,
8 whether it's the recycling or through processing at
9 H-Power or, you know, some other method that, you
10 know, that's what's allowed, the rate at which we
11 fill that available space has essentially slowed
12 down. Meaning that less objectionable waste are
13 placed in there, and we're able to use it more.

14 So to answer that question -- that we
15 measure capacity by the amount of space we have, not
16 by time. For practical reasons because we want to
17 divert more.

18 COMMISSIONER ACZON: So really the
19 Commissioners cannot rely on the timeline, as
20 a put-up date. You cannot rely on that in capacity,
21 but we can say by 2022, that's it, whether it's with
22 capacity or not, correct?

23 MS. CHAN: I'm sorry, 2022 for the deadline
24 to identify a site?

25 COMMISSIONER ACZON: Yes. Just an example,

1 I guess we cannot rely on a date on -- the Commission
2 cannot rely upon a specific date, but we can say by,
3 for example, by 2022 let's say we cannot use the
4 landfill, regardless of the landfill reach capacity
5 or not.

6 MS. CHAN: I don't believe the evidence
7 would support that. I think that would be very
8 similar to the 20 --

9 COMMISSIONER ACZON: I'm just making an
10 example. I'm not, you know, it's not my --

11 MS. CHAN: I think misunderstood that.

12 CHAIRPERSON SCHEUER: Commissioners?

13 Commissioner Ohigashi.

14 COMMISSIONER OHIGASHI: I think I'd like to
15 request that at least during the other panels -- part
16 of panel's presentation that the City does some
17 research and point out to me in the record regarding
18 any other capacity studies or references or evidence
19 that they would rely upon that we can rely upon in
20 making our decision today.

21 Because what I'm concerned about is we're
22 constrained to the record up until 2012. The talk
23 about additional capacity, brand new -- whatever --
24 brand new technology, that's not part of the record.

25 So I'm concerned about what basis within

1 the record itself that establishes their position
2 that there is sufficient capacity to go forward. So
3 far I've seen only one example of this, and that's a
4 15 year -- 15 years from 2003. So if I go by the
5 record alone, you've used up that 15 years, and
6 you're asking for more. It seems to me that the
7 record is not complete with regard to your request to
8 addition -- to extend the time. And your concern is
9 saying that we're sort of responsible for this
10 because if we close it down, it will cause all kind
11 of havoc.

12 It seems to me that by constraining the
13 record to 2012, we're not able -- or 2012, that's
14 when the record stops.

15 We may not be able to fashion a condition
16 or fashion a remedy in this matter that you're
17 requesting. And so I'm trying to find references.
18 So I'm going to request that if she can find
19 something, that she be allowed to report it to us.

20 CHAIRPERSON SCHEUER: I'm kind of inclined
21 to grant that.

22 Thank you, Commissioner Ohigashi.

23 Commissioners, further questions for Ms.
24 Chan? If not, I have a series of questions related
25 to the issue of whether or not the City could or

1 should pursue a District Boundary Amendment in lieu
2 of seeking a Special Use Permit.

3 If I understood, your position is that
4 because after landfill closure, the use could be
5 agriculture or park or something suited to be in the
6 Agricultural District is inappropriate to seek for
7 redistricting to an Urban District; is that correct?

8 MS. CHAN: Correct.

9 CHAIRPERSON SCHEUER: Okay. Is there any
10 land currently in the boundaries of the City and
11 County of Honolulu which is in the State Urban
12 District, which is permanently designated for
13 agriculture under City Land Use Ordinance?

14 MS. CHAN: I don't know. I'm not able to
15 respond to that.

16 CHAIRPERSON SCHEUER: Is there any land
17 that is in the Preservation District where no
18 functional uses are allowed, even though it might be
19 in the Urban District?

20 MS. CHAN: I'm sorry, that is not something
21 that I've examined. I'm not able to respond to that.

22 CHAIRPERSON SCHEUER: Are there any parks
23 that you know of that are in the Urban District?

24 MS. CHAN: I would assume so.

25 CHAIRPERSON SCHEUER: Do you have any

1 examples like perhaps Kapiolani Park or --

2 MS. CHAN: Yes, I mean, that would be --

3 CHAIRPERSON SCHEUER: -- Urban District?

4 So parks are allowed in Urban Districts, you don't
5 have to redistrict it back to the Agricultural
6 District?

7 MS. CHAN: Correct.

8 CHAIRPERSON SCHEUER: So you can have uses
9 that might be allowed in Agricultural District but
10 can also be allowed in an Urban District, right?

11 MS. CHAN: Correct.

12 CHAIRPERSON SCHEUER: Okay. Is it also
13 possible for this Commission to put a condition on a
14 redistricting that says, after the landfill is
15 closed, at whatever time the City and the Department
16 of Health so determines it is at capacity, it reverts
17 to Agricultural District?

18 MS. CHAN: In a --

19 CHAIRPERSON SCHEUER: In a DBA.

20 MS. CHAN: I would believe that you can do
21 that.

22 CHAIRPERSON SCHEUER: I think you're
23 correct.

24 Should the City had ten years ago or five
25 years ago or even tomorrow seek a District Boundary

1 amendment and it was granted and was placed in the
2 Urban District, who would be responsible for issuing
3 all the permits necessary to operate a landfill other
4 than the DOH permit, the Land Use permit?

5 MS. CHAN: For -- I'm sorry.

6 CHAIRPERSON SCHEUER: If this land was
7 redistricted into the Urban District, would you be
8 coming before this Commission for permission to
9 operate a landfill?

10 MS. CHAN: Yes.

11 CHAIRPERSON SCHEUER: In the Urban
12 District?

13 MS. CHAN: Oh, I'm sorry, no.

14 CHAIRPERSON SCHEUER: So you would be able
15 to actually solely as the City seek all of these
16 things?

17 MS. CHAN: Correct.

18 CHAIRPERSON SCHEUER: And since you talked
19 about responsibility and consequences of decision,
20 which City official, elected or otherwise, employed
21 by the City is the one who made the decision not to
22 pursue a District Boundary Amendment, just so that
23 we're clear on the record?

24 MS. CHAN: I'm not able to specify, I'm
25 sorry.

1 CHAIRPERSON SCHEUER: Is it with ENV? Is
2 it with a DPP? Is it within the council or mayor?

3 MS. CHAN: I don't know that. That was
4 established --

5 CHAIRPERSON SCHEUER: Your testimony seems
6 to be that we are holding a certain responsibility
7 for this, but I'd like to know who might be
8 responsible for certain --

9 MS. CHAN: So it was not the intent of my
10 statement, it was just that these are the things that
11 ENV would be wrestling with should we find ourselves
12 in that situation where the application is denied.
13 That was my sole purpose of that statement.

14 CHAIRPERSON SCHEUER: Last question.
15 Is there anything legal provision or
16 otherwise that has prevented the City from seeking a
17 District Boundary Amendment from this Commission at
18 any time?

19 MS. CHAN: No, not that I'm aware of.

20 CHAIRPERSON SCHEUER: Thank you.

21 Is there anything further, Commissioners?
22 If not, we've been going an hour. We will take a
23 ten-minute break and proceed with Schnitzer Steel.

24 (Recess taken.)

25 CHAIRPERSON SCHEUER: Aloha, we are back on

1 the record.

2 Mr. Sandison, are you prepared?

3 MR. SANDISON: Yes, we are prepared to
4 proceed.

5 CHAIRPERSON SCHEUER: Okay. Thank you.

6 MR. SANDISON: I would like to start with
7 just a couple observations about the discussion
8 that's taken place over the last couple of days. And
9 there seems to be a clear concern about the propriety
10 of making a decision on the closure of the landfill
11 today, which is based on the evidence which is seven
12 to ten years old. And some of that evidence is --
13 doesn't have a hold with time, some of the points
14 that Mr. Chipchase has made.

15 Other aspects of that evidence have been
16 about capacity, evidence about how long it will take
17 to site and acquire and permit a new landfill.

18 Fully that evidence does get stale at times
19 and that there is a need, at least in my belief,
20 before making a firm decision on these matters to
21 obtain new evidence to -- that is current.

22 There is also evidence which is simply
23 missing from the record, and I think that Ms. Chan
24 pointed to the lack of the Planning Commission's
25 direct answer to the second question from the Land

1 Use Commission that it would be appropriate to remand
2 to the Planning Commission with very explicit
3 instructions to reopen the record, to adduce, to
4 introduce testimony that would address those
5 questions.

6 And perhaps the most important evidence
7 that is not on the record is the cost of the -- both
8 the actual cost in dollars and cents, and the
9 societal cost of developing an alternative landfill.

10 Mr. Chipchase I think said it best when he
11 pointed out there was no evidence that had -- to
12 suggest that closing Waimanalo Gulch would be
13 wasteful or really expensive or unnecessary. The
14 flip side of that is there's no evidence that it
15 won't be all those things. And that it is important
16 in making this decision to understand the impacts
17 both financial and societal to selecting an
18 alternative land site.

19 For these reasons Schnitzer asks if the
20 Land Use Commission is not inclined to grant the
21 special permit as conditioned by the -- the
22 conditions that have been suggested by the Office of
23 State Planning, that the appropriate thing to do is
24 to remand the Special Use Permit back to the Planning
25 Commission with specific instructions to reopen the

1 evidentiary proceedings to answer very specific
2 issues.

3 And that we believe would be the best
4 course of action in this case. We also commit to
5 providing a letter to Ms. Chan answering her
6 questions about the evidentiary proceeding and what
7 evidence can be considered by the Land Use Commission
8 in making this decision.

9 Also I want to comment briefly on denial of
10 the permit. I think that what I have been hearing in
11 this case is that denial of the permit will introduce
12 a level of uncertainty in the landfill operations
13 that doesn't currently exist.

14 Yesterday Mr. Wurdeman suggested it would
15 be appropriate for the governor to issue an emergency
16 proclamation. It could clearly take us into
17 litigation in circuit court on -- and I would get a
18 test of the -- test for injunction in both the
19 likelihood of prevailing on the merits as well as the
20 balancing of harms, and causing that kind of
21 uncertainty is probably, at least in my opinion, not
22 helpful to the resolution and the more orderly
23 gathering of specific evidence, and then the weighing
24 of that evidence through this process is the
25 appropriate way to reach a resolution on questions

1 which we don't have the answer to for the legality of
2 the existing permits and what is the exact effect of
3 the supreme court's order.

4 I would like to point out briefly that one
5 of the things that the supreme court did not say in
6 the order is that the landfill needs to close, and
7 that the landfill is operating without a permit. And
8 it did not make that exclusive finding. You have to
9 read into their language to get there.

10 With that I'm happy to answer any of your
11 questions.

12 CHAIRPERSON SCHEUER: Thank you very much.

13 Commissioners?

14 Commissioner Okuda.

15 COMMISSIONER OKUDA: Thank you very much
16 for your very reasoned and reasonable position.

17 Can I ask you this? And I just don't know
18 because I wasn't focusing on this specific question
19 when I looked and reviewed the record.

20 But when KOCA filed their motion to reopen
21 the evidence before the Planning Commission, or in
22 the proceedings below, what was the position of your
23 client?

24 MR. SANDISON: Schnitzer took no position.
25 I believe there were -- it's my -- this is in my

1 recollection.

2 I believe the City first moved to reopen
3 the record -- and Mr. Chipchase can correct me -- in
4 my record -- my recollection is that KOCA opposed
5 that. And then there was a couple of other efforts,
6 and I think Schnitzer did not take a position on
7 reopening the record.

8 COMMISSIONER OKUDA: Okay. Do you believe
9 the record that's before us at this point in time is
10 sufficient to approve the special permit or the
11 application for the special permit?

12 MR. SANDISON: I think sufficiency is a
13 judgment call. I think if I were sitting in your
14 position, I would like to have more evidence both
15 that is current and -- current evidence of things
16 that have been discussed in the past such as closure
17 and closure dates and capacity and how that is
18 calculated as well as evidence that isn't on the
19 record in terms of cost and what does it mean to site
20 a new landfill.

21 COMMISSIONER OKUDA: So based on that
22 response to my question, do you believe the record is
23 sufficient or not sufficient to approve granting of
24 the special permit as the City has requested the Land
25 Use Commission?

1 MR. SANDISON: I believe that if this
2 Commission approves the Special Use Permit and
3 conditions it like OP has suggested, that if that is
4 appealed, we will most definitely argue that there
5 was sufficient evidence to make that determination.

6 COMMISSIONER OKUDA: I know that's probably
7 what you would argue, but my question again is a
8 little bit more simple.

9 Do you believe that the record, as
10 presented to us now, which includes the fact that we
11 don't have basically evidence of what's transpired
12 positive, negative or otherwise regarding this
13 landfill since 2012, whether the record as it stands
14 now is sufficient to approve the special permit?

15 I think the answer is yes, no, or I don't
16 know.

17 MR. SANDISON: I'll provide an alternative
18 to that.

19 Schnitzer would very much like to see this
20 remanded for additional evidence to be introduced
21 into the record, and we believe that that is
22 appropriate.

23 I believe it's sufficient. Sufficiency is
24 a loaded magic term of art that would be decided by
25 the supreme court later, and I don't know what they

1 would do. But I think it would be a responsible move
2 to gather more evidence.

3 COMMISSIONER OKUDA: Okay. Let me just try
4 it one more time, and that will be my last time.

5 Using your professional judgment and
6 understanding of the standard of review that Hawai'i
7 supreme court would apply at least on paper of
8 determining or making its decision, do you believe
9 the record that's presenting to us is sufficient to
10 grant the special permit? And, again, the answer I
11 think is yes, no, or I don't know.

12 MR. SANDISON: I don't know.

13 COMMISSIONER OKUDA: Okay. Thank you.

14 CHAIRPERSON SCHEUER: Thank you,
15 Commissioner Okuda.

16 Commissioners?

17 Do you take a position on whether or not
18 there's sufficient information on the record to deny?

19 MR. SANDISON: I think denial has --

20 CHAIRPERSON SCHEUER: I heard you speak
21 about the uncertainty that you believe it would
22 create for operation, but it's a more specific
23 question.

24 Does your client at this point take a
25 position on whether or not there is sufficient

1 information on the record to deny?

2 MR. SANDISON: I don't. I think that if
3 the Land Use Commission were to deny the permit, it
4 would be faced with the task of explaining the -- of
5 citing specific evidence in the record, and
6 explaining the decision to deny it. And I am
7 uncertain of how that would be written. I don't know
8 how you would write that. So basically I don't see
9 the basis for denying the permit.

10 CHAIRPERSON SCHEUER: That's an answer.
11 Thank you.

12 Commissioner Cabral, then Commissioner
13 Chang.

14 VICE CHAIR CABRAL: I'm certainly not the
15 lawyer-type here, but I'm starting to catch on to the
16 lingo.

17 So you say remand it back to -- you're
18 talking remand it back to the supreme court to make a
19 decision?

20 MR. SANDISON: Planning Commission.

21 VICE CHAIR CABRAL: Planning Commission.
22 Oh, okay. Thank you. Because I was thinking that
23 seems like a really long journey. Thank you very
24 much for that clarification.

25 CHAIRPERSON SCHEUER: Commissioner Chang.

1 COMMISSIONER CHANG: Good morning, Mr.
2 Sandison. Thank you.

3 I, like Mr. Okuda, appreciate a reasonable,
4 rational -- your statement. I want to ask you
5 another question.

6 Would your client have any objection or
7 would they support a District Boundary Amendment
8 should the City file one?

9 MR. SANDISON: I think we've -- our client
10 is agnostic in that regard. I think just the course
11 of performance here has been that this project has
12 been dealt through the special use process, and to
13 now put it into a different process and it, again,
14 introduces uncertainty that -- and I'm not sure that
15 it needs the relief that Mr. Chipchase's clients are
16 looking for.

17 Again, I think that the tension here is
18 the -- is obviously public health and safety, the
19 need for a landfill and the burden that falls upon
20 the community that hosts the landfill. I think we're
21 grappling with are ways to mitigate the harm to the
22 community and to also address the broader needs of
23 the citizens of Oahu.

24 And I think the most -- and this is just --
25 Schnitzer is agnostic; this is just me talking.

1 I think the effort should be to most
2 expeditiously get to a resolution that provide --
3 that minimizes the harm to the surrounding community,
4 but at the same time answers the public need for a
5 landfill.

6 And I think that whatever procedural
7 process should have that bottom line.

8 COMMISSIONER CHANG: From your client's
9 point of view, you just -- your client just wants to
10 ensure that there is a landfill for your client to
11 dispose appropriately of whatever they're generating,
12 the waste generated?

13 MR. SANDISON: Right. Our permit requires
14 us to dispose of automobile shredder residue in the
15 Waimanalo Gulch Landfill. And there is, in spite
16 of -- and this is something that's not on the
17 record -- but in spite of the significant effort over
18 the last several years to come up with something
19 else, that's where we are.

20 I think that that is a public need because
21 what my client does is essentially vacuum up all the
22 old cars off the streets of Oahu.

23 COMMISSIONER CHANG: Okay. Thank you.

24 CHAIRPERSON SCHEUER: Further questions,
25 Commissioners?

1 Commissioner Aczon?

2 COMMISSIONER ACZON: Yes, just a quick one.
3 You probably mentioned it before.

4 If the Commission deny the application,
5 what would be the harm for your client and any
6 back-up plan that, you know, your client is
7 contemplating?

8 MR. SANDISON: Well, I think our -- we
9 don't have a back-up plan besides Waimanalo Gulch.
10 And so I think the harm is the uncertainty, and it's
11 unclear what happens next if the Commission simply
12 denies the permit.

13 The status quo is that the landfill is
14 operating. There is a disagreement as to whether
15 it's currently permitted under a Special Use Permit,
16 and things are proceeding normally if there is a
17 denial of the Special Use Permit. It is then
18 blisteringly clear that there is no permit. And that
19 throws -- that creates great uncertainty as to what
20 is going to happen next.

21 Is that going to result in closure of the
22 landfill? I'm reasonably certain next the place we
23 go is circuit court, and -- but there's -- it's
24 really unclear what would -- what's going to happen
25 next, so I think the harm to my client is

1 uncertainty.

2 COMMISSIONER ACZON: So you mean that if
3 the denial, we deny the permit, your client's
4 operations is going to be closed?

5 MR. SANDISON: It's certainly more likely
6 to happen if you deny than if you do not.

7 COMMISSIONER ACZON: Thank you.

8 CHAIRPERSON SCHEUER: Anything further,
9 Commissioners?

10 Commissioner Ohigashi.

11 COMMISSIONER OHIGASHI: Mr. Schnitzer
12 [sic], do you agree with me that the record as it
13 stands now indicates that there was a 15-year life
14 span for the Waimanalo Gulch as of 2003?

15 MR. SANDISON: That is my memory, and I
16 have not searched the record. But I think there have
17 been -- my recollection I've been part of this for
18 about the amount of time Mr. Chipchase has. There
19 has been a number of projections all of which have
20 changed over the years, and the things that what I
21 recall, and my memory is faulty, is that Mr. Doyle
22 initially said it would take four years to find a new
23 landfill. And as we got to Mr. Steinberger, then it
24 was seven to eight. And so these things have kind of
25 grown.

COMMISSIONER OHIGASHI: As a judge once told me, you live by the record, you die by the record. So I'm just talking about the record as of 2012 what we were told that we are limited to.

And I'm just seeking clarification. The only thing in the record that I have been able to find is that there was a 15-year lifetime expectancy for the landfill as to 2003. That's the only thing I can find that was even mentioned during the life --

MR. SANDISON: I believe there is more, but I would have to go back and review it.

COMMISSIONER OHIGASHI: Okay. If you have
time during --

MR. SANDISON: I will.

COMMISSIONER OHIGASHI: -- your presentation, point it out to me, and I will be glad to listen to that.

But as I said, you're going to live by the record or die by the record.

MR. SANDISON: And precisely why I think the record should be opened up to get current information.

CHAIRPERSON SCHEUER: Commissioners,
anything further?

Okay. Ko Olin Community Association and

1 Senator Shimabukura?

2 MR. CHIPCHASE: Yes, Chair. We'll just set
3 up our projection screen.

4 CHAIRPERSON SCHEUER: Okay.

5 In spite of the references to life and
6 death, we have not yet been granted by the
7 legislature the power to give the death penalty in
8 this case.

9 This is going to be KOCA's presentation.

10 Are you ready?

11 MR. CHIPCHASE: Yes, Chair.

12 CHAIRPERSON SCHEUER: Please proceed.

13 MR. CHIPCHASE: I will. Mr. Wurdeman has
14 ceded me five of his minutes. So if I speak for more
15 than ten, that's why.

16 CHAIRPERSON SCHEUER: Okay.

17 MR. CHIPCHASE: So what I wanted to talk
18 about in my limited time is what we've heard and then
19 what we haven't heard.

20 On the subject of what we haven't heard,
21 what we haven't heard from the City or from Schnitzer
22 or OP is how this use meets the standards, the
23 guidelines, however you phrase it, for a Special Use
24 Permit. That is what we have not heard. Nothing.
25 In two days now of hearings how we meet all of these

1 standards or these guidelines. It's just not there.
2 That's not the discussion.

3 Instead, the refrain is simply we need a
4 landfill. Bad things will happen, uncertainty will
5 happen. We don't know what will happen if we don't
6 have one.

7 That's not the standard. That's not in the
8 guidelines.

9 The other thing we haven't heard is any
10 explanation as to why the City didn't seek District
11 Boundary Amendment. In 2008 when they actually filed
12 for one, why they didn't keep that application going,
13 we showed on the screen a statement that they would
14 withdraw the DBA if they got the Special Use Permit.
15 They pursued both.

16 They took the easier path when they got the
17 Special Use Permit, but they didn't like the
18 condition on it. They could only use the landfill
19 for three years, and then it's limited to ash and
20 residue.

21 So instead of maintaining the DBA or coming
22 back and doing a new DBA then, they appealed the
23 condition and challenged it and continued to use the
24 landfill through that appeal, through 2012, through
25 the vacatur. It's not reasonably debatable what the

1 supreme court did. It vacated the order approving
2 the SUP. When you vacate something, there is no
3 approval. It went away. That's what happened. It's
4 not reasonably debatable.

5 Instead of coming in for a DBA at any point
6 in that history, they just kept using the landfill
7 and pursuing a SUP for indefinite use.

8 What we have heard a lot about in terms of
9 Commissioners' questions, and questioned me and
10 questioned of the other parties is credibility and
11 reasonableness. I'd like to address some of those
12 subjects in our response.

13 What we put up on the screen is in the
14 record and reflects that timeline that we discussed
15 yesterday. And as you see in 2008, that was ENV's
16 position we will withdraw our DBA if we get the SUP.
17 They did that, but then instead of keeping the DBA or
18 filing a new DBA, they simply proceeded with a SUP
19 that they liked, but didn't like the conditions,
20 didn't like the limitation on the use of it.

21 The land somewhere up here in that long
22 seven-year timeline was on a remand. And in that
23 remand, as we talked about extensively, there was
24 specific directions to the Planning Commission to
25 clarify specific items.

1 On the other side of that screen, we put
2 open or put up what we said in our motion to reopen.
3 We said, the LUC told you specifically to do these
4 things. We moved to reopen on those specific things,
5 what the LUC has told you to do. Every one of them.
6 The City opposed it.

7 The City said, no. Our record is complete.
8 Reopening will delay things. We don't want you to do
9 that. Commission, do not reopen the record.

10 Schnitzer, as Mr. Sandison said, took no
11 position. We don't know. We take no position.
12 Doesn't matter to us. That was their position then.
13 It is not credible to come up and say now that the
14 evidence is incomplete. That you need more. Give us
15 another shot because although we were told to do it,
16 and KOCA asked to do it, we opposed it or we took no
17 position.

18 Now, we see we really should have done it.
19 We'd like to do it again. That's not how these
20 proceedings work. That's not what you would do for a
21 private party, and you can't do it here. ENV, to its
22 credit, even in its presentation today has not asked
23 for a remand. The Applicant has not asked for a
24 remand. Has not acknowledged my record is
25 incomplete, inadequate to support my request. Has

1 not asked for it.

2 Has instead said, if you do that, it will
3 delay things another two years potentially because
4 there aren't enough commissioners on the Planning
5 Commission to hear and decide this case, and I have
6 to agree with that.

7 I cannot believe that it took us two years
8 from the last remand to simply get a decision,
9 without a single additional hearing day. No
10 additional evidence at all. It took two years just
11 to get a decision.

12 We can't do that again. And as I went
13 through the record from this last proceeding
14 yesterday, we have no confidence that that further
15 proceeding will be fair, will be something that the
16 public can have confidence in and will produce
17 anything better than we have today. This is the
18 record ENV wanted; it is the record ENV is stuck
19 with.

20 We talked about -- Mr. Wurdeman brought up
21 the Department of Health should have cited the
22 landfill for not operating with a SUP. Mr. Yee said,
23 that's not DOH's responsibility, but actually it is.
24 This is from the DOH permit that says, you can use
25 this as a landfill in accordance with your SUP. You

1 don't have a SUP; you don't have DOH approval. There
2 is a relationship between them just as there is a
3 relationship between this approval and the other
4 regulatory bodies. It's always that way.

5 We talked a lot about the need for the use
6 deadline. A deadline on the Special Use Permit. In
7 2009, as I touched on yesterday, this was OP's
8 position, you have to have a use deadline. There has
9 to be an end point, a firm and fixed end point to a
10 special use, or it's not a special use.

11 Today OP's position is the capacity is a
12 sufficient deadline. That is flatly contrary to
13 everything they told this Commission ten years ago on
14 the same permit for the same use in the same area.
15 The law hasn't changed one inch since 2009.

16 A firm and fixed deadline was necessary
17 then, so necessary that the Planning Commission
18 according to the OP overstepped its bounds by not
19 imposing one. That was true, absolutely true in
20 2009. It remains absolutely true today.

21 OP and Schnitzer have argued for a remand.
22 They won't admit that the record isn't sufficient to
23 sustain the application, so they won't tell you that
24 it is. That was not OP's position in 2009. In 2009
25 holding the government to its commitments including

1 the commitment to close, having public confidence in
2 the proceedings and treating parties equally
3 regardless of the use they propose or who they are
4 were essential. They were essential then, and they
5 remain essential today.

6 This is again from the OP's letter. When
7 governments fail to enforce their own laws upon
8 themselves, civilization tends to deteriorate. Those
9 aren't my words -- it's not dependent on the fall of
10 Roman empire.

11 This is OP's belief in the failure of the
12 City to follow its promises to the community when it
13 came in for an unlimited SUP in 2008/2009. Today
14 it's okay not to follow those promises. Today its
15 okay if the City Council rejected what the
16 administration had promised, that one branch of the
17 City government can vitiate something else that the
18 executive branch had said and that's okay, but it
19 wasn't okay in 2009? It wasn't okay then, and it's
20 not okay now.

21 In a long colloquy about social justice
22 yesterday, OP declined to acknowledge that social
23 justice was an element of this consideration, this
24 body's consideration in granting a SUP. A SUP that
25 has burdened the community for 30 years. But in

1 2009, OP recognized that social justice involves
2 keeping your word, particularly keeping your word to
3 this community, this community that accepted the
4 burden as a compromise in 2003. If you don't keep
5 your word, as OP recognized in 2009, that's not
6 social justice to this community. It's no less true
7 today just because ten years have past, and they've
8 been stuck with this burden for an additional time
9 than it was in 2009.

10 Subject of reasonableness. You know, in
11 response to Commissioner Aczon's questions, ENV
12 basically said it objects to every single condition
13 that KOCA has proposed. The protection of the
14 community, every single one. All right.

15 In what sense is that reasonable? What
16 we've heard is a time limit isn't appropriate, we can
17 use it until capacity, even though no one can say
18 what capacity is. And we've seen unequivocally that
19 capacity is a shifting sand, shifting because of
20 technology, shifting because as it has in the past
21 expansion, reengineering, putting more into cells, it
22 moves. You wouldn't treat a private party this way.

23 I do a lot of things, so I'm familiar with
24 SUP's quarries that came up yesterday. This is from
25 a quarry decision. You didn't say use the quarry

1 until capacity, you said use it until a finite time.
2 We go down to the other conditions and things that we
3 proposed, we hear, oh, gosh, you can't be too
4 involved in the management of the landfill. Don't
5 talk about requiring guns to actually following the
6 plan and condition because that would be too far
7 involved in the management of the landfill. That's
8 what you do to a private party. These are the
9 conditions you impose on private operators.

10 Why should you require specific compliance
11 with other governmental agency's provisions and
12 requirements in your order? You do that for private
13 parties. Why on earth would you exempt a public
14 operator from the same kinds of requirements,
15 particularly when this public operator indisputably
16 has had a significant negative impact on the
17 community.

18 Talk about things we haven't heard. No one
19 came before you, three parties according to the
20 application, no one came to you and said, it didn't
21 have that big of an impact. It hasn't been that hard
22 on the community. The community hasn't really
23 suffered under this landfill for 30 years. They
24 haven't said that because there's nothing in the
25 record that would support those things. It is not

1 true. The record is completely the other way that it
2 has had a significant impact for a very long time,
3 and for private parties, you impose those conditions.

4 What we put up simply contrasting what ENV
5 has requested and what you do -- what ENV has told
6 you you can or can't do getting involved in its
7 business, and what you do for private parties.

8 What ENV asks is completely contrary to the
9 things you impose routinely when granting a Special
10 Use Permit.

11 I put back up just a couple of conditions
12 that came up specifically, and this refrain that, oh,
13 gosh, you can't cross-reference regulations. We've
14 seen you do it with private corporation, private --
15 but this is from your last order, this is actually
16 from the current PC, Planning Commission condition
17 which was patterned after your last order,
18 specifically cross-referencing DOH and revised
19 ordinances of Honolulu.

20 Why is that okay to incorporate that but
21 not the EPA when the EPA, as we've seen has issued
22 violations, cited them for the leachate releases in
23 2010 and 2011. They should comply with all laws.
24 It's the same thing here. You have an expressed
25 requirement. You've had an expressed requirement

1 that they have to comply with DOH as to water issues.
2 Why not all onsite and off-site?

3 The question, you know, came up today, but
4 requiring onsite and off-site compliance would be too
5 much. How so? It was a failure to complete a cell
6 on schedule as required that led to the breach in the
7 flood in 2010 and 2011. Of course, that should also
8 be a violation of the permit because, of course, that
9 impacted the community, and that's a specific
10 guideline in granting a SUP.

11 CHAIRPERSON SCHEUER: You have five
12 minutes.

13 MR. CHIPCHASE: More than enough time.

14 The question is obviously what to do now.
15 We are where we are, the record is what it is. And
16 you've been presented with essentially four
17 alternatives.

18 One, remand, because the record is
19 incomplete. Respectfully that is not an appropriate
20 choice. We have been down that road. We've asked to
21 reopen. You gave very specific direction. The
22 Applicant wanted the record intact. That was the
23 Applicant's choice. Applicant is stuck with that
24 record.

25 The second is to grant the application as

1 requested. With respect nothing allows you to do
2 that. The law doesn't allow you to do that. As your
3 attorney advised you in 2009, as Russel Suzuki
4 testified or argued before the court in 2009. The
5 law does not allow a SUP with no time limit.

6 Capacity is not a sufficient time limit.
7 One, it's ethereal. Two, there's nothing in the
8 record saying even today or even, you know, in 2012
9 what the capacity was.

10 CHAIRPERSON SCHEUER: Can you wrap up?

11 MR. CHIPCHASE: Oh, I thought I had five
12 minutes left.

13 CHAIRPERSON SCHEUER: One minute.

14 MR. CHIPCHASE: One minute left.

15 CHAIRPERSON SCHEUER: Now it's none, but
16 I'll allow you to close.

17 MR. CHIPCHASE: I wouldn't have said I had
18 sufficient time. Thank you, Chair. I appreciate
19 the --

20 CHAIRPERSON SCHEUER: It's not to the
21 capacity of this meeting.

22 MR. CHIPCHASE: Very good, Chair. I will
23 wrap up very quickly, and I appreciate the
24 indulgence.

25 The record -- not only does the law not

1 support it, not only do your guidelines not support
2 it, the record would not support granting this permit
3 for an indefinite use. It just simply would not.

4 The third option is to deny the permit.
5 The record absolutely would support denial. All
6 right. The Applicant has not carried its burden.
7 That's clear from the record. You can deny the
8 permit.

9 What we have proposed we believe is the
10 most reasonable outcome and that is to grant the
11 permit but to finally set an end date. And while the
12 landfill continues to operate, impose conditions that
13 will better protect the community that has been
14 protected for the last 30 years. Thank you.

15 CHAIRPERSON SCHEUER: Thank you, Mr.
16 Chipchase.

17 If we can have the lights up again and take
18 the screen down so that we can see OP.

19 Commissioners, questions for KOCA?

20 Commissioner Okuda.

21 COMMISSIONER OKUDA: Thank you, Mr. Chair.

22 Mr. Chipchase, just so that we're clear,
23 what is the specific harm to your client if this
24 matter is remanded to obtain a more complete record?

25 MR. CHIPCHASE: I would say the harms are

1 manifest. It continues the use of its landfill. If
2 the matter is remanded and we're faced with at least
3 another two years before we're back up here, then
4 that is two more years this landfill will operate.
5 That has an obvious, direct palpable harm to my
6 client.

7 COMMISSIONER OKUDA: Well, besides the fact
8 that the landfill will operate during the period of
9 remand, is there any other harm to your client
10 besides that if there was a remand?

11 MR. CHIPCHASE: Yes. Obviously, the delay
12 and expense. It is not inexpensive to continue this
13 proceeding for seven, eight years and another two on
14 top of that. So delay and the expense are always
15 recognized prejudices to a party when looking at
16 whether to remand or to stay or to continue a
17 proceeding.

18 COMMISSIONER OKUDA: Okay. Besides the
19 items you listed:

20 No. 1, the fact that the landfill would
21 continue operating;.

22 No. 2, delay and expense.

23 Is there any other harm to your client if
24 the matter is remanded?

25 MR. CHIPCHASE: I'll give you one more,

1 Commissioner.

2 COMMISSIONER OKUDA: Sure.

3 MR. CHIPCHASE: The third one is further
4 eroding my client's and the public's trust in this
5 proceeding. We have been to the Planning Commission
6 a number of times. We have asked to reopen a number
7 of times. They have all been denied.

8 And if the City is treated again better
9 than a private party, if the City is treated to a
10 remand when it can't carry its burden, you wouldn't
11 do that for a private party.

12 The further erosion of our confidence, my
13 client's confidence and the public in this proceeding
14 is, again, a real and palpable harm.

15 COMMISSIONER OKUDA: Besides those three
16 general items that you've listed as harm, is there
17 any other harm that you see to your client if there
18 is a remand?

19 MR. CHIPCHASE: If I could read Mr.
20 Goodin's handwriting, I might have another one for
21 you. I have no idea what he wrote for me, and so I
22 stand on those three.

23 COMMISSIONER OKUDA: Now, with respect to
24 the harm about the landfill continuing to operate,
25 what is your client's position, just so that we're

1 absolutely clear on whether or not your client
2 believes there is a valid subsisting and existing
3 permit which allows operation, we're talking land use
4 permit, or is there no permit in effect right now?

5 MR. CHIPCHASE: There is no permit in
6 effect right now, Chair or Commissioner. The supreme
7 court's decision is unequivocal. I don't know how
8 you come up with a different reading.

9 And I will say, you know, Mr. Yee commented
10 that it doesn't matter whether they've been operating
11 without a permit or not. I may disagree on that, but
12 I absolutely disagree on whether it matters whether
13 you acknowledge you don't have an existing permit and
14 try to do something about it.

15 That to me goes to the credibility of the
16 party and position. There's no credible position
17 that it is a valid permit after the supreme court's
18 decision.

19 COMMISSIONER OKUDA: Now, as of what date
20 is it your client's position that there was no valid
21 permit in existence?

22 MR. CHIPCHASE: As of the date of the
23 supreme court's decision in May 2012. And we argued
24 that before the Planning Commission and before this
25 body as well.

1 COMMISSIONER OKUDA: And your client has
2 possible remedies that it could take with the fact
3 that you believe, or your client believes that as of
4 2012, there is no valid permit in existence, correct?

5 MR. CHIPCHASE: Possibly, Commissioner, and
6 I'll explain a little bit more, and I think it's fair
7 for the body to understand why we did not seek
8 circuit court relief or seek other relief during this
9 period for two principal reasons.

10 The first is that we had no idea it would
11 take seven years to be back before the Land Use
12 Commission. When the decision came down, we expected
13 the two proceedings to be promptly consolidated, to
14 conclude the decision, and to be up here still in
15 2012 or very early 2013.

16 When dealing with that kind of short
17 timeframe, it doesn't make sense to go to court over
18 it. As things got continued. We still never
19 believed that they would take, in the last remand,
20 two years to get through the Planning Commission. I
21 assumed six months, and we would be back before the
22 LUC.

23 And so had we known in 2012 what we do
24 today, the same way had this body known in '87 what
25 it does today, I think different decisions would have

1 been made.

2 The second reason is that while the permit
3 is in process, you have issues with primary
4 jurisdiction because of regulatory body's examining
5 the permit is under contest -- or the use that is
6 under contest in circuit court, and I can't be
7 confident that the circuit court would intervene in
8 those things while the proceeding is going on.

9 Once the proceeding is over, if the permit
10 is denied, I absolutely think there is a judicial
11 role at that point.

12 COMMISSIONER OKUDA: Okay. Thank you, Mr.
13 Chipchase.

14 Thank you, Chair.

15 CHAIRPERSON SCHEUER: Thank you,
16 Commissioner Okuda.

17 Commissioners?

18 Commissioner Aczon.

19 COMMISSIONER ACZON: Thank you, Mr.
20 Chipchase.

21 I guess what I'm hearing is that your
22 client strongly oppose remanding this to the Planning
23 Commission.

24 MR. CHIPCHASE: Yes, Commissioner.

25 COMMISSIONER ACZON: So that left us three

1 options: Grant, deny or with modification.

2 MR. CHIPCHASE: Yes.

3 COMMISSIONER ACZON: And I would assume
4 that you will strongly oppose granting this without
5 any condition?

6 MR. CHIPCHASE: If I haven't made anything
7 else clear in two days, I hope I've made that clear.

8 COMMISSIONER ACZON: I just want to make
9 sure.

10 MR. CHIPCHASE: Yes, Commissioner.

11 COMMISSIONER ACZON: And denial would be
12 kind of based on your testimony is that it might be
13 testimony by OP, might be some consequences, so we
14 are left with, you know, with modification.

15 I really appreciate your proposed
16 conditions. That kind of tells me that you're open
17 to some conditions and, you know, moving this forward
18 with some conditions.

19 MR. CHIPCHASE: I think that's fair. I
20 mean, as I said, I do think that record supports
21 denial, so I think the most reasonable position,
22 given everything, is to approve with conditions as
23 long as those conditions include a time limit.

24 COMMISSIONER ACZON: Thank you.

25 You have OP's proposed amended conditions,

1 October 8th?

2 MR. CHIPCHASE: I do.

3 COMMISSIONER ACZON: Do you have any issues
4 on those amended -- proposed amendments?

5 MR. CHIPCHASE: I do, Commissioner. I do
6 for a couple of reasons. And if you'll give me a
7 second to actually put them in front of me. Got it.

8 So I do for a couple of reasons; one,
9 they're meaningless, all right, in terms of KOCA and
10 the operation landfill. They're utterly meaningless.

11 If we look at page one of that letter and
12 then look at Condition 1, we come back to
13 December 31, 2022. One, it's an utterly made up
14 date. There was no basis in the record for that date
15 to cite then. There still isn't. And it doesn't do
16 anything for us. You site another landfill and then
17 nothing happens. You continue to use Waimanalo until
18 capacity, whatever that possibly means.

19 If we look down at Condition 2 on Page two,
20 the condition to me amounts to a concession that my
21 timeline for closure is accurate, because here's a
22 stipulated condition by ENV and OP that not less than
23 seven years before Waimanalo is estimated to reach
24 capacity for either MSW or ash. The Applicant shall
25 pursue appropriate site application, et cetera. All

1 those things you do to open another landfill.

2 So the ENV and OP in their stipulated
3 findings are telling us seven years before capacity,
4 seven years before closure. That's enough time for
5 us to site and develop a new landfill. I agree.
6 That's why we've put it in our condition and why it's
7 been part of our closure conditions since 2012.

8 Beyond that, though, that condition is
9 meaningless again for us, because we have no idea
10 when that seven years will begin. It doesn't help
11 the community in any way, plan, feel confident, know
12 that the use is going to be eliminated by a date
13 certain does nothing for us other than stating my
14 timeline for closure is correct.

15 If we look down at the -- at Condition 3
16 that they've proposed and we look at the underlined
17 language where they require estimations. There's
18 been total number of ash in tons and estimated tons
19 diverted, estimated years remaining.

20 To me that is all bootstrapping, evidence
21 that if the ENV wanted it, if the ENV believed it was
22 relevant to its permit, they should have introduced
23 that evidence in the Planning Commission.

24 You don't get to approve a permit that
25 doesn't have all of these things that are obviously

1 important and say, well, we require them to report
2 them going forward.

3 That doesn't do anything for me. I can't
4 cross-examine the witnesses on this subject. I can't
5 offer rebuttal evidence. I can't go, oh, my gosh,
6 your evidence shows that there's actually going to be
7 50 years left on the landfill. That would have been
8 good for everyone to know before you approved the
9 permit.

10 So it not only does nothing, it's obvious
11 bootstrapping of things that are missing from this
12 record which, again, is ENV's burden to introduce.

13 And, again, ENV has consistently opposed
14 reopening to include any of it, if they can't go
15 around that by sticking in a condition.

16 COMMISSIONER ACZON: So do you have any --
17 some kind of recommendation that would be acceptable
18 to you besides throwing this out the window?

19 MR. CHIPCHASE: Absolutely, Commissioner.
20 We have proposed both before the Planning Commission
21 and reintroduced them for this Commission detailed
22 Findings of Fact, Conclusions of Law and Decision and
23 Order that accurately recount what the record shows.
24 The evidence before the Planning Commission and the
25 appropriate law, and then approve the permit for a

1 defined period with acceptable conditions.

2 And if I can just harp on one of those
3 conditions that we have asked for just a moment,
4 Commissioner.

5 One of the things that we asked in two
6 separate places was diversion. And you heard ENV say
7 today, well, the more we divert, the less harm in the
8 community, yet ENV has opposed both diversion
9 conditions that we have requested. I just don't see
10 how that's reasonable or credible.

11 So what we have put before the Commission
12 in terms of findings, conclusions and the order we
13 believe to be reasonable and appropriate and the best
14 that we can do to protect the community for the
15 limited amount of time that we believe the landfill
16 must remain open.

17 COMMISSIONER ACZON: One more question.
18 You heard ENV's decision on several of your
19 recommendations. It's kind of too many to kind of
20 mention, so I thought I wouldn't talk.

21 So any of those your clients strongly
22 disagree, or is there anything on that that, you
23 know, it's going to be a legal problem later on?

24 MR. CHIPCHASE: The conditions were the
25 product of a lot of work, some of which was done when

1 we were attempting to negotiate a resolution. So we
2 put a lot of thought before them, and we put in
3 things that we think are both necessary for the
4 community to reach that point where we minimize the
5 adverse effect and that are reasonable.

6 And like you said, it's too many to go
7 through all of them, but I'll just -- a couple of
8 them that were specifically mentioned today.

9 One was objecting to providing us a copy of
10 the report that they're required to issue. I mean,
11 what really is the objection to that? We're a party
12 to the proceeding. Parties to proceedings get all
13 kinds of rights, benefits, you know, notices. You
14 guys give notice to people who just submit a list to
15 you for proceedings. Right?

16 So anybody who just says, I want to be
17 notified of proceeding, here's a notice. We who've
18 invested eight years in this, we can't get notice
19 when there's going to be a hearing? We can't get a
20 copy of the report that they're required to prepare?
21 It's not reasonable and it's not credible, and we can
22 go through all of them.

23 But if the landscaping condition came up
24 today, there's no evidence in the record that our
25 landscaping condition is in any way consistent

1 with any -- inconsistent with any obligation that
2 they have. No one came before the Planning
3 Commission that said we can't landscape this. We
4 can't make it look good. That's inconsistent with
5 our DOH obligation. Nobody said that.

6 They just opposed the condition, which
7 should have an obvious benefit to the community.
8 Doesn't hurt them in any way except maybe add some
9 operational cost. But there's not even any testimony
10 to that that we can't do it because it's cost
11 prohibitive. They just imposed it.

12 That's not reasonable. That's not
13 credible, and I'll go through all of them if you want
14 to, but we end up at the same place.

15 COMMISSIONER ACZON: That's okay.

16 MR. CHIPCHASE: I'll try not to be hurt by
17 that.

18 COMMISSIONER ACZON: Thank you, Chair.

19 CHAIRPERSON SCHEUER: Commissioners? Thank
20 you very much, Commissioner Aczon.

21 Commissioner Chang.

22 COMMISSIONER CHANG: Thank you, Mr.
23 Chipchase. You are an advocate indeed.

24 MR. CHIPCHASE: I'll take that in the best
25 possible way.

1 COMMISSIONER CHANG: It is meant to be
2 that.

3 I just want to go to a line of questioning
4 regarding your objections to the remand. And one you
5 said what the remand, the time period, who knows how
6 long it will take and they would continue to operate.

7 But as I understand, even under your own
8 proposed conditions, you are willing to let them
9 operate for a limited period of time.

10 So is your opposition that they would still
11 be able to continue, is that an advocacy or is that a
12 real objection?

13 MR. CHIPCHASE: I hope it's a real
14 objection and not just advocacy. And, again, if I
15 can take a moment to try to explain that.

16 We proposed these closure conditions in
17 2012 when we thought the proceeding should -- was set
18 to wrap up. By now we would be at closure or very
19 near to it if those had been adopted.

20 We proposed them in 2016 or 2017 when it
21 went back down then. So shorten that three years,
22 right? We proposed them, now in 2019 we've stretched
23 it all the way out to 2027. If we're back here
24 proposing them in 2021, then it's 2029, and the
25 landfill has continued to operate.

1 COMMISSIONER CHANG: And I really greatly
2 appreciate the patience by your clients, but you're
3 right, there has been a historic practice of this
4 continued delay. And, of course, we're stuck with
5 what it is and then how do we move forward.

6 Is there an appropriate condition that your
7 client would be acceptable as a form of -- I guess
8 you would call it like mitigation -- to provide the
9 City an incentive?

10 I mean, is there a community benefit? Is
11 there something that can be placed -- because you
12 also raised a lot of -- if you have the opportunity
13 in a contested case hearing before the Planning
14 Commission to raise a lot of the conditions that
15 you're even talking about where there is much greater
16 participation by the parties to air these things out
17 pursuant to a remand, is there something that your
18 client -- because I think it was Ms. Rezentes'
19 testimony that there used to be community benefits,
20 but there aren't any more.

21 I mean, is there anything that would be
22 acceptable to your clients as a temporary community
23 benefit to provide the City an incentive to timely
24 proceed with the remand or with the filing of a
25 boundary amendment?

1 MR. CHIPCHASE: So it's an excellent
2 question, if I can take some time working my way
3 through the answer.

4 First is that as we went through the
5 proceedings before, of course, I talked to my client,
6 Senator Shimabukura, and by extension their
7 communities about whether there could be a community
8 benefit or some compromise again as they had done in
9 2003.

10 And the answer at that time was uniformly
11 no, and it was uniformly no in no small part because
12 of the absence of any faith or credibility that those
13 things will be followed through on, and will be
14 maintained with any consistency.

15 They weren't in place by the time we got to
16 the proceeding. And by then, as you've heard, a lie.
17 The City had broken its trust with the community. I
18 don't see now that being a viable option.

19 I would also say in a remand order it would
20 be difficult for me to see if this Commission, or at
21 least I would have questions whether this Commission
22 had the power to order conditions like a community
23 benefit package or some other incentive for the City
24 as part of a remand.

25 And then the last thing I would say is once

1 you do remand as you've seen, because you've
2 remanded, I want to say three times, right? When we
3 first got the supreme court decision, the Planning
4 Commission said, okay, we're not deciding anything
5 now. We said, no, no, no, you have to. They said,
6 no, we're not. And this Commission had to order them
7 to proceed. The Chair at that time ordered them to
8 proceed, so they finally did.

9 It comes up to this body, and we remand
10 again. And it comes up to this body, and we remand
11 again. And in between those periods, you lose
12 control over it. And so whatever you say today on a
13 remand, whether you set a time limit or anything
14 else, there's no ability to ensure that it's
15 followed; you lose control. And so there is no way
16 to mitigate the harm to my client.

17 COMMISSIONER CHANG: And I appreciate that.
18 I think we're just faced with a very difficult
19 decision.

20 MR. CHIPCHASE: And I appreciate that.

21 COMMISSIONER CHANG: So having the ability
22 to hear from your client something that would be
23 acceptable, I think also the City has heard really
24 clear. And we thought we heard -- they heard it
25 clear two years ago in 2017 what we wanted. So,

1 okay. You know, I appreciate your responses.

2 MR. CHIPCHASE: Thank you, Commissioner.

3 CHAIRPERSON SCHEUER: Thank you,
4 Commissioner Chang.

5 Commissioner Giovanni.

6 COMMISSIONER GIOVANNI: Thank you, Mr.
7 Chipchase. Trying to understand your position on --
8 in logistically.

9 MR. CHIPCHASE: Okay.

10 COMMISSIONER GIOVANNI: If I understand
11 correctly, you are recommending that the permit be
12 granted with a finite timeline for closure?

13 MR. CHIPCHASE: Yes, Commissioner.

14 COMMISSIONER GIOVANNI: And my
15 understanding consistent with that is that the City's
16 position is that there will be residual capacity
17 remaining in the existing landfill whenever that day
18 occurs?

19 MR. CHIPCHASE: That is certainly their
20 position. The evidence doesn't indicate that, but
21 that's their position.

22 COMMISSIONER GIOVANNI: My question is, if
23 those two -- if it is granted with a limited closure
24 in a specific time, which would necessitate the City
25 to seek an alternative site, what would your position

1 be whether or not the existing landfill would be
2 qualified as a -- could be qualified for an
3 additional site?

4 MR. CHIPCHASE: I appreciate that question
5 for a couple of reasons. One is that that, of
6 course, has come up before, right? Could this
7 landfill be the new site? They simply redesignate
8 it. And I believe it was 2008, 2009, this Commission
9 unequivocally said, no, you can't simply redesignate
10 Waimanalo as the new landfill site like you tried to
11 do five years earlier, and the simple reason is
12 simple. That's then meaningless to us.

13 Do you have a deadline on a Special Use
14 Permit that you can redesignate this and come in for
15 a new Special Use Permit for your new landfill? That
16 doesn't help anything.

17 And I'll say for the second reason I
18 appreciate the question is that it gets into do we
19 end this use with time remaining in terms of
20 capacity? Possibly, but that's not a standard in a
21 Special Use Permit, could we make more use of this?
22 Could we fully exhaust the property under a Special
23 Use Permit? Yeah, maybe, but that's not a standard
24 under a SUP. It's all those guidelines.

25 And looking at all of those guidelines, is

1 it reasonable and unusual taking into account the
2 impact on the community? Not can you fully exhaust a
3 resource, right? That's what they're advocating for,
4 is to fully exhaust the resource, and no amount of
5 evidence is going to change that a SUP has to have a
6 firm and finite deadline.

7 The LUC's counsel said it in '09, and the
8 OP said in '09 let's bring forth that in '82, right?
9 That's going to be a law for two years that this came
10 back just like it is the law today.

11 So having that additional information as
12 ENV advocated before the Planning Commission doesn't
13 change the requirements for the SUP to change what
14 the law is and wouldn't allow them either to use this
15 site to a capacity under the existing SUP or a SUP or
16 as a newly designated site.

17 COMMISSIONER GIOVANNI: Thank you for
18 clarifying your position.

19 MR. CHIPCHASE: You're very welcome.

20 CHAIRPERSON SCHEUER: I think we actually
21 have a series of further questions for you.

22 We've been going for an hour, so I'm going
23 to call for a ten-minute break.

24 (Recess taken.)

25 We're back on the record. The Commission

1 was asking questions of the counsel Ko Olin
2 Community Association and Senator Shimabukura.

3 Commissioner Ohigashi.

4 COMMISSIONER OHIGASHI: So I guess my
5 fixation is on this -- about the issue and what is in
6 the record. Have you been able to read the -- was it
7 a resolution by the council or was it an ordinance by
8 itself?

9 MR. CHIPCHASE: It was a resolution. Go
10 ahead, I'm sorry.

11 COMMISSIONER OHIGASHI: I just ask, have
12 you read that resolution?

13 MR. CHIPCHASE: Yes.

14 COMMISSIONER OHIGASHI: Okay. Would that
15 be -- when was that determined or when was that
16 resolution passed, if you remember?

17 MR. CHIPCHASE: My recollection is 2004.

18 COMMISSIONER OHIGASHI: And is there any
19 other part of the record that you can recall that
20 dealt with the issue of the amount of time that it --
21 the landfill would be in existence, or amount of time
22 it would take to reach capacity?

23 MR. CHIPCHASE: So while other counsel were
24 presenting, I had asked Mr. Goodin to search the
25 record. We have the transcripts in the record. And

1 so he's been looking for other discussions of
2 capacity and how much time is left. There certainly
3 was discussion of that specific 15-year estimate in
4 2012. That estimate from 2004, in particular
5 Commissioner Pacopac Planning Commission at the time,
6 hasn't been on a recent proceeding. He may no longer
7 be with the Commission, but he questioned then Acting
8 Director Tim Steinberger extensively about that
9 15-year estimate. That was '04. Here we're in 2012,
10 so what's what, and Director Steinberger's response
11 was simply, yeah, I know, that was the estimate
12 given.

13 We haven't identified anything from 2012
14 that says, well, now we believe it's this much time
15 remaining in terms of capacity.

16 COMMISSIONER OHIGASHI: So would it be fair
17 to assume that the status of the record was as of
18 2004, there was only 15 years capacity left in the
19 landfill?

20 MR. CHIPCHASE: That's the only specific
21 estimate that we've been able to identify.

22 COMMISSIONER OHIGASHI: Thank you.

23 CHAIRPERSON SCHEUER: Commissioner Chang.

24 COMMISSIONER CHANG: Thank you, Mr.
25 Chipchase. Just one question.

1 There's a line of questioning in regards to
2 whether the same site could be redesignated under
3 SUP, and you said that would just be absurd
4 essentially.

5 MR. CHIPCHASE: I think that's a fair
6 summation.

7 COMMISSIONER CHANG: But you would also
8 agree that if they went in for a boundary amendment
9 and then sought to apply the same property for
10 landfill that they could do that?

11 MR. CHIPCHASE: I would absolutely concede
12 nothing prevents them from pursuing a boundary
13 amendment, nothing has prevented them. And it's my
14 position on the boundary amendment today would be
15 that if they had intended to use the site
16 indefinitely, that's what they should have pursued.

17 COMMISSIONER CHANG: Greatly appreciate
18 that, and hopefully counsel has heard that as well
19 and doesn't want to come back here one more time. So
20 thank you.

21 CHAIRPERSON SCHEUER: Further questions for
22 Mr. Chipchase, Commissioners?

23 I have a couple of lines of questioning,
24 Mr. Chipchase.

25 MR. CHIPCHASE: I would be surprised if you

1 didn't.

2 CHAIRPERSON SCHEUER: To quote you, I will
3 take that as a compliment.

4 MR. CHIPCHASE: That is sincerely how I
5 mean it. And I should advise the other Commissioners
6 that on a break I was ordered to be nicer to my
7 co-counsel, Mr. Goodin.

8 CHAIRPERSON SCHEUER: I did so order. If
9 handwriting quality was a condition of anything, I
10 would not be the Chair of this Commission.

11 MR. CHIPCHASE: And so taking the Chair's
12 order seriously, I asked Mr. Goodin what he had
13 written down. And what he had written down was that
14 a further delay in a remand would further erode the
15 promises that the City had made to close the landfill
16 back in -- by 2008, 2009, we would be just continuing
17 the same broken promises.

18 CHAIRPERSON SCHEUER: Thank you, co-counsel
19 and counsel.

20 My two lines of questioning. I would like
21 you -- well, okay. First, I appreciate that you
22 have, in the efforts in your words to be reasonable,
23 offered conditions that you would seek our approval
24 of additional conditions in approving the SUP.

25 But it's not going to be, you know, all

1 rainbows and unicorns if we took that action.

2 Is there anything that you've seen over --
3 since 2012 at least that would convince you that the
4 City would not appeal such a decision in the circuit
5 court?

6 MR. CHIPCHASE: No. I would expect that
7 they would appeal.

8 CHAIRPERSON SCHEUER: So there's almost no
9 situation that you can envision in which whatever
10 action the Commission takes, that at least one party
11 won't be appealing this decision to the circuit
12 court, correct?

13 MR. CHIPCHASE: I think that that is the
14 most likely outcome.

15 CHAIRPERSON SCHEUER: So in that regard,
16 you know, concerns about there being additional
17 uncertainty from Commission's courses of action could
18 really apply to any action that we take. There's not
19 going to be a resolution, regardless of what decision
20 we make today.

21 MR. CHIPCHASE: I think that there probably
22 wouldn't be assuming the most likely, which is that
23 someone appeals anything, any kind of decision, there
24 probably isn't a resolution, and any other counsel
25 can speak for this, maybe three to five years before,

1 maybe five is a safer estimate before there's a
2 decision.

3 What I would say is that the decision that
4 we propose, we do believe -- I mean, I will say,
5 unshyly, unequivocally that we believe its imminently
6 defensible. And with a clear closure condition, the
7 City should get moving on that and not what it did
8 last time which is do nothing, appeal and then say we
9 have an emergency.

10 CHAIRPERSON SCHEUER: So in regard to that
11 last point, I'm interested in your thoughts on the
12 limitations of the kinds of conditions, additional
13 conditions that this Commission might make on a
14 Planning Commission decision.

15 Because one of my concerns frankly with
16 your proposal is that putting a certain deadline is
17 so different than the unlimited future use to
18 capacity that the Planning Commission has offered is
19 that in someways it is a reversal of their decision
20 rather than a modification.

21 MR. CHIPCHASE: I think that's a useful
22 discussion, and I think we can look at it in two
23 ways. One is historical, that's exactly what
24 happened in 2009. The Planning Commission had
25 said -- had approved it to capacity. OP and your

1 counsel said you can't do that, you need to have a
2 time limit, and so you imposed a time limit.

3 The supreme court on its review did not say
4 you cannot propose time limits on a Special Use
5 Permit. You have to let them use it to capacity.
6 Your Condition 14 is terrible. Not at all. They
7 said you just haven't provided us with a record that
8 we believe supports the particular closure period,
9 but we recognize -- quite the opposite of saying you
10 can't do it -- we recognize you wouldn't have
11 approved it without this time limit, and so we're
12 sending it back so you can develop the record more
13 fully, and that's exactly what has happened.

14 So bringing that historical point forward,
15 the record has been pointed out. And at this point,
16 record absolutely supports a closure condition in the
17 form that we have proposed.

18 CHAIRPERSON SCHEUER: Again, but my
19 question is not whether or not the record supports --
20 whether you contend the record supports such
21 condition, but whether the addition of that condition
22 would not in effect be reversing the decision of the
23 Planning Commission?

24 MR. CHIPCHASE: And so I didn't mean to be
25 opaque. I thought I had addressed that. What I

1 would say indirectly is it would reverse the Planning
2 Commission as to that portion of the decision. You
3 would disagree with them not in terms of the entire
4 decision. You would be saying no permit.

5 But as to that portion, would you be saying
6 we don't agree with the capacity limitation
7 effectively that you put on. We believe a firm time
8 limit is there, and I believe that your rule of
9 15-15-96 specifically empowers you to agree, to
10 disagree completely not just in part or to modify any
11 condition and that you have the power to impose
12 additional conditions.

13 CHAIRPERSON SCHEUER: Thank you.

14 So that was my first line. My second line
15 is just that I want to hear it from you with greater
16 detail on what conditions -- on what you believe
17 exists in the record that would allow us to deny.

18 MR. CHIPCHASE: So the reason I believe
19 that the record would support a denial is that if we
20 come back to first principles, it is the Applicant's
21 burden to establish the appropriateness of a special
22 use, guided by those things that are set out in your
23 rules. That rests on the Applicant.

24 The guidelines specifically involve,
25 specifically direct the Commission to consistency

1 with State Land Use plans, and consistency or the
2 absence of adverse affect on the community. Here we
3 have an application that seeks an unlimited use,
4 that's what they want.

5 We don't believe that's consistent with a
6 Special Use Permit at all, and so you can just simply
7 deny on that, rather than giving them part of a what
8 they want the landfill for a limited duration. You
9 say, you asked for this. You can't have that, so
10 we're denying your application.

11 The second is you could say, you have not
12 presented us through the Planning Commission with
13 evidence that your use is consistent with the state
14 plans and all these guidelines dealing with water
15 quality, environmental harm, harm to persons and
16 property, all of these things.

17 You had that burden and you haven't shown
18 us those things, so we don't approve.

19 The third thing that the Court's denied is
20 the adverse effect. The record is replete with
21 adverse affect, and you could say it was your burden
22 to show that your use does not have an adverse effect
23 on the community. You have not carried your burden,
24 City, and so we deny your permit.

25 And on top of not carrying the burden, you

1 have objected to the imposition of conditions to
2 address the harms that you have caused. You don't
3 want those. You want to eliminate or operate without
4 those and without restrictions. You don't have a
5 permit at all. We believe all three of those would
6 supported denial of --

7 CHAIRPERSON SCHEUER: Be nice.

8 MR. CHIPCHASE: So, you know, being nice,
9 the handwriting is excellent, and I will say that Mr.
10 Goodin represents that he found one reference to an
11 estimate in 2011 that there were 15 years remaining
12 in capacity.

13 And so we will endeavor to put that up so
14 at least everyone can see that estimate before we
15 close today's proceedings.

16 CHAIRPERSON SCHEUER: Other than those
17 three reasons, do you see anything else on the record
18 to deny?

19 MR. CHIPCHASE: No. I believe those would
20 be the principle basis. I would say this. One of
21 the standards is the use is not suitable for the uses
22 allowed in the district. All right. We've heard
23 mixed statements on those things from OP and from ENV
24 that maybe it is, and we don't support a District
25 Boundary Amendment because we think the uses could

1 revert, and they would be consistent. Then I would
2 say that's another reason that a SUP is
3 inappropriate. If there are uses that are allowed in
4 the district that are appropriate for the property,
5 you don't grant a SUP.

6 But because those statements aren't
7 evidence that no opinion is appropriate to rely on
8 them. I just point out the inconsistency of the
9 guidelines. Thank you.

10 CHAIRPERSON SCHEUER: Commissioners,
11 anything further for Mr. Chipchase?

12 Commissioner Wong.

13 COMMISSIONER WONG: Nothing.

14 CHAIRPERSON SCHEUER: Commissioner
15 Ohigashi.

16 COMMISSIONER OHIGASHI: In my own
17 inarticulate way, I will ask questions. It appears
18 to me that the SUP from its inception has adverse
19 impacts to the community, and however the community,
20 what my understanding is your argument is the
21 community agreed because they believed it would be a
22 limited amount of time that they would suffer under
23 those adverse impacts.

24 Is that what you're telling me.

25 MR. CHIPCHASE: That was certainly true in

1 2003. But in 2003 the community did not oppose the
2 limited expansion -- it wasn't closed by then -- did
3 not oppose the limited continued use of the landfill
4 in return for the promises that it was closed and
5 certain community benefits. That was the agreement.

6 COMMISSIONER OHIGASHI: And in 2000 and --
7 when was it, at the next juncture, the community
8 decided to intervene and to become -- to voice their
9 feeling on that adverse impact?

10 MR. CHIPCHASE: I would say there were two
11 junctures. One would be the OA proceeding which
12 Colleen Hanabusa intervened, and obviously opposed
13 strenuously, and that resulted in the 2009 decision.

14 When we reached the next expansion point in
15 2011, the community that I represent, including
16 Senator Shimabukura did intervene, and as we looked
17 at the hearing and prepared for the hearing
18 overwhelmingly what I heard from people was it's
19 twofold:

20 The City promised us it would close, and we
21 just can't believe them any more. Here they are
22 coming back after an unlimited expansion. We can't
23 go along with that.

24 And the second one, it has been really
25 harmful much more harmful than we anticipated and

1 than they promised to us eight, seven, ten years, and
2 so that's absolutely formed the basis for the
3 community's decision to intervene.

4 CHAIRPERSON SCHEUER: Anything further,
5 Commissioners?

6 Commissioner Chang.

7 COMMISSIONER CHANG: Just one follow-up
8 question.

9 Mr. Chipchase, when I asked about the
10 community benefits, you thought that might not be an
11 appropriate condition. So what was the vehicle that
12 was used to give the community benefits originally?

13 MR. CHIPCHASE: Promises.

14 COMMISSIONER CHANG: Just nothing in
15 writing, no enforceable condition? It's just --

16 MR. CHIPCHASE: I'm not aware of anything
17 -- Mr. Goodin, who I'm always nice to, could correct
18 me if I'm wrong, but I'm not aware of anything in any
19 prior condition. I believe they were representations
20 from the City.

21 COMMISSIONER CHANG: Now, what kinds of
22 representations were those?

23 MR. CHIPCHASE: I believe Ms. Rezentes
24 touched on them yesterday. They were support for
25 various nonprofit operations for the community.

1 COMMISSIONER CHANG: Okay. Thank you.

2 CHAIRPERSON SCHEUER: Anything further?

3 If not, we'll move on to Intervenor
4 Hanabusa. You've given up five minutes so, I
5 think --

6 MR. WURDEMAN: I don't have all that much
7 further to add. I think I made my position very
8 clear yesterday, and I assumed I -- or I tried to
9 answer all the questions that were posed to me at
10 that time.

11 So we would certainly submit on that. I
12 just wanted to make a couple of comments without
13 waiving our position in any way.

14 I think that one -- in talking about the
15 remand, the idea that was thrown out there during the
16 discussions today. One is on a practical effect. It
17 is my impression that the Planning Commission has
18 absolutely no intention of doing anything further
19 than what it's already done.

20 Secondly, I think in the 2017 remand that
21 was done by this Commission, it -- the vehicle, the
22 main vehicle by which it was done was that the record
23 that was sent was based on improper and in violation
24 of the Planning Commission's rules in adopting its
25 decision and that -- and completing that record. So

1 I think there was illegal basis to remand at that
2 point because of that defect.

3 However, now, that issue, although we
4 objected to the way they did it, that issue was
5 addressed on its procedure, and the Planning
6 Commission has once again sent its record to this
7 Land Use Commission. It's now a complete record.

8 And under 205-6(e), once a complete record
9 is sent to this Land Use Commission, it shall render
10 a decision within 45 days. The statute doesn't allow
11 it to go remand for further proceedings to add things
12 to the record that the Land Use Commission feels
13 uncomfortable about it not containing. The
14 legislature didn't allow for that option. The
15 legislature said you shall make a decision.

16 And so we would object to any remand,
17 because I think it's legally inappropriate, and it
18 doesn't -- it's not supported by the statute.

19 So I wanted to make those comments with
20 respect to the discussion I heard earlier about the
21 remand.

22 And then finally on another point, and just
23 as a -- looking at what may happen in all of this, if
24 there was an approval with modifications, I would
25 certainly hope that such an approval would not be

1 done by just adopting the Planning Commission's
2 Findings of Fact, Conclusions of Law which the
3 Commission did way back in 2009, because that was in
4 my opinion the tragic flaw in all of this, because
5 the Planning Commission had its findings. The Land
6 Use Commission adopted it then, and then it added
7 findings -- conditions I should say, excuse me --
8 that were inconsistent with those findings.

9 So if there's going to be any kind of
10 conditions imposed, I think it's going to take a lot
11 more than just adopting the record that the Planning
12 Commission sent over as far as findings and
13 conclusion that were made.

14 But I'd also like to add that, you know,
15 the feeling of what the Commission's concerns may be
16 with what a denial may result in a practical sense,
17 that is not or shouldn't be a consideration by this
18 Commission, and it shouldn't also be a consideration
19 by this Commission because it has been the City that
20 has taken this cavalier approach, and I think that,
21 and I propose some mechanisms going forward, but I
22 think that unless there is a denial, and unless the
23 City is held to -- it has that burden.

24 Unless the City is held to seeking the
25 proper mechanism, if there's time lines put on, if

1 there's conditions that they have to go look for
2 other sites, they're not going do it. And what's
3 going to happen is we're going to be back here again
4 in four or five years.

5 They're going to go file an application, a
6 petition with the Planning Commission for a new SUP.
7 They may at that time then ask for a district
8 boundary amendment at the same time like they did way
9 back in 2009.

10 CHAIRMAN SCHEUER: You're out of time.

11 MR. WURDEMAN: So we need to -- thank you.
12 And I would strongly, and with all due respect,
13 suggest that we make that decision today so that we
14 can address it the way it should be addressed.

15 CHAIRPERSON SCHEUER: Thank you very much,
16 Mr. Wurdeman.

17 Questions?

18 Mr. Ohigashi.

19 COMMISSIONER OHIGASHI: This interesting
20 legal argument that I've been thinking about, and how
21 to -- if we accept the Intervenor's proposed
22 conditions, how do we determine if those proposed
23 conditions are in line with the Findings of Fact?
24 And do we have to change the Findings of Fact to do
25 so?

1 And if we do change the Findings of Fact,
2 we don't have the power to do so.

3 So the question that I have to you is that,
4 if you have had any authority with regards to whether
5 or not those Findings of Fact are consistent with the
6 conclusions or the proposals made by either -- by all
7 parties, I guess by OP and --

8 MR. WURDEMAN: It would be my opinion that
9 if you just adopted the Findings of Fact, Conclusions
10 of Law the Planning Commission and added now -- and I
11 hope I'm answering your question the way it was
12 presented to me. If it simply did that like it did
13 in 2009 then -- and then put the closure dates and
14 everything else that have been suggested or
15 recommended, that if that's all that was done as far
16 as the Land Use Commission's findings and decision in
17 this matter, it I think would certainly be subject to
18 challenge on appeal like it was back in 2009.

19 COMMISSIONER OHIGASHI: My understanding
20 then it's your position that we have really only two
21 options, right, to grant or deny?

22 MR. WURDEMAN: I think the only option is
23 to deny. And it's deny because they're asking for a
24 use that seems to be unlimited in purpose or
25 duration, I should say, and that there's no evidence

1 that it ever presented that it would be returned or
2 changed to any other use after that, and that's their
3 burden.

4 And that argument and that presentation is
5 inconsistent and in violation of the supreme court's
6 mandate in Waianae Coast Neighborhood Board No. 24,
7 and I think the only option is to deny the Special
8 Use Permit, and force them to petition for a district
9 boundary amendment.

10 And I'm sorry, Commissioner Chang,
11 yesterday you had asked about the time issues
12 involved in that, and those time requirements are, of
13 course, set forth -- and I went back and looked at
14 the statute HRS 205-4 and there's supposed to be a
15 public hearing not less than 60 days and not more
16 than 180 days after the petition is submitted.

17 And then there is another provision in the
18 statute that requires that the findings, I believe,
19 and the ruling be made no more than 365 days after
20 the proper filing of a petition unless otherwise
21 ordered by a court or unless the time extension which
22 shall not exceed 90 days is established by two-thirds
23 vote of the member of the Commission.

24 So that's my understanding of the time
25 issues.

1 CHAIRPERSON SCHEUER: Commissioner
2 Giovanni.

3 COMMISSIONER GIOVANNI: Is it your position
4 that denial, I think the word you used was would
5 force the County, the City and County to seek a
6 district boundary amendment? Could you expand upon
7 how it would force them to do that?

8 MR. WURDEMAN: Well, because they would be
9 operating a landfill illegally, and I -- and as Mr.
10 Chipchase had discussed, I would disagree also with
11 the Office of Planning that the Department of Health
12 does not have the authority nor is it the body that
13 should be taking enforcement actions by imposing
14 daily fines against the City if it continues to
15 operate that landfill illegally because it would
16 be -- and the Department of Health does require a
17 valid permit, a Special Use Permit, or otherwise, to
18 be in place in order for it to meet its approvals.

19 COMMISSIONER GIOVANNI: So it's clear that
20 that scenario that you just laid out did not occur
21 over the last six years. What makes you think it
22 would occur going forward?

23 MR. WURDEMAN: Well, I would hope that the
24 Office of Planning would write the Department of
25 Health and inform them of the violations by the City,

1 and put them on notice, and I would hope that the
2 Department of Health would then do its job.

3 COMMISSIONER GIOVANNI: So is the
4 difference between forcing them to do it and hoping
5 that they would do it?

6 MR. WURDEMAN: Well, I mean, you know, if
7 the City doesn't want to apply for a permit and run
8 the landfill legally, I mean, you know, they're
9 violating the law.

10 I mean, I'm not sure how else to express
11 that, you know, the City just like any other body
12 whether public or private needs to follow the law.

13 COMMISSIONER GIOVANNI: So I would agree
14 with that. And I would think that they should follow
15 the law, right, and/or deal with the consequences.

16 MR. WURDEMAN: Yes.

17 CHAIRPERSON SCHEUER: Commissioner Okuda.

18 COMMISSIONER OKUDA: Thank you very much,
19 Mr. Chair.

20 Mr. Wurdeman, just so that I'm clear on
21 your position regarding remand, let me quote from HRS
22 205-6(e), second paragraph, it says, and I quote:

23 Within 45 days after receipt of the
24 complete record from the County Planning Commission,
25 the Land Use Commission shall act to approve, approve

1 with modification, or deny the petition. That's the
2 end of the quote.

3 Is that an accurate statement of the law?

4 MR. WURDEMAN: That's what the statute
5 says.

6 COMMISSIONER OKUDA: And so is that the
7 basis for why you're saying that remand is not
8 appropriate because the word "remand" does not appear
9 anywhere in the plain language of that sentence as
10 far as what the Land Use Commission is authorized to
11 do?

12 MR. WURDEMAN: In my plain reading of the
13 statute, which I think is clear and unambiguous,
14 shall act to approve within 45 days means exactly
15 that unequivocally.

16 COMMISSIONER OKUDA: Okay. So the word
17 "remand" isn't there at all?

18 MR. WURDEMAN: It doesn't condition at all
19 the use shall in the statute.

20 COMMISSIONER OKUDA: Okay, thank you. I
21 have no further questions.

22 CHAIRPERSON SCHEUER: Commissioner Aczon?

23 COMMISSIONER ACZON: I just want to clarify
24 Intervenor Hanabusa.

25 So you oppose us remanding this to the

1 Planning Commission?

2 MR. WURDEMAN: Yes.

3 COMMISSIONER ACZON: And your proposition
4 is to deny the request?

5 MR. WURDEMAN: Yes.

6 COMMISSIONER ACZON: So you also oppose on
7 granting it with modification?

8 MR. WURDEMAN: I don't -- as I expressed
9 yesterday, I don't think that's the proper mechanism
10 to address the landfill issue given its history,
11 given the piecemeal approach to it, given the -- I
12 think that the language in Waianae Coast Neighborhood
13 Board No. 24 did make it clear that it should -- the
14 Special Use Permit process shouldn't be used to
15 circumvent the district boundary amendment
16 requirement.

17 COMMISSIONER ACZON: So if I hear you
18 right, if we -- if the Commission decides to grant
19 the motion with modification and you hope that this
20 Commission doesn't entirely accept the Planning
21 Commission's findings of law?

22 MR. WURDEMAN: I'm sorry?

23 COMMISSIONER ACZON: The Planning
24 Commission's findings of law you were mentioning that
25 you hope that we don't adopt fully the findings?

1 MR. WURDEMAN: Without waiving my positions
2 on how we believe that the Commission or the request
3 that we're making of this Commission, I believe that
4 unless the Commission adopted its own Findings of
5 Facts, Conclusions of Law to support the closure,
6 that it would be suspect again like it was in 2009
7 for it to just simply adopt the Findings of Facts,
8 Conclusions of Law of the Planning Commission and
9 then add conditions that weren't supported by those
10 Findings of Fact and Conclusions of Law.

11 COMMISSIONER ACZON: Would you agree that
12 this Commission has the power to amend the Planning
13 Commission findings?

14 MR. WURDEMAN: The statute says it can
15 approve, approve with modification or deny. So
16 that's obviously all it can do. And I haven't
17 researched enough nor do I know if there is even
18 authority that exists that discusses a situation in
19 which the Land Use Commission did do such an act of
20 adopting the -- its own Findings of Fact, Conclusions
21 of Law and then approving with modifications the
22 Planning Commission's decision that was sent up to
23 it.

24 COMMISSIONER ACZON: Thank you.

25 CHAIRPERSON SCHEUER: Commissioner Chang.

1 COMMISSIONER CHANG: Thank you, Mr.
2 Wurdeman. Just two questions.

3 Looking at 205-6(e) is it also reasonable
4 interpretation of that statute when it says "receipt
5 of the complete record"? If the Land Use Commission
6 determines that the record is not complete, that the
7 record -- that there's insufficient evidence, for
8 example, capacity, that the Commission could remand
9 that matter back to the Planning Commission with very
10 specific instructions as to what needs to be in the
11 record to be complete, so that with that
12 interpretation we could remand the case back?

13 MR. WURDEMAN: I'm sorry, I don't agree
14 with that reading.

15 COMMISSIONER CHANG: Okay.

16 The second question is, if we deny and you
17 say OP can then go write a letter to the Department
18 of Health to seek an enforcement action. If OP
19 doesn't seek an enforcement action, is your client --
20 would your client file an enforcement action?

21 MR. WURDEMAN: I'll certainly discuss that
22 with my client who isn't here today.

23 COMMISSIONER CHANG: All right. Thank you.

24 CHAIRPERSON SCHEUER: Commissioners?

25 Mr. Wurdeman, I'm just going to -- I

1 actually I don't think it's going to be determinative
2 in our discussions today, but I would just flag that,
3 at least in our administrative rules in addition to
4 the sentence that says that we shall either approve,
5 approve with modification or deny. It also says upon
6 determination by the Commission the petition maybe
7 remanded to the County Planning Commission for
8 further proceedings. I don't have a sense that this
9 is the direction that we are going in, but I believe
10 our administrative rules provide for such an action.

11 MR. WURDEMAN: Assuming those rules are
12 consistent with the statute, so I -- that's a whole
13 other --

14 CHAIRPERSON SCHEUER: We try to operate
15 with that assumption.

16 I asked you yesterday and I asked Mr.
17 Chipchase today, if we were to deny and we were to
18 make -- state clear reasons for denial, do you have
19 anything to add to the three reasons that Mr.
20 Chipchase laid out for the basis for denial?

21 MR. WURDEMAN: No. I think those covered.
22 I would additionally like to add that my client, who
23 has a long time history in working in various
24 legislative branches, does take law making very
25 seriously and that we -- and also had previously

1 litigated this case herself before I got involved in
2 it, and has a long history in litigating this case,
3 and has always taken the position that denial was
4 appropriate that with respect to the law, with
5 respect to the Hawai'i supreme court decisions, that
6 it would be her position that statutory and
7 decisional law should be followed, and that would be
8 in addition to those other factors.

9 CHAIRPERSON SCHEUER: Thank you.

10 Commissioners, anything further for Mr.
11 Wurdeman?

12 Commissioner Ohigashi.

13 COMMISSIONER OHIGASHI: I would like to
14 make a motion to go into executive session; however,
15 I want to know if -- are we going -- what is the
16 schedule like because OP is up next?

17 CHAIRPERSON SCHEUER: Yes.

18 COMMISSIONER OHIGASHI: We have a
19 conclusion or --

20 CHAIRPERSON SCHEUER: We're near a lunch
21 break, so one possibility we could do is move into
22 executive session with the understanding the
23 Commission would be eating lunch while in executive
24 session and then reconvening at a set time.

25 Commission Cabral.

1 VICE CHAIR CABRAL: Yeah, my suggestion
2 would be because these breaks interfere with my brain
3 thinking simple as it is. I think I'd like to hear
4 OP and come to a conclusion of everybody being able
5 to like, you know, have your second chance at the
6 wheel here and then do a break.

7 CHAIRPERSON SCHEUER: That was the other
8 option I was going to opine.

9 VICE CHAIR CABRAL: Thank you.

10 CHAIRPERSON SCHEUER: Mr. Yee, how long do
11 you need?

12 MR. YEE: Five minutes.

13 CHAIRPERSON SCHEUER: Okay. So if we can
14 keep our questioning and your responses to our
15 questions brief enough, we should be able to get
16 through this before lunch.

17 Is that acceptable Commissioners?

18 Okay, I think nothing more for Intervenor
19 Hanabusa, correct? Moving onto the Office of
20 Planning.

21 MR. YEE: Thank you.

22 The Office of Planning's position I think
23 revolves majorally around one particular issue, and
24 that is we don't believe this SUP process should be
25 used in order to determine the location of the

1 landfill. That's a county function. They figure out
2 where the site is, they make that decision, and then
3 they come to you. You don't go around looking to see
4 what the best site IS to be located.

5 But if you take that on, if you take on
6 that decision-making power, then we do ask that you
7 then let ENV open the record to demonstrate the many
8 and good reasons why they made that decision.

9 So if you're disturbed by Waimanalo Gulch,
10 the site of the landfill, then ask ENV to reopen the
11 record to demonstrate why they made that decision.
12 That issue hasn't been brought up specifically, but
13 it has been sort of the silent question that seems to
14 be behind everyone's argument of why it should be
15 closed.

16 Having said that, while the Office of
17 Planning is not changing its position, I do want you
18 to know that we've heard the many questions that the
19 Land Use Commission has heard. So we have the
20 following final comments:

21 If you are inclined, as in 2009, to allow
22 the landfill but only with a deadline, and if that
23 deadline is to be the capacity, but you are not happy
24 with the uncertain date and you want a particular
25 date as to when that capacity is going to be reached,

1 then we believe you should remand to admit evidence
2 of time and capacity estimate for the landfill for
3 both ash and MSW.

4 Admittedly, that number will change over
5 time. The ENV will then have to come back to you for
6 extensions as new technology occurs, but that is what
7 you would require them to do.

8 So if you're concern is simply the lack of
9 a deadline, but you're fine with the idea or the
10 concept that this landfill can be operated and chosen
11 by the City until it reaches capacity, but you're
12 simply not willing to rely on the unstated date and
13 so therefore need or want to require a particular
14 time, then remand for that particular purpose.

15 If you believe that you need to get DBA for
16 this case, and that a SUP perhaps is not the ideal
17 way which this should be done, then we believe you
18 should remand this matter to admit evidence as to the
19 length of time in which a DBA can be issued.

20 The current evidence is not based I think
21 on the DBA process, and that is a different length of
22 time than a SUP -- for a new SUP for a new landfill.

23 So if you think that this landfill should
24 be processed through a district boundary amendment
25 for the various public policy reasons, why we think

1 this landfill should be allowed to operate for public
2 health and safety, we think you should at least allow
3 us to operate until they can get that DBA, and then
4 we're -- and therefore remand this to figure out what
5 that time period is as the supreme court will
6 probably tell you that we don't know how long that
7 period is.

8 Please note however that the Office of
9 Planning might disagree that a DBA is appropriate,
10 that we might have concerns regarding any permanent
11 park performance after closure as those could be
12 considered to be taking, and that you may be
13 establishing a precedence for other landfills,
14 quarries and solar facilities which have similarly
15 long periods of time in which their special permits
16 had been issued, so there may be some other
17 consequences for a requirement for a DBA.

18 There have been some other issues regarding
19 evidence, and I just want to note them. They
20 included the remand for the admission of evidence
21 demonstrating why 2022 is the time needed for a site
22 identification as well as what remediation or
23 restoration requirement should be imposed for future
24 non-landfill uses. That might be another matter that
25 you want to remand this case forward.

1 We know that KOCA made a request down
2 before the Planning Commission to reopen the record,
3 we just want to read the comments on those requests.

4 One was to open the record for current
5 diversion efforts by the City. We have no particular
6 comment upon the adequacy of that request.

7 The second was the status of landfill site
8 selection. To be quite honest, we're not sure why
9 you need that for your purpose. If you think that's
10 important, you can require that. But from the Office
11 of Planning's perspective, KOCA's position was you
12 only allow landfill to be open until you get a
13 landfill site selection. So it's very important for
14 them to establish their condition.

15 For the Office of Planning, we didn't think
16 that it should be open. That's the basis by which
17 the deadline should be set, so it's not -- it was not
18 relevant to the Office of Planning's analysis. It is
19 up to you.

20 Let me just sum up with a couple of things.
21 One is they did ask for operation of the Waimanalo
22 Gulch Sanitary Landfill --

23 THE COURT REPORTER: I'm sorry, I didn't
24 hear that.

25 MR. YEE: That the operations at Waimanalo

1 Gulch Sanitary Landfill is too vague of a description
2 and we would ask that you be more specific.

3 And so let me just close by saying that we
4 ask that you not give up on the Planning Commission
5 and their process. We know it's been sometime, and
6 we know there's been some frustrations. That
7 frustration has been shared by the Office of Planning
8 as well, but it is a co-equal governmental agency and
9 we ask you allow them to do their job in providing
10 you with the information that you want. Thank you.

11 CHAIRPERSON SCHEUER: Thank you, Mr. Yee.

12 Questions for Office of Planning?

13 Commissioner Aczon.

14 COMMISSIONER ACZON: Thank you, Chair.

15 What I heard was Office of Planning
16 strongly oppose denying this request?

17 MR. YEE: Correct.

18 COMMISSIONER ACZON: Secondly, you
19 mentioned several options that we have or suggestions
20 that we can take. My question now is: Do you oppose
21 remanding this to the Planning Commission?

22 MR. YEE: I'll say no. The Office of
23 Planning had a recommended position which is
24 different than remand, but we don't oppose the
25 remand. We do think that the length of time should

1 be the capacity of the landfill.

2 COMMISSIONER ACZON: Going back to KOCA's
3 proposed conditions, like ENV, do you see any of
4 those that would create inconsistency from the
5 Planning Commission's findings of law, or any of
6 those would put some kind of legal questions?

7 MR. YEE: KOCA's conditions are
8 essentially -- I think the Chair referred to it as
9 like a reversal -- and I think that's maybe not
10 legally accurate, but I can understand why that's
11 helpful analytically.

12 KOCA's proposal essentially says, I want
13 the land to be open only as long as it takes to
14 establish a new landfill, and they have a series of
15 conditions about the interim, what happens in the
16 interim.

17 ENV obviously has a major difference of
18 opinion about that as does the Planning Commission,
19 so I think the two conditions are incompatible. I'm
20 not sure that that answered the question you had
21 raised.

22 COMMISSIONER ACZON: I guess my concerns
23 is, you know, putting these conditions is going to
24 reverse Planning Commission's findings of laws and --

25 MR. YEE: It would reverse the spirit and

1 intent of the Planning Commission's decision.

2 COMMISSIONER ACZON: Any specific
3 conditions from -- that you would say that
4 automatically reverse that, you know, Planning
5 Commission's findings of laws?

6 MR. YEE: Let me answer in two different
7 ways. I guess if you're saying technically are there
8 other changes perhaps to be made in order to support
9 KOCA's Findings and Conclusions of Laws and
10 conditions, I -- we didn't look at -- so closely at
11 it to determine do you have the correct Findings of
12 Fact to demonstrate that these conditions should be
13 imposed? We just didn't do that analysis. So we
14 didn't take a position or comments on it.

15 It's possible, but I don't know that I
16 could get more down on the technical aspects of it.

17 If you're asking me do I think KOCA's
18 conditions and the Planning Commission's decision are
19 consistent? As they say the Planning Commission's
20 condition as it exists today versus KOCA's
21 conditions, I would say in essence, no.

22 COMMISSIONER ACZON: Yeah, I don't believe
23 that they're consistent. What I'm asking is, if
24 those conditions would reverse Planning Commission's
25 Findings of Facts?

1 MR. YEE: If you're asking like are there
2 Findings of Fact which would be inconsistent with
3 KOCA's conditions, I don't know. I'm not so familiar
4 with the record that I could tell you yes or no. We
5 can take a look at that, but I wouldn't be able to do
6 it today.

7 COMMISSIONER ACZON: Thank you.

8 CHAIRPERSON SCHEUER: Thank you,
9 Commissioner Aczon.

10 Commissioner Okuda.

11 COMMISSIONER OKUDA: Thank you, Chair.

12 Briefly, Mr. Yee, you saw on the screen the
13 quotations that KOCA's attorney placed on the screen
14 as far as statements by Russell Suzuki, the attorney
15 representing -- or Deputy Attorney General, Russell
16 Suzuki, and also other statements allegedly
17 attributed to the Office of Planning. You saw that
18 presentation, correct?

19 MR. YEE: Yes.

20 COMMISSIONER OKUDA: Did KOCA, or did those
21 statements that were projected on the screen, were
22 they accurate as far as what was said or represented
23 by Mr. Suzuki and the Office of Planning at that
24 time?

25 MR. YEE: Mr. Suzuki, I believe, was

1 speaking as an advocate on behalf of the LUC, but the
2 statements are correct. The 2009 statements from the
3 Office of Planning I believe are correct, although I
4 do want to make one small factual notation. And that
5 is in 2017, the Office of Planning presented
6 different comments than reflected in 2009. I believe
7 he said, this is the -- 2019 is the first time we've
8 changed our position. That's not correct. We
9 submitted almost identical comments in 2017.

10 COMMISSIONER OKUDA: Okay, so the position
11 is their -- okay, I understand your statement, thank
12 you very much.

13 CHAIRPERSON SCHEUER: Commissioner Chang.

14 COMMISSIONER CHANG: Thank you, Mr. Yee. I
15 appreciate your statements.

16 Do you believe that we can remand with and
17 take an action on the SUP, but we would have to
18 remand it back to the Planning Commission to
19 establishing a full record?

20 MR. YEE: I think you remand -- well, let
21 me be more mechanical. You remand for particular
22 purposes. It goes back to the Planning Commission.
23 The Planning Commission admits evidence. It is
24 entirely possible the Planning Commission makes
25 absolutely no change to their decision. It simply

1 sends up a larger -- quite a large record with the
2 additional information that the Land Use Commission
3 has asked, comes back to the Land Use Commission.
4 The Land Use Commission may then modify the condition
5 based upon the enlarged record.

6 COMMISSIONER CHANG: But you don't believe
7 that we could -- we couldn't take an action. If we
8 remand, we are saying that the record is not
9 complete, and so we wouldn't be able to take an
10 action on the SUP at this time?

11 MR. YEE: Correct.

12 COMMISSIONER CHANG: Okay. That was my
13 understanding as well, thank you.

14 CHAIRPERSON SCHEUER: Is there anything
15 further for Mr. Yee, Commissioners?

16 Commissioner Aczon.

17 COMMISSIONER ACZON: So, Mr. Yee, so you
18 disagree with Mr. Wurdeman that we cannot remand this
19 to the Planning Commission?

20 MR. YEE: I disagree. I believe there is
21 the implicit power to do so, and that was recognized
22 in your rules which I believe have the assumption of
23 legality, certainly have the force and effect of law.
24 So clearly there was a Deputy Attorney General, I
25 believe Diane Erickson at the time made the review

1 and determined that your rules were legal, and your
2 rules allow for remand.

3 COMMISSIONER ACZON: Thank you for that
4 clarification.

5 CHAIRPERSON SCHEUER: Commissioners? If
6 not, I have a couple.

7 I guess first perhaps, Mr. Yee, it's more
8 of a comment as to the first part of your statement.
9 I think I agree with you more that we're -- the Land
10 Use Commission shouldn't try to get into the business
11 of choosing a site. But I think it's imminently
12 within our power to suggest whether or not a permit
13 is properly issued.

14 MR. YEE: And in 2009, the Land Use
15 Commission did agree to issue or approve the SUP
16 permit provided that a deadline was issued. At no
17 time did someone suggest that the criteria was not
18 met, so the various criteria that are being brought
19 now was not at issue on appeal for questions by the
20 LUC at this time. So when it was remanded back and
21 it came back up to you, perhaps it's not been that
22 full discussion of the guidelines -- I keep saying
23 criteria because that's what other people were using
24 -- of the guidelines that are established under your
25 rules. But that's in part I think because that's

1 been reviewed, and the only remaining issue is we
2 narrowed the scope was the issue of the deadline.

3 CHAIRPERSON SCHEUER: But since 2009, there
4 was 2010, correct?

5 MR. YEE: Yeah.

6 CHAIRPERSON SCHEUER: Including the flood
7 which -- evidence of which is in the record before
8 us?

9 MR. YEE: Yes.

10 CHAIRPERSON SCHEUER: Which could leave one
11 to the understanding that whatever representation may
12 have been made about there not being an impact
13 inconsistent with the guidelines, that there clearly
14 are impacts that are inconsistent with the
15 guidelines?

16 MR. YEE: Understanding that we said these
17 are guidelines and not mandatory requirements, yes,
18 you certainly may consider the additional evidence in
19 2010 with respect to that, but then would you need to
20 make the determination that the single incident in
21 2010 requires a determination that this is an
22 inappropriate site.

23 That's just a necessary conclusion you have
24 to reach, then have that defended in court.

25 CHAIRPERSON SCHEUER: My second thing is,

1 you suggested to us what we might do on remand to
2 address, if we felt that the most appropriate venue
3 was actually a DBA rather than a Special Use Permit,
4 but to be honest I could not understand what you were
5 suggesting we do.

6 MR. YEE: Okay. So if you think that it's
7 better to do it pursuant to a DBA, then the
8 suggestion is you allow the Special Use Permit as --
9 for the period of time it would take to do a DBA.
10 You don't know what that period of time is now, so
11 remand it back to the Planning Commission to
12 introduce evidence of that time period.

13 CHAIRPERSON SCHEUER: That's clear. I have
14 nothing further.

15 Commissioners?

16 COMMISSIONER CHANG: I just have one final
17 question.

18 CHAIRPERSON SCHEUER: Commissioner Chang.

19 COMMISSIONER CHANG: I promise.

20 So, Mr. Yee, Office of Planning's position
21 is the Land Use Commission has four options, we can
22 deny, we can grant, we can approve with conditions or
23 we can remand.

24 MR. YEE: Correct.

25 COMMISSIONER CHANG: All right. Okay.

1 CHAIRPERSON SCHEUER: There was a desire
2 expressed to go into executive session earlier before
3 we decided to allow Mr. Yee to conclude.

4 Let me just say that procedurally what we
5 might do is if the Commission wants to go to
6 executive session and chooses to do so, for
7 efficiency of these proceedings, we would do so
8 during our lunch period. And then we would come
9 back, we would allow any final questions of any of
10 the parties by the Commission and then we would open
11 to deliberations.

12 COMMISSIONER OHIGASHI: Mr. Chair?

13 CHAIRPERSON SCHEUER: Commissioner
14 Ohigashi.

15 COMMISSIONER OHIGASHI: I move to go into
16 an executive session to consult with the board's
17 attorney on questions and issues pertaining to the
18 board's powers, duties, privileges and immunities,
19 liabilities and specifically on one of the issues
20 that I would like to explore is about the consistency
21 between the Findings of Fact and Conclusions of Law
22 and the necessity of that issue and also the question
23 of remand with our attorney.

24 CHAIRPERSON SCHEUER: Thank you.

25 There's a motion from Commissioner

1 Ohigashi.

2 VICE CHAIR CABRAL: I'll second that.

3 CHAIRPERSON SCHEUER: It's been seconded by
4 Commissioner Cabral. Is there a discussion on the
5 motion? If not all in favor say "aye". Anybody
6 opposed? The motion carries. It is 12:24, let us
7 plan to reconvene at 1:00 o'clock.

8 (Noon recess taken.)

9 CHAIRPERSON SCHEUER: I apologize for the
10 delay. Thank you for your patience. Okay. We are
11 back on the record.

12 Commissioners, we have the opportunity to
13 ask -- well, I guess two things.

14 One is Commissioner Ohigashi asked the
15 parties to do any further research on one certain
16 narrow issue. Do any of the parties have something
17 to report on that?

18 MR. CHIPCHASE: We do, Chair.

19 CHAIRPERSON SCHEUER: You do.
20 County?

21 MS. CHAN: We would need a little bit more
22 time.

23 CHAIRPERSON SCHEUER: So, no, okay.

24 MR. SANDISON: Schnitzer needs a little
25 more time.

1 CHAIRPERSON SCHEUER: Okay.

2 MR. YEE: OP has nothing.

3 CHAIRPERSON SCHEUER: Okay. So please go
4 ahead.

5 MR. CHIPCHASE: So we'll put it up on the
6 screen so that everybody has an opportunity to --

7 CHAIRPERSON SCHEUER: Okay. After this we
8 will then proceed to have the Commissioners ask any
9 final questions of the parties before we move into
10 deliberation.

11 MR. CHIPCHASE: So, Chair, what we put up
12 on the screen is from the application statement by
13 the then director -- Acting Director Tim Steinberger
14 representing that the capacity was estimated at
15 15 years from 2011. That would take it to 2026,
16 which dovetails pretty closely with our closure
17 conditions at this time.

18 Beyond that I'm not aware of anything else
19 in the record.

20 CHAIRPERSON SCHEUER: Any questions on this
21 particular point?

22 Commissioner Ohigashi.

23 COMMISSIONER OHIGASHI: I just want to
24 thank Mr. Goodin.

25 MR. GOODIN: You're welcome.

1 CHAIRPERSON SCHEUER: You now get your
2 screen actor's guild card.

3 Okay. So I guess the screen can come down.

4 And, Commissioners, we have the opportunity
5 to ask any final questions of the parties before
6 moving onto deliberations.

7 Commissioner Wong.

8 COMMISSIONER WONG: Okay. I'm going to ask
9 every one this -- every member -- everyone on this
10 panel this. City, do you believe that the record is
11 complete?

12 MS. CHAN: Yes, we believe that the record
13 is complete and that it supports the decision as
14 issued by the Planning Commission.

15 COMMISSIONER WONG: Schnitzer, do you?

16 MR. SANDISON: Schnitzer believes the
17 record is complete as far as the Planning
18 Commission's Findings of Fact, Conclusions of Law,
19 Decision and Order is concerned.

20 To the extent that it is further modified
21 with a specific closure date, we do not believe there
22 is sufficient evidence in the record to allow the
23 Land Use Commission to impose a specific closure
24 date.

25 COMMISSIONER WONG: KOCA?

1 MR. CHIPCHASE: Commissioner, we do believe
2 that the record is complete, but it does not support
3 the findings issued by the Planning Commission and
4 that it would support either closure or the Findings
5 of Fact, Conclusions of Law and Decision and Order
6 with conditions that we have proposed.

7 And we further believe that this Commission
8 has ample authority under the rules and statute to
9 modify any findings, to modify any conclusions, to
10 come up with its own findings and conclusions, and
11 anything less would effectively make it a rubber
12 stamp which this Commission is absolutely not.

13 COMMISSIONER WONG: Colleen Hanabusa?

14 MR. WURDEMAN: I believe that the record is
15 complete. And in my reading of the statute, it
16 really is determined by the Planning Commission when
17 they send it up to the Land Use Commission. And if
18 the legislature wanted to say, unless otherwise
19 determined by the Land Use Commission, it would have
20 put that in the statute, but it didn't. So that's my
21 answer.

22 COMMISSIONER WONG: OP?

23 MR. YEE: For purposes of ENV, I think it's
24 complete, but not for purposes of the Land Use
25 Commission. Apparently from the questions that you

1 asked that you require additional information that is
2 not on the record, so for those -- from that
3 perspective, no, it is not.

4 COMMISSIONER WONG: Thank you.

5 Thank you, Chair.

6 CHAIRPERSON SCHEUER: Thank you,
7 Commissioner Wong.

8 Commissioner Cabral.

9 VICE CHAIR CABRAL: Yes, for County. Do
10 you have any reason to believe or feel that the
11 intention of your department is to continue this into
12 legal activities or challenges or what have you for
13 an additional 20 years until the capacity is filled?

14 MS. CHAN: I didn't catch the middle part
15 of your question.

16 VICE CHAIR CABRAL: Okay. Do you have any
17 reason to believe that your agency is -- got an
18 intention to continue this into appeal or legal
19 proceedings to meet or approach the date of capacity
20 of this landfill?

21 MS. CHAN: That is not something that we
22 have discussed at this point.

23 VICE CHAIR CABRAL: Okay. Thank you.

24 CHAIRPERSON SCHEUER: Further questions,
25 Commissioners? Going once, going twice.

1 Okay. If there's no further questions, the
2 Commission will now conduct formal deliberations on
3 this matter. And I will note for the parties and for
4 the public that during the Commission's
5 deliberations, I will not entertain any additional
6 input from the parties or the public unless those
7 individuals or parties are specifically requested to
8 do so by me.

9 If called upon, I will ask that the
10 question -- any comments be limited to the questions
11 at hand.

12 Let me next, Commissioners, confirm that
13 each of you have reviewed the record and read the
14 transcripts for any meetings you may have missed and
15 are prepared to deliberate on the subject docket.

16 After I call your name, would you please
17 signify with either an "aye" or a "nay" that you are
18 prepared to deliberate on this matter.

19 CHAIRPERSON SCHEUER: Commissioner Aczon?

20 COMMISSIONER ACZON: Aye.

21 CHAIRPERSON SCHEUER: Commissioner Chang?

22 COMMISSIONER CHANG: Aye.

23 CHAIRPERSON SCHEUER: Commissioner Cabral?

24 VICE CHAIR CABRAL: Yes.

25 CHAIRPERSON SCHEUER: Commissioner

1 Giovanni?

2 COMMISSIONER GIOVANNI: Aye.

3 CHAIRPERSON SCHEUER: Commissioner
4 Ohigashi?

5 COMMISSIONER OHIGASHI: Aye.

6 CHAIRPERSON SCHEUER: Commissioner Okuda?

7 COMMISSIONER OKUDA: Yes.

8 CHAIRPERSON SCHEUER: Commissioner Wong.

9 COMMISSIONER WONG: Aye.

10 CHAIRPERSON SCHEUER: And I as the Chair am
11 also prepared to deliberate on this matter.

12 Commissioners, what is your pleasure?

13 Commissioner Okuda.

14 COMMISSIONER OKUDA: Mr. Chair, I
15 respectively make a motion that the Application for
16 Special Permit be denied.

17 CHAIRPERSON SCHEUER: A motion for Denial
18 has been made by Commissioner Okuda. Is there a
19 second?

20 COMMISSIONER OHIGASHI: I second.

21 CHAIRPERSON SCHEUER: It has been seconded
22 by Commissioner Ohigashi. Discussion?

23 I'll offer the opportunity for the movant
24 to speak to the motion.

25 COMMISSIONER OKUDA: Thank you, Mr. Chair.

1 And I thank everyone for their testimony,
2 time and concern that's been placed here. Especially
3 thank Mr. Sandison for his very reasonable and cogent
4 argument that he's made. I'd like to assure you that
5 I took to heart what you are representing, arguing.
6 It caused me a lot of internal deliberation over this
7 time. You might have noticed that I kind of kept my
8 mouth shut after listening to you on a lot of things
9 just because I was trying to process what you had
10 said, and I want to assure you that I didn't take
11 what you were presenting lightly.

12 But the reason why I made this motion, and
13 I asked that my fellow Commissioners to consider it
14 is I believe the record, which everyone has conceded
15 is complete for purposes of making a decision,
16 demonstrates clearly that the Applicant has failed to
17 meet its burden of proof, failed to meet its burden
18 to come forward with the evidence, and failed to meet
19 its burden of persuasion.

20 These are some of the examples from the
21 record that I believe shows that the burden wasn't
22 met.

23 First of all, the Applicant has failed to
24 meet the burden to demonstrate that the continued use
25 as it's requesting is within the parameters of HRS

1 section 205-6. And in making that statement, I'm
2 trying to adhere to the admonition of the Hawaii
3 supreme court as stated in the case Save Sunset Beach
4 Coalition versus City and County of Honolulu found at
5 102 Hawai'i Report 465 at page 482, the Pacific 3d
6 citation is 78 Pacific 3d page 1 at page 18, a 2003
7 case.

8 And if I can quote from the case which is
9 the admonition of our Hawaii supreme court, and I
10 quote.

11 "We observe that the 'reasonable and
12 unusual' exception permitted by HRS section 205-6
13 cannot be utilized to circumvent the essential
14 purpose of the Agricultural District.

15 In Curtis, spelled, C-U-R-T-I-S, 90 Hawaii
16 at 397, 978 Pacific 2nd at 835, this court held that
17 the, quote, essential purpose {of HRS section
18 205-6}... is to provide landowners relief in
19 exceptional situations where the use desired would
20 not change the essential character of the district
21 nor be inconsistent therewith". Close quote.

22 And there is a citation to Neighborhood
23 Board No. 24 (Waianae Coast) versus State Land Use
24 Commission 64 Hawai'i 265, 639 Pacific 2nd 1097, a
25 1982 case, which the parties have discussed and cited

1 in this proceeding.

2 In addition to items in the record, or more
3 specifically regarding items in the record, if we
4 look at the Findings of Fact of the Planning
5 Commission which has been submitted as part of the
6 record, these Findings of Fact on their face
7 demonstrate that the Applicant has not met its burden
8 of proof, burden of persuasion or burden of coming
9 forward with the evidence.

10 And as far as background and framework
11 while making that decision, I'm also guided by the
12 case which I asked counsel about earlier, the Iao,
13 I-A-O, Groundwater Management Area High Level Source
14 Water Use Permit Application case, which is found at
15 128 Hawai'i 228 at Page 283. The Pacific 3d citation
16 is 287 Pacific 3d 129 at 184, a 2012 case.

17 And in that case, the Hawaii supreme court
18 made clear that findings of administrative agencies
19 have to have three things:

20 No. 1, it has to be reasonably clear to
21 enable the parties and the reviewing court to
22 ascertain the basis of the agency's decision;

23 No. 2, sufficient to enable the reviewing
24 court to track the steps by which the agency reached
25 its decision;

1 And No. 3, expressly set out to assure
2 reasoned decision-making by the agency took place.

3 And regarding that it's clear, in my view,
4 taking into account, you know, the instructions that
5 Justice Acoba, Simeon Acoba gave in the Unite Here
6 Local 5 versus City and County of Honolulu case,
7 which, you know, I also questioned counsel about.
8 That evidence cannot be stale or used to support a
9 party or applicant meeting its burden of proof,
10 burden of persuasion, burden of coming forth with the
11 evidence.

12 And when we look at some of the findings
13 here, and I, you know, I could go through a whole
14 list of them, but this is an example. The findings
15 reference evidence which is dated from 2012 or
16 earlier.

17 And the absence of -- well, that fact
18 demonstrates the burden was not met. And on top of
19 that, you know, I'm persuaded by the fact that
20 notwithstanding some of the comments or arguments
21 here, the Land Use Commission was pretty clear about
22 what the City was required to do as far as
23 considering or bringing forth evidence to meet its
24 burden as far as on the remand. Because, for
25 example, the remand order from the Land Use

1 Commission stated, for example, in paragraph three,
2 excuse me, quote, "clarify whether the record needs
3 to include updated information on the operation of
4 the WGSJ, the landfill site selection process and the
5 waste diversion efforts of the City and County of
6 Honolulu."

7 In other words, the Land Use Commission was
8 trying to give a road map on how and what information
9 would be necessary for the applicant to meet its
10 burden of proof. Because as all counsel seem to
11 concede in questioning here, if the applicant doesn't
12 meet its burden of proof, its burden of persuasion,
13 its burden of coming forward with the evidence,
14 frankly, it doesn't matter if the opponents have
15 presented a good case, a bad case or unpersuasive
16 case, because the burden always rests with the
17 applicant.

18 And, you know, as far as findings on its
19 face, which indicate that the burden has been met,
20 there are findings that talk about future events
21 which are anticipated to take place at a date which
22 date has already past.

23 I'll give an example. Findings of Fact 94,
24 which says, quote, "by 2012 when H-Power's third
25 boiler is expected to be operational, the City,

1 through its various solid waste management programs,
2 expects to divert eighty (80) percent of the waste
3 stream with the remaining 20 percent being landfilled
4 at WGS�."

5 The burden simply cannot be met by pointing
6 to things in the record such as this Finding of Fact
7 of an event which is anticipated to take place in the
8 future, but that future date has already past.

9 Now, what's concerning about this is the
10 evidence in the record about representations that
11 have been made to the community. And whether we term
12 this as the term judicial estoppel, promissory
13 estoppel, cite to the well-known estoppel case Ravelo
14 versus County of Hawaii, even though that was an
15 employment case, estoppel cases in the law basically
16 state a common sense statement or policy. Which is
17 if the word by the government agency is given to the
18 community, the government should stand behind its
19 representation and promises.

20 Now, we don't have to get into why people
21 criticize government today and don't have faith in
22 institutions, but that's what the Hawaii supreme
23 court has laid out. If we in government say
24 something, we should stand behind our word; or if
25 we're not going to stand behind our word, we need to

1 make clear on the record with admissible evidence why
2 there is a change of position.

3 And frankly, in this case, that's one of, I
4 believe, the concerns that I have in addition and
5 primarily my primary concern, again, is the fact that
6 the burden of proof wasn't met.

7 But especially where you have this type of
8 landfill which now seems to be foisted on the Leeward
9 Coast community, it's even more important that we
10 follow the requirements of the law, and follow the
11 standards that the law sets here.

12 Yeah, it's really tough that we're being
13 given this bad situation, but I think that's why we
14 look at the law to give us guidance and hopefully
15 giving us, you know, the wherewithal to do what the
16 law requires.

17 And so for those reasons, I ask my fellow
18 Commissioners to take the hard choice and deny this
19 application for a special permit.

20 CHAIRPERSON SCHEUER: Thank you, Commission
21 Okuda.

22 Commissioners?

23 Commissioner Aczon.

24 COMMISSIONER ACZON: I think the Waianae
25 community spent at least eight years trying to get

1 this done, and I don't want to spend another eight
2 years coming back here with different Commissioners
3 talking about the same thing. What could happen,
4 what would happen. What happened the last time,
5 promises, all those legal things that -- I'm not a
6 lawyer, but I can understand all of those
7 ramifications.

8 Again, I don't want to come back here in
9 the audience because I'm not going to be here talking
10 about the same thing.

11 My primarily concern really, what I heard
12 from the counsels, ENV, even KOCA, Intervenor KOCA
13 and also Office of Planning, there is a grave
14 consequences on denying this. Are we ready to find
15 out what it is? Do we have to gamble the public, the
16 health and safety of the public just to find out that
17 we were right or wrong?

18 So having said that, I'm planning to oppose
19 the motion.

20 CHAIRPERSON SCHEUER: Commissioner Chang?

21 COMMISSIONER CHANG: Thank you.

22 Undoubtedly this is a very difficult matter. I am,
23 like Commissioner Okuda, I'm more offended that we
24 are placed in this position. However, for the last
25 two days, my inclination is not to support the

1 motion. But rather my inclination is I think we need
2 more information and -- because I do not believe the
3 record is complete. I believe that there are -- we
4 don't know the basis upon which capacity is. We
5 don't know the basis upon which the City has made a
6 decision or is telling us that we -- at the end of
7 this, there's a definite lifetime and property can be
8 restored. There is no assurance on this.

9 So while I am -- while I do not believe
10 this is the right platform for the community to have
11 to come and raise their continued concerns about the
12 place, but the City not doing, taking timely actions
13 and keeping to their promises. This unfortunately is
14 the only platform because the Planning Commission has
15 chosen not to have a hearing on this matter.

16 My inclination is to have this remanded and
17 reopen the evidentiary hearing and give the parties
18 an opportunity to develop a more full record before
19 it comes up to us. And for the Planning Commission
20 to truly hear, to have the -- to hear the same things
21 that we are hearing.

22 But I am -- as difficult as this is, my
23 feeling as the planning -- as the Land Use
24 Commission, it's not our role to decide the location.
25 Where are these decisions? They should be at the

1 county -- at the City level. They should have full
2 opportunity for participation by the community.
3 There should be full-on environmental reviews, but I
4 do not feel that we have sufficient information
5 before us in the existing record to make a
6 determination on this permit.

7 And for those reasons, I am inclined not to
8 support the existing motion.

9 CHAIRPERSON SCHEUER: Thank you,
10 Commissioner Chang.

11 Commissioner Cabral?

12 VICE CHAIR CABRAL: I do appreciate my
13 fellow Commissioner Okuda for his always elegant
14 reference to the law. However, I have a problem
15 supporting the absolute denial because of what I
16 anticipate or find historically has happened with
17 this particular case that it just allows for a whole
18 lot more lawyers to push this can down the road. I'm
19 so inelegant.

20 I would rather have, and I'm not really
21 crazy about remanding it back because, again, I think
22 that's just going to take another ten or 20 years of
23 legal mumbo jumble. That's an official word now.
24 And I'm much more in favor of approving it with a
25 condition that would include its original requirement

1 that is identify another location, not that we
2 identify it, but it be identified by 2020, and I'm
3 looking at all of the numbers with what I have that
4 approval and condition to also require that it be
5 closed eight years later which for the record was how
6 long it was supposed to exist in the first place so
7 that it could be closed by 2030 for lack of any
8 better numbers, no later than 2030.

9 I would hate to just keep pushing this down
10 the road, and it be literally seven or eight years
11 later before it even gets heard again, and then it'd
12 be another potentially 20 years before it be
13 considered filled to capacity.

14 So for that -- those reasons, I would vote
15 against the current motion as it stands. Thank you.

16 CHAIRPERSON SCHEUER: Thank you,
17 Commissioner.

18 Commissioner Ohigashi.

19 COMMISSIONER OHIGASHI: I support the
20 motion, and the reason why I support it is that I
21 took an oath as a Land Use Commissioner to uphold the
22 laws in the State of Hawai'i, Constitutions of the
23 United States and the State of Hawai'i. And I think
24 that as a Land Use Commission we have duties
25 involved. We have to determine whether or not in

1 this case the Applicant met its burden of proof. And
2 I agree with Commissioner Okuda.

3 In addition to that, I fail to see why
4 remand would be -- would do anything any more than
5 what we have. The County, the Applicant, the
6 Intervenor, the two Intervenor all agree that the
7 record is complete. The State of Hawai'i, OP has
8 said that we don't think it's complete because the
9 Commissioners have doubts. And to alleviate those
10 doubts, we need to -- we don't think its complete;
11 therefore, we should remand.

12 I don't take that position. I take the
13 position that we live by the record, and we die by
14 the record. And if we are we just following the
15 record itself, denial is proper in this case.

16 CHAIRPERSON SCHEUER: Commissioner Wong.

17 COMMISSIONER WONG: Chair, I am stuck here.
18 I myself don't believe the record is complete for
19 our -- enough for the information that's provided in
20 front of us for this Special Use Permit. Because
21 they want to expand from 170-something acres to
22 200 -- yeah, to 200 something acres.

23 However, also the Leeward Coast people are
24 taking a hit, and they're not getting anything back
25 from it. I mean, that's wrong, too. And, you know,

1 they're being -- we're giving them the burden taking
2 on our stuff. When I say "us," I mean, you know, my
3 stuff and whoever else's stuff. I don't know what to
4 do because we denied it, then what's going to happen?

5 If we remand it back, and if the City don't
6 want to do anything, then what's going to happen? If
7 we approve it with any conditions, someone is going
8 to appeal. I'm just stuck right now to figure out
9 what to do. That's all I'm going to say.

10 CHAIRPERSON SCHEUER: Okay. I can speak to
11 the motion --

12 Oh, Commissioner Giovanni.

13 COMMISSIONER GIOVANNI: Do you want to go
14 first?

15 CHAIRPERSON SCHEUER: No. Please, I'm
16 sorry.

17 COMMISSIONER GIOVANNI: I find Commissioner
18 Okuda's motion and the support that he voiced for his
19 motion to be very persuasive and complete. I also
20 can see where the record as it stands supports the
21 motion.

22 My concern, however, is where would it go
23 next? It kind of -- I find myself aligned with
24 Commissioner Cabral in that regard. I'm very
25 sensitive to my feelings in which I'm disappointed

1 and disturbed by how the County has performed since
2 2012. In particular, basically ignoring the fact
3 that it didn't have a permit. It just continued to
4 operate without seeking immediate remedy to that
5 situation.

6 I also feel that, and I concur with my
7 fellow Commissioners that remand doesn't seem to be
8 an option as well. That's like going back to -- it's
9 like insanity going back in another six years just
10 like we went through. I have no confidence that we
11 see anything coming forth from the Planning
12 Commission that's anything different than what we
13 have before us today. We just lose six years.

14 For all those reasons, I'm not going to
15 support the motion, and I'm going to favor something
16 along the lines that Commissioner Cabral was
17 suggesting which is approval with specific
18 conditions.

19 CHAIRPERSON SCHEUER: I'm going to speak in
20 favor of the motion, but just a couple prefacing
21 remarks.

22 First, I am immensely proud to serve with
23 the particular Commissioners that I serve with. I
24 think that the kind of debates and discussions we
25 have are exactly what was intended in the framing of

1 the State Land Use law. And so even though I don't
2 always agree with all my fellow Commissioners on
3 things, I think that we do the kind of work that
4 we're supposed to be doing, and we do it well. I
5 feel that regardless of which way the vote goes.

6 I also just want to be clear for the record
7 for the rank and file people and to the degree the
8 way ENV carries out its work, I'm always amazed. I
9 put trash on the curb and it goes away, and I'm super
10 grateful. I call in dumped cars on the street I live
11 in and they are shredded and put away. I'm very
12 grateful to the people who do that work, too.

13 I speak in favor of the motion -- or this
14 is the last thing I'll say. It's a big picture. I
15 like to try and widen the lens a little bit when we
16 have these discussions, because as local and state
17 officials, we are often asked to make very difficult
18 decisions about issues that we have a very small
19 amount of control over.

20 Until the global economy is retooled to a
21 place that is not having so many disposable things
22 and so many unrecyclable things, until we have cars
23 that can be completely dismantled and recycled, we
24 are stuck at this local level with these very
25 unfortunate needs for landfills which we know on a

1 global scale is unstable. But here we are now, so
2 we're constrained.

3 So given those constraints how we make our
4 decisions, what I learned from three years on the
5 Oahu Island Burial Council and, for instance, people
6 would come to us and because they had an agenda
7 against the rail project, so they were trying to use
8 burials to fight the rail project.

9 And then there's some people who were
10 trying -- very pro rail, they were trying to use
11 issues around burials to fight for the rail project.
12 The clarity that we came to was like we had one very
13 small kuleana -- and that clarity led us through our
14 process.

15 Similarly, here we have -- yes, there's
16 obviously global concerns and local concerns about
17 where landfills are situated and other things, but
18 our duty is to fulfill the land use law.

19 And to me the land use law is actually very
20 clear. We have these four broad districts,
21 Conservation, Ag, Rural and Urban, which really go
22 from the least intensity of the use to the most
23 intensity of use.

24 And for the two least intensive uses the
25 Conservation District and Agricultural District, we

1 have these special provisions that occasionally we
2 are allowed, through various processes, to have not
3 inconsistent things done in those districts so long
4 as they're not so outside of the character of those
5 districts.

6 And for Special Use Permits, we have a set
7 of procedures and guidelines that we are to follow.

8 I think there is no reasonable way for us
9 to look at the guidelines which -- one of which is
10 that there's no harm to neighboring communities,
11 neighboring property from the use and to conclude
12 that this landfill fits the criteria of the Special
13 Use Permit.

14 It does, however, very well, very well
15 might fit the need for a District Boundary Amendment.

16 It is difficult to express the depth of my
17 disappointment that the leadership of the City and
18 County to fail to actually file a District Boundary
19 Amendment on this matter because it is the one
20 process that we have as state, as a community to say,
21 you know what, there are certain things that we need
22 to have happen, and they're going to be bad and
23 they're going to have impacts and they're going to
24 disproportionately affect certain people. But we
25 need them so we're going to do it, and we're going to

1 do them here in this way.

2 And we have due process in that and we have
3 an opportunity for people to intervene, and we can
4 put (indecipherable) -- on the Commission. But you'd
5 be deprived of that ability because of the
6 applicant's refusal to go through the DBA process.

7 I join in the entirety with the
8 Commissioners Okuda's remarks, with my additions to
9 them.

10 Are there any further discussion on this
11 motion?

12 If not, Mr. Orodener, please poll the
13 Commissioners.

14 EXECUTIVE OFFICER: Thank you, Mr. Chair.

15 The motion is for the application for the
16 special permit to be denied.

17 Commissioner Okuda?

18 COMMISSIONER OKUDA: Yes.

19 EXECUTIVE OFFICER: Commissioner Ohigashi?

20 COMMISSIONER OHIGASHI: Aye.

21 EXECUTIVE OFFICER: Commissioner Aczon?

22 COMMISSIONER ACZON: No.

23 EXECUTIVE OFFICER: Commissioner Giovanni?

24 COMMISSIONER GIOVANNI: No.

25 EXECUTIVE OFFICER: Commissioner Cabral?

1 VICE CHAIR CABRAL: No.

2 EXECUTIVE OFFICER: Commissioner Chang?

3 COMMISSIONER CHANG: No.

4 EXECUTIVE OFFICER: Commissioner Wong?

5 COMMISSIONER WONG: Aye.

6 EXECUTIVE OFFICER: Chair Scheuer?

7 CHAIRPERSON SCHEUER: Aye.

8 EXECUTIVE OFFICER: Thank you. Mr. Chair,
9 the vote is four to four, and the motion does not
10 carry.

11 COMMISSIONER OHIGASHI: Mr. Chair.

12 CHAIRPERSON SCHEUER: Commissioner
13 Ohigashi.

14 COMMISSIONER OHIGASHI: I'd like to make a
15 motion.

16 CHAIRPERSON SCHEUER: Please proceed.

17 COMMISSIONER OHIGASHI: I would move to
18 grant in part and deny in part the Special Use Permit
19 request.

20 I would move to deny that portion that
21 would increase the total amount of acreage to the
22 landfill to 200 acres. I would move to grant the
23 Special Use Permit over the remaining portion with
24 certain conditions.

25 And the conditions would be that there be a

1 time deadline set in accordance with the record to
2 terminate all activity at the landfill.

3 And I would ask that the parties prepare
4 Findings of Fact, Conclusions of Law for our
5 consideration to show --

6 COURT REPORTER: To show what?

7 COMMISSIONER OHIGASHI: To support this
8 motion, to support the -- the Commission -- to
9 support the order, the proposed order.

10 CHAIRPERSON SCHEUER: There is a motion by
11 Commissioner Ohigashi, is there a second?

12 COMMISSIONER GIOVANNI: I second.

13 CHAIRPERSON SCHEUER: It's been seconded by
14 Commissioner Giovanni.

15 Anyone want to speak to the motion further?

16 COMMISSIONER GIOVANNI: Just a
17 clarification, first.

18 CHAIRPERSON SCHEUER: Commissioner
19 Giovanni.

20 COMMISSIONER GIOVANNI: You're seeking part
21 of the parties to provide finding of fact specific to
22 the closure date or more than that?

23 COMMISSIONER OHIGASHI: Specific to the
24 closure date, as well as any other proposals that
25 they may have in regard. Specifically my motion for

1 the purposes of trying to -- I believe that there
2 isn't sufficient evidence to expand the area. I
3 think that the record does not include any evidence
4 nor was it referred to in any comments before this
5 Commission with regard to why the area needs to be
6 expanded, and that's the first thing.

7 And I think that we should limit it to what
8 was actually approved so far.

9 CHAIRPERSON SCHEUER: Okay. May I
10 interject here on a couple of procedural matters.

11 Commissioner Giovanni, I realize you
12 seconded the motion but then you asked for
13 clarification on the motion. So I think it would
14 actually be appropriate to not be seconding the
15 motion until the motion is fully clarified.

16 COMMISSIONER GIOVANNI: Agreed. Sorry
17 about that.

18 CHAIRPERSON SCHEUER: Okay. No problem.
19 So may we consider that the second has not been made
20 yet.

21 COMMISSIONER GIOVANNI: You may.

22 CHAIRPERSON SCHEUER: So it's been
23 withdrawn.

24 Secondly, not speaking for or against the
25 motion but on the procedure of the motion. Because

1 after a motion is made, we need to deliberate on the
2 motion at hand, and setting an uncertain date for
3 closure might require us to have deliberation past a
4 vote being made. I think that there needs to
5 actually be a date in the motion itself.

6 COMMISSIONER OHIGASHI: If I may amend my
7 motion and start all over again.

8 I move that we accept the date proposed by
9 Intervenor KOCA and that we use those dates as a
10 basis for closure of the --

11 COMMISSIONER GIOVANNI: Clarification. I
12 think that's condition 3.c that was proposed by KOCA.

13 CHAIRPERSON SCHEUER: And Commissioner
14 Ohigashi, your general motion is still to deny in
15 part and approve in part?

16 COMMISSIONER OHIGASHI: Yes.

17 CHAIRPERSON SCHEUER: Okay. I'm just
18 trying to understand the motion that you're making in
19 front of us. Can you restate it, please? I'm
20 hesitant --

21 COMMISSIONER OHIGASHI: I would deny -- my
22 motion is to deny the County's Special Use Permit
23 request to expand the Waimanalo landfill from 107 --
24 I believe it's 107 acres to 200 acres and remain at
25 107 acres and that we implement the timeline closure

1 proceedings proposed by KOCA.

2 CHAIRPERSON SCHEUER: There is the motion.

3 COMMISSIONER GIOVANNI: I second.

4 CHAIRPERSON SCHEUER: It's now been
5 seconded by Commissioner Giovanni.

6 Do you wish to speak to the motion?

7 COMMISSIONER OHIGASHI: Just a short. I
8 don't believe that there's any evidence in the record
9 that establishes why the total amount of landfill or
10 land -- or the total amount should -- I don't believe
11 that there is any reason to believe that any basis to
12 expand it to 200 acres. There's nothing in the
13 record that has been proposed to us or shown to us
14 about that.

15 The second part is, I don't believe that
16 any other clarifications is necessary on the
17 Conclusions of Law. I believe that the meat of this
18 problem is to try to determine how long the land
19 use -- how long should the landfill be in operation.
20 And I believe that Intervenor has indicated, has
21 established specific portions of the record that
22 support.

23 Specifically, I was concerned that what was
24 the understanding in 2012 as to how long this
25 landfill can operate. And according to the evidence

1 that we've seen, it doesn't appear to be and is
2 uncontroverted by the record in 2011. It said that
3 we would -- the lifetime of this landfill is to 2026.

4 The proposal that KOCA has made falls
5 within the facts or the record of this case, and is
6 supported by the record in this case.

7 As to the other conditions, I believe, I
8 have not pressed on for them because those other
9 conditions appear to be available to other agencies
10 to handle. And I'm not sure whether or not it's
11 necessary, given the eventual closure, that any of
12 the other conditions are necessary.

13 CHAIRPERSON SCHEUER: Thank you,
14 Commissioner Ohigashi.

15 Any discussion, further discussion on this
16 motion?

17 Commissioner Chang.

18 COMMISSIONER CHANG: Thank you.

19 And thank you, Commissioner Ohigashi.

20 I am inclined to oppose the motion. I am
21 resisting the temptation. I truly understand and
22 appreciate, and I hope the City appreciates how
23 difficult this is for the Land Use Commission. You
24 put us in a very, very bad position.

25 I mean, we're trying everything we can, but

1 my opposition I think we just don't have enough in
2 the record to support granting in part and denying in
3 part. I don't like it, but I -- and I guess for
4 those reasons I think a remand to have a more
5 complete record on those areas that specifically the
6 Land Use Commission feels -- at least I feel that the
7 record is inadequate.

8 I want to give the City the benefit of the
9 doubt that they have the opportunity to provide us
10 evidence, reports, expertise on the capacity, and I
11 think that was the testimony by the City during the
12 proceedings that there is a way it may change, but
13 there is a way to actually determine capacity based
14 upon a time certain.

15 I don't think that that's part of the
16 record at this point in time. That would be one of
17 the things I'd like to know.

18 Again, I also feel like if the City's not
19 going to file a boundary amendment and they believe
20 that this property can revert back to agricultural --
21 for agricultural uses, I'd like to see something in
22 the record to support that. I don't see that right
23 now.

24 So for those kinds of reasons, I am going
25 to -- I am inclined not to support the motion.

CHAIRPERSON SCHEUER: Thank you,
Commissioner Chang.

Is there further deliberation on this motion?

Commissioner Giovanni.

COMMISSIONER GIOVANNI: I support this motion because it brings more certainty in my mind to the path forward. It still leaves the door open, if I understand correctly, for the City and County to pursue a District Boundary Amendment at their option.

In the meantime, it gives the certainty to a path forward, and it makes clearer the voice of the Commission in that matter. We're taking a position that could be understood by the community, and I think it's the right one to take. And, therefore, I support it.

CHAIRPERSON SCHEUER: Commissioner Cabral.

VICE CHAIR CABRAL: I agree with both Commissioners Ohigashi and Giovanni that we're given some clarity because clearly -- apparently, we have not been clear enough in the past, so hopefully this will help provide some clarity and hopefully the County will understand that they need to start taking some action to find a new landfill location.

And also although I'm certain that they

1 understand that they've got all kinds of ways to
2 continue this as well as making changes to their
3 actual zoning, and that's the route they choose to
4 take while they attempt to fulfill our requirements.
5 Thank you.

6 CHAIRPERSON SCHEUER: Thank you,
7 Commissioner Cabral.

8 Is there further discussion on this motion?
9 Commissioner Okuda.

10 COMMISSIONER OKUDA: Without taking back my
11 arguments, and I would prefer that this application
12 for a special permit be denied for the reasons that I
13 set forth, I'm persuaded by what has been discussed
14 here to support this motion, but I'd like to preface
15 by saying again I think there is something from a
16 public policy standpoint that is fundamentally wrong
17 where certain types of negative public facilities
18 like a landfill seem to end up on the Waianae or
19 Leeward coast and not in other neighborhoods.

20 I understand that in the statute the words
21 "environmental justice" or "economic justice" or what
22 have you do not appear on its face. But at the same
23 time, there's nothing in the law that prohibits us as
24 a decision-making body who's taken an oath to uphold
25 the constitution of the State of Hawai'i, to take

1 that factor into account.

2 So notwithstanding the fact that I think
3 there is something fundamentally unfair that certain
4 neighborhoods in this community seem to bear a
5 disproportionate burden, and seem to bear the burden
6 of disproportionate changes in governmental
7 positions, I do agree with my fellow Commissioners
8 that this is not only a lawful way of proceeding
9 forward, that the record that has been pointed out
10 supports a finding of this specific closing date.

11 There's no need for us to fill in all those
12 other little details because I believe the closing
13 date will determine, you know, all the other
14 predicated dates.

15 I understand Commissioners Chang's concern
16 about the record. All I'd like to say is that all
17 the counsel here generally seem to agree that there's
18 a sufficient record, or the record is complete enough
19 to make certain types of decisions like this
20 decision.

21 And given what happened on the last remand
22 where I believe the order of remand was very clear
23 what was expected, and the record is clear of what we
24 got in response, remanding this is not going to
25 address the serious concern that this landfill has

1 been operated without a valid permit just frankly
2 illegally, and that something that I don't believe
3 any governmental body or commission should be trying
4 to sanction or justify in any way. Illegal is
5 illegal; in my view illegal is wrong.

6 CHAIRPERSON SCHEUER: Thank you.
7 Commissioner Okuda.

8 Is there further discussion on the motion?

9 All right. The Chair is disinclined to
10 vote for the motion. I believe that the law and
11 rules provide us four options to deny, approve,
12 approve with modifications or remand. I don't think
13 that we have the option to do a hybrid.

14 And for that reason, I believe that this
15 would actually cause further uncertainty because it
16 will be appealed, and the appeal will be successful
17 on procedural grounds leading us no further ahead.

18 Commissioner Giovanni.

19 COMMISSIONER GIOVANNI: Could you clarify
20 what you mean by "hybrid"?

21 CHAIRPERSON SCHEUER: The motion is, as I
22 understand about four options, a hybrid of approving
23 with modifications and denial, and I don't think that
24 the law envisions us to have that ability.

25 COMMISSIONER GIOVANNI: So in other words,

1 if it was -- if it did not include the part, approve
2 the part with modification, that's the hybrid
3 complement to it?

4 CHAIRPERSON SCHEUER: Yes. Well, at the
5 very least, the motion was phrased as to deny in part
6 and approve in part. I am not sure whether if a
7 motion was made to approve with modifications, and
8 one of the modifications would be to not approve the
9 area expansion.

10 I'd have to think about whether that was in
11 my opinion complying with the law, and then I would
12 also have to think about whether I would vote for
13 such a motion.

14 But I do at a minimum believe that the way
15 the motion was phrased may exceed our powers.

16 Commissioner Ohigashi.

17 COMMISSIONER OHIGASHI: Mr. Chair, are you
18 ruling the motion out of order?

19 CHAIRPERSON SCHEUER: You have asked a very
20 provocative question. And we'll have a brief recess
21 to consult with the board's counsel.

22 (Recess taken.)

23 CHAIRPERSON SCHEUER: I was asked by
24 Commissioner Ohigashi whether I was going to rule the
25 motion out of order. I'm declining to do so, because

1 while it is my belief that the motion exceeds our
2 powers, I'm not prepared to and not qualified to make
3 a legal determination as to that.

4 I will also add to my reasons for speaking
5 about the motion that I believe that the record
6 before us dating from 2012 is ambiguous as to whether
7 or not the expansion area is already in use, is
8 necessary and integral to the ongoing operations of
9 the Waimanalo Gulch Sanitary Landfill and, therefore,
10 could our motion actually be implementable. So
11 that's why I will be voting against the motion.

12 Any continued deliberations on the motion
13 before us?

14 Commissioner Okuda.

15 COMMISSIONER OKUDA: Chair, if I can ask a
16 question of you. Would you still have that
17 opposition or objection if the motion was just
18 limited and just included a closing date as stated by
19 Commissioner Ohigashi and didn't include the other
20 part with respect to a prohibition against expansion?

21 CHAIRPERSON SCHEUER: Essentially if there
22 was a motion simply to approve with a modified
23 closing date?

24 COMMISSIONER OKUDA: Yes.

25 CHAIRPERSON SCHEUER: It is my personal

1 belief that the record is incomplete as to our
2 ability to make that determination, but it is
3 complete as to our ability to deny. So my personal
4 inclination would be to vote against such a motion.

5 But the motion before us right now is the
6 motion to deny in part and approve in part. As long
7 as we're at it, I also have no inclination to vote
8 for a deferral because -- or not a deferral, a
9 remand, because I have absolutely no faith that the
10 Planning Commission would take any of our
11 instructions.

12 Any further deliberation on the motion?

13 Commissioner Okuda.

14 COMMISSIONER OKUDA: Chair, I don't know
15 whether this is a proper motion to make at this point
16 in time or whether it's procedurally proper, but I'd
17 like to make a motion to amend the motion to delete
18 the restriction on expansion of the landfill but
19 maintaining the closing date as Commissioner Ohigashi
20 has stated in his motion.

21 COMMISSIONER OHIGASHI: I'll second that.

22 CHAIRPERSON SCHEUER: You would not second
23 it, but you would accept the friendly amendment.

24 COMMISSIONER OHIGASHI: I would second it.
25 However, if it is a request to make a friendly

1 amendment, I accept the friendly amendment.

2 COMMISSIONER OKUDA: If I may answer, Mr.
3 Chair?

4 CHAIRPERSON SCHEUER: Yes.

5 COMMISSIONER OKUDA: It's a request as a
6 friendly amendment as you put it.

7 CHAIRPERSON SCHEUER: Okay. And does the
8 seconder also agree to the friendly amendment?

9 COMMISSIONER GIOVANNI: Yes.

10 CHAIRPERSON SCHEUER: Okay. So the motion
11 before us is to approve the Special Use Permit with
12 the addition of a closure date of -- can you please
13 help me fill in, Commissioner Ohigashi?

14 COMMISSIONER OHIGASHI: I believe it was an
15 eventual closure date of 2017.

16 COMMISSIONER GIOVANNI: '27.

17 COMMISSIONER OHIGASHI: 2027 effective.
18 2027 with additional stipulations contained in KOCA's
19 proposal.

20 CHAIRPERSON SCHEUER: And if I may ask just
21 for clarity purposes, there was a reference to KOCA's
22 proposed Condition 3 -- 3.c which was actually
23 appeared closure date?

24 COMMISSIONER OHIGASHI: That's correct.

25 CHAIRPERSON SCHEUER: So if the motion is

1 for approval of the Special Use Permit with the
2 addition of KOCA's 3.c.

3 Commissioner Okuda.

4 COMMISSIONER OKUDA: Okay. I'm sorry, Mr.
5 Chair, maybe I misstated my friendly amendment. My
6 friendly amendment was intended just to have the
7 specific closing date without all these other tiers,
8 without the tiers.

9 COMMISSIONER GIOVANNI: 3.c is without the
10 tiers.

11 COMMISSIONER OKUDA: Okay. I'm sorry,
12 okay. Okay. Commissioner Giovanni has clarified for
13 me that 3.c is without the tiers. Okay.

14 CHAIRPERSON SCHEUER: So 3.c, can somebody
15 for the clarity of our discussion, please read 3.c to
16 us, so it's clear what the motion is?

17 COMMISSIONER GIOVANNI: I can do it.

18 CHAIRPERSON SCHEUER: Please, Commissioner
19 Giovanni.

20 COMMISSIONER GIOVANNI: The landfill shall
21 stop accepting any form of waste enclosed on or
22 before March 2nd, 2027.

23 CHAIRPERSON SCHEUER: Movant, that's also
24 your understanding, Commissioner Okuda?

25 COMMISSIONER OKUDA: I understand, and that

1 answered my question.

2 CHAIRPERSON SCHEUER: Okay. That's the
3 motion before us.

4 Move --

5 Commissioner Aczon.

6 COMMISSIONER ACZON: Kind of reluctantly
7 will support the motion, but I would like to make
8 another motion amendment to the motion, and move that
9 in addition of taking on the Office of Planning's
10 recommendation No. 2, I don't -- I just want to make
11 sure that the City, after this hearing, kind of
12 starts moving their things together and move forward
13 on trying to select a site.

14 So I don't know if it is No. 2, no less
15 than seven years before estimated to reach capacity.
16 I'm more on the potential pursuit of an appropriate
17 site acquisition, the preparation of an Environmental
18 Impact Statement, land use permitting as might be
19 required, and initiate the detailed engineering
20 studies needed to support the design find and
21 construction of the replacement landfill in
22 preparation for the transfer of landfill operations
23 when Waimanalo field reaches capacity.

24 That's one of my amendment.

25 And the other one, I want to insert the

1 public health and safety conditions. If the landfill
2 releases waste or leachate, the ENV must immediately
3 notify the surrounding community including
4 Makakilo/Kapolei/Honokai Hale, Waianae Coast and
5 Nanakuli-Maili Neighborhood Boards, Intervenor
6 Schnitzer Steel Hawai'i Corporation, Ko Olina
7 Community Association, Maile Shimabukura, Colleen
8 Hanabusa and take remedial actions to clean up the
9 waste and to keep the waste from spreading. Such
10 remedial actions shall include, but not limited to,
11 placing debris barriers and booms at the landfill's
12 shoreline outfall to prevent waste from spreading
13 into the ocean.

14 I just want to make sure there's a public
15 health and safety conditions on this.

16 CHAIRPERSON SCHEUER: Thank you,
17 Commissioner Aczon. Just to be clear. I want to be
18 clear.

19 So we are referring to the October 8, 2019
20 letter received by the Land Use Commission on
21 October 9th from the counsel for the Office of
22 Planning referred to the stipulated conditions, and
23 you're proposing as a friendly amendment the
24 inclusion of Condition 2 as well as you have read
25 condition -- what is numbered in this letter as

1 Condition 4, which may already actually be a part of
2 the -- I think 4 is already included, so the new
3 language is only 2, 4 is already a part of the KOCA.

4 COMMISSIONER ACZON: KOCA is only 3.c,
5 right? There is no really public health and safety
6 conditions.

7 CHAIRPERSON SCHEUER: Okay. For the very
8 narrow purpose of clarifying this, I'm going to ask
9 Mr. Yee: Condition 4 in that letter comes from
10 where?

11 MR. YEE: It comes from the existing
12 Planning Commission decision.

13 CHAIRPERSON SCHEUER: Okay. So it is in
14 the decision, if we were amending the decision, it
15 would -- along the lines of what Commissioner Aczon
16 is seeking, you would include 2, but 4 is already in
17 there?

18 MR. YEE: Yes. It was simply renumbered.

19 CHAIRPERSON SCHEUER: Thank you.

20 COMMISSIONER GIOVANNI: So clarification
21 question. It appears that No. 2 is in conflict
22 because it's on the basis of capacity and not on the
23 basis of a firm date of closure, so I would ask if
24 Commissioner Aczon would be agreeable to seven years
25 before the date that's closed, so it would be

1 March 2nd, 2020 as opposed to reference to a
2 capacity?

3 COMMISSIONER ACZON: That's fine.

4 CHAIRPERSON SCHEUER: Okay. So your
5 friendly amendment, Commissioner Aczon, to the motion
6 before us, which is to approve with additional
7 conditions, including the date certain as read
8 before, and this Condition 2, as modified to be
9 reflective of the date certain.

10 COMMISSIONER ACZON: Yes.

11 CHAIRPERSON SCHEUER: That is your friendly
12 amendment.

13 Does the movant agree to that friendly
14 amendment?

15 COMMISSIONER OHIGASHI: I just got to read
16 it one more time.

17 CHAIRPERSON SCHEUER: That's fine.

18 Commissioner Okuda?

19 COMMISSIONER OKUDA: Chair, I would ask
20 that instead of just a friendly amendment, that this
21 be brought as a motion to amend the pending motion,
22 or I be allowed to just give some input on whether or
23 not this should be accepted as a friendly amendment
24 because I think there are potential issues here if
25 the underlying motion is amended.

1 CHAIRPERSON SCHEUER: Commissioner
2 Ohigashi.

3 COMMISSIONER OHIGASHI: I don't believe
4 that this language would -- should be applied. We
5 have been hearing time and time again that we should
6 not interfere with the process of selection of a new
7 site.

8 CHAIRPERSON SCHEUER: Okay. So let may put
9 this up to a vote, and then you can state your
10 reasons for voting against it.

11 Somebody needs to second the motion to the
12 amendment made by Commissioner Aczon.

13 VICE CHAIR CABRAL: If there's no second,
14 then it dies?

15 CHAIRPERSON SCHEUER: Correct.

16 So there's a motion made by Commissioner
17 Aczon to amend the main motion as stated before to
18 include language very similar to the stipulated
19 Condition 2. Is there a second to that?

20 Commissioner Chang?

21 COMMISSIONER CHANG: No.

22 CHAIRPERSON SCHEUER: Okay. The motion
23 dies for lack of a second, Commissioner Aczon.

24 So we are back to debating on the main
25 motion which is to approve the SUP as amended with

1 the inclusion of a date certain as previously stated.

2 COMMISSIONER OHIGASHI: Mr. Chair.

3 CHAIRPERSON SCHEUER: Commissioner
4 Ohigashi.

5 COMMISSIONER OHIGASHI: I'll try to be --
6 not to be inarticulate again, but the purpose of this
7 is to establish a date certain that we know we can --
8 when operations will stop. We are not here to pick a
9 new place, we are not here to encourage engineering
10 studies, we are not here to tell them, hey, this is
11 what you have to do.

12 We're here to respond to what is on the
13 record that all parties have agreed is complete. And
14 as I indicated, the record shows that the City and
15 County accept estimated 15 years from 2011 of the
16 life of this landfill.

17 Again, I'm reminding everybody that you
18 live by the record, and you die by the record. This
19 is the record that we have in front of us.

20 CHAIRPERSON SCHEUER: Thank you,
21 Commissioner Ohigashi.

22 We're in discussion on the motion for
23 further discussion.

24 Commissioner Wong.

25 COMMISSIONER WONG: Chair, I'm inclined to

1 void this motion, just because even though the KOCA
2 has stated a date in the evidence, the supreme court
3 to me stated that this is kind of an arbitrary date
4 that was kicked back once.

5 So just because of that, I'm going to vote
6 against this, not because I'm against the people of
7 the Leeward Coast, but just because I figure if it's
8 going on a fight and then appeal, it's going to be
9 kicked back to us again. So that's the reason.

10 CHAIRPERSON SCHEUER: Thank you,
11 Commissioner Wong.

12 Is there further discussion on this motion?
13 If not, Mr. Orodenker, please roll call
14 vote.

15 EXECUTIVE OFFICER: The motion is to
16 approve the special permit with the amendment to
17 include Condition 3.c as proposed by KOCA.

18 Commissioner Ohigashi?

19 COMMISSIONER OHIGASHI: Aye.

20 EXECUTIVE OFFICER: Commissioner Giovanni?

21 COMMISSIONER GIOVANNI: Aye.

22 EXECUTIVE OFFICER: Commissioner Cabral?

23 VICE CHAIR CABRAL: Yes.

24 EXECUTIVE OFFICER: Commissioner Okuda?

25 COMMISSIONER OKUDA: Yes.

1 EXECUTIVE OFFICER: Commissioner Chang?

2 COMMISSIONER CHANG: No.

3 EXECUTIVE OFFICER: Commissioner Aczon?

4 COMMISSIONER ACZON: No.

5 EXECUTIVE OFFICER: Commissioner Wong?

6 COMMISSIONER WONG: No.

7 EXECUTIVE OFFICER: Chair Scheuer?

8 CHAIRPERSON SCHEUER: Chair votes no.

9 EXECUTIVE OFFICER: Mr. Chair, the motion
10 is not carried forth.

11 CHAIRPERSON SCHEUER: So we are still in
12 deliberation. Does anybody else want to make a
13 motion?

14 VICE CHAIR CABRAL: I would like to have
15 clarification.

16 CHAIRPERSON SCHEUER: Commissioner Cabral.

17 VICE CHAIR CABRAL: Commissioner Wong
18 referenced an opinion by the supreme court about
19 setting of a date, and I'd like to have clarification
20 of his conclusion that we're not allowed to set a
21 date is correct or not.

22 Can somebody speak to that behalf?

23 CHAIRPERSON SCHEUER: Mr. Orodénker?

24 EXECUTIVE OFFICER: I actually don't
25 believe that that's what the supreme court decision

1 was. The supreme court decision was that there was
2 no evidence on the record to support the time frame
3 that the Land Use Commission had put forward.

4 If this Commission believes that there is
5 evidence on the record to support a time frame, it
6 may propose one.

7 CHAIRPERSON SCHEUER: Commissioner Wong.

8 COMMISSIONER WONG: Just wanted to say,
9 it's also my belief that the evidence doesn't -- not
10 enough evidence to show that it didn't happen for
11 that timeframe. Thank you.

12 CHAIRPERSON SCHEUER: Commissioners, so we
13 are in deliberation.

14 Commissioner Chang.

15 COMMISSIONER CHANG: Thank you, Chair.

16 I'd like to move that we remand this matter
17 back to the Planning Commission with very specific
18 instructions to reopen the evidentiary hearing to,
19 one, set a specific date to determine capacity.

20 And I recognize that that may be -- the
21 date may change. I am going to ask the parties to
22 help us draft the specific findings of facts on this
23 matter. I think Office of Planning did suggest that
24 we be much more specific. So clearly the Commission
25 is not happy with the position we're in.

1 CHAIRPERSON SCHEUER: Have you completed
2 making the motion?

3 COMMISSIONER CHANG: Yes. So my motion is
4 to remand for the Planning Commission to reopen the
5 evidentiary hearing to make a -- on specific
6 instructions, and I would -- I'm just going to
7 vaguely describe them as I'd like the parties to
8 propose specific findings and conclusions that are
9 consistent with the motion to remand.

10 So one of the areas is on a specific date
11 for the closure.

12 Two, it is if there are new technologies to
13 describe that.

14 Three, to determine how the City is meeting
15 its burden of proof on this SUP.

16 Four, to determine if the -- what is the
17 site restoration at the life of this SUP. In
18 addition, community benefits to mitigate the impacts,
19 the adverse impacts to this community. And any other
20 matters that may be appropriate for the evidentiary
21 hearing.

22 CHAIRPERSON SCHEUER: There is a motion by
23 Commissioner Chang. Is there a second?

24 COMMISSIONER WONG: Second.

25 CHAIRPERSON SCHEUER: The motion has been

1 seconded by Commissioner Wong to remand on specific
2 enumerated issues as stated by movant.

3 Is there discussion on this motion?

4 If you want to speak to the motion,
5 Commissioner Chang, please do.

6 COMMISSIONER CHANG: And I will try to be
7 very brief.

8 I think for purposes -- I think we're --
9 the Commission is struggling, but clearly in my view
10 the record is incomplete. And I think pursuant to
11 the rules and the statute, we only have four options:
12 grant, deny or modify or to remand.

13 And the remand is, in my view, because the
14 record is not complete. And so for those reasons,
15 that's why I made the motion.

16 CHAIRPERSON SCHEUER: Thank you,
17 Commissioner Chang.

18 Is there further discussion?

19 Commissioner Cabral.

20 VICE CHAIR CABRAL: I'm going to vote
21 against that, just because of -- I am a private
22 citizen, not a lawyer, and not a government employee
23 of any type or framework, and I think that somewhere
24 in the government somebody has to have the gumption
25 to make a decision. And kicking the situation down

1 for another ten years doesn't do anything.

2 I'm sure that all the appeals will happen
3 and everything else, but I think that the Land Use
4 Commission should be really clear and not just keep
5 passing the buck. So I'm going to vote against it
6 and I'm trying again with another motion to set a
7 deadline. Thank you very much.

8 CHAIRPERSON SCHEUER: Thank you,
9 Commissioner Cabral.

10 Commissioner Giovanni.

11 COMMISSIONER GIOVANNI: I'm going to echo
12 Commissioner Cabral. The motion on the floor now
13 does not seem to me to bring us one step closer to
14 closure. It also does not take a clear position of
15 why the Commission, what we think makes the most
16 sense. I think we need to be partially instructive
17 in this matter.

18 I do think that there's a fundamental
19 question before all of us, and that is do we close
20 this landfill, or do we encourage the landfill to
21 close by a date certain, or by when it reaches
22 capacity? That's the fundamental decision. And
23 those dates could be widely different.

24 With diversion activities and technology
25 available and expansion to 200 acres, I believe that

1 you don't have a date certain and use the capacity
2 model that it could provide continuous harm to the
3 people of Waianae Coast for many, many, many, many
4 years.

5 Therefore, I'm going to vote against this
6 motion. I'm going to try to refashion the motion
7 that just failed. That might find a way to find a
8 closure date or an option for a closure date that is
9 more copacetic with some of the Commissioners that
10 had trouble with that, but I'm going to vote against
11 this one.

12 CHAIRPERSON SCHEUER: Thank you,
13 Commissioner Giovanni.

14 Is there further discussion?

15 Commissioner Okuda.

16 COMMISSIONER OKUDA: Yeah, I would like to
17 incorporate by reference what Commissioner Giovanni
18 said. An additional reason not to vote in favor of
19 this is frankly I think the record demonstrates we
20 cannot believe, given past record and response to the
21 very clear instruction by the Land Use Commission,
22 that there's going to be any real compliance with a
23 remand order, no matter how clear that order is.

24 So for that reason, I'm going to vote
25 against the motion.

1 CHAIRPERSON SCHEUER: Is there further
2 discussion?

3 If not, Mr. Orodenker, please poll the
4 Commission.

5 EXECUTIVE OFFICER: Thank you, Mr. Chair.

6 The motion is to remand back to the
7 Planning Commission to reopen the evidentiary hearing
8 to get evidence on specific instructions.

9 Commissioner Chang?

10 COMMISSIONER CHANG: Yes.

11 EXECUTIVE OFFICER: Commissioner Wong?

12 COMMISSIONER WONG: Aye.

13 EXECUTIVE OFFICER: Commission Aczon?

14 COMMISSIONER ACZON: No.

15 EXECUTIVE OFFICER: Commissioner Ohigashi?

16 COMMISSIONER OHIGASHI: No.

17 EXECUTIVE OFFICER: Commissioner Okuda?

18 COMMISSIONER OKUDA: No.

19 EXECUTIVE OFFICER: Commissioner Cabral?

20 VICE CHAIR CABRAL: No.

21 EXECUTIVE OFFICER: Commissioner Giovanni?

22 COMMISSIONER GIOVANNI: No.

23 CHAIRPERSON SCHEUER: Chair Scheuer?

24 CHAIRPERSON SCHEUER: No.

25 EXECUTIVE OFFICER: Mr. Chair, the motion

1 does not carry by five votes to two.

2 CHAIRPERSON SCHEUER: Okay, Commissioners.
3 We are making progress. We are getting clarity on
4 what we do not like. Is that a motion, Dan? Oh,
5 wait, you can't make a motion.

6 Commissioner Aczon.

7 COMMISSIONER ACZON: I just have a
8 question. The reason why we can't consider the date,
9 that I just want to get some clarification.

10 CHAIRPERSON SCHEUER: So I think the proper
11 way to discuss this with my limited abilities is for
12 somebody to make a new motion on the date and then
13 debate that.

14 Commissioner Giovanni.

15 COMMISSIONER GIOVANNI: I'd like to make a
16 motion.

17 CHAIRPERSON SCHEUER: Please proceed.

18 COMMISSIONER GIOVANNI: That we grant the
19 permit with the condition of a time limit, and that
20 the time limit will be determined based on a review
21 by the Commission of Findings of Fact that are
22 offered by the parties within the --

23 COURT REPORTER: Within what?

24 COMMISSIONER GIOVANNI: I'm asking for
25 clarification on my own approach here.

1 CHAIRPERSON SCHEUER: Yes. So may I
2 suggest to the Commissioner that you at least, for
3 discussion purposes, propose a date certain for the
4 purpose of having a functional motion.

5 COMMISSIONER GIOVANNI: Okay. I propose a
6 date certain of March 2nd, 2027, but it would be
7 subject to revision based on receipt of proposed
8 Findings of Fact by the parties in this docket.

9 CHAIRPERSON SCHEUER: There is a motion
10 before us.

11 VICE CHAIR CABRAL: I will second it.

12 CHAIRPERSON SCHEUER: It has been seconded
13 by Commissioner Cabral. For at least discussion
14 purposes, we now have a motion before us, and there
15 was an expressed interest by Commissioner Aczon to
16 discuss some aspects of having a date certain.

17 Commissioner Aczon.

18 COMMISSIONER ACZON: I just want to get
19 some clarification on why we can consider that date.

20 CHAIRPERSON SCHEUER: Are you referencing
21 the statement by Commissioner Wong?

22 COMMISSIONER ACZON: March 2nd, 2027.
23 Based on KOCA's 3.c conditions, right?

24 COMMISSIONER GIOVANNI: Yes.

25 CHAIRPERSON SCHEUER: Mr. Giovanni?

1 COMMISSIONER GIOVANNI: So I selected that
2 date and included it in my record because it is a
3 functional date that one of the parties have put
4 forth.

5 It's also consistent with what's in the --
6 my understanding of what's in the evidentiary record
7 from 2011, in which the County represented the
8 15 years hence, there is an expectation at that point
9 in time in 2011 that the facility would reach its
10 capacity, so it's consistent in those two regards.

11 However, some time has past since 2011, so
12 I want to get the parties involved in this case an
13 additional opportunity to inform the Commission of a
14 date which might be more appropriate if March 2nd,
15 2027 is not the best date.

16 CHAIRPERSON SCHEUER: Commissioner Okuda.

17 COMMISSIONER OKUDA: Chair, if I may either
18 move to amend the motion or suggest a friendly
19 amendment.

20 The friendly amendment for the motion to
21 amend would be that we -- that the motion delete
22 input for review by parties in this case, but we
23 leave the specific date of March 2, 2027 as the date
24 of closure.

25 I believe with the specific date it's a

1 different motion than the prior motion which died or
2 did not pass because it was a four-four tie.

3 So my friendly amendment is that the motion
4 is simply with the specific date, March 2, 2027.

5 COMMISSIONER GIOVANNI: I agree to that.

6 VICE CHAIR CABRAL: I accept.

7 CHAIRPERSON SCHEUER: Okay. So the movant
8 -- one moment.

9 COMMISSIONER WONG: Excuse me, Chair. Can
10 we have a recess, please?

11 CHAIRPERSON SCHEUER: Brief recess.

12 (Recess taken.)

13 CHAIRPERSON SCHEUER: Commissioner Okuda.

14 COMMISSIONER OKUDA: Chair, I might have
15 misspoken, so let me make my friendly amendment
16 clear. Okay.

17 The amendment is to have the closing date
18 to be March 2, 2028. I'm sorry if I said 2027. And
19 to delete the other portion of the condition. So in
20 other words, it's to have the closing date be
21 March 2, 2028.

22 CHAIRPERSON SCHEUER: I'm going to treat it
23 as a motion to amend the main motion. Is there a
24 second?

25 COMMISSIONER GIOVANNI: I agree.

1 COMMISSIONER OKUDA: Or a friendly
2 amendment, either one.

3 CHAIRPERSON SCHEUER: Or a friendly
4 amendment.

5 VICE CHAIR CABRAL: And I'll agree.

6 CHAIRPERSON SCHEUER: Okay. Friendly
7 amendment has been accepted by the movant and the
8 second.

9 So the motion before us is to approve the
10 Special Use Permit with the amendment of a closure
11 date of --

12 COMMISSIONER OKUDA: March 2, 2028.

13 CHAIRPERSON SCHEUER: -- March 2, 2028.
14 Commissioner Aczon.

15 COMMISSIONER ACZON: I know it's getting
16 late, and I'm very sorry, Mr. Chair. I want to --
17 I'm just confused, because I thought the reason why
18 we didn't pass the previous motion of the date
19 March 2nd, 2027 is not supported by the record.

20 CHAIRPERSON SCHEUER: I believe one
21 Commissioner stated that they believed it was not
22 supported by the record, and there was a reference to
23 the Hawaii supreme court case which I believe stated
24 not that they were not allowed to put a date certain,
25 but that the date certain that was placed at the time

1 was not explicitly tied to the record.

2 COMMISSIONER ACZON: Yeah. And that's the
3 reason why I voted against it. And the reason why I
4 voted against it because of that comment, and also I
5 didn't see any provision.

6 What I'm trying to do is put some provision
7 that if there's something happened between now and
8 2027, the community has some kind of a public health
9 and safety condition that we can rely on. Otherwise,
10 go back on pointing it out again, you know, who
11 supposed to do this and who supposed to do that so --
12 and that's the reason why I voted against that
13 because I don't see any safety net for the community.

14 CHAIRPERSON SCHEUER: Thank you,
15 Commissioner Aczon.

16 Commissioner Okuda.

17 COMMISSIONER OKUDA: Thank you, Chair.

18 If I may respond to that.

19 First of all, the date of 2028, I believe
20 it's supported in the record by the point of the
21 record which Mr. Chipchase presented on the screen as
22 far as specific reference to the closing date.

23 I agree with Commissioner Aczon's concern
24 about responsiveness and safety to the community.
25 Again, I think it's basically patently unfair that

1 when something goes wrong with this landfill, either
2 small or big or otherwise, it's our fellow citizens
3 on the Leeward Coast that bear the burden. There's
4 really something wrong with that.

5 I find it really hard to justify. But even
6 without these conditions, these other conditions, I
7 believe there are already protections in the law.
8 And without trying to give, you know, any type of
9 legal advice here, I believe, and, you know, I can be
10 corrected by our Deputy Attorney General, the Hawaii
11 supreme court has recognized a private right of
12 action to protect the environment.

13 There's also common law protections against
14 nuisance. Again, sometimes the nuisance cases are
15 termed in trespass-types of actions. So if there's
16 harm coming off of this landfill, I believe there's
17 ample other remedies that the community has to
18 basically get protection, to bring actions against
19 the City and County and to have people live up to
20 their responsibilities.

21 So I would prefer not to have these
22 specific things spelled out, and one of the reasons
23 so that nobody starts arguing that, well, the
24 community's remedies are limited simply to what we
25 put in the order here.

1 And I believe it's sufficient that if we
2 have this closing date, other things will fall into
3 place, and if the closing date is not followed, then
4 the parties here who are represented by able
5 attorneys I'm sure will go to court and enforce this
6 order if it's adopted. Thank you.

7 CHAIRPERSON SCHEUER: Thank you,
8 Commissioner Okuda.

9 Commissioner Chang, followed by
10 Commissioner Giovanni.

11 COMMISSIONER CHANG: Thank you, Chair.

12 In all due respect to my fellow
13 Commissioners, I, too, am offended by the position
14 that we're in, and the fact that the Leeward Coast
15 has had to bear the burden of a lot of the opala and
16 just the environmental injustice.

17 However, my challenge here is I do not
18 believe the record supports any specific date of
19 closure. We have raised, just within our own
20 deliberations, at least three different dates. And I
21 think the supreme court has been very clear on this
22 decision. We need to have the basis upon which we
23 support, we make these -- we make this determination.

24 It pains me to no end that I am asking for
25 a remand for more evidence because the Planning

1 Commission has failed to act. But that doesn't, in
2 my mind, mean that we have to act. I think we have
3 to put it in the body that's responsible, and that's
4 why I believe that giving them specific instructions,
5 reopening the evidentiary hearing where all of the
6 parties can then have a full hearing opportunity to
7 ask the questions, to put evidence into the record.

8 But my fear is, we will go up on appeal.
9 We will get overturned. And we will be back here at
10 least in five years. And then we will be all -- we
11 will have to start this process again.

12 So, again, my inclination is to vote
13 against the motion because I do not believe the
14 evidence supports a specific date of this 2028. This
15 is the first time I've heard that date. So that's
16 why I'm inclined to vote -- it may seem like I'm
17 proposing a process that will be longer, but please
18 understand, I'm trying to propose a process that
19 is -- that will get us more expeditiously to where we
20 need to go.

21 CHAIRPERSON SCHEUER: Thank you,
22 Commissioner Chang.

23 Is there further discussion on the motion?
24 Commissioner Wong.

25 COMMISSIONER WONG: Chair, I still think

1 that the evidence is -- I think the City put us in a
2 bad spot by not giving us -- opening it up to giving
3 us more evidence. I still think that to my heart.
4 The Leeward Coast people are being hurt by this
5 issue, what the City did to them by not opening up
6 the evidence, opening up the whole procedure again to
7 have more evidence.

8 However, we have to have a date, and for
9 that reason, I'm going to support this.

10 CHAIRPERSON SCHEUER: Thank you,
11 Commissioner Wong.

12 Is there further discussion on the motion?

13 Commissioner Giovanni.

14 Sorry, I said I was going to you and I did
15 not. I apologize.

16 COMMISSIONER GIOVANNI: Thank you, Chair.

17 With all due respect to my fellow
18 Commissioners, and I agree with them that I wish the
19 record was more complete and more up-to-date and with
20 more data. I'm an engineer by nature and I like data
21 and information, but I do think on balance the record
22 is sufficient to support the date that has been
23 proposed for the amendment by Commissioner Okuda.
24 And I encourage that we pass this amendment.

25 CHAIRPERSON SCHEUER: Is there further

1 discussion?

2 Commissioner Cabral.

3 VICE CHAIR CABRAL: I would like to ask the
4 attorneys present, I think two of them -- three
5 referenced that date.

6 CHAIRPERSON SCHEUER: So you'll have to
7 reference this as I described in the procedures, you
8 may make a request to me, then I may choose to ask.

9 VICE CHAIR CABRAL: Okay. I'd like to ask
10 our Chairman to get clarification as to the record
11 that was established by the County back in 2011, I
12 believe, as to the -- what date they believed they
13 could be closed by if so required.

14 And that was something that was brought up
15 a couple of times in the presentation. So I'd like
16 to get confirmation as to what that date was.

17 CHAIRPERSON SCHEUER: I'm trying to
18 understand the question.

19 VICE CHAIR CABRAL: I think it was Counsel
20 Chipchase did it. I think maybe even the County had
21 it referenced. If I can just ask one. Chipchase, I
22 think.

23 CHAIRPERSON SCHEUER: Mr. Chipchase, could
24 you please briefly and solely respond to these two
25 questions?

1 The justification on the record for the
2 closure date you proposed; and whether you see any
3 justification on the record for the date that's been
4 proposed in this motion?

5 MR. CHIPCHASE: Yes, Chair, I shall.

6 The justification for either date is that
7 they provide ample time to site and develop the new
8 landfill, so this use is truly a special use. And
9 there's no evidence in the record that would indicate
10 it would take more than eight-and-a-half years, which
11 is really what we're looking at now, in the proposed
12 closure deadlines to site and develop a new landfill.

13 Same as to both questions I can answer
14 again. The record before the Commission and
15 therefore before you was that we put on the screen
16 that the City anticipated closing the landfill by
17 2026. That anticipation when it came into the
18 expansion in 2011 would support either closure
19 deadline by 2027 or 2028.

20 And finally, I would say that the nature of
21 a Special Use Permit being temporary, the length of
22 time that has gone on and the harm to the community
23 would support either closure date.

24 CHAIRPERSON SCHEUER: Thank you, Mr.
25 Chipchase.

1 VICE CHAIR CABRAL: Thank you.

2 CHAIRPERSON SCHEUER: Is there further
3 discussion?

4 Commissioner Okuda.

5 COMMISSIONER OKUDA: Chair, if I could just
6 respond to my friend Dawn Chang's issue or note about
7 an appeal.

8 It's true, I think, that any party can
9 appeal the decision that we make. But, for example,
10 I can foresee a scenario where that if the City and
11 County were to appeal an order similar to the appeal
12 that was filed previously with the Hawaii supreme
13 court, and the Hawaii supreme court vacates the
14 decision, which includes vacating the permit, then
15 again, the City will be back in a situation it finds
16 itself now operating a landfill without a valid
17 permit. But this time around, it wouldn't surprise
18 me if KOCA, Hanabusa or, in fact, some other party
19 brings an action in circuit court for an injunction
20 to shut the landfill down totally.

21 So I think it really would behoove the City
22 and County of Honolulu to be very, very careful about
23 deciding to appeal a decision, which I see is
24 supported amply by evidence in the record which the
25 parties have conceded for purposes of making this

1 decision and this motion, the record is complete.

2 Because you can win the appeal, and I
3 believe it's reasonable -- it would not be
4 unreasonable to foresee a circuit judge issuing an
5 injunction to enforce the law. That's all my
6 comments.

7 CHAIRPERSON SCHEUER: Commissioners, is
8 there further discussion of the motion before us?

9 The Chair will again be voting against this
10 motion. Just to further expand on my previous
11 comments, I believe the Applicant has failed to meet
12 their burden to show that Special Use Permit. They
13 have met the criteria, and, in fact, there is
14 information on the record that they failed to meet
15 the guidelines.

16 And second of all, I believe that because
17 of the way that the City has insisted on pursuing the
18 Special Use Permit, we are somewhat tying ourselves
19 to the fiction that they have an existing permit that
20 we are somehow building upon, which I believe is
21 amply clear from the supreme court language that one
22 does not exist.

23 Is there any further discussion?

24 If not, Mr. Orodenker, please roll call
25 vote.

1 EXECUTIVE DIRECTOR: Thank you, Mr. Chair.
2 I will try and count everybody this time.

3 Commissioner Giovanni?

4 COMMISSIONER GIOVANNI: Aye.

5 EXECUTIVE OFFICER: Commissioner Chang --

6 COMMISSIONER CHANG: No.

7 EXECUTIVE OFFICER: -- Commissioner Cabral?

8 I'm sorry.

9 VICE CHAIR CABRAL: Yes.

10 EXECUTIVE OFFICER: Commissioner Chang?

11 COMMISSIONER CHANG: No.

12 EXECUTIVE OFFICER: Commissioner Wong?

13 COMMISSIONER WONG: Aye.

14 EXECUTIVE OFFICER: Commissioner Aczon?

15 COMMISSIONER ACZON: Aye.

16 EXECUTIVE OFFICER: Commissioner Ohigashi?

17 COMMISSIONER OHIGASHI: Aye.

18 EXECUTIVE OFFICER: Commissioner Okuda?

19 COMMISSIONER OKUDA: Yes.

20 EXECUTIVE OFFICER: Chair Scheuer?

21 CHAIRPERSON SCHEUER: Nay.

22 EXECUTIVE OFFICER: Thank you. Mr. Chair,
23 the motion passes with six affirmative votes and two
24 nay.

25 CHAIRPERSON SCHEUER: I'm going to charge

1 the -- Commissioner Ohigashi.

2 COMMISSIONER OHIGASHI: I didn't hear you.

3 CHAIRPERSON SCHEUER: Please go ahead.

4 COMMISSIONER OHIGASHI: No, made a mistake.

5 CHAIRPERSON SCHEUER: While looking to my
6 counsel and Executive Officer, I'm going to instruct
7 the parties by no later than October 18th, please
8 propose Findings of Fact and Conclusions of Law
9 consistent with this decision, and submit them to the
10 Commission.

11 Mr. Yee.

12 MR. YEE: May I suggest that the assignment
13 be given to ENV and to KOCA? I think other counsel
14 would be willing to review what has --

15 COURT REPORTER: I'm sorry, you think other
16 counsel what? Can you --

17 MR. YEE: That the assignment be given to
18 counsel for ENV and KOCA. I believe other counsel
19 are probably willing to work with those two as to
20 something appropriate to be submitted.

21 CHAIRPERSON SCHEUER: Commissioner Okuda?

22 COMMISSIONER OKUDA: Chair, I would
23 respectfully ask that your instruction be carried out
24 as to all counsel, and this is the reason why.

25 First of all, statutorily, we are under a

1 deadline to take action; otherwise, this matter might
2 just be inadvertently approved in a way that we're
3 not really deciding or agreeing to.

4 Secondly, parties can choose not to submit
5 their proposed Findings and Conclusions of Law, but
6 I'd like to state for the record, if somebody doesn't
7 submit Findings of Fact and Conclusions of Law, I
8 would consider that a deemed waiver of whatever
9 position they really intended to take.

10 And it really would help us if everyone
11 submits Findings of Fact, Conclusions of Law so that,
12 you know, the arguments and positions can clearly be
13 considered so that we can have the best form of
14 order. Thank you, Mr. Chair.

15 CHAIRPERSON SCHEUER: Thank you, Mr. Okuda,
16 and I agree with you.

17 All parties will submit proposed Findings
18 of Fact and Conclusions of Law consistent with the
19 decision of this Commission by October 18th.

20 MR. WURDEMAN: Could I be heard, Mr. Chair?

21 CHAIRPERSON SCHEUER: Mr. Wurdeman.

22 MR. WURDEMAN: Thank you.

23 Although a specified closure date is
24 certainly better than no -- than an indefinite amount
25 of time of operation, no doubt. We object to the --

1 we've made our position very clear that we don't want
2 to acquiesce in any way our position by submitting
3 Findings of Fact, Conclusions of Law that support the
4 motion that we don't agree with.

5 CHAIRPERSON SCHEUER: So my thought is that
6 you would submit that kind of statement in writing by
7 the date.

8 MR. WURDEMAN: Thank you.

9 CHAIRPERSON SCHEUER: Thank you very much,
10 Mr. Wurdeman.

11 MR. SANDISON: For the ease of preparing
12 the Findings of Fact and Conclusions of Law, could we
13 make the date dependent on the availability of the
14 transcript?

15 COURT REPORTER: It's going to be two weeks
16 for me at least.

17 CHAIRPERSON SCHEUER: We can try and
18 expedite the portion of the transcript simply with
19 the motion in it that was approved. But we have a
20 deadline under the statute to meet, and most of us,
21 in fact, the entirety of the Findings of Fact and
22 Conclusions of Law will be based on the record as
23 handed to us rather than the transcript.

24 There being no further business, before
25 adjourning the meeting, I'd like to remind the LUC

1 staff to make working -- plans for a working lunch
2 due to our limited time and remote location available
3 for the planned October 24, 2019 meetings in Hilo.

4 Mr. Orodenker?

5 EXECUTIVE OFFICER: We will make such
6 arrangements.

7 CHAIRPERSON SCHEUER: Thank you.

8 With that, I declare this meeting
9 adjourned.

10 (The proceedings adjourned at 3:01 p.m.)
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CERTIFICATE

STATE OF HAWAII)
) SS.
COUNTY OF HONOLULU)

I, JEAN MARIE McMANUS, do hereby certify:

That on October 10, 2019, at 9:00 a.m., the proceedings contained herein was taken down by me in machine shorthand and was thereafter reduced to typewriting under my supervision; that the foregoing represents, to the best of my ability, a true and correct copy of the proceedings had in the foregoing matter.

I further certify that I am not of counsel for any of the parties hereto, nor in any way interested in the outcome of the cause named in this caption.

Dated this 10th day of October, 2019, in Honolulu, Hawaii.

/s/ Jean Marie McManus
JEAN MARIE McMANUS, CSR #156