

MICHAEL J. MATSUKAWA, 1885
75-5751 Kuakini Highway, Room 201
Kailua-Kona, Hawaii 96740
Telephone (808) 329-1385

Attorney for Intervenor Jeffrey Gomes

BEFORE THE COUNTY OF HAWAI'I

WINDWARD PLANNING COMMISSION

In the Matter of	)	SPP No. 12-00138
)	
CONNECTIONS NEW CENTURY	)	INTERVENOR JEFFREY
CHARTER SCHOOL AND	)	GOMES' EXCEPTIONS TO
COMMUNITY BASED EDUCA-	)	COUNTY OF HAWAI'I WIND-
TION SUPPORT SERVICES	)	WARD PLANNING COMMIS-
	)	SION'S PROPOSED FINDINGS
	)	OF FACT, CONCLUSIONS OF
	)	LAW, DECISION AND ORDER
Application for Special Permit	)	ON REMAND; EXHIBITS "2"
Application No. 12-000138	)	AND "3;" CERTIFICATE OF
	)	SERVICE
)	
	)	<u>Argument and Decision</u>
TMK (3) 2-5-006-141; Kaumana,	)	Date: 5/1/14
South Hilo, Hawaii	)	Place: Aupuni Center, Hilo, HI
)	
)	
	)	<u>On Remand:</u>
	)	Date: 10/7/21
	)	Place: Remote Hearing
)	
)	

INTERVENOR JEFFREY GOMES' EXCEPTIONS TO
COUNTY OF HAWAI'I WINDWARD PLANNING COMMISSION'S
PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW,
DECISION AND ORDER ON REMAND

The Intervenor Jeffrey Gomes, by and through his attorney, submits exceptions to the Windward Planning Commission’s proposed (draft) findings, conclusions, decision and order on remand. The Intervenor submits these exceptions pursuant to Section 91-11, Hawaii Revised Statutes.

Both Connections New Century Charter School and Community Based Education Support Services are the named applicants in this proceeding and are referred to collectively as “Connections.” Both entities also joined in appeals to the Third Circuit Court and then in the Intermediate Court of Appeals.

Preliminary Matter

On January 31, 2020, in CAAP-17-0000050, the Intermediate Court of Appeals remanded this case to the Windward Planning Commission (the “Planning Commission”) for further proceedings.¹ Although the Intermediate Court of Appeals *reversed* the Planning Commission’s original May 12, 2014 decision, the Court vacated only some (not all) of the Planning Commission’s original findings and conclusions. The original findings and conclusions that were not vacated by the Intermediate Court of Appeals remain valid, binding and in full force and effect on remand.

¹ The Intermediate Court of Appeals *reversed* “the Planning Commission’s May 12, 2014 Decision and Order,” but did not vacate all of the Planning Commission’s underlying findings and conclusions, and then remanded the case to the Planning Commission “for further proceedings *consistent with* this Memorandum Opinion.” (Memorandum Opinion, Pages 43 to 44).

However, the Planning Commission's proposed (draft) findings and conclusions purport to eliminate, alter or change several of the Planning Commission's original (and critical) May 12, 2014 findings and conclusions that the Intermediate Court of Appeals did NOT vacate and that continue to have full force and effect. The Planning Commission was already informed by Connections that the commission does not have the freedom to "redo" or "rewrite" its prior findings and conclusions and on remand must act within the scope of the Intermediate Court of Appeals' mandate. *State v. Lincoln*, 72 Haw. 480, 825 P.2d 64 (1992); *In Re Hawaii Electric Light Company, Inc.*, 149 Haw. 239, 487 P.3d 708 (2021) (agency may make new determinations only as directed by the appellate court).

A.

Findings and Conclusions Vacated and Not Vacated on Appeal
and Not Assigned as Error on Appeal

In its January 31, 2020 decision, the Intermediate Court of Appeals vacated only some (not all) of the Planning Commission's original May 14, 2012 findings and conclusions. Further, Connections did not challenge some of the original findings and conclusions or otherwise assign error to original Finding Nos. 22 (Connections' ability to provide sufficient water for the school) and 57 (change to the character of the subject property). (See Exhibits "2" and "3," copies of

Connections' opening briefs on appeal)² As a result, the unvacated and unappealed findings remain in full force effect and are binding on remand.

The following outline sets forth the findings and conclusions that the Intermediate Court of Appeals did vacate and those findings and conclusions that the Court did NOT vacate on appeal and that Connections did not assign as error on appeal.

<u>Subject</u>	<u>ICA Decision Page No.</u>	<u>Finding or Conclusion Affected by ICA Decision</u>
Affect on surrounding properties (traffic)	18 to 23	FF 17, 18, 46, 47 NOT VACATED.
Source of 60 gpd data ("where that figure came from")	25 to 27	FF 21, 48, 50, 51 vacated.
Applicants' ability to develop a potable water source	26	FF 49 NOT VACATED.
No evidence applicant can provide sufficient water for the school	---	FF 22 NOT VACATED. NOT ASSIGNED AS ERROR ON APPEAL.
Restrictive view of guideline 6-3(b)(5)(D) that school must "service the needs of its immediate neighbors"	28 to 29	Last sentence in FF 52 erroneous and therefore vacated.
Suitability of land for agricultural uses	29 to 32	FF 55 vacated.

² Rule 28(b)((4) of the Hawaii Rules of Appellate Procedure requires an appellant to assign error to specific findings and conclusions for the purpose of appellate review. If an appellant does not assign error to a specific finding or conclusion, the finding or conclusion stands. *Sprague v. California Pacific Brokers & Insurance, Ltd.*, 102 Haw. 189, 195-196, 74 P.3d 12, 18-19 (2003).

Change in essential character of the land	---	FF 57 NOT VACATED. NOT ASSIGNED AS ERROR ON APPEAL.
General Plan consistency	39 to 42	FF 59 and 62 vacated. COL 5 vacated.
Burden of proof for Special Permit	42 to 43	FF 63 vacated. COL 4 vacated.

B.
The Remand Hearings

At its first meeting on remand, on August 5, 2021, the Planning Commission ruled that it will not receive or consider new evidence and will confine its action on remand to the record that was established for the post-May 2014 appeals. Nevertheless, at its subsequent October 7, 2021 hearing, the Planning Commission allowed, over the Intervenor’s objection, Connections to offer new evidence regarding actual water usage of another school in Puna as well as at its present school, demographics, USDA grants and community outreach, matters that are not contained in the original record.

At its October 7, 2021 action meeting on remand, the Planning Commission voted to approve Connections’ request for a Special Permit based on the former planning director’s October 2012 revised recommendations. (*See* proposed Finding No. 21, at Page 4; Transcript: Oct. 7, 2021, Page __) However, in 2014, the Planning Commission had rejected the revised recommendations and

the revised recommendations today are still not “consistent with” and still contradict the Planning Commission’s original findings that were NOT VACATED or challenged on appeal and that continue to have full force and effect. Specifically, the former planning director’s statements in her revised recommendations regarding (1) the affect on surrounding properties, including traffic, (2) the sufficiency of potable water and (3) the change in the character of the land are NOT supported by the Planning Commission’s original findings that were NOT VACATED or challenged on appeal.

In this respect, the former planning director’s revised recommendations cannot be “rehabilitated” simply by voting to adopt the same on remand. At the very least, the Planning Commission must explain why those revised recommendations remain valid today and how those recommendations are supported by the record, including the findings that were NOT VACATED or challenged on appeal.

C.

Deviation of Proposed Findings and Conclusions
from Intermediate Court of Appeals’ Mandate

In its proposed (draft) findings and conclusions, the Planning Commission changed the numbering of its original findings and conclusions, but the text can be “tracked.” The following proposed (draft) findings and

conclusions deviate from the Intermediate Court of Appeals’ decision and are not “consistent with” the Court’s mandate.

<u>Subject</u>	<u>Proposed Finding or Conclusion</u>	<u>Change to Original Findings or Conclusions</u>
Affect on surrounding properties (traffic) [Pages 6 to 7]	31 (removed last sentence of FF 31) 32, 33, 34, 35, 36	<i>Eliminates</i> original FF 17, 18, 46 and 47 that were <u>not</u> vacated on appeal and that remain in full force and effect on remand.
Source of 60 gpd data (“where that figure came from”) [Pages 7 to 8]	37, 38, 39, 40, 41	Does <u>not</u> establish source of 60 gpd data, as mandated.
Ability to develop a potable water source [Pages 7 to 8]		<i>Eliminates</i> original FF 49 that was <u>not</u> vacated on appeal and that remains in full force and effect on remand.
Ability to provide sufficient water for the school [Pages 7 to 8]		<i>Eliminates</i> original FF 22 that was <u>not</u> assigned as error on appeal and that remains in full force and effect on remand.
Adverse affect on surrounding properties [Pages 14 to 15]	Part 65.B Part 65.C	Contradicts original FF 46, 47 that were <u>not</u> vacated on appeal and that remain in full force and effect on remand.
Change in essential character of the land [Page 16]	Part 65.F	<i>Contradicts</i> original FF 57 that was <u>not</u> assigned as error on appeal and that remains in full force and effect on remand.

The foregoing proposed (draft) findings listed above are clearly erroneous. Nor are the former planning director’s revised recommendations that the Planning Commission relied on when it voted to approve Connections’ Special

Permit request on October 7, 2021 supported by the original findings that were NOT VACATED or challenged on appeal.

D.

The Public Trust Doctrine

At Pages 17 to 18, proposed Finding No. 66, the Planning Commission makes a summary analysis of the public trust doctrine that does not satisfy the strict proof requirements set forth in *Kauai Springs, Inc. v. Planning Commission*, 133 Haw. 141, 173-175, 324 P.3d 951, 983-985 (2014). The fact that the Department of Land and Natural Resources should have addressed this constitutional requirement at the start (before issuing the subject lease to Connections) in the first instance does not mean that the Planning Commission, which is the “lead agency” in this proceeding, can or should ask another state agency, the State Land Use Commission, to deal with this matter.

The Planning Commission also fails to address Section 13-29 of the County of Hawaii Charter that county voters adopted to establish a county-based public natural resources trust.³ As a county agency, the Planning Commission must address Section 13-29, but did not do so.

³ “For the benefit of present and future generations, the county shall conserve and protect Hawaii’s natural beauty and all natural and cultural resources, including but not limited to land, water, air, minerals, energy sources, wahi pana, surf spots, historic sites, and historic structures, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the county. All public natural and cultural resources are held in trust by the county for the benefit of the people.” (adopted 2010)

E.
Sending the Case Up to the State Land Use Commission

Even if the Planning Commission feels it is best to send the case up to the State Land Use Commission as soon as possible, the Planning Commission must still first enter a lawful decision that is based on the record. Convenience is not grounds for rendering a decision, especially if the purpose for doing so is to let another “distant agency,” the State Land Use Commission, decide a “hard case.”

F.
Argument

The Planning Commission is aware of the *Hawaii Electric Light Company* decision – that on remand, an agency cannot freely “redo” or “rewrite” its reversed decision. The Planning Commission instead “must closely adhere to the true intent and meaning of the appellate court’s mandate” and must confine its actions on remand to what the Intermediate Court of Appeals directed the Planning Commission to do. Findings and conclusions that were NOT VACATED by the appellate court remain in place and continue to be binding on the Planning Commission and the parties on remand. Similarly, findings that Connections did not assign as error on appeal remain in place and continue to be binding on remand.

1. THE PROPOSED (DRAFT) FINDINGS AND CONCLUSIONS DEVIATE FROM THE INTERMEDIATE COURT OF APPEAL'S MANDATE AND ATTEMPT TO ELIMINATE THE ORIGINAL FINDINGS AND CONCLUSIONS THAT THE COURT DID NOT VACATE AND THAT REMAIN IN FULL FORCE AND EFFECT ON REMAND.

As stated in Parts A and C, above, the Planning Commission proposes to eliminate and to “redo” or “rewrite” original Finding Nos. 17, 18, 46 and 47 (adverse affect on surrounding properties), Finding Nos. 22 and 49 (ability of applicant to develop a potable water source or provide sufficient water for the school) and Finding No. 57 (change in the essential character of the land), which are findings that the Intermediate Court of Appeals did NOT VACATE or that were not challenged on appeal. As stated earlier, the former planning director's revised recommendations, which the Planning Commission relied upon when it voted to approve Connections' Special Permit request, are not supported by the unvacated findings and unappealed findings. In fact, some of the former planning director's revised recommendations stand in direct contradiction to the unvacated and unappealed findings as to at least three of the decision criteria.

2. THE PROPOSED (DRAFT) FINDINGS AND CONCLUSIONS FAIL TO REVEAL THE SOURCE OF THE 60 GPD DATA THAT THE INTERMEDIATE COURT OF APPEALS COULD NOT LOCATE IN THE RECORD AND, FURTHER, DO NOT ANALYZE THAT DATA.

The Intermediate Court of Appeals for some reason did not read the testimony of the Department of Water Supply witness (T. McCall, Page 84, Record at 1630) who is the source of the 60 gpd data. (*See Memorandum Opinion, at Page*

25) Connections also referred to that source in its own environmental assessment (Record on Appeal at 124). On remand, the Planning Commission ignores the source of the 60 gpd standard and makes no finding thereon. Nor does the Planning Commission analyze that data in relation to Connections' proposed use and unvacated and unappealed Finding Nos. 22 and 49 that Connections does not have the ability to develop a potable water system or to provide sufficient water for the school.⁴

3. AT LEAST THREE OF THE DECISION CRITERIA DEMONSTRATE THAT THE SCHOOL IS NOT AN "UNUSUAL AND REASONABLE" USE OF THE LAND IN QUESTION.

As stated, the original record shows that an adverse affect is presented to surrounding properties (unvacated Finding Nos. 17, 18, 46 and 47). Further, the original record also shows that there will be a change in the essential character of the land (unvacated and unappealed Finding No. 57). Moreover, the record shows that Connections cannot provide a sufficient water for the school (unappealed

⁴ On this point, the Intermediate Court of Appeals stated that the Planning Commission made no determination on the credibility of Connections' water expert (Memorandum Opinion, at Pages 25-26), but did not address original Finding No. 22 ("Connections has not produced any evidence to demonstrate that it has or can develop *sufficient water* for the Development") because Connections did not assign this finding as error on appeal. Accordingly, the Intermediate Court of Appeals let Finding No. 22 stand as written.

As to original Finding No. 49, the Intermediate Court of Appeals informed the Planning Commission that it "may reconsider any weight to be assigned" to the facts covered by Finding No. 49 ("There is no evidence that Connections has the ability to develop a *potable water source* as a mitigating measure, previously proposed by the Director"). (Memorandum Opinion, Pages 26-27) However, since the Court left original Finding No. 22 in place -- that there is no evidence to demonstrate that Connections "has or can develop sufficient water for the Development" -- the Planning Commission must still give great weight to Finding No. 22.

Finding No. 22, also unvacated Finding No. 49). In its proposed findings and conclusions, the Planning Commission does not explain why Connections' request for a Special Permit should be approved even though Connections' Special Permit request is not consistent with these three important decision criteria. And as stated earlier, the unvacated and unappealed findings do not support the former planning director's revised recommendations on which the Planning Commission based its vote to approve Connections' Special Permit request.

Moreover, the Planning Commission uses a "totality of the evidence" analysis, purporting to "weigh" all seven decision criteria, but without discussion or analysis, and arriving at an ultimate conclusion. On appeal, the Intermediate Court of Appeals criticized the Planning Commission for using this "totality of the evidence" approach (Memorandum Opinion, Page 43), so why use it again? ⁵

4. THE PROPOSED (DRAFT) FINDINGS AND CONCLUSIONS DO NOT ANALYZE THE PUBLIC NATURAL RESOURCES TRUST DOCTRINE.

On a subject of great state constitutional importance, the Planning Commission confines its analysis of the public natural resources trust to a single paragraph (Pages 17 to 18, proposed Finding No. 66). In the *Kauai Springs* case,

⁵ "[T]he Planning Commission did not base its decision on any single criterion; rather, it was based on the totality of the evidence when applied to all seven criteria." The Intermediate Court of Appeals then held that if any one of those seven criteria is not satisfied, then in the absence of clear findings that explain how the Planning Commission weighed all of the evidence, the Planning Commission's decision had to be reversed. (Memorandum Opinion, Page 43)

the Hawaii Supreme Court demanded much more of an agency that acts as a public trustee. The Court held that the agency has a duty to address several points with express findings, 133 Haw. at 181, 324 P.3d at 991, such as:

- * Whether the proposed use is consistent with a trust purpose.
- * If a presumption should be applied in favor of a public use.⁶
- * Whether the use is private or commercial in nature; and if so, will it meet the test of a high level of scrutiny.
- * Whether the use satisfies the “reasonable and beneficial” standard in relation to other public and private uses of the resource (the land).
- * Whether the applicant has demonstrated its actual needs and the propriety of the use.
- * Whether the applicant has demonstrated the absence of a practicable alternative.⁷
- * If harm will be presented to the resource (the land), whether the applicant has demonstrated that the use is still “reasonable and beneficial” and that the applicant can implement reasonable mitigation measures.
- * Whether the applicant has met its burden of proof.

Proposed Finding No. 66 fails to address these subjects in the manner required by the *Kauai Springs* case. Nor does it address the county’s counterpart set forth in the Hawaii County Charter, Section 13-29.

⁶ A charter school is deemed to be a “public” school in Hawaii.

⁷ An “alternative” may be a different place. It may also be a different procedure like a boundary amendment and rezoning, which require appropriate services to be provided.

Furthermore, the record shows that the State Department of Land and Natural Resources, the *fee owner* of the publicly-owned land in question, does not have a masterplan for the land and did not offer testimony to the Planning Commission. Nor did the State Department of Agriculture provide testimony to the Planning Commission. One state agency, the State Office of Planning, did offer comments to the Planning Commission and suggested that a boundary amendment might be a better and alternative procedure to employ in this case (rather than a Special Permit request). The Planning Commission does not discuss these undisputed points of fact in context of the public natural resource trust and whether the participation of these state agencies is or is not relevant.

5. THE FOLLOWING PROPOSED FINDINGS AND CONCLUSIONS ARE BASED ON UNLAWFUL PROCEDURE, ARE NOT SUPPORTED BY THE SUBSTANTIAL EVIDENCE IN THE RECORD AND APPLICABLE LAW AND ARE ARBITRARY.

Based on the foregoing discussion, several of the Planning Commission's proposed findings and conclusions are based on unlawful procedure, are not supported by the substantial evidence in the record or applicable law and are arbitrary.

Adverse Affect on Surrounding Properties
29, 30, 31, 32, 33, 34, 35 and 36; 65-B

Potable Water
39, 40 and 41; 65-C

Unusual Conditions
65-D

Suitability for Agriculture
65-E

Change in Character of the Land
65-F

Public Natural Resources Trust
66

Conclusion of Law; Decision and Order

CONCLUSION

The primary flaw in the Planning Commission's proposed (draft) findings and conclusions is its attempt to "redo" or "rewrite" its original findings that the Intermediate Court of Appeals did NOT VACATE on appeal (see Parts A and C, above) and that Connections did not assign as error on appeal (Finding No. 22). The Planning Commission on remand is bound by the original findings that the Court did NOT VACATE and that were not challenged on appeal. Instead of addressing the unvacated and unappealed findings and explaining why the unvacated and unappealed findings have no evidentiary effect on Connections' Special Permit request, the Planning Commission simply ignores the unvacated and unappealed findings altogether.

Further, the Planning Commission's reliance on the former planning director's revised recommendations is also misplaced because the former planning

director's revised recommendations cannot be "rehabilitated." The former planning director did not make a new appearance in this proceeding and even if she could, she cannot offer new evidence to "fix" her revised recommendations to "fit" the outcome that the Planning Commission now desires. In any event, the revised recommendations are not supported by the original findings that were NOT VACATED or challenged on appeal. As such, the former planning director's revised recommendations stand in direct contradiction with the unvacated and unappealed findings.

Finally, as noted in the record for the October 7, 2021 meeting, some commissioners believed that the case should be sent up to the State Land Use Commission for final action. However, that belief does not relieve the Planning Commission from making a proper decision on remand, based on the record.

Request for Relief

The Planning Commission should instead adopt the Intervenor's proposed amendments to the Planning Commission's original decision.

Dated at Kailua-Kona, Hawaii: November 1st, 2021.

JEFFREY GOMES, Intervenor

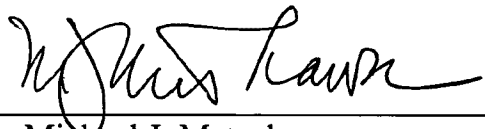
By 
Michael J. Matsukawa
His Attorney

EXHIBIT "2"

Electronically Filed
Intermediate Court of Appeals
CAAP-16-0000813
21-MAR-2017
03:31 PM

NO. CAAP-16-0000813

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

STATE OF HAWAII

COMMUNITY BASED EDUCATION	)	CIVIL NO. 14-1-0223
SUPPORT SERVICES,	)	(Agency Appeal)
)	
Applicant-Appellant,	)	APPEAL FROM:
)	
vs.	)	(1) DECISION AND ORDER AFFIRMING
	)	WINDWARD PLANNING COMMISSION,
WINDWARD PLANNING COMMISSION,	)	COUNTY OF HAWAII'S FINDINGS OF
COUNTY OF HAWAII; DEPARTMENT	)	FACT, CONCLUSIONS OF LAW AND
OF PLANNING, COUNTY OF HAWAII,	)	DECISION AND ORDER DENYING
	)	SPECIAL PERMIT APPLICATION NO.
Appellees,	)	SPP 12-138; and
	)	(2) FIRST AMENDED FINAL
and	)	JUDGMENT FILED ON OCTOBER 26,
	)	2016
JEFFREY GOMES, Intervenor,)	
	)	JUDGE: Hon. Melvin H. Fujino
Intervenor-Appellee.)	
)	

APPELLANT'S OPENING BRIEF

APPENDICES "A." - "D"

DECLARATION OF TED H. S. HONG

and

CERTIFICATE OF SERVICE

October 22, 2013 (RA: part III, 1653-1803); November 12, 2013 (RA: part III, 1804-1844); January 8, 2014 (RA: part III, 1845-1987) and January 22, 2014 (RA: part III, 1988-1998). On January 22, 2014, the Hearing Officer closed the contested case hearing. RA: part III, 1992.

On April 7, 2014, the Hearing Officer submitted her Report to the parties and Planning Commission. RA: part III, 2528-2535; 2900-2915; See, Appendix "A," attached hereto.

On or about April 21, 2014, CBESS and Appellant Connections submitted their Joint Exceptions to Hearings Officers [sic] Report Finding of Fact, Conclusions of Law and Recommendation Dated April 7, 2014. RA: part III, 2952-2972. Appellee Planning Director's Exceptions to Hearing Officer's Report Dated April 7, 2014. RA: part 3, 2974-2979.

On May 1, 2014, at the fifth further public hearing, the Appellee Commission voted to uphold the Hearings Officer's report and recommendation and denied SPP No. 12-000138. RA: part III, 2891-2899; 3064-3095.

On May 12, 2014, Appellee Commission distributed its Findings of Fact and Conclusions of Law to the parties. RA: part III, 3103-3118.

On or about June 9, 2014, CBESS filed its Notice of Appeal to the Third Circuit Court, State of Hawaii. RA: part I, 31-87. See, Appendix "B," attached hereto.

The Third Circuit Court issued its Decision and Order Affirming Windward Planning Commission, County of Hawaii's Findings of Fact, Conclusions of Law and Decision and Order Denying Special Permit Application No. SPP 12-138, filed on July 14, 2015 (RA: part I, 1468-1472).

The underlying administrative agency appeal was terminated by the entry of the First Amended Final Judgment filed on October 26, 2016 (RA: Part I, 1619-1622) (Appendix "C.") and Notice of Entry of Judgment, Filed on November 16, 2016 (RA: Part I, 1623-1624).

The Appellant filed its Notice of Appeal on November 16, 2016 in CAAP-16-0000813. RA: part I, 1625-1637.

III.

STATEMENT OF POINTS OF ERROR

A. Findings of Fact (clearly erroneous standard)

The Trial Court and Appellee Commission were clearly erroneous in view of the reliable,

probative, and substantial evidence in the whole record by adopting the following Findings of Fact:

II. Proposed Development

A. General Description

9. The Connections application proposes the development of a K to 12 charter school campus with dorm facilities, and an intergenerational program that would provide childcare and elder care at a single facility on the Development, together with related use on the 70-acre parcel of land. As the site is bisected by Edita Street, the lower portion of the Development would consist of the major school or campus facilities, while the upper portion of the Development would be use for outdoor type of educational programs, including a forestry preservation program. (Emphasis added)

RA: part I, 67.

* * *

14. **The Development does not propose to establish a charter on the Property to serve the needs of the immediate vicinity in the Kaumana area of Hilo, although some students from the area may attend this school.** (Emphasis added)

RA: part I, 68.

* * *

Appellant objected to these alleged errors in its April 21, 2014, Joint Exceptions to Hearings Officers [sic] Report Finding of Fact, Conclusions of Law and Recommendation Dated April 7, 2014. RA: part III, 2957-2958.

B. Public Utilities and Services
Access/Traffic

* * *

18. **Notwithstanding the findings of the TIAR and the recommendations of the Police Department and Department of Public Works, the area residents uniformly expressed concerns about the adverse traffic impacts of the Development along Edita Street and Kaumana Drive.** Also residents objected that the TIAR was four years old and the traffic counts contained in the TIAR were taken when certain schools were not in session.

(Emphasis added)

RA: part I, 69.

* * *

Appellant objected to this alleged error in its April 21, 2014, Joint Exceptions to Hearings Officers [sic] Report Finding of Fact, Conclusions of Law and Recommendation Dated April 7, 2014. RA: part III, 2958-2960.

Water

* * *

21. The available water from the County of Hawaii municipal water system is insufficient to support the first phase of the Development.
(Emphasis added)

RA: part I, 69.

* * *

Appellant objected to this alleged error in its April 21, 2014, Joint Exceptions to Hearings Officers [sic] Report Finding of Fact, Conclusions of Law and Recommendation Dated April 7, 2014. RA: part III, 2960-2963.

IV. STATE AND COUNTY PLANS

* * *

36. The County of Hawaii General Plan Land Use Pattern Allocation Guide ("LUPAG") Map designates the Property for low density urban uses. The LUPAG designation of Low Density urban use, allow for residential uses, with ancillary community and public uses, and neighborhood and convenience-type commercial uses. The Development is not proposed to be a community or public use for the Kaumana area of Hilo. (Emphasis added)

RA: part I, 71.

Appellant objected to this alleged error in its April 21, 2014, Joint Exceptions to Hearings Officers [sic] Report Finding of Fact, Conclusions of Law and Recommendation Dated April 7, 2014. RA: part III, 2963-2964; 2966.

VI. APPLICATION OF SPECIAL PERMIT CRITERIA TO THE DEVELOPMENT

* * *

B. Affect on Surrounding Properties

46. **Based upon the testimony from surrounding and neighboring property owners, the Development will have an adverse effect on surrounding properties by creating noise, traffic, and impacting the quality of life of the adjoining residents.**

47. **Measures proposed by Connections, regarding the establishment of building setbacks and roadway improvements to Edita Street do not appear to be sufficient to mitigate the overwhelming concerns raised by surrounding property owners.**

C. Burden on Public Agencies to Provide Services

48. **There is insufficient water available from the county system to service the Development. Therefore, to allow the Development would unreasonably burden the Department of Water Supply to provide water for its facilities.**

49. **There is no evidence that Connections has the ability to develop a potable water source as a mitigating measure, previously proposed by the Director.**

50. **A mitigating measure previously proposed by the Director of limiting the number of students to the amount of potable water available to the project is not reasonable because Connections is proposing to construct a high school for 107 students in its first phase, when the potable water available would only allow for 70 students.**

51. **As such, the proposed use may unreasonably burden the County Department of Water Supply to provide water to the Development.**
(Emphasis added)

RA: part I, 74-75.

Appellant objected to these alleged errors in its April 21, 2014, Joint Exceptions to Hearings Officers [sic] Report Finding of Fact, Conclusions of Law and Recommendation Dated April 7, 2014. RA: part III, 292958-2959; 2958-2963.

D. Unusual Conditions, Trends and Needs

52. **Unusual conditions and needs have arisen since the establishment of this land use district in the 1970s, because the area in which the Property is located has essentially become residential in character. Also the County General Plan LUPAG map recognizes this trend by designating the area for low density urban use. However, there was no evidence presented to demonstrate that**

location of a school that is not intended to specifically service the needs of the immediate community is such an unusual condition, trend or need that justifies location of the Development at this location.

E. Suitability of Land for Agricultural Uses

53. The Land Study Bureau soil classification rating for the Property is “D” or “Poor,” which suggests that the land may be unsuited for agricultural uses.

54. Connections is proposing to maintain the upper portion or nearly one-half of the Property for forestry use. In addition Connections is proposing to construct greenhouses on the Property and conduct an agricultural program in conjunction with its curriculum.

55. Based upon the representations of Connections, it cannot be found that the Property is unsuited for agricultural uses. (Emphasis added)

* * *

RA: part I, 75.

Appellant objected to these alleged errors in its April 21, 2014, Joint Exceptions to Hearings Officers [sic] Report Finding of Fact, Conclusions of Law and Recommendation Dated April 7, 2014. RA: part III, 2963-2964; 2964-2965.

59. The Development, which proposes a charter school that is not specifically intended to service the immediate community surrounding the school, is not consistent with the uses permitted in the area of low density urban use.

RA: part I, 76.

Appellant objected to this alleged error in its April 21, 2014, Joint Exceptions to Hearings Officers [sic] Report Finding of Fact, Conclusions of Law and Recommendation Dated April 7, 2014. RA: part III, 292963-2964; 2966. See, also, Sec. 91-14(g)(5), HRS. *Hua v. Bd. of Trustees of the Employees’ Ret. Sys., State of Hawaii*, 112 Hawai’i 292, 298, 145 P.3d 835, 841 (Ct.App. 2006).

B. Conclusions of Law (right/wrong standard)

The Trial Court and Appellee were wrong as a matter of law in adopting the following Conclusions of Law:

* * *

4. The Development does not adequately meet the requirements or guidelines for a special permit as required by Section 205-6, HRS and Rule 6 of the Commission Rules.

5. **The Development is not consistent with the County General Plan, particularly as to the impacts on the immediate community.** (Emphasis added)

RA: part I, 77.

Appellant objected to these alleged errors in its April 21, 2014, Joint Exceptions to Hearings Officers [sic] Report Finding of Fact, Conclusions of Law and Recommendation Dated April 7, 2014. RA: part III, 2965-2966; 2967. See also, Sec. 91-14(g)(1), (2), and (4), HRS; *Troyer v. Adams*, 102 Hawai'i 399, 409, 77 P.3d 83, 93 (2003).

C. Mixed Findings of Fact and Conclusions of Law (clearly erroneous standard)

The Trial Court and Appellee were clearly erroneous because the Trial Court's and Appellee's conclusions are dependent upon the facts and circumstances of each individual case: The following are Mixed Findings of Fact and Conclusions of Law:

VI. **APPLICATION OF SPECIAL PERMIT CRITERIA TO THE DEVELOPMENT**

* * *

62. Although the County General Plan Public Facilities-Education course of action for South Hilo encourages **the establishment of additional schools as the need arises, the property Development, at the subject location, is contrary to the General Plan.** (Emphasis added)

RA: part I, 76.

Appellant objected to this alleged error in its April 21, 2014, Joint Exceptions to Hearings Officers [sic] Report Finding of Fact, Conclusions of Law and Recommendation Dated April 7, 2014. RA: part III, 2965-2967.

VII. **UNUSUAL AND REASONABLE USE OF LAND**

63. The construction of a school on the Property is an unusual use of the land because a school is not a permitted use in the State Land Use Agricultural District. However, **the evidence presented does not demonstrate that the Development is a reasonable use of the Property.** Specifically, **Connections has not demonstrated how this school can be built without sufficient potable**

water resources. Nor, has Connections demonstrated how the development of a regional charter school on the Property that does not specifically service the needs the immediate community and this is overwhelmingly objected to by the immediate community is a reasonable site for this facility. In addition, Connections has not demonstrated that the Development meets most of the criteria to be considered by the Commission in the subject application. (Emphasis added)

RA: part I, 76-77.

Appellant objected to this alleged error in its April 21, 2014, Joint Exceptions to Hearings Officers [sic] Report Finding of Fact, Conclusions of Law and Recommendation Dated April 7, 2014. RA: part III, 2966-2967. See also, Sec. 91-14(g)(5), HRS; *Aluminum Shake Roofing, Inc. v. Hirayasu*, 110 Hawai'i 248, 252, 131 P.3d 1230, 1234 (2006); *Del Monte Fresh Produce (Hawaii), Inc. v. Int'l Longshore & Warehouse Union, Local 142, AFL-CIO*, 112 Hawaii 489, 499, 146 P.3d 1066, 1076 (2006)

IV.

STANDARD OF REVIEW

Generally, appeals of an administrative agency decision is secondary appeal and the court applies the standards of Sec. 91-14(g), HRS, to determine if the trial court's decision was right or wrong:

§91-14 Judicial review of contested cases.

* * *

(g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or**
- (2) In excess of the statutory authority or jurisdiction of the agency; or**
- (3) Made upon unlawful procedure; or**
- (4) Affected by other error of law; or**
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or**
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion. (Emphasis added)**

EXHIBIT "3"

CAAP-17-0000050
(consolidated cases CAAP-16-0000813, CAAP-16-0000879 and CAAP-17-0000050)

Electronically Filed

IN THE INTERMEDIATE COURT OF APPEALS **Intermediate Court of Appeals**

CAAP-17-0000050

STATE OF HAWAI'I **05-JUL-2017**

02:21 PM

COMMUNITY BASED EDUCATION
SUPPORT SERVICES; CONNECTIONS
NEW CENTURY PUBLIC CHARTER
SCHOOL;

Applicants-Appellants

vs.

WINDWARD PLANNING
COMMISSION, COUNTY OF HAWAI'I;

Appellee,

And

JEFFREY GOMES, Intervenor,

Intervenor-Appellee

CIVIL NO. 14-1-0223
(AGENCY APPEAL)

APPEAL FROM THE
1) DECISION AND ORDER AFFIRMING
WINDWARD PLANNING COMMISSION,
COUNTY OF HAWAI'I'S FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
DECISION AND ORDER DENYING
SPECIAL PERMIT APPLICATION NO.
SPP12-138

2) SECOND AMENDED FINAL
JUDGMENT ENTERED ON JANUARY
13, 2017

THIRD CIRCUIT COURT
THE HON. MELVIN H. FUJINO
Judge

**APPLICANT-APPELLANT CONNECTIONS NEW CENTURY PUBLIC CHARTER
SCHOOL'S OPENING BRIEF**

APPENDICES "A" – "B"

CERTIFICATE OF SERVICE

DOUGLAS S. CHIN 6465
Attorney General of Hawai'i

HOLLY T. SHIKADA 4017
GREGG M. USHIRODA 5868
Deputy Attorneys General
Department of the Attorney General
235 South Beretania Street, Room 304
Honolulu, Hawai'i 96813
Tel. (808) 586-1255/Fax (808) 586-1488
Attorneys for Applicant-Appellant

Circuit Court's entry of the Second Amended Final Judgment. ICA 25 at PDF 1721-1725. On January 23, 2017, Connections timely filed its Notice of Appeal as to the Second Amended Final Judgment, which was designated as CAAP-17-0000050. *Id.* at PDF 1726-1739.

On April 21, 2017, the Court of Appeals entered its Order Granting February 21, 2017 Motion To Consolidate Appellate Court Case Number CAAP-16-0000813, CAAP-16-0000879 And CAAP-17-0000050 Under Appellate Court Case Number CAAP-17-0000050 And Dismissing As Moot All Other Pending Motions In Appellate Court Cases Number CAAP-16-0000813.

III. CONCISE STATEMENT OF POINTS OF ERROR

The Circuit Court committed the following error(s) in reviewing the Commissions' Decision and Order Affirming Windward Planning Commission, County of Hawai'i's Findings of Fact, Conclusions of Law and Decision and Order Denying Special Permit Application No. SPP12-138:

1. The Circuit Court erred when it reviewed and decided the agency appeal based on the "principle that an agency's decision carries a presumption of validity and appellants have the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences." ICA 25 at PDF 1470. This error occurred in the Circuit Court's Decision and Order. *Id.* The first time that this error appeared in the record was in the Circuit Court's Decision and Order. *Id.* The Circuit Court's Decision and Order is attached as App. B.

2. The Commission erroneously applied the facts to the criteria under Planning Commission Rule 6-3(b)(5)(A)-(G) to deny Connections' special permit application. ICA 25 at PDF 74-78. Therefore, the Circuit Court erred when it affirmed the Commission's determination

that "Connections has not demonstrated that the Development meets most of the criteria to be considered by the Commission in the subject application." ICA 25 at PDF 77-78, 1470-1471. ✓
FE # 63

This error occurred in the Commission Decision and the Circuit Court's Decision and Order. Id. Connections objected to this error in Applicants Connections New Century Public Charter School and Community Based Education Support Services (CBESS) Joint Exceptions of Hearings Officer's Report, Findings of Fact, Conclusions of Law, and Recommendation Dated April 7, 2014 (Joint Exceptions). ICA 31 at PDF at 1369 and 1359-1368. The Commission Decision is attached as App. A. The Circuit Court's Decision and Order is attached as App. B.

3. The Circuit Court erred when it affirmed the Commission's determination that "[m]easures proposed by Connections, regarding the establishment of building setbacks and roadway improvements to Edita Street do not appear to be sufficient to mitigate the overwhelming concerns raised by surrounding property owners." ICA 25 at PDF 75, 1470-1471. ✓
FF # 42

This error occurred in the Commission Decision and the Circuit Court's Decision and Order. Id. Connections objected to this error in its Joint Exceptions. ICA 31 at PDF 1360-1362. The Commission Decision is attached as App. A. The Circuit Court's Decision and Order is attached as App. B.

4. The Circuit Court erred when it affirmed the Commission's determination that "the proposed use may unreasonably burden the County Department of Water Supply to provide water to the Development" and that "Connections has not demonstrated how this school can be built without sufficient potable water resources." ICA 25 at PDF 76-78, 1470-1471. This error ✓
FE # 51
FE # 60

occurred in the Commission Decision and the Circuit Court's Decision and Order. Id. Connections objected to this error in its Joint Exceptions. 31 ICA at PDF 1365, 1369, and 1362-1364. The Commission Decision is attached as App. A. The Circuit Court's Decision and Order

is attached as App. B.

5. The Circuit Court erred when it affirmed the Commission's determination that "there was no evidence presented to demonstrate that location of a school that is not intended to specifically service the needs of the immediate community is such an unusual condition, trend or need that justifies location of the Development at this location." ICA 25 at PDF 76, 1470-1471. This error occurred in the Commission Decision and the Circuit Court's Decision and Order. Id. Connections objected this alleged error in its Joint Exceptions. ICA 31 at PDF 1368-1369. The Commission Decision is attached as App. A. The Circuit Court's Decision and Order is attached as App. B. FF # 5

6. The Circuit Court erred when it affirmed the Commission's determination that "it cannot be found that the Property is unsuited for agricultural uses" and that the "evidence presented does not demonstrate that the Development is a reasonable use of the Property." ICA 25 at PDF 76-77, 1470-1471. This error occurred in the Commission Decision and the Circuit Court's Decision and Order. Id. Connections objected to this error in its Joint Exceptions, ICA 31 at PDF 1366 and 1369. The Commission Decision is attached as App. A. The Circuit Court's Decision and Order is attached as App. B. FF # 5

7. The Circuit Court erred when it affirmed the Commission's determination that the "Development, which proposes a charter school that is not specifically intended to service the immediate community surrounding the school, is not consistent with the uses permitted in areas of low density urban use" and that "[a]lthough the County General Plan Public Facilities-Education course of action for South Hilo encourages the establishment of schools as the need arises, the proposed Development, at the subject location, is contrary to the General Plan". ICA 25 at PDF 77, 1470-1471. This error occurred in the Commission Decision and the Circuit FF # 59

Court's Decision and Order. Id. Connections objected to this error in its Joint Exceptions. ICA 31 at PDF 1367-1369. The Commission Decision is attached as App. A. The Circuit Court's Decision and Order is attached as App. B.

8. The Circuit Court erred when it affirmed the Commission's determination that "Connections [has not] demonstrated how the development of a regional charter school on the Property that does not specifically service the needs of the immediate community and that is overwhelming objected to by the immediate community is a reasonable site for this facility" and that the "Development is not consistent with the County General Plan, particularly as to the impacts on the immediate community" ICA 25 at PDF 77-78, 1470-1471. This error occurred in the Commission Decision and the Circuit Court's Decision and Order. Id. Connections objected to these alleged errors in its Joint Exceptions. ICA 31 at PDF 1368-1369. The Commission Decision is attached as App. A. The Circuit Court's Decision and Order is attached as App. B.

IV. STANDARD OF REVIEW

The appeal of the Circuit Court's Decision and Order is a secondary appeal, which means that this Court must determine whether the Decision and Order was either right or wrong. Kolio v. Hawaii Pub. Hous. Auth., 135 Haw. 267, 270-71, 349 P.3d 374, 377-78 (2015). In deciding the merits of this secondary appeal, the Court applies the standards set forth in HRS § 91-14(g) to the Commission's decision, which states in pertinent part:

- (g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
 - (1) In violation of constitutional or statutory provisions; or
 - (2) In excess of the statutory authority or jurisdiction of the agency; or
 - (3) Made upon unlawful procedure; or

BEFORE THE WINDWARD PLANNING COMMISSION

COUNTY OF HAWAI'I

In the Matter of) SPP No. 12-00138
)
CONNECTIONS NEW CENTURY)
PUBLIC CHARTER SCHOOL AND)
COMMUNITY BASED EDUCATION)
SUPPORT SERVICES)
)
) CERTIFICATE OF SERVICE
Application for Special Permit)
Application No. 12-000138)
)
TMK (3) 2-5-006-141, Kaumana)
South Hilo, Hawaii)
_____)

CERTIFICATE OF SERVICE

Pursuant to Rule 4-3 of the Planning Commissions Rules of Practice and Procedure, I mailed a copy of the foregoing document to the following persons, addressed as follows and postage prepaid:

TED H. S. HONG
P.O. Box 4217
Hilo, Hawaii 96720

CARTER K. SIU
235 S. Beretania St., Room 304
Honolulu, Hawaii 91813

JEAN K. CAMPBELL
Office of Corp. Counsel
101 Aupuni St., Suite 325
Hilo, Hawaii 96720

MELISSA DACAYANAN
Planning Department
101 Pauahi Street
Hilo, Hawaii 96720
[and by email to Melissa.
dacayanan@hawaiicounty.gov]

Dated at Kailua-Kona, Hawaii: November 17, 2021.



Michael J. Matsukawa
Attorney for Intervenor