

LAND USE COMMISSION
MEETING MINUTES
January 19-20 – 9:00 a.m.

Pursuant to Exhibit C of the Governor’s Emergency Proclamation Related to the COVID-19 Response, the Commission conducted its meeting using interactive conference technology.

PLACE: Zoom Webinar Virtual Meeting
Meeting Link for Wednesday, January 19th, 2022

https://us02web.zoom.us/webinar/register/WN_bCainOVTB-9GxMh_IetnQ

Due to the COVID-19 pandemic, the meeting was held remotely with Commission members, Staff and Applicants participating via an online meeting venue. The public could participate in the meeting via the “ZOOM” platform. Interested persons were also advised to submit written testimony no later than 24 hours in advance of the meeting to allow for distribution to Commission members prior to the meeting and to register to testify during the ZOOM meeting using instructions circulated on the meeting agenda.

COMMISSIONERS PRESENT: Jonathan Scheuer
(Attending via ZOOM conference media) Dawn N. S. Chang
Lee Ohigashi
Dan Giovanni
Edmund Aczon
Arnold Wong

COMMISSIONERS EXCUSED: Nancy Cabral
Gary Okuda

(8 seated Commissioners as of 10/1/19)

STAFF PRESENT: Daniel Orodener, Executive Officer
(Attending via ZOOM conference media) Dan Morris, Deputy Attorney General (DAG)
Scott Derrickson, Chief Planner
Riley Hakoda, Staff Planner/Chief Clerk
Natasha Quinones, Program Specialist

COURT REPORTER: via Naegeli Deposition and Trial
(from recorded ZOOM conference media)

CALL TO ORDER

Chair Scheuer called the meeting to order at 9:00 a.m.

Chair Scheuer and the attending Commissioners acknowledged that they were present and able to communicate via the ZOOM program. (7 Commissioners present)

Chair Scheuer announced that Commissioner Okuda had recused himself from this matter.

Commissioner Cabral communicated that she needed to recuse herself from this matter due to her current relationship with this Petitioner as their landlord at their current location.

Chair Scheuer asked her to stay in the meeting for the Approval of Minutes and Tentative Meeting Schedule.

APPROVAL OF MINUTES

The first agenda item was the approval of the Minutes for January 5-6, 2022. The Chair asked if any public testimony had been submitted and if any corrections needed to be made. There was no public testimony and no corrections to be made.

Commissioner Cabral moved to adopt the Minutes. Commissioner Giovanni seconded the motion. There was no discussion.

By a roll call, the Minutes for January 5-6, 2022, were approved unanimously (7-0-1 excused).

Chair Scheuer called for Mr. Orodener to provide the Tentative Meeting Schedule.

TENTATIVE MEETING SCHEDULE

Executive Officer Orodener provided the tentative meeting schedule from February 2022 to April 2022 for the Commissioners and cautioned that it was subject to change based on the pandemic impacts. Commissioners were advised to contact LUC staff if there were any questions or conflicts.

Mr. Orodener also announced Martina Segura as the new LUC staff planner.

There were no questions or comments regarding the tentative meeting schedule.

Chair Scheuer moved to the next agenda item.

ACTION- DOCKET No. SP21-413

SP21-413 CONNECTIONS NEW CENTURY PUBLIC CHARTER SCHOOL/ Community Based Education Support Services (CBESS) (SPP 12-000138) (Hawai'i) To Consider Special Permit Application for the Connections New Century Public Charter School/Community Based Education Support Services (CBESS) (SPP 12-000138)

APPEARANCES:

Kevin Richardson, Esq., Deputy Attorney General, Counsel for Connections New Century Public Charter School, (Connections)

Romeo Garcia, School Principal, Connections

Ted Hong, Esq., Counsel for Community Based Education Support Services (CBESS)

John Thatcher, Former Principal and Member, CBESS

Malia Kekai, Esq., Deputy Corporation Counsel, Windward Planning Commission, (WPC)

Jean Campbell, Esq., Deputy Corporation Counsel, Hawaii County Planning Department (County)

Jeffrey W. Darrow, Deputy Planning Director, Hawaii County Planning Department (County)

Alison Kato, Deputy Attorney General, Office of Planning and Sustainable Development (OPSD)

Rodney Funakoshi, Land Use Administrator, OPSD

Lorene Maki, Planner, OPSD

Mike Matsukawa, Esq., Counsel for Intervenor Jeffrey Gomes

Jeffrey Gomes, Intervenor

Chair Scheuer updated the record, described the procedures for the hearing and asked if there were any questions on the procedures.

Commissioner Giovanni asked for clarification on the procedures.

Chair Scheuer disclosed having had a social-working relationship with Mr. Hong's sister. There were no objections to Chair's continued participation.

PUBLIC TESTIMONY

Chair Scheuer asked if any written testimony had been received.

Ms. Quinones read the list of written testimony.

Chair Scheuer asked if there were any members of the public who wished to testify.

For brevity, the minutes will provide a list of the witnesses in the order they testified. "Supports" notation indicates that testimony was in support of the Special Use Permit Application. "Opposes" notation indicates that testimony was against its approval. "Other" notation indicates that the testimony was unclear. (Parentheses indicate organizational representation)

Chair Scheuer called for public witnesses from the audience and swore in each testifier.

1) Ming Peng, resident. Opposes

Mr. Hong questioned the witness about his knowledge of the filings on the docket.

2) Nalyn Ang, resident. Opposes

Mr. Hong questioned the witness about the community outreach meetings and her experience in water calculations.

3) Dr. Henry Lee Loy, resident. Opposes

Mr. Hong asked the witness about the location of his property and his experience regarding water allocation.

Commissioner Chang asked Mr. Lee Loy the importance of the Kaumana Cave system area with respect with its natural, historical, and cultural resources.

4) Jeffrey Gomes, resident. Opposes

Chair Scheuer questioned the witness about the video on the record.

4) Anna Kennedy, landowner. Opposes

Chair Scheuer asked the witness about her participation in any of the proceedings before the Windward Planning Commission.

Mr. Garcia noted that there were two students from the school wishing to testify. Chair Scheuer acknowledged that he would call them after recess.

Chair Scheuer declared recess at 10:08 a.m. and reconvened the meeting at 10:19 a.m.

5) Sadira Kirkham, student. Supports

6) Krysta Costa, student. Supports

Chair Scheuer closed testimony and moved on to presentations from the parties.

Commissioner Wong announced his availability to participate for the next day's meeting.

PETITIONER'S PRESENTATIONS

I. Presentation by CONNECTIONS

Mr. Richardson provided a historical overview of the proceedings for this application and offered Mr. Romeo Garcia, School Principal for Connections to provide testimony.

Mr. Garcia was sworn in by Chair Scheuer and testified about the focus of the school and the use of the land for the school.

Questions from Commissioners

Commissioner Chang requested clarification on the applicable rules on Special Use Permits, ICA's decision about adverse effects on surrounding areas (traffic) and Planning Commission's and LUC's obligation to protect and preserve customary and traditional practices.

Commissioner Ohigashi requested to know where in the record he could find diagrams of the proposed development.

Chair Scheuer declared recess at 11:01 a.m. and reconvened the meeting at 11:12 a.m.

II. Presentation by CBESS

Mr. Hong pointed at CBESS' position previously submitted in writing and provided a brief presentation that included a short background of the project, reference to docket SP00-393 for Kamehameha Schools and misconceptions in the record. Mr. Hong also introduced Mr. John Thatcher, former Principal for Connections and CBESS Member, as a witness.

Mr. Thatcher was sworn in by Chair Scheuer and testified in the following subject areas:

- choosing this property for the school
- protecting the cave at the north side of the property
- school promoting sustainable industries such as Agriculture and Forestry Conservation
- public water availability
- dormitories for groups who travel
- intergenerational preschool program

Mr. Hong commented on Petitioner's commitment to updating the traffic report and water calculations and addressed Commissioner Ohigashi's request for diagrams of the property.

Chair Scheuer addressed Mr. Hong's motion for the Commission to take judicial notice of prior decision on docket SP00-393 and the question of whether this was considered introducing new evidence.

Ms. Kekai, Ms. Campbell, Ms. Kato, Mr. Matsukawa provided their positions on this matter.

Questions from Commissioners

Commissioner Chang asked Mr. Hong about the offer of proof in terms of relevancy of SP00-393 to this case. She did not find any relevancy to what was in front of the Commission.

Commissioner Ohigashi made comments about the issue of Special Use Permit (SUP) as the appropriate process.

Mr. Hong argued Applicant's decision to use a SUP application instead a District Boundary Amendment (DBA).

Chair Scheuer declared recess at 11:57 a.m. and reconvened the meeting at 12:30 p.m.

Commissioner Chang and Mr. Hong discussed their conflicting views of the Planning Commission's and LUC's Constitutional obligation to protect and preserve traditional customary rights of native Hawaiians.

Commissioner Chang was also concerned with the conclusion of "No Adverse Effect" on the Environmental Assessment (EA) stating that it was based on lack of response.

Commissioner Ohigashi sought clarification from Mr. Thatcher and Mr. Hong on details about the conceptual drawing, phases and cost of development.

Mr. Richardson indicated where in the record the phases of the construction could be found.

Commissioner Wong expressed his preference of having more than conceptual drawings for this project.

Chair Scheuer commented on charter schools and curriculum; and requested clarification on things that should be in the record such as:

- existence of DNLR agreement with special permit conditions under the requirement of HAR 15-15-95A
- Existence of a Letter of concurrence from the State Historic Preservation Division
- Existence of the recommendation received to use a SUP instead of a DBA
- Location of the current property in reference to County's urban growth boundary line
- Supreme Court's directives under Local 5 case on how long an EA was good for.

Commissioner Giovanni asked for clarification from Mr. Garcia about his remark on climate change and whether the operations on the new site would neutralize the effects of climate change.

Chair Scheuer added his last question on how meet the County's requirement to dispose wastewater onsite without affecting the cave system.

Chair Scheuer declared recess at 1:31 p.m. and reconvened the meeting at 1:41 p.m.

COUNTY'S PRESENTATION

I. Hawai'i County Windward Planning Commission Presentation

Ms. Kekai stated that the Planning Commission's stood behind its recommendation and that the application met all of the SUP criteria.

Questions from Commissioners

Commissioners Wong and Chang requested clarification in the areas of:

- Planning Commission's reliance on outdated and conceptual project plans
- adverse effect on traffic and mitigation
- Planning Commission's different conclusions in 2014 and 2021
- legal requirements under special use permits
- conclusion of "no adverse effect" on traditional cultural practices

Commissioner Ohigashi sought clarification on the allegation that the Planning Commission's Director advice to pursue a special permit rather than a district boundary amendment.

II. Hawai'i County Planning Department Presentation

Ms. Campbell confirmed the Planning Department's recommendations that were in the record and suggested approval of the special permit application.

Questions from Commissioners

Commissioner Chang, Wong and Ohigashi sought Ms. Campbell's position on the concerns that they had previously posed to Ms. Kekai.

Ms. Campbell deferred Chair Scheuer's questions to Mr. Darrow.

Mr. Jeff Darrow from the Planning Department was sworn in to answer Chair Scheuer's line of questions on special use permits, keeping the proposal under 15 acres and the fact that this proposal is in the urban growth boundary.

Chair Scheuer declared recess at 2:38 p.m. and reconvened the meeting at 2:47 p.m.

OPSD PRESENTATION

Chair moved on to OPSD's Presentation

Ms. Kato stated that OPSD recommended approval of this special use permit with additional conditions for archeological resources and endangered species and further explained OPSD's position.

Questions from Commissioners

Commissioners Chang and Wong requested Ms. Kato perspective on the same **subjects of concern posed to the County** .

Commissioner Ohigashi had additional questions to clarify OPSD's position regarding special use permits "reasonable and unusual use", time limits on SUP and sustainability for this project.

Chair Scheuer asked Ms. Kato for OPSD's opinion on some of the previous questions to the parties and added questions in the areas of:

- additional conditions that would require agricultural activities and programs
- urban growth boundary plans represented in OPSD 5-year boundary review

Chair Scheuer sworn Mr. Funakoshi (OPSD Administrator) to add clarifications about urban growth boundary plans and to confirm that OPSD did not consult with DLNR.

Chair Scheuer moved on to the Intervenor's presentation.

INTERVENOR'S PRESENTATION

Mr. Matsukawa provided a brief history of the case after the denial in 2014 and explained how the Planning Commission contemplated reopening the record to consider new evidence. Mr. Matsukawa also spoke about the Intervenor's Proposed Amended Findings and finalized by stating that the Commission should deny this application.

Questions from Commissioners

Commissioner Chang asked Mr. Matsukawa for his opinion on:

- "adverse effect" on one of the criteria for special use permits that doesn't meet "reasonable and unusable use".
- issue of article 12 section 7.
- obligation to raise customary practices

LUC office had a disruption in connectivity and Chair Scheuer decided to declare a short recess at 3:42 p.m. until connectivity was restored. Meeting reconvened at 3:45 p.m.

Chair re-assessed procedures for the day.

Commissioner Ohigashi asked for clarification on the possibility to deny based on only one of the criteria for special use permit.

Meeting recessed at 3:55 p.m. to reconvene January 20th, 2022 at 9:30 a.m.

LAND USE COMMISSION
MEETING MINUTES
January 19-20 – 9:00 a.m.

Pursuant to Exhibit C of the Governor’s Emergency Proclamation Related to the COVID-19 Response, the Commission conducted its meeting using interactive conference technology.

PLACE: Zoom Webinar Virtual Meeting
Meeting Link for Thursday, January 20th, 2022

https://us02web.zoom.us/webinar/register/WN_kZ0BaamVS3aVQSIEgh1Tow

Due to the COVID-19 pandemic, the meeting was held remotely with Commission members, Staff and Applicants participating via an online meeting venue. The public could participate in the meeting via the “ZOOM” platform. Interested persons were also advised to submit written testimony no later than 24 hours in advance of the meeting to allow for distribution to Commission members prior to the meeting and to register to testify during the ZOOM meeting using instructions circulated on the meeting agenda.

COMMISSIONERS PRESENT: Jonathan Scheuer
(Attending via ZOOM conference media) Dawn N. S. Chang
Lee Ohigashi
Dan Giovanni
Edmund Aczon
Arnold Wong

COMMISSIONERS EXCUSED: Gary Okuda
Nancy Cabral

(8 seated Commissioners as of 10/1/19)

STAFF PRESENT: Daniel Orodener, Executive Officer
(Attending via ZOOM conference media) Linda Chow, Deputy Attorney General (DAG)
Scott Derrickson, Chief Planner
Riley Hakoda, Staff Planner/Chief Clerk
Natasha Quinones, Program Specialist

COURT REPORTER: via Naegeli Deposition and Trial
(from recorded ZOOM conference media)

CALL TO ORDER

Chair Scheuer called the meeting to order at 9:30 a.m.

Chair Scheuer and the attending Commissioners acknowledged that they were present and able to communicate via the ZOOM program. (6 Commissioners present)

APPEARANCES:

Kevin Richardson, Esq., Deputy Attorney General, Counsel for Connections New Century Public Charter School, (Connections)

Romeo Garcia, Principal, Connections

Ted Hong, Esq., Counsel for Community Based Education Support Services (CBESS)

John Thatcher, Member, CBESS

Malia Kekai, Esq., Deputy Corporation Counsel, Windward Planning Commission, (WPC)

Jean Campbell, Esq., Deputy Corporation Counsel, Hawaii County Planning Department (County)

Jeffrey W. Darrow, Deputy Planning Director, Hawaii County Planning Department (County)

Alison Kato, Deputy Attorney General, Office of Planning and Sustainable Development (OPSD)

Rodney Funakoshi, Land Use Administrator, OPSD

Lorene Maki, Planner, OPSD

Mike Matsukawa, Esq., Counsel for Intervenor Jeffrey Gomes

Jeffrey Gomes, Intervenor

Chair Scheuer updated the record and noted that the CBESS written response to Commissioner's inquiries was received.

Ms. Quinones confirmed that the filing had been posted to the website.

Chair Scheuer asked the parties to provide their final comments.

FINAL COMMENTS

Mr. Richardson described Connections limited funding and its unique program that combined a traditional school with an agricultural forestry program. He argued that the

Commission to consider Connections' status as a charter school with finite resources and a unique program in nature and grant the Petition.

There were no questions.

Mr. Garcia commented on the purpose and foundation of the school and asked for the Commission's support for this project.

Mr. Hong raised multiple issues regarding administrative matters:

- concerns of ex-parte communication between Commissioners and Intervenor
- allegation of Agenda's meeting time change
- objection to untimely filing by the County of Hawaii

Chair addressed each of Mr. Hong's concerns starting with Commissioner Chang.

Commissioner Chang stated that she had known Mr. Matsukawa for many years as a fellow member of the bar and confirmed having no ex-parte communication with Mr. Matsukawa, nor being co-counsels in any case.

Mr. Hong acknowledged Ms. Chang's statement.

Chair Scheuer deferred to LUC's Deputy Attorney General on the second point of concern.

Ms. Chow addressed the concern and confirmed that the requirements for "Continuation of Meetings" were met.

Chair asked Mr. Richardson if as co-counsel, he was joining the concerns of administrative matters.

Mr. Richardson said he was satisfied with Commissioner Chang and Ms. Chow's responses.

Chair Scheuer addressed the third matter regarding a written objection from Mr. Matsukawa.

LUC Staff confirmed that no filing was received by the Intervenor other than the Notice of Appearance by counsel.

Chair Scheuer confirmed with Mr. Matsukawa that he did not file a motion but an objection to the late filing of the record on appeal and served the parties.

LUC staff verified not receiving this filing.

Mr. Orodenker commented that the effects of such filing of the record on appeal would have no prejudice to the parties.

Mr. Hong requested that Intervenor withdraw this objection.

Mr. Matsukawa withdrew his objection.

Having addressed all three administrative matters from Mr. Hong, Chair Scheuer continued with Final Comments from the parties.

Mr. Hong declared his belief that LUC was engaging in unlawful ruling and raised three main points of concern regarding the Commission's ruling:

- suggestion that the EA was stale
- request for final financial planning for an SUP
- believe that a dba is more appropriate

Mr. Hong continued his closing statements by arguing about petitioner's effort for the cultural assessment and accused the Commission of holding the Petitioner to a double standard, mocking the Petitioner and questioning his integrity based on financial wealth. There were no questions for Mr. Hong.

Chair Scheuer moved on to the County's final comments.

Ms. Kekai stated that WPC thanked the Commission for its time and asked the Commission to find that the SUP application met all the criteria and approve it. There were no questions for the Windward Planning Commission.

Ms. Campbell noted that the Planning Department remained satisfied that this SUP application met all the County requirements for special permits and stood by its recommendations for approval. There were no questions for the Planning Department.

Ms. Kato stated that OPSD's position remained the same and had no additional comments. There were no questions for OPSD.

Mr. Matsukawa reiterated the points raised on the Intervenor's Proposed Findings filed with WPC to which the ICA did not vacate the following points:

- concerning adverse impacts on surrounding properties
- Connections' ability to develop an adequate potable water system
- adverse effects on the essential character of the land
- public natural resources trust
- OSP's letter filed in 2012 suggesting that a DBA was an alternative procedure for the applicant

Questions from Commissioners

Commissioner Ohigashi sought clarification about denying application on any one of the criteria including the additional County criteria.

Mr. Matsukawa provided his position about what the LUC guidelines were for ruling.

There were no other questions. Chair Scheuer moved on to formal deliberations.

FORMAL DELIBERATIONS

Commissioner Ohigashi had one final question for Mr. Hong regarding the Neighborhood case analysis.

Due to longer than usual silence at the time of deliberations, Chair Scheuer reminded the Commission of the possible ruling options for this docket.

Commissioner Wong inquired about what would follow if the Commission could not render a decision during this meeting.

Chair Scheuer, Ms. Chow and Mr. Orodener provided clarification to the Commissioners about automatic approval process and the 45-day time limit on this docket.

Chair Scheuer provided comments on the issue of permit application requirements that were not found on the record.

Commissioners Ohigashi and Chang provided their thoughts on the difficulty on making this decision due to:

- The merits of the project as innovative
- The Planning Commission denial in 2014 and decision to not reopen the record
- ICA's opinion and conclusions of the adverse effect of traffic
- LUC's constitutional obligation to protect cultural traditional practices

Commissioner Aczon gave way to Commissioner Chang to make a motion.

Commissioner Chang moved to deny the Special Use Permit. Commissioner Aczon seconded the motion.

Commissioner Chang spoke to the motion stating that the proposed project did not demonstrate being harmless to traditional customary practices and did not mitigate the traffic impact on the surrounding properties.

Commissioner Aczon spoke in support of the motion and expressed his concern with the change of decision without justification by the Planning Commission.

Commissioner Giovanni asked about the alternative to go back to the Planning Commission and expressed his concerns.

Commissioner Ohigashi considered remanding this case.

Commissioner Chang expressed her thoughts about remanding back to the County and instead favored having an alternative to revisit the project to address the unresolved matters.

Commissioner Ohigashi stated his decision to support the motion.

Chair Scheuer made comments in support of the motion and asked Mr. Orodenker to poll the Commission.

By a roll call, the motion to deny the Special Use Permit Application based upon the record passed unanimously (6-0-2 recused).

