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STATE OF HAWAII

LAND USE COMMISSION

Hearing held on January 19, 2021

Commencing at 9:00 a.m.

Held via Zoom by Interactive Conference Technology

I. CALL TO ORDER

II. ADOPTION OF MINUTES

January 5-6, 2022 Minutes

III. TENTATIVE MEETING SCHEDULE

IV: ACTION

**SP21-413 CONNECTIONS NEW CENTURY PUBLIC
CHARTER SCHOOL/Community Based Education
Support Services (CBESS) (SPP 12-000138)
HAWAII**

To Consider Special Permit Application for
the Connections New Century Public Charter
School/Community Based Education Support
Services (CBESS) (SPP 12-000138)

V. RECESS/ADJOURNMENT



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BEFORE :

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APPEARANCES BY VIDEOCONFERENCE

COMMISSIONERS PRESENT:

- Jonathan Scheuer, Chair
- Dawn N.S. Chang
- Dan Giovanni
- Lee Ohigashi
- Edmund Aczon
- Arnold Wong

COMMISSIONERS RECUSED:

- Nancy Cabral
- Gary Okuda

STAFF PRESENT BY VIDEOCONFERENCE:

- Daniel Orodener, Executive Officer
- Scott Derrickson, Chief Planner
- Riley Hakoda, Staff Planner
- Natasha Quinones, Program Specialist/Chief Clerk
- Linda Chow, Deputy Attorney General

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APPEARANCES BY VIDEOCONFERENCE CONTINUED

PETITIONER:

Ted H.S. Hong, Esquire, for CBESS

Kevin M. Richardson, Esquire for Connections

OFFICE OF PLANNING AND SUSTAINABLE DEVELOPMENT:

Mary Alice Evans, Director

Alison Kato, Deputy Attorney General

COUNTY OF HAWAII:

Zendo Kern, Director

Jeff Darrow, Deputy Planning Director

Jean K. Campbell, Esquire, Deputy Corporation Counsel,
Hawaii Planning Department

Malia A. Kekai, Esquire, Deputy Corporation Counsel,
Hawaii Planning Commission

INTERVENOR JEFFREY GOMES:

Michael J. Matsukawa, Esquire

1 **CHAIRMAN SCHEUER:** Okay. Mai kakou, good
2 morning. This is the January 19, 2022 Land Use
3 Commission meeting which is being held using
4 interactive conference technology linking
5 videoconference participants and other interested
6 individuals of the public via the Zoom Internet
7 conferencing platform.

8 We are doing this, of course, to comply
9 with ongoing county and state official operational
10 directives during the still ongoing COVID-19
11 pandemic. Members of the public are able to attend
12 and view the meeting via the Zoom webinar platform.

13 One change that has occurred during the
14 pandemic is that we make our court transcript
15 recordings from the Zoom recording; so it's really
16 important for all participants that I stress to you
17 the importance to speak slowly, clearly, directly
18 into your microphone, and before speaking, it is
19 helpful to identify yourself for the record.

20 Please be aware, of course, for all
21 meeting participants, including any witnesses or
22 public testifiers who come in, that this meeting is
23 being recorded on the digital record of this
24 meeting; so your continued participation is your
25 implied consent to be part of the public record for

1 the event. If you do not wish to be part of the
2 public record, you should leave the meeting now.

3 As most of us know, the Zoom conferencing
4 technology allows the parties and each individual
5 commissioner individual remote access to the meeting
6 via our own personal digital devices.

7 Because of that and because of many times
8 matters entirely outside of our control, occasional
9 disruptions to connectivity may occur. If this does
10 happen, please let us know and please be patient as
11 we try to restore audiovisual signals in order to
12 conduct business during the pandemic.

13 For any members of the public who are here
14 who wish to testify on any matter on which testimony
15 is being allowed and you are accessing this meeting
16 by phone rather than the Zoom Internet software,
17 please know that to raise your hand, you can press
18 the key sequence star 9 or the same again to lower
19 it and star 6 to ask to be unmuted.

20 Otherwise, participants can use the
21 software raise hand button to raise your hand. We
22 will take breaks from time to time, approximately 10
23 minutes every hour.

24 My name is Jonathan Likeke Scheuer, and I
25 have the pleasure and honor of serving as the State

1 Land Use Commission Chair.

2 We currently have eight seated
3 commissioners of a possible nine. Along with me on
4 Oahu, Commissioner Dawn Chang, Commissioner Arnold
5 Wong, Commissioner Ed Aczon as well as our Chief
6 Executive Officer Daniel Ordenker, our Chief Planner
7 Scott Derrickson, our Staff Planner Riley Hakoda,
8 our Chief Clerk Natasha Quinones, our Deputy
9 Attorney General Linda Chow are all on the island of
10 Oahu.

11 Commissioner Nancy Cabral is on Hawaii
12 Island. Commissioner Ohigashi is on Maui.
13 Commissioner Dan Giovanni is on Kauai.

14 As I stated before, court transcripts are
15 being done from this Zoom recording. I note that
16 Commissioner Gary Okuda is excused and has already
17 recused himself from this meeting.

18 Commissioner Cabral, do you also wish to
19 say something at this time?

20 **COMMISSIONER CABRAL:** Yes. Thank you,
21 Chair. I would very much love to hear this petition
22 and be able to be involved, but in review of the
23 state ethics laws and with the help of getting that
24 information from our Linda Chow with the Attorney
25 General's office, and in review of that, I realize

1 that I am an agent and representative and involved
2 and have financial benefit from my relationship with
3 Connection schools as they are my tenant in their
4 current location in the Kress Building.

5 And so in order to not have any kind of
6 future claims or problem from any of the different
7 parties involved with this, I have to recuse myself
8 from this hearing.

9 So I want to say aloha to everyone
10 involved and wish I could be more involved with
11 this, but I think that in light of the law, though I
12 think I'm fair and impartial at all times, but in
13 light of the wording of the law, I definitely cannot
14 hear this case.

15 **CHAIRMAN SCHEUER:** Thank you, Commissioner
16 Cabral. Commissioner, if you wish to stay for
17 approval of the minutes and a hearing of the staff
18 or the upcoming meeting schedule, you may.

19 **COMMISSIONER CABRAL:** Yes, I will do that,
20 thank you.

21 **CHAIRMAN SCHEUER:** Okay. Thank you for
22 that. So our next order of business is adoption of
23 the minutes of the January 5 and 6, 2022 meeting.
24 Ms. Quinones, has any written testimony been
25 submitted?

1 **MS. QUINONES:** Good morning, Chair. No, I
2 have not received any written testimony on the
3 minutes.

4 **CHAIRMAN SCHEUER:** Okay. Is there anybody
5 in the public attending this meeting who wishes to
6 testify solely on adoption of the minutes.

7 There will be a separate opportunity to
8 testify on the main docket that we are hearing
9 today; so I would like you to raise your hand only
10 if you wish to testify on the adoption of the
11 minutes from January 5 through 6.

12 If your hand is raised I'm going to call
13 on you and assume that you are testifying on
14 adoption of the minutes. There's two people whose
15 hands were already raised, but if that is incorrect,
16 you should lower your hands at this time.

17 So checking, if your hand is raised, it
18 means you wish to testify on adoption of the
19 minutes. I am going to be promoting to be a panelist
20 Anna Kennedy.

21 When you are promoted to be a panelist,
22 you can enable your audio and video. I will swear
23 you in. Okay. Ms. Kennedy, lower your hand, please,
24 if you are declining to be promoted to be a
25 panelist.

1 Is there anybody who wishes to testify on
2 adoption of the minutes? Seeing none, is there any
3 comments or questions or is there a motion to
4 approve? Commissioner Cabral?

5 **COMMISSIONER CABRAL:** Since it's my one
6 act of the day, I will make a motion to approve the
7 minutes of the LUC meetings on January 5 and 6.

8 **CHAIRMAN SCHEUER:** I'm sorry, one moment.
9 Panelist Romeo Garcia, your hand is raised. Do you
10 wish to say something at this time? Romeo Garcia,
11 your hand is raised. Can you hear me.

12 Okay. I'll suspect that somebody who is
13 associated with Mr. Garcia will communicate with
14 him. We are moving on. Is there a second?

15 **COMMISSIONER GIOVANNI:** (Indicating).

16 **CHAIRMAN SCHEUER:** Seconded by
17 Commissioner Giovanni.

18 **COMMISSIONER GIOVANNI:** Second.

19 **CHAIRMAN SCHEUER:** Any discussion? Seeing
20 none, Mr. Ordenker, please do a roll call vote for
21 approval of the January 5 through 6, 2022 minutes.

22 **MR. ORODENKER:** Thank you, Mr. Chair. The
23 motion is to approve the minutes. Commissioner
24 Cabral.

25 **COMMISSIONER CABRAL:** Yes.

1 **MR. ORODENKER:** Commissioner Giovanni.

2 **COMMISSIONER GIOVANNI:** Aye.

3 **MR. ORODENKER:** Commissioner Aczon.

4 **COMMISSIONER ACZON:** Yes.

5 **MR. ORODENKER:** Commissioner Chang.

6 **COMMISSIONER CHANG:** Aye.

7 **MR. ORODENKER:** Commissioner Ohigashi.

8 **COMMISSIONER OHIGASHI:** Aye.

9 **MR. ORODENKER:** Commissioner Wong.

10 **COMMISSIONER WONG:** Aye.

11 **MR. ORODENKER:** Commissioner Okuda is
12 absent. Chair Scheuer.

13 **CHAIRMAN SCHEUER:** Aye.

14 **MR. ORODENKER:** Thank you, Mr. Chair. The
15 motion passes.

16 **CHAIRMAN SCHEUER:** Thank you, Mr.
17 Ordenker. Our next agenda item is the tentative
18 meeting schedule. Will you please share it with us.

19 **MR. ORODENKER:** Thank you, Mr. Chair.
20 Tomorrow we also have this matter scheduled for Zoom
21 meeting, New Century Public Charter School. On
22 February 2, we will hopefully be adopting the order
23 in the New Century Public Charter School matter.
24 And on February 3rd, we will tentatively carry the
25 ER21-75 the Kaukauna Hula Ranch matter.

1 On February 16, we will be taking up the
2 FEA acceptance for Pulama Lanai Miki Basin. That's
3 also scheduled for February 17th as well as
4 potentially the adoption of the order on the
5 Kaukauna Hula Ranch matter.

6 On March 9, we have ER21-72. We are
7 anticipating a motion in the Church-Hildal matter.
8 On March 10th, we are currently open. March 23rd, we
9 have scheduled the 10:55 KSY on the solar farm
10 matter, and March 24th, we have the FEIS acceptance
11 for Kanaha Hotel.

12 On April 13th, we will be once again
13 taking up the KSY on the solar farm matter. That's
14 also tentatively scheduled for the 14th if
15 necessary.

16 On the 27th, we have tentatively scheduled
17 the Kekaha agricultural matter. The 28th is open at
18 this point, and that takes us through our confirmed
19 schedule.

20 **CHAIRMAN SCHEUER:** Thank you very much,
21 Mr. Ordenker. Commissioners, are there any
22 questions for Dan about our schedule? Commissioner
23 Giovanni.

24 **COMMISSIONER GIOVANNI:** Yeah. Thank you,
25 Chair. April 27th, Kekaha Ag, is that the IAL

1 matter?

2 **CHAIRMAN SCHEUER:** Yes, I believe it is.

3 **MR. ORODENKER:** Yes, it is, that is

4 correct. That's the DR21-76, which is IAL.

5 **COMMISSIONER GIOVANNI:** Okay, thank you.

6 That's all.

7 **CHAIRMAN SCHEUER:** Any further questions?

8 If not, we bid a fond adieu and productive workday

9 to Commissioner Cabral. Thank you.

10 Our next agenda item today is an action
11 item for docket number SP21-413, Connections New
12 Century Public Charter School, Community Based
13 Education Support Services, Hawaii, to consider a
14 special permit application for the Connections New
15 Century Public Charter School/Community Based
16 Education Support Services SPP 12-000138.

17 Will the parties please identify
18 yourselves for the record starting with the
19 Petitioner.

20 **MR. RICHARDSON:** Good morning, Chair, and
21 Commissioners. Kevin Richardson, Deputy Attorney
22 General on behalf of Connections New Century Public
23 Charter School. Also with me is Romeo Garcia,
24 principal for Connections.

25 **MR. GARCIA:** Good morning, this is Romeo

1 Garcia, Po'okumu, Principal at Connections Charter
2 School. Unfortunately, my screen is frozen on my
3 end. Can you see me moving?

4 **CHAIRMAN SCHEUER:** No, we cannot.

5 **MR. GARCIA:** So I'm going to go ahead and
6 log out and then log back in again.

7 **CHAIRMAN SCHEUER:** Okay, that would be
8 great. Thank you.

9 **MR. GARCIA:** Thank you.

10 **MR. HONG:** Good morning, Mr. Chairman,
11 Members of the Land Use Commission. My name is Ted
12 Hong. I represent the Petitioner CBESS. With me
13 this morning representing CBESS is Mr. John
14 Thatcher, who appears on the Zoom screen as
15 petitioner with a green painted wall in the
16 background.

17 **CHAIRMAN SCHEUER:** Okay.

18 **MR. THATCHER:** Aloha.

19 **CHAIRMAN SCHEUER:** Okay. So can we change
20 his name?

21 **MR. THATCHER:** Yeah, it should be CBESS.

22 **CHAIRMAN SCHEUER:** But your name.

23 **MR. THATCHER:** John Thatcher.

24 **CHAIRMAN SCHEUER:** J-o-h-n or J-o-n?

25 **MR. THATCHER:** J-o-h-n T-h-a-t-c-h-e-r.

1 **CHAIRMAN SCHEUER:** Okay.

2 **MR. HONG:** Thank you.

3 **CHAIRMAN SCHEUER:** Anyone else from the
4 Petitioner? No. County?

5 **MS. CAMPBELL:** Good morning,
6 Commissioners. This is Jean Campbell, Deputy
7 Corporation Counsel for the Planning Department, and
8 with me is Deputy Planning Director Jeffrey Darrow.

9 **CHAIRMAN SCHEUER:** Thank you very much.
10 Good morning. Office of Planning and Sustainable
11 Development.

12 **MS. KATO:** Good morning, Alizon Kato,
13 Deputy Attorney General for the Office of Planning
14 and Sustainable Development. Also here with me are
15 Rodney Funakoshi and Lorraine Maki from OPSD. Thank
16 you.

17 **CHAIRMAN SCHEUER:** Excuse me, we also have
18 somebody else from the Planning Commission from the
19 county?

20 **MS. KEKAI:** Yes. Good morning,
21 Commission. Malia Kekai, Deputy Corporation Counsel
22 for the Windward Planning Commission.

23 **CHAIRMAN SCHEUER:** Okay. And Intervenor.

24 **MR. MATSUKAWA:** My name is Michael
25 Matsukawa for the Intervenor Jeffrey Gomes. Jeffrey

1 Gomes is logging in from Hilo separately.

2 **CHAIRMAN SCHEUER:** Okay. I see Mr. Gomes
3 is here, and I'm going to promote him to be a
4 panelist as well, though would ask him to keep his
5 screen off until he's called on, if that occurs.
6 Have we gotten everybody? Okay. My next step is to
7 update the record.

8 On October 8, 2021, the Commission
9 received a county of Hawaii employee's email
10 advising that SUP 12-138 had been passed by the
11 Windward Planning Commission.

12 On October 20, the LUC informed the
13 Windward Planning Commission that docket number
14 SP21-413 would be assigned for future submittals.

15 On October 30, due to the very large
16 volume of files to be transferred to the Commission,
17 the Commission had email communications with the
18 Windward Planning Commission on the best, most
19 efficient, and accurate intake of older historical
20 files to update and establish the docket history.

21 On November 3, the Commission received the
22 Applicant's record on appeal and File 9. On
23 November 16, the Commission received a letter from
24 the Windward Planning Commission in reference to the
25 project.

1 On December 7 we sent -- the Land Use
2 Commission sent a letter authorizing digital files.
3 On December 10, the Applicant filed an index and
4 additional document Exhibits 109 through 115 via
5 email.

6 On December 28, the Commission received
7 notice of appearance from Intervenor's
8 representative Michael Matsukawa.

9 On January 4, the Commission received the
10 Applicant's notice of representation by Kevin M.
11 Richardson, a Deputy Attorney General with the
12 Department of Education, and the Applicant CBESS's
13 notice of appearance for Ted Hong.

14 On January 7, the LUC mailed and emailed
15 the agendas for the January 19 and 20, 2022 meetings
16 for the parties, statewide, and county mailing
17 lists.

18 On the 10th, the Hawaii -- County of
19 Hawaii Planning Department filed its notice of
20 representation by Jean Campbell. Also on that day
21 we received from the Windward Planning Commission
22 the Third Circuit Court decision and order and the
23 Third Circuit Court first amended final judgment.

24 On January 11, the County of Hawaii
25 Planning Commission filed its notice of appearance

1 by Malia Kekai, Deputy Corporation Counsel. And
2 yesterday, the Office of Planning and Sustainable
3 Development filed its recommendation letter. Also
4 on that date we received a written statement on
5 behalf of CBESS by Ted Hong.

6 Now let me go over our procedures for
7 today's docket. First I will recognize any written
8 testimony that has been submitted. Next I will call
9 for people who wish to provide oral testimony on
10 this matter to do so using either the star 9 key
11 sequence or raising your hand.

12 After each witness is brought into the
13 hearing room, I will swear you in, give you three
14 minutes to testify. After any testimony that you
15 offer, you then need to remain on the line to have
16 any questions asked of you by any of the parties in
17 this docket or the Commissioners.

18 Following the conclusion of any public
19 testimony, I will call for the Applicant to make
20 their presentation and to allow the Commissioners to
21 ask their questions. I don't know, between Mr.
22 Richardson and Mr. Hong, whether you have an order
23 that you wish to go in.

24 **MR. HONG:** Mr. Chairman, if it please the
25 Commission, the agreed upon order to myself and Mr.

1 Richardson, Mr. Richardson and Mr. Garcia will go
2 first and then we will follow up.

3 **CHAIRMAN SCHEUER:** Okay. So we will do
4 Richardson and then Hong and following that, we will
5 do the county. Between Planning Commission and
6 Planning Department, what's the order? Ms.
7 Campbell?

8 **MS. CAMPBELL:** The Planning Commission can
9 go first and the Planning Department will follow.

10 **CHAIRMAN SCHEUER:** Acceptable, Ms. Kekai?

11 **MS. KEKAI:** Yes, thank you.

12 **CHAIRMAN SCHEUER:** Thanks for the oral
13 response. Okay. Following that, OPSD. So that's
14 the order that we will do the presentations. After
15 each presentation, there will be questions from the
16 Commissioners.

17 When we get through all that, the
18 Commission will then be allowed to ask any final
19 questions to any of the parties, and then we will
20 enter into formal deliberations. As I've stated
21 before, we take breaks about 10 minutes every hour;
22 so first anticipated break is at 9:15.

23 The only other matter I want to go through
24 or only couple of matters I want to go through
25 before I check with the understanding of the

1 parties, Commissioners, can I clarify your
2 availability today and tomorrow.

3 When do people need to leave by today?

4 The Chair needs to be completed by four o'clock
5 today. Is there anybody who needs to leave before
6 four o'clock?

7 Tomorrow, Mr. Aczon, if we continue to
8 tomorrow, Mr. Aczon, you have an appointment in the
9 day?

10 **COMMISSIONER ACZON:** That's correct.

11 **CHAIRMAN SCHEUER:** What time is that?

12 **COMMISSIONER ACZON:** One o'clock.

13 **CHAIRMAN SCHEUER:** Sorry, could you repeat
14 that?

15 **COMMISSIONER ACZON:** From eleven o'clock
16 to one o'clock.

17 **CHAIRMAN SCHEUER:** Okay. And Commissioner
18 Wong, you are unavailable?

19 **COMMISSIONER WONG:** That is correct,
20 Chair.

21 **CHAIRMAN SCHEUER:** Okay. We have eight
22 seated commissioners, and two have recused so we
23 have six seating. We need a bare minimum of five
24 both as quorum and to take action; so should we go
25 beyond today into tomorrow, we will have to take a

1 mandatory break while Commissioner Aczon is
2 unavailable because -- well, wait, no, we could
3 continue but then he'd have to go -- Commissioner
4 Ohigashi.

5 **COMMISSIONER OHIGASHI:** Tomorrow I have a
6 court hearing from about two o'clock. So might not
7 be able to be here 2:00 to 3:00.

8 **CHAIRMAN SCHEUER:** Okay. We will do the
9 best we can. Obviously just want the parties to be
10 aware to the degree that we can get our work done
11 today, it will be logistically easier for all of us.

12 Another reminder, I'd like to remind the
13 public and the parties that special permit
14 proceedings before the Land Use Commission under
15 Section 205-6 Hawaii Revised Statutes are not
16 evidentiary hearings.

17 As such, the Commission is limited to
18 review the evidence already contained in the record
19 in rendering its decision. Generally, there's no
20 requirement for the parties to present witnesses or
21 submit written evidence.

22 Sorry, Commissioner Giovanni?

23 **COMMISSIONER GIOVANNI:** Yes, Chair. Will
24 we be hearing directly from the Intervenor?

25 **CHAIRMAN SCHEUER:** Yes. I neglected that

1 in the order. They would be last prior to --

2 **COMMISSIONER GIOVANNI:** Prior to
3 deliberation?

4 **CHAIRMAN SCHEUER:** Thank you, Mr.
5 Giovanni. Normally we don't have two parties per
6 every party so I got thrown off a little bit. Thank
7 you for that clarification.

8 So I'm going to go in order and check that
9 all the parties here today understand our procedures
10 that I've gone over. Starting with Mr. Richardson.

11 **MR. RICHARDSON:** Yes, understood.

12 **CHAIRMAN SCHEUER:** Okay. Mr. Hong?

13 **MR. HONG:** Yes, Mr. Chairman, thank you.

14 **CHAIRMAN SCHEUER:** Ms. Kekai?

15 **MS. KEKAI:** Yes.

16 **CHAIRMAN SCHEUER:** Ms. Campbell?

17 **MS. CAMPBELL:** Yes.

18 **CHAIRMAN SCHEUER:** Ms. Kato?

19 **MS. KATO:** Yes.

20 **CHAIRMAN SCHEUER:** And Mr. Matsukawa.

21 **MR. MATSUKAWA:** Yes.

22 **CHAIRMAN SCHEUER:** Are there any further
23 disclosures that the Commissioners have to make at
24 this time related to this docket? I'll note that
25 for many years, the Mr. Hong's sister and I have

1 worked together and have been friends, but I don't
2 actually believe I've ever met Mr. Hong.

3 And if I have met you before, I apologize,
4 I don't even recall. So just a social -- social
5 working relationship with Mr. Hong's sister. Any
6 other disclosures.

7 Seeing none, it's now time for public
8 testimony. Ms. Quinones, what written testimony has
9 been received in this docket?

10 **MS. QUINONES:** Yes, good morning, Chair.
11 I forwarded you the list we have received. I can
12 read it for you, if you want.

13 **CHAIRMAN SCHEUER:** Would you please?

14 **MS. QUINONES:** Yes. I have we received
15 written testimony from January 11 until yesterday.
16 The first one was Linda Pexa, Ivan Mochida, Carolyn
17 Kaichi, Lester Sakamoto, June Sakamoto, Wayne
18 Kanemoto, Iwasaki Farms, Loretta and Ronald
19 Crivello, Fay Sakata, Yolanda Keehne, Steven Sakata,
20 Bertram Carvalho, Anna Kennedy, Ke'ala Lee Loy,
21 Henry Lee Loy, Wanda Quiocho and Ming Peng. There
22 was a total of 17 testimonies received.

23 **CHAIRMAN SCHEUER:** Okay, Ms. Quinones.
24 And those have been posted to our website?

25 **MS. QUINONES:** Yes.

1 **CHAIRMAN SCHEUER:** Thank you. Are there
2 any members of the public who wish to give oral
3 testimony today? Now you may raise your hand and I
4 will call you in order, admit you to be panelists
5 one by one, swear you in. You'll have the
6 opportunity to be questioned by any of the parties,
7 and then we will move on.

8 So Ming Peng followed by Nalyn Ang, then
9 Henry Lee Loy, Anna Kennedy. And Mr. Gomes, you
10 wish to testify as a public testifier, do I
11 understand that correctly by your raised hand? Mr.
12 Matsukawa, could you clarify?

13 **MR. MATSUKAWA:** Yes, I think he signed in
14 to testify.

15 **CHAIRMAN SCHEUER:** Ms. Peng, Ming Peng, if
16 you can enable your audio and video.

17 **DR. PENG:** Certainly.

18 **CHAIRMAN SCHEUER:** I'm going to swear you
19 in. Do you swear or affirm the testimony you are
20 about to give is the truth?

21 **DR. PENG:** Yes.

22 **CHAIRMAN SCHEUER:** Okay. So if you would
23 state your name and address for the record, and then
24 proceed.

25 **DR. PENG:** Yes. My name is Ming Peng, P-

1 e-n-g. I live at 1547 Mele Manu Street in Hilo, and
2 just for the record, I did not submit written
3 testimony. I believe that was my wife Nalyn Ang who
4 actually submitted the written testimony.

5 **CHAIRMAN SCHEUER:** Okay. You can proceed.
6 I'll give you three minutes.

7 **DR. PENG:** Thank you. Again, my name is
8 Ming Peng. I live near the proposed site of the
9 school of which I am against. I hope my testimony
10 today will help your decision to deny this special
11 use permit.

12 I don't know if any of you are familiar
13 with the Kaumana area, but if you were, you would
14 understand that this quiet, residential community is
15 inappropriate and incompatible for a facility of
16 this size.

17 I feel a facility of this size with the
18 construction and presence would adversely impact the
19 environment and surrounding community because of the
20 increased traffic, increased noise, increased
21 utilization of resources, and increased waste.

22 Also, the facility is located near the
23 entrance of the subdivision of where I live, and
24 there is only one way in or out of the subdivision
25 for the over 80 houses that currently exist there.

1 There is no alternative route, and I feel this poses
2 a further danger.

3 I guess in general, I have to admit that
4 I'm a little bit cynical. I kind of get this
5 feeling that throughout this process and with all
6 the attorneys involved, that the community's concern
7 is not being heard and that there is this
8 expectation of a rubber stamp of approval by the
9 Land Use Commission, but I guess that's my own
10 cynicism of how things have been going.

11 And, you know, these are just feelings, I
12 guess, but I hope that you guys will please consider
13 the concerns of the local community, the adverse
14 impact of this facility, and deny this permit. I'm
15 happy to take questions now.

16 **CHAIRMAN SCHEUER:** Okay. Thank you very
17 much. Questions for the witness, Mr. Richardson?

18 **MR. RICHARDSON:** No questions.

19 **CHAIRMAN SCHEUER:** Mr. Hong?

20 **MR. HONG:** Thank you, I have some
21 questions. Mr. Peng, what do you do for a living.

22 **DR. PENG:** I'm a physician.

23 **MR. HONG:** In Hilo.

24 **DR. PENG:** Yes.

25 **MR. HONG:** And isn't it true that your

1 community has opposed any attempt to include another
2 access into your subdivision.

3 **DR. PENG:** That I'm not aware of, you
4 know, I mean, I would actually -- yeah, I'm not
5 aware of that there has been opposition to an
6 alternative access.

7 **MR. HONG:** How long have you been living
8 there. DR. PENG: 2004.

9 **MR. HONG:** Have you read any of the draft
10 environmental reports or assessments in this case.

11 **DR. PENG:** I briefly looked at them.

12 **MR. HONG:** And have you read any of the
13 decisions rendered by the Hearings Officer or
14 Planning Commission or the latest findings of fact
15 by the Planning Commission.

16 **DR. PENG:** I have briefly looked at them.

17 **MR. HONG:** When was the last time you
18 looked at the findings by the planning -- Windward
19 Planning Commission.

20 **DR. PENG:** About just a few weeks ago,
21 yeah.

22 **MR. HONG:** Thank you. I have no further
23 questions.

24 **CHAIRMAN SCHEUER:** Thank you. Ms. Kekai?

25 **MS. KEKAI:** No questions, Chair.

1 **CHAIRMAN SCHEUER:** Ms. Campbell?

2 **MS. CAMPBELL:** No questions, thank you.

3 **CHAIRMAN SCHEUER:** Ms. Kato?

4 **MS. KATO:** No questions, thank you.

5 **CHAIRMAN SCHEUER:** Mr. Matsukawa?

6 **MR. MATSUKAWA:** No questions.

7 **CHAIRMAN SCHEUER:** Commissioners,
8 questions? So I didn't say this, I sometimes say
9 this when we get dockets in front of us which bring
10 in a number of people who've never had reason to
11 attend Land Use Commissions before.

12 Just so you know, we are all volunteers,
13 nine of us. We get appointed by the governor,
14 confirmed by the senate, disclose our finances.
15 Some of us are attorneys. I'm not, a number of us
16 aren't.

17 We do this to as a way to serve Hawaii,
18 and I would say if you asked around in various
19 communities in Hawaii including the development
20 community, rubber stamp is not a word that would be
21 used to describe this particular Commission.

22 But that's just my personal opinion after
23 serving almost eight years, but just wanted to say
24 that as a response to your testimony. Thank you
25 very much for taking the time to testify today.

1 DR. PENG: No, thank you.

2 CHAIRMAN SCHEUER: We appreciate it very
3 much.

4 DR. PENG: Thank you.

5 CHAIRMAN SCHEUER: Okay. I'm going to
6 move you back to be attendee. I'm going to admit
7 who I understand from your earlier -- actually, I'm
8 going to go to Mr. Gomes and then follow by Nalyn
9 Ang.

10 Mr. Gomes, would you please enable your
11 video? Jeff Gomes, would you please enable your
12 video?

13 Mr. Matsukawa. Mr. Gomes, can you enable
14 your video, are you able to? Can you say something?
15 Okay. We are going to pause on Mr. Gomes, I'll let
16 you work that out. Perhaps you need to exit the
17 meeting and come back in, but I'm going to move on
18 to Nalyn Ang, followed by Henry Lee Loy.

19 When you are admitted, Nalyn Ang, please
20 enable your audio and video.

21 DR. ANG: All right.

22 CHAIRMAN SCHEUER: There we go. Aloha.
23 I'm going to swear you in and then ask you to say
24 your name and address for the record and then
25 testify. Do you swear or affirm the testimony you

1 are about to give is the truth?

2 **DR. ANG:** Yes. And my name is Nadezna Lyn
3 Ang, I go by Nalyn. Last name is Ang, A-n-g. I
4 live at 1547 Mele Manu Street here in Hilo, and I,
5 too, am testifying in opposition to this project.

6 My point of view is I'm concerned about
7 the lack of water and that they are going to have a
8 state sponsored project on catchment when no one
9 else in this area is on catchment. That's going to
10 open the state to liability when people do get sick
11 from the catchment water or even suspect that they
12 have gotten sick from the catchment water.

13 They propose dorms on this project which
14 is going to involve lots of water use, and 25
15 intergenerational clients, I guess, living on the
16 complex, which would again involve lots of water use
17 and as well as a groundskeeper cottage. These
18 people are going to need to bathe, cook, clean, wash
19 their clothes.

20 I've had other residences. You know, if
21 you have a personal catchment system, it's your
22 responsibility to maintain it. When it's the state
23 maintaining it because there is a public school,
24 it's the state who's going to be responsible.

25 Having said that, I'm also concerned about

1 just the size of this project. If water
2 availability and roads and traffic do not limit the
3 size and scope of a project, I don't know what does
4 other than the potentially 70 acres that they have.

5 I am concerned that this project will
6 morph into something much bigger. A 25 client
7 intergenerational client housing complex may expand
8 to 30, 35. The dorms for 30, start doubling them up
9 in a room, will expand to a dorm for 60.

10 These are concerns I have because that
11 will make this very much more a commercial endeavor
12 that has been dropped into an already well-
13 established residential area, and there is still no,
14 you know, talk of alternate access.

15 When we first met, we asked them could you
16 please make your access off Puainako Extension, and
17 the answer was no because it would be expensive. We
18 went yes, but the goodwill of the community and
19 possibly bringing in more water, is that worth the
20 money or could you find someone to help you develop
21 that road?

22 It's been very dismissive. They say, no,
23 we don't need to, and from a resident's point of
24 view where I have to drive by there every day and
25 thinking, oh, my goodness, how am I going to get my

1 child to school with all the traffic coming in and
2 out.

3 We already have backups going down Kaumana
4 up to the Legacy, that's like a half mile. You
5 bring in another hundred, 150 cars into this area,
6 that's going to back us up even further and make it
7 not only inconvenient but dangerous for people
8 trying to get just in and out of their house.

9 It's not just their community up here on
10 Mele Manu Street or Pacific Plantation that's
11 affected by the traffic coming up and down Kaumana
12 Street. It's all the houses.

13 **CHAIRMAN SCHEUER:** Okay. Can I ask you to
14 summarize, please.

15 **DR. ANG:** Yeah. So in summary, this is
16 way too big. I think Connections absolutely needs a
17 campus. I would love for them to be in Pono Hilo or
18 Kona, but definitely not Kaumana. This is not an
19 appropriate use of the land in this area. Thank you.

20 **CHAIRMAN SCHEUER:** Thank you very much.
21 Please stay on to see if there's any questions for
22 you from any of the parties or the Commissioners.
23 Mr. Richardson?

24 **MR. RICHARDSON:** No questions, Chair.

25 **CHAIRMAN SCHEUER:** Mr. Hong?

1 **MR. HONG:** Thank you, I have a few
2 questions. Ms. Ang, how many of the community
3 meetings did you attend where Connections made a
4 presentation.

5 **DR. ANG:** I attended the ones I knew about
6 because I live outside of that radius of
7 notification, and there were at least two to three
8 when they, because we met at Kaumana Elementary,
9 when they first announced the development of the
10 school.

11 Honestly since then, it's been pretty much
12 radio silence from Connections as far as outreach to
13 the community that I know of. There's been no.

14 **MR. HONG:** Then have you ever looked at
15 the findings from the Windward Planning Commission
16 back in October, did you read through those.

17 **DR. ANG:** Yes, I read through them last
18 night. That's where they reminded me of the dorms
19 for the nontraditional housing and the 25
20 intergenerational clients. I had already remembered
21 the groundskeeper. I didn't remember how big of a
22 dorm they were planning.

23 **MR. HONG:** And what do you do for a
24 living.

25 **DR. ANG:** I am a physician, but currently

1 I am not working.

2 **MR. HONG:** All right. And in terms of any
3 experience regarding the water calculations, do you
4 have any experience in that area.

5 **DR. ANG:** No, I do not. I had to go --

6 **MR. HONG:** Okay, thank you very much. No
7 further questions.

8 **CHAIRMAN SCHEUER:** Thank you, Mr. Hong.
9 Ms. Kekai?

10 **MS. KEKAI:** No questions. Thank you,
11 Chair.

12 **CHAIRMAN SCHEUER:** Ms. Campbell?

13 **MS. CAMPBELL:** No questions. Thank you,
14 Chair.

15 **CHAIRMAN SCHEUER:** Ms. Kato?

16 **MS. KATO:** No questions, thank you.

17 **CHAIRMAN SCHEUER:** Mr. Matsukawa?

18 **MR. MATSUKAWA:** No questions.

19 **CHAIRMAN SCHEUER:** Commissioners, any
20 questions for this witness? I'm seeing none. Thank
21 you very much for your testimony. We very much
22 appreciate it.

23 **DR. ANG:** I have to leaf, right?

24 **CHAIRMAN SCHEUER:** Well, I will move you
25 off, don't worry, to be an attendee. I'm now going

1 to admit -- sorry, any luck with Mr. Gomes? Can you
2 unmute? See if we can't at least get audio on Mr.
3 Gomes.

4 If you are able to hear me and you are
5 having a hard time, you might try, as worked for Mr.
6 Garcia, to leave the meeting and come back in. I'm
7 going to admit Henry Lee Loy, if Henry will enable
8 your audio and video. Aloha.

9 **DR. LEE LOY:** Good morning, Mr. Chair.

10 **CHAIRMAN SCHEUER:** Good morning. Do you
11 swear or affirm the testimony you are about to give
12 is the truth?

13 **DR. LEE LOY:** I do.

14 **CHAIRMAN SCHEUER:** Okay. State your name
15 and address for the record and then proceed.

16 **DR. LEE LOY:** I'm having some construction
17 around the area so --

18 **CHAIRMAN SCHEUER:** We cannot hear it. You
19 are coming in perfectly.

20 **DR. LEE LOY:** Okay. I was going to ask
21 Mr. Riley Hakoda to -- I had made a video because of
22 the noise. Would he be able to play it in lieu of
23 my three-minute testimony?

24 **CHAIRMAN SCHEUER:** So, yes. So can you
25 stay on for questioning, and I was -- I got a copy

1 to the link so let me see if I can pull that up.

2 Okay, one moment. I'm going to try and
3 share screen and then -- but I need you to stay on
4 for questioning by any of the parties, okay, Mr. Lee
5 Loy?

6 **DR. LEE LOY:** Yes, I will, Mr. Chairman.

7 **CHAIRMAN SCHEUER:** Can somebody confirm
8 that they are seeing the video of Mr. Lee Loy?

9 **UNIDENTIFIED MALE:** Yes.

10 **CHAIRMAN SCHEUER:** Okay. And then
11 somebody confirm when I start playing whether the
12 audio is coming through.

13 **UNIDENTIFIED MALE:** No audio.

14 **CHAIRMAN SCHEUER:** No audio, okay. So Mr.
15 Lee Loy, I'm going to stop screen sharing. It might
16 exceed our technical abilities on the fly; so if you
17 could give us your oral testimony, please.

18 **DR. LEE LOY:** Yes, sir. Good morning, my
19 name is Dr. Henry Lee Loy. I'm a retired physician.
20 I live in Kaumana, Hilo, Hawaii.

21 I'm not against the existence of
22 Connections Public Charter School. I oppose the
23 development of a public charter school for 435
24 students and a 30-person dormitory for multiple
25 health and safety reasons, primarily inadequate

1 water supply and the cave system vulnerable to
2 surface pollution from contamination by chemicals
3 and sediment associated with urban, agricultural,
4 and livestock land use.

5 In the 1940s when the Red Hill fuel tanks
6 were constructed, we did not have the foresight to
7 predict the catastrophic existential threat to our
8 lives. Today we are equipped with foresight,
9 experience, and evidence-based science.

10 Every decision regarding our land and
11 natural resources must be scrutinized and vetted for
12 potential hazards. Island living requires this kind
13 of substantial and careful approaches to granting
14 permits for anything and everything.

15 It is too costly to fix after the fact.
16 Human lives and destruction of natural resources
17 cannot and should not be compromised ever.

18 The EA was not thoroughly scrutinized and
19 instead readily passed by then Office of
20 Environmental Quality Control Director Katherine
21 Kealoha, who today sits in a federal prison.

22 This commission has an obligation to
23 deliver such scrutiny. This 70-acre parcel is the
24 last remaining watershed directly above and
25 protecting the town of Hilo.

1 It is situated directly over the extensive
2 Kaumana Cave system formed by the 1881 lava flow
3 from Mauna Loa, which Princess Ruth, Ke'elikolani,
4 an advocate for Hawaiian culture helped to stop by
5 standing in its path at the foot of the lava flow
6 while chanting and making offerings to Pele. The
7 lava flow soon ceased and she camped overnight just
8 beyond the lava's reach.

9 Ola i ka Wai, Water is Life. If the
10 position for the cultural commissioner were filled,
11 I'm sure you would be having a different
12 conversation today. As Commissioners, you have a
13 moral obligation to keep our citizens safe from
14 tainted or contaminated resources. Ola i ka Wai,
15 Water is Life. Mahalo.

16 **CHAIRMAN SCHEUER:** Mahalo a nui for your
17 testimony. Let me check with the parties if there's
18 questions for you. Mr. Richardson?

19 **MR. RICHARDSON:** No questions, thank you.

20 **CHAIRMAN SCHEUER:** Mr. Hong?

21 **MR. HONG:** I have a few questions for Dr.
22 Lee Loy.

23 **CHAIRMAN SCHEUER:** Please proceed.

24 **MR. HONG:** How far is your home away from
25 where the site is in terms of where Connections

1 wants to build.

2 **DR. LEE LOY:** I live, Mr. Hong, I live
3 approximately half a mile away as you know because
4 you attend the tennis school near our neighborhood.

5 **MR. HONG:** Yeah, I did until one of the
6 neighbors complained about the tennis lessons and
7 those have been shut down by --

8 **CHAIRMAN SCHEUER:** I'm going to ask the
9 parties to focus on the matter at hand.

10 **MR. HONG:** My question is in terms of the
11 water calculations, have you looked at those.

12 **DR. LEE LOY:** Yes, I have, Mr. Hong.

13 **MR. HONG:** What experience do you have in
14 terms of water use and water calculations and how
15 the water -- the water, county water allocations you
16 have in the course of your experience as a
17 physician.

18 **DR. LEE LOY:** I reviewed the application
19 form which stated that there is only 4,200 gallons
20 of potable water available for this entire project
21 that will require between 10,000 and 26,000 at full
22 buildout.

23 **MR. HONG:** All right. And did you also,
24 in terms of the wastewater of how the school
25 intended to use, for lack of a better knowledge,

1 wastewater from toilets, things like that, did you
2 see how they intended to handle that issue.

3 **DR. LEE LOY:** I believe they were trying
4 to reach an R2 level of wastewater for recycling use
5 into their agricultural program.

6 **MR. HONG:** Okay. Thank you, Doctor. I
7 have no further questions.

8 **DR. LEE LOY:** Thank you, Mr. Hong. That's
9 not my phone, sorry.

10 **CHAIRMAN SCHEUER:** Somebody, I think it's
11 -- somebody silence their phone, please.

12 **UNIDENTIFIED MALE:** Sorry, Mr. Chair, that
13 was my fault, my bad.

14 **CHAIRMAN SCHEUER:** Thank you. Mr. Hong,
15 sorry, did you conclude your questions?

16 **MR. HONG:** I did, Mr. Chairman, thank you.

17 **CHAIRMAN SCHEUER:** Thank you, Ms. Kekai?

18 **MS. KEKAI:** No questions. Thank you,
19 Chair.

20 **CHAIRMAN SCHEUER:** Ms. Campbell?

21 **MS. CAMPBELL:** No questions. Thank you,
22 Chair.

23 **CHAIRMAN SCHEUER:** Ms. Kato? The.

24 **MS. KATO:** No questions, thank you.

25 **CHAIRMAN SCHEUER:** Mr. Matsukawa?

1 **MR. MATSUKAWA:** No questions.

2 **CHAIRMAN SCHEUER:** Commissioner Chang.

3 **COMMISSIONER CHANG:** Aloha, Mr. Lee Loy.

4 **DR. LEE LOY:** Aloha.

5 **COMMISSIONER CHANG:** I'm Dawn Chang and I
6 sit on the Commission. I have -- I read your
7 written testimony that we received, and in it, it
8 says Kaumana Cave system is important for its
9 natural, historical, and cultural resources. Can
10 you please expand on that, what -- could you, yeah,
11 just expand, what is important about the Kaumana
12 Cave system with respect to these three components,
13 natural, historical, and cultural resources?

14 **DR. LEE LOY:** Yes, Ms. Chang. As I stated
15 in my oral testimony, the Kaumana Cave system was
16 formed during the 1881 lava flow from Mauna Loa. As
17 it made its way, as the lava flow made its way
18 downhill toward the city of Hilo, Princess Ruth
19 stood in its path and did oli and offerings to Pele
20 and it seemed to have worked as the lava flow
21 stopped and did not flow down further into Hilo.

22 The Kaumana Cave system is part of the
23 County of Hawaii park system which allows visitors
24 and residents to access this large lava tube, very
25 extensive which runs probably further down from the

1 parcel further down into Hilo.

2 This is the last remaining watershed that
3 protects the area of Hilo. If developed, it would
4 cause more problems with flooding, runoff from
5 agricultural, urban, and pollutants into the nearby
6 Waipahoehoe stream which runs directly along the
7 border of the property and further empties
8 downstream into Alenaio Stream, thus into Wailoa
9 River where the Nene goose breed, and out directly
10 into Hilo Bay. So I believe there is a significant
11 cultural significance to the location of this
12 proposed project.

13 **COMMISSIONER CHANG:** Okay. Mr. Lee Loy,
14 can I ask you, are you aware of any, within this
15 cave system, any cultural resources that have been
16 discovered, any, for example, iwi kupuna or other
17 kinds of resources that have been discovered in this
18 lava tube?

19 **DR. LEE LOY:** I heard but have not seen
20 any written evidence that there may be some iwi that
21 were, but I did not read any written proof of this.

22 **COMMISSIONER CHANG:** All right. Are you
23 aware of any other kinds of cultural activities
24 associated with either Kaumana Cave system or the
25 surrounding areas.

1 **DR. LEE LOY:** Well, we have native
2 mammalian hoary bats, and we also have the native
3 hawk which resides in the forest in this area. The
4 hawk is the Aumakua to many families, including my
5 family, and my video that I was to play was of a
6 hawk sitting right outside my door yesterday
7 screeching and probably wanting to remind the Land
8 Use Commission that it is responsible for preserving
9 and providing, protecting Hawaii's lands as it was
10 meant to be.

11 **COMMISSIONER CHANG:** Can I ask you, Mr.
12 Lee Loy, in light of the fact that this may be your
13 Aumakua or some of the other examples you've just
14 described, what impact would this project have on
15 these cultural resources that you have a connection
16 to.

17 **DR. LEE LOY:** It could lead to development
18 of the --

19 **CHAIRMAN SCHEUER:** I'm sorry, one second,
20 Mr. Gomes, sorry, can you not, like, put things up
21 in front of your screen? It's disruptive to the
22 hearing. Excuse me. Please continue Commissioner
23 Chang.

24 **COMMISSIONER CHANG:** Mr. Lee Loy, yes, go
25 ahead. So what impact would this project have on

1 these resources that you just --

2 **UNIDENTIFIED FEMALE:** Unfortunately, we
3 won't know until it's too late.

4 **DR. LEE LOY:** Well, unfortunately we won't
5 know until it's too late, but this property has
6 already begun cleaning and clearing the area and
7 illegally had removed Ohia trees from the property
8 without any permission from the state.

9 **COMMISSIONER CHANG:** Are you aware of
10 anyone using these Ohia trees historically, are you
11 aware of anybody gathering resources from these
12 sites, from this property?

13 **DR. LEE LOY:** Other than where the eel
14 probably resides and nests and where the Hawaiian
15 bats used to live, I'm not aware of any other
16 significance.

17 **COMMISSIONER CHANG:** All right. Thank you
18 so much. I greatly appreciate your testimony.

19 **DR. LEE LOY:** Thank you, ma'am.

20 **CHAIRMAN SCHEUER:** Thank you, Commissioner
21 Chang. Commissioners, any further questions for Dr.
22 Lee Loy? Seeing none, thank you very much Dr. Lee
23 Loy, I will remove you to be an attendee.

24 **DR. LEE LOY:** Thank you.

25 **CHAIRMAN SCHEUER:** Mr. Gomes, can you

1 enable your audio? You are muted. Bottom left hand
2 corner of your screen perhaps, a little microphone-
3 like button that says mute.

4 **MR. GOMES:** There we go.

5 **CHAIRMAN SCHEUER:** Okay. So before we
6 proceed further, the other account that's logged in
7 as Jeff Gomes, I'm going to dismiss that.

8 **MR. GOMES:** Okay.

9 **CHAIRMAN SCHEUER:** Or can you log out of
10 that, is that you on a different device?

11 **MR. GOMES:** It's me because I'm looking
12 and watching the computer.

13 **CHAIRMAN SCHEUER:** Okay. I'm going to
14 move that to be attendee. Okay. Mr. Gomes, do you
15 swear or affirm the testimony you are about to give
16 is the truth?

17 **MR. GOMES:** I do.

18 **CHAIRMAN SCHEUER:** Okay. State your name
19 and address for the record and proceed.

20 **MR. GOMES:** My name is Jeff Gomes. I live
21 at 281 Edita Street in Hilo.

22 **CHAIRMAN SCHEUER:** Okay, please proceed.

23 **MR. GOMES:** So I'm concerned that there's
24 so much evidence, you didn't all get the opportunity
25 to look at all the evidence, and I'd like to start

1 with the letter from Mary Evans recommending
2 approval. If you go to page 6 in the FEA, section
3 mitigating measures, 100-foot buffer to the
4 surrounding area.

5 So I don't know if you watched this video
6 or not. If you look up on YouTube, Dry Well on
7 Edita Street, this is part of the evidence, Dry Well
8 on Edita Street.

9 It shows that Kaumana Cave, I proved
10 because I lived there, right, I showed -- the video
11 shows that the Kaumana Cave flows directly
12 underneath the property completely on both sides.

13 The irony of the letter from Mary Evans is
14 she mentioned Dr. Fred Stone, who was opposed to the
15 project. Dr. Fred Stone is the reason the school
16 has agreed not to build on the upper portion because
17 this is actually documented.

18 And there's a lot of evidence and I can't
19 imagine you've had time to look at everything, but
20 Dr. Stone has verified it is an ecosystem. The cave
21 needs to be preserved, it needs to be protected.

22 When the school illegally bulldozed to put
23 up the illegal fence without permits prior to the
24 levy, if you watched the video that I posted, I'm
25 standing in the levy area at the top of the dry

1 well.

2 Before that levy was put in, the county
3 had a barrier, a concrete barrier blocking the water
4 that floods out of Kaumana Cave from hitting the
5 residents, and as everybody probably knows, the
6 concrete barrier does not stop water and so the
7 county dismantled the concrete barrier and built the
8 levy.

9 But when they dismantled the barrier, they
10 illegally dumped it on the state property where
11 Connections is located now, and the residents who
12 grew up in the area, all the kids remember climbing
13 and playing on the concrete that the county
14 illegally dumped on state property.

15 So this concrete that was left on the
16 property. When the school illegally bulldozed to
17 put their fence up, they crushed the concrete and
18 smashed --

19 **CHAIRMAN SCHEUER:** Mr. Gomes, it's been
20 three minutes. Could I ask you to summarize your
21 testimony, please?

22 **MR. GOMES:** Okay. Look at the website.
23 This is wrong. Watch the video. Ask me a ton of
24 questions.

25 **CHAIRMAN SCHEUER:** Let me see if there's

1 any questions for you, Mr. Gomes, starting with Mr.
2 Richardson.

3 **MR. RICHARDSON:** No questions, thank you.

4 **CHAIRMAN SCHEUER:** Mr. Hong?

5 **MR. HONG:** No questions, thank you.

6 **CHAIRMAN SCHEUER:** Ms. Kekai?

7 **MS. KEKAI:** No questions, thank you.

8 **CHAIRMAN SCHEUER:** Ms. Campbell?

9 **MS. CAMPBELL:** No questions, thank you.

10 **CHAIRMAN SCHEUER:** Ms. Kato?

11 **MS. KATO:** No questions, thank you.

12 **CHAIRMAN SCHEUER:** Mr. Matsukawa?

13 **MR. MATSUKAWA:** No questions.

14 **CHAIRMAN SCHEUER:** Commissioners? Seeing

15 --

16 **MR. GOMES:** May I make one final statement
17 before.

18 **CHAIRMAN SCHEUER:** Hold on. Checking if
19 any of the Commissioners have questions for you. I
20 have a question for you, Mr. Gomes. The video that
21 you are referencing, is that part of the record that
22 was in front of the Windward Planning Commission?

23 **MR. GOMES:** Yes. And so that's why when
24 that video was introduced, the Windward Planning
25 Commission came up to the dry well, looked at it,

1 and told the Petitioner that they need to
2 investigate and prove that I am wrong.

3 So Dr. Fred Stone climbed down into that
4 dry well where he fell and broke his back and never
5 did the investigation, and he recently died from
6 those injuries.

7 So this has not been investigated and it
8 still proves that the cave runs completely under the
9 lower section as well as the upper section and it's
10 very unsafe. The fact that they --

11 **CHAIRMAN SCHEUER:** Okay. Hold on, Mr.
12 Gomes, I'm going to -- you've answered the question
13 that I posed for you which was whether or not it was
14 part of the record on appeal. And for the LUC, just
15 very, like, one sentence for those commissioners who
16 may not be familiar with what a dry well is, can you
17 explain what a dry well is?

18 **MR. GOMES:** So let.

19 **CHAIRMAN SCHEUER:** Let me put it this way.
20 A dry well is a hole in the ground, correct?

21 **MR. GOMES:** Right, it's a hole in the
22 ground to catch excess water, and eventually it
23 overflows, but this particular --

24 **CHAIRMAN SCHEUER:** That was -- that was --
25 that was sufficient. Thank you very much.

1 Commissioners, anything further? Thank you very
2 much for your testimony, Mr. Gomes.

3 **MR. GOMES:** Thank you.

4 **CHAIRMAN SCHEUER:** Are there any other
5 members -- if you put yourself on mute again, Mr.
6 Gomes, could you mute yourself, please? Are there
7 any other members of the public who wish to provide
8 testimony at this time? If so, raise your hand.
9 Okay, Ms. Kennedy, Anna Kennedy. Anybody else.

10 I see that we have now been going a full
11 hour. I'm going to admit Anna Kennedy to testify,
12 and subsequent to that we will end public testimony
13 on this matter, and we will get into the substance
14 of presentations by the parties.

15 So going once, twice, if you want to
16 testify orally, raise your hand. If not, I'm going
17 to close public testimony. Seeing none, just Anna
18 Kennedy. I'm promoting you to be a panelist. If you
19 enable your audio and video. Okay. Your audio is
20 on and your video is there, great. I think you've
21 seen how we do this so can you say something so I
22 can hear you?

23 **MS. KENNEDY:** Yes. Can you hear me?

24 **CHAIRMAN SCHEUER:** Okay, great. We can.
25 Do you swear or affirm the testimony you are about

1 to give is the truth?

2 **MS. KENNEDY:** I do.

3 **CHAIRMAN SCHEUER:** Okay. State your name
4 and address for the record and proceed.

5 **MS. KENNEDY:** Okay. My name is Anna
6 Kennedy and I live on 1300 Mele Manu. This home is
7 in direct sight of the Connections proposed property
8 or project.

9 I live here with my extended family, and
10 I've lived here now for three years. I've lived on
11 the island for 10.

12 We are not opposed to the concept of the
13 Connections school and think that the state and the
14 island would benefit from an agricultural school at
15 this level of education. However, we do not think
16 this property is in the best interest of the school,
17 its clientele, or the immediate surrounding
18 community.

19 As has been stated, it's on Kaumana Drive,
20 which is very narrow and is already hazardous, and
21 the traffic counts for the school were taken at
22 least 13 years ago. Much -- there has been
23 development since then.

24 There is also a proposed development on a
25 piece of property that is immediately adjacent to

1 the school, which is now Kaumana Inn, and it has
2 been approved to be subdivided into six lots for six
3 houses. The property has not yet sold, but that is
4 a possibility.

5 It has been stated it's on top of a lava
6 flow, and I would like to point out that the nature
7 of this kind of lava is not suitable for farming
8 because there's no soil. It does not develop soil
9 rapidly, and how in the heck can you farm when
10 there's no soil.

11 Half of the property has already been
12 determined unusable because of the cave; however,
13 there is the possibility of other tubes and caves
14 under the property, and if detected as development
15 proceeds, they will have to cease and stop and
16 figure out something and so why would anyone gamble
17 the future and the safety of their school and the
18 students with such a big unknown?

19 The location of this school in my opinion
20 should be developed in an agricultural area that is
21 already established so the school could benefit from
22 examples of surrounding agricultural activity where
23 it's safer, has a longer future, and does not impact
24 a dense residential area that already has a
25 constricted traffic flow.

1 It is my understanding that special
2 permits can be granted; however, they should not
3 impact state or county or any government agency with
4 excessive expense, which means that if the Edita
5 Street were to connection to the Puainako Extension,
6 state's going to have to pay for that and --

7 **CHAIRMAN SCHEUER:** If I could ask you to
8 summarize your testimony, please.

9 **MS. KENNEDY:** Okay. That would be a big
10 expense for the state plus it, too, would impact not
11 only the community but the school property also.
12 Thank you.

13 **CHAIRMAN SCHEUER:** Let me see if there's
14 questions for you. Mr. Richardson, questions for
15 Ms. Kennedy?

16 **MR. RICHARDSON:** No questions.

17 **CHAIRMAN SCHEUER:** Mr. Hong?

18 **MR. HONG:** No. Thank you, Mr. Chair, no
19 questions.

20 **CHAIRMAN SCHEUER:** Ms. Kekai?

21 **MS. KEKAI:** No questions, Chair, thank
22 you.

23 **CHAIRMAN SCHEUER:** Ms. Campbell?

24 **MS. CAMPBELL:** No questions, thank you.

25 **CHAIRMAN SCHEUER:** Ms. Kato?

1 **MS. KATO:** No questions.

2 **CHAIRMAN SCHEUER:** Mr. Matsukawa?

3 **MR. MATSUKAWA:** No questions.

4 **CHAIRMAN SCHEUER:** Commissioners? Sorry,
5 hold on. Mr. Garcia, you've raised your hand again.
6 Was that intentional, are you trying to --

7 **MR. GARCIA:** Yes, I raised my hand because
8 we have a couple of students that have used the
9 public link to offer testimony today.

10 **CHAIRMAN SCHEUER:** Hold on, can I conclude
11 with this witness? Then --

12 **MR. GARCIA:** Sure. I'm sorry.

13 **CHAIRMAN SCHEUER:** -- come to you in a
14 moment. Questions for this witness from the
15 Commissioners? Ms. Kennedy, did you participate in
16 any of the proceedings in front of the Windward
17 Planning Commission on this matter?

18 **MS. KENNEDY:** Did I what?

19 **CHAIRMAN SCHEUER:** Participate in any of
20 the proceedings before the Windward Planning
21 Commission on this matter?

22 **MS. KENNEDY:** I attended their Zoom
23 meeting in September of this year. I have
24 thoroughly studied the Windward Planning Commission
25 materials that I have found.

1 **CHAIRMAN SCHEUER:** Did you testify at that
2 meeting, was testimony allowed?

3 **MS. KENNEDY:** Yes, I did.

4 **CHAIRMAN SCHEUER:** Thank you so much. I
5 really appreciate it. Any further questions? If
6 not, I'm going to move you to be an attendee. Okay.
7 Mr. Garcia, I think you are trying to indicate that
8 some students have been trying to testify? Can you
9 unmute yourself?

10 **MR. GARCIA:** Yes. We have had a couple of
11 students that were logged on to the public link.
12 I'm not sure if they are able to raise their hand,
13 I'm checking with a staff person. Are they still
14 able to raise their hand if they are present still?

15 **CHAIRMAN SCHEUER:** Yes, but the only
16 person whose hand is raised --

17 **MR. GARCIA:** It's from Connections. It
18 will say Connections Charter School.

19 **CHAIRMAN SCHEUER:** The only hand that's --
20 okay. I see there's somebody as an attendee using
21 your name --

22 **MR. GARCIA:** Yes.

23 **CHAIRMAN SCHEUER:** -- so perhaps they
24 registered under your name.

25 **MR. GARCIA:** Yes, because they are located

1 here in the school building.

2 **CHAIRMAN SCHEUER:** And then Krysta Costa.

3 **MR. GARCIA:** Yes.

4 **CHAIRMAN SCHEUER:** So were they not clear
5 with the directions to raise hands?

6 **MR. GARCIA:** Yeah, they may have -- may
7 not have been clear. I'm not in the room with them.

8 **CHAIRMAN SCHEUER:** Who are the two
9 individuals?

10 **MR. GARCIA:** Krysta Costa and Sadira
11 Sprout Kirkham.

12 **CHAIRMAN SCHEUER:** Okay. So I'm going to
13 close testimony after them, but it is 10:08. We
14 need to take a break. It is 10:08. We will take a
15 10-minute break until 10:18 exactly at which time we
16 will hear from the two last public testifiers and
17 then proceed.

18 **MR. GARCIA:** Thank you very much.

19 **(Recess taken from 10:08 to 10:18 a.m.)**

20 **CHAIRMAN SCHEUER:** Okay. It's 10:18, we
21 are back on the record. I've admitted Sadira
22 Kirkham as a witness. Do you swear or affirm the
23 testimony you are about to give is the truth?

24 **MS. KIRKHAM:** I do.

25 **CHAIRMAN SCHEUER:** Could you state your

1 name and address for the record and then proceed.

2 **MS. KIRKHAM:** Sadira Kirkham, 16913
3 Waipala Road, Mountain View, Hawaii.

4 **CHAIRMAN SCHEUER:** Okay. So you have
5 three minutes, you can share your testimony with us.

6 **MS. KIRKHAM:** Thank you. I believe that
7 Connections should indeed continue with their
8 projects on the Kaumana property including building
9 a separate campus. This will greatly improve our
10 community and our lives on an ecological and social
11 scale.

12 If I as a student were to have a campus
13 where I could explore and express myself in the
14 outdoors, my education and time as a student would
15 greatly improve, especially during a pandemic.

16 Our agricultural endeavors will bring
17 positive changes to the environment and inspire
18 changes inwardly and outwardly. People will look in
19 to see how they can improve as well as having
20 uplifted self-esteem so that we may reflect without
21 beating ourselves up.

22 We will help ourselves so that we may help
23 others. We will look out to see how we can benefit
24 the planet and the other creatures on it including
25 us.

1 Connections kids are creative, innovative,
2 unique, and compassionate. We are the future and we
3 will shine the light that traced back to change.
4 Connections believes in project-based learning and
5 creating a caring and growing environment.

6 It is a place to not only learn school
7 subjects but learn valuable life skills as well. It
8 is a place where you may step out of your comfort
9 zone and into your best self as you create fond
10 memories. Hands on kinesthetic learning and
11 sovereign communities create curiosity and
12 connections.

13 In the future, I'd like to continue
14 creating positive changes for the community, and I
15 believe Connections is greatly helping me on that
16 path.

17 For my senior project, I'd like to grow
18 food on Kaumana property and cook and bake healthy
19 items at an affordable price range for anyone in
20 need. Connections prepares you for the next step and
21 will help you along the way. Mahalo for your
22 consideration.

23 **CHAIRMAN SCHEUER:** Mahalo for your
24 testimony. Let me see if there's questions for you.
25 Mr. Richardson?

1 **MR. RICHARDSON:** No questions, thank you.

2 **CHAIRMAN SCHEUER:** Mr. Hong?

3 **MR. HONG:** No questions, Mr. Chairman,
4 thank you.

5 **CHAIRMAN SCHEUER:** Ms. Kekai?

6 **MS. KEKAI:** No questions, thank you.

7 **CHAIRMAN SCHEUER:** Ms. Campbell?

8 **MS. CAMPBELL:** No questions, thank you.

9 **CHAIRMAN SCHEUER:** Ms. Kato?

10 **MS. KATO:** No questions, thank you.

11 **CHAIRMAN SCHEUER:** Mr. Matsukawa
12 apparently is still absent. Commissioners,
13 questions for the witness?

14 I will say that you are more articulate
15 than a lot of more experienced testifiers who have
16 appeared in front of us.

17 **MS. KIRKHAM:** Thank you.

18 **CHAIRMAN SCHEUER:** So your testimony is
19 really valued.

20 **MS. KIRKHAM:** I appreciate that.

21 **CHAIRMAN SCHEUER:** Any further questions?
22 If not, thank you very much for taking the time to
23 testify and for your testimony. Going to move you
24 back to be an attendee.

25 **MS. KIRKHAM:** Thank you.

1 **CHAIRMAN SCHEUER:** And final witness,
2 Krysta Costa. If you would enable your audio.
3 Aloha. Great, I can see you.

4 **MS. COSTA:** Hello.

5 **CHAIRMAN SCHEUER:** So do you swear or
6 affirm the testimony you are about to give is the
7 truth?

8 **MS. COSTA:** Yes, I do.

9 **CHAIRMAN SCHEUER:** Okay, great. If you'd
10 state your name and address for the Record and then
11 proceed.

12 **MS. COSTA:** Sure, my name is Krysta Costa.
13 It's 333 Ohai Street, Apartment 412.

14 **CHAIRMAN SCHEUER:** Please proceed.

15 **MS. COSTA:** I believe Connections should
16 be approved because they -- this would be really
17 good for the students.

18 See, there's so many students and kids
19 nowadays who stay in the phones and devices and they
20 don't really go out, and they just don't really do
21 much with the nature and the earth. So I think this
22 could really help them to reconnect and to learn
23 more about the earth that they live on.

24 I also think it would be really good for
25 the students because we can make so many new

1 memories there. We can -- on what we do. We can
2 make friends there.

3 We can -- and for students like me who are
4 really poor, and I live in an apartment so I really
5 can't interact with nature all that much, although
6 I'm also very lazy so I can't say anything about
7 that, but I will say that I do believe that there
8 are lots of students like me who stay disconnected.

9 So I think this would really help them,
10 not to mention that this would also help those who
11 are poor to, you know, have more experiences where
12 they wouldn't be able to. And, yeah, I think that's
13 -- yeah, I think that's it.

14 **CHAIRMAN SCHEUER:** Great. Let me see if
15 there's questions for you. Mr. Richardson?

16 **MR. RICHARDSON:** No questions.

17 **CHAIRMAN SCHEUER:** Mr. Hong?

18 **MR. HONG:** No questions, thank you.

19 **CHAIRMAN SCHEUER:** Ms. Kekai?

20 **MS. KEKAI:** No questions, thank you.

21 **CHAIRMAN SCHEUER:** Ms. Campbell?

22 **MS. CAMPBELL:** No questions. Thank you.

23 **CHAIRMAN SCHEUER:** Ms. Kato?

24 **MS. KATO:** No questions, thank you.

25 **CHAIRMAN SCHEUER:** Mr. Matsukawa?

1 **MR. MATSUKAWA:** No questions.

2 **CHAIRMAN SCHEUER:** What year are you at
3 the charter school?

4 **MS. COSTA:** I'm senior so I will be
5 leaving, sir.

6 **CHAIRMAN SCHEUER:** So your testimony
7 really is not to benefit you but for future
8 students?

9 **MS. COSTA:** Yeah. It's, I don't know, I
10 just wanted to help give them what we could not or
11 what I did not have.

12 **CHAIRMAN SCHEUER:** Are you willing to
13 share any of your future plans with the Commission?

14 **MS. COSTA:** Oh, yes, sorry. I plan to go
15 to college, become a psychologist or author, you
16 know.

17 **CHAIRMAN SCHEUER:** Okay.

18 **MS. COSTA:** Maybe go overseas.

19 **CHAIRMAN SCHEUER:** Thank you so much for
20 your testimony. We really appreciate it. I'll move
21 you back to being an attendee.

22 Okay. We are closing testimony on this,
23 and now we will proceed with presentations by each
24 of the parties followed by questions from the
25 Commission members starting in the agreed to order

1 which we now should have clear, starting with Mr.
2 Richardson.

3 **MR. RICHARDSON:** Thank you, Chair. Just
4 to give you a road map.

5 **CHAIRMAN SCHEUER:** Yes, please.

6 **MR. RICHARDSON:** I'll plan to give a brief
7 background of some of the history and of the
8 proceedings with this case, and then I'll have Mr.
9 Garcia follow up with a brief presentation about the
10 project itself, and then after that, Mr. Hong, Mr.
11 Thatcher will give their presentations or
12 discussions.

13 And as far as question and answers go,
14 both myself and Mr. Garcia are relatively new to
15 this case whereas Mr. Hong and Mr. Thatcher have
16 been there since the outset. Therefore, perhaps
17 question and answers could be collectively for the -
18 - all the Petitioners.

19 **CHAIRMAN SCHEUER:** I will question -- I
20 don't mind taking questions at the end of the
21 presentations from Mr. Hong. I'll just remind the
22 parties again, now that we are done with public
23 witness portion, we are confined under our rules to
24 the information on the docket as the evidence has
25 been presented to us by the Windward Planning

1 Commission.

2 So to the degree that you are able to
3 directly reference items in the record, it will be
4 of great assistance to this Commission. And for the
5 Commissioners, we will often ask our questions in
6 terms of pointing to the record where is such and
7 such, does it exist or not.

8 Commissioner Wong, I see your hand waving.
9 Of course it's harder with the smaller. Sorry if
10 I've missed you for a little while.

11 **COMMISSIONER WONG:** I just wanted to
12 inform the Chair and Commissioners and all of the
13 parties that tomorrow during the break -- I checked
14 with my office.

15 I can listen to the testimony and all the
16 proceedings until maybe 1:00 or 2:00, then I can
17 join you, you know, via Zoom, but I can only listen
18 tomorrow and not ask any questions if that's okay
19 with you, Chair.

20 **CHAIRMAN SCHEUER:** That's great, thank
21 you. Let's see how far we get today, hopefully --
22 hopefully very far. Thank you very much,
23 Commissioner Wong. Anything further.

24 If not, let's start with the
25 presentations. I'm sorry, do you have a time

1 estimate, Mr. Richardson?

2 **MR. RICHARDSON:** My overview will be very
3 brief, certainly less than five minutes.

4 **CHAIRMAN SCHEUER:** Okay. And Mr.
5 Thatcher.

6 **MR. GARCIA:** This is Romeo Garcia. I'll
7 be following.

8 **CHAIRMAN SCHEUER:** Sorry.

9 **MR. GARCIA:** I should be about 15 minutes,
10 probably less.

11 **CHAIRMAN SCHEUER:** Great, thank you.
12 Please proceed.

13 **MR. RICHARDSON:** Okay. So my portion's
14 just a brief background of proceedings. It started
15 in, you know, over 10 years ago in March 2008.

16 Connections obtained conditional approval
17 for a direct lease from the Board of Land and
18 Natural Resources for the subject property. I'll
19 refer to it as the Kaumana property.

20 And so in order to receive the DLNR
21 approval, an environmental assessment was conducted,
22 and that was initiated in 2009 and the final EA,
23 which included a finding of no significant impact,
24 was published in November 2010.

25 Shortly thereafter in January 2011, the

1 DLNR approved a 65-year lease, and in May 2012
2 public notice of the lease was issued, and my
3 understanding is that the commencement date of that
4 lease was February 1, 2013.

5 Shortly after the public notice of the
6 lease, Connections and CBESS -- sorry. For
7 clarification purposes, Connections is the public
8 charter school whereas CBESS is the 501(c)(3)
9 nonprofit that supports the charter school.

10 Both, I'll call them co-applicants,
11 submitted their special permit application to the
12 County of Hawaii Planning Department. After a
13 series of public hearings and a five-day contested
14 case hearing spanning from November 2012 all the way
15 to May 2014, the Windward Planning Commission issued
16 its decision and order adopting the hearing
17 officer's findings recommending that the special
18 permit be denied.

19 That matter was appealed to circuit court
20 where it was affirmed, a decision and order, and
21 that decision was then appealed to the Intermediate
22 Court of Appeals. The ICA rendered its decision in
23 January 2020 vacating the 2014 decision and order
24 and remanding the case back to the Planning
25 Commission for further proceedings consistent with

1 the court's decision.

2 Looking at the ICA decision, they vacated
3 specific findings of fact including numbers 21, 48,
4 50, the last sentence of 52, 55, 59, 62, and 63.
5 And additionally, the ICA vacated the conclusions of
6 law number 4, 5, and 51 meaning those findings and
7 conclusions were either unsupported, contrary to
8 law, or contradicted by evidence and therefore
9 nullified.

10 As far as the specific findings by the
11 court, they mostly reversed on issues pertaining to
12 erroneous findings that there was available
13 municipal or, excuse me, that available municipal
14 and potable water was insufficient. Also the ICA
15 acknowledged that there was evidence the traffic
16 concerns were not sufficient and could be reasonably
17 mitigated.

18 Additionally, the court found it erroneous
19 that the 2-20-14 decision and order finding that the
20 location of the proposed school would not benefit
21 the immediate community.

22 The court also noted that unusual
23 conditions and needs have arisen since the land use
24 district was established as an agricultural use
25 district in the 1970s because the other is now

1 essentially residential in character pointing to the
2 LUPAG map designation for low density urban use.

3 The court also addressed erroneous
4 findings pertaining to the consideration of
5 suitability of land for agricultural uses finding
6 that the land was not suited for any agricultural
7 use was erroneous including -- and that the
8 agricultural component of the school was not a
9 reason to nullify the permit or to deny the permit,
10 excuse me.

11 The ICA found that it would be an absurd
12 result to read the unsuited for agricultural use
13 consideration so strictly and narrowly, particularly
14 under the circumstances such as those presented here
15 to deny a special permit to an applicant's attempt
16 to incorporate an agricultural component into its
17 proposed use.

18 Finally, the -- with respect to the
19 general plan and other plan, which is the separate
20 consideration for the Planning Commission, the court
21 stated that the finding that the location and
22 purpose of the proposed school was not consistent
23 with the uses permitted in areas of low density
24 urban use, that that was an erroneous finding.

25 In addition, that the proposed school is

1 contrary to the county's general plan was also an
2 erroneous finding and so this was remanded back to
3 the Windward Planning Commission.

4 On July 6, there was -- the Planning
5 Commission requested that the parties provide a
6 brief regarding whether the Commission should decide
7 the special permit application on the record as
8 presented or open the record to consider new
9 evidence and after --

10 **CHAIRMAN SCHEUER:** You can totally
11 continue if you want to, just be sure the
12 Commissioners do read the record.

13 **MR. RICHARDSON:** Okay, I understand.

14 **CHAIRMAN SCHEUER:** This is contained in
15 the ICA decision, which is also part of the record
16 before us so --

17 **MR. RICHARDSON:** Okay, that's fine. I
18 just wanted to go over that if somebody had or any
19 Commissioners hadn't reviewed that, but I'll
20 conclude that their decision and order was adopted
21 on November 14 and now is here before the LUC. And
22 so I'll let Mr. Garcia go next.

23 **CHAIRMAN SCHEUER:** Okay. Mr. Garcia, I'm
24 going to swear you in. Do you swear or affirm the
25 testimony you are about to give is the truth?

1 **MR. GARCIA:** Yes, sir.

2 **CHAIRMAN SCHEUER:** Okay. Please proceed.

3 **MR. GARCIA:** I'd like to share screen if I
4 could.

5 **CHAIRMAN SCHEUER:** Let me ask, is the
6 matter which you are sharing screen part of, like,
7 are you showing things that are already part of the
8 record?

9 **MR. GARCIA:** Yes. I'm giving information
10 about the school itself, our educational philosophy,
11 and providing information about the use of the land
12 moving forward.

13 **CHAIRMAN SCHEUER:** And is this a
14 presentation that's already been presented on the
15 record, for instance, in front of the Windward
16 Planning Commission?

17 **MR. GARCIA:** Part of the presentation.
18 Statistics at the end of the presentation were
19 presented then. The narrative that I have was not
20 presented then, and it gives more information about
21 the activities and the focus of the school.

22 **CHAIRMAN SCHEUER:** So just to be really
23 clear again, right, so we are limited in our
24 decision-making to making a decision based on the
25 record that has come before us from the Windward

1 Planning Commission.

2 So I would -- I would ask you in your
3 presentation, I will allow the presentation, but I
4 will ask you to limit your remarks to things that
5 have already been before the Windward Planning
6 Commission.

7 **MR. GARCIA:** Okay. Yes, they have.

8 **CHAIRMAN SCHEUER:** Okay. You should be
9 able to share screen.

10 **MR. GARCIA:** Okay. All right. I'm
11 looking to operate zoom --

12 **CHAIRMAN SCHEUER:** My version of the
13 software, it appears at the very bottom of your
14 screen.

15 **MR. GARCIA:** Okay. It says security. I
16 did click on share screen and it took me to security
17 and privacy. I'll try it again. Share screen, it
18 says desktop one, desktop two, whiteboard.

19 **CHAIRMAN SCHEUER:** Yeah. So at that
20 point, you click on whatever it is that you are
21 wishing to share.

22 **MR. GARCIA:** Okay. Desktop one, share.
23 Above zoom to share your screen. Okay. Now it's
24 asking for other information. All right.

25 **CHAIRMAN SCHEUER:** Commissioner Ohigashi.

1 You are muted, Commissioner.

2 **COMMISSIONER OHIGASHI:** Sorry. Mr.
3 Richardson, could you point us to where in the
4 Record this presentation was made so maybe we can
5 access it because we do have the record here.

6 While he's making his presentation, if you
7 can access what part of the record it is in, it
8 would assist us because.

9 **MR. RICHARDSON:** It was in the minutes of
10 the October winter planning commission meeting.

11 **CHAIRMAN SCHEUER:** It would be of
12 particular use given the vast volume of records here
13 if you could point to us where on the LUC's website
14 where the record is posted it appears.

15 **MR. RICHARDSON:** Okay. Mr. Garcia.

16 **CHAIRMAN SCHEUER:** Go ahead, Mr.
17 Richardson.

18 **MR. RICHARDSON:** I was going to say, Mr.
19 Garcia, I don't know if your actual presentation
20 itself was used during that meeting so perhaps you
21 came use the similar testimony that you provided --

22 **MR. GARCIA:** Okay.

23 **MR. RICHARDSON:** -- from the October
24 meeting.

25 **MR. GARCIA:** So I'm not going to -- I

1 guess for technical reasons I'm not going to be able
2 to share my screen. I can't understand what it --
3 it wouldn't let me share it with Zoom for some
4 reason, but I can go ahead and provide the narrative
5 that I prepared.

6 **CHAIRMAN SCHEUER:** So long as that is the
7 same as information that's been provided earlier, I
8 will allow it.

9 **MR. GARCIA:** Yes. There's no new
10 information.

11 **CHAIRMAN SCHEUER:** Please proceed. And
12 just tell the parties, especially given the number
13 of parties here, I really would like to run these
14 proceedings as efficiently as possible while still
15 giving all parties all opportunity to present; so
16 try to be prepared. Mr. Garcia, please continue.

17 **MR. GARCIA:** All right. Thank you very
18 much, Chair. My apologies for the technical
19 difficulty.

20 Connections, as you know, public charter
21 school opened in August 2000 on the campus of
22 Mountain View Elementary School with 184 students in
23 grades K through six. By August 2001, the school
24 was expanded to a K-12 program at the Kress Building
25 in Hilo with a total of 360 students.

1 Connections maintains an enrollment
2 waiting list today evidencing the school's success
3 and the need and desire for alternative educational
4 opportunities.

5 In 2006, the legislature passed a law
6 allowing charter schools to lease unused state lands
7 for the location of school facilities. The
8 following year, Connections asked DLNR for a list of
9 properties that could be used for the construction
10 of a campus.

11 At that time, the Hawaii state code,
12 Hawaii County general plan, and a memo outlined a
13 compilation of county and state rules and
14 regulations that charter schools in Hawaii County
15 were required to follow.

16 Hawaii general plan stated charter schools
17 were defined as public schools responsible for
18 selecting their own sites. A county memo defined
19 the applicability of state laws as charter schools
20 were exempt from state laws except those relating to
21 health, safety, and a few other exemptions,
22 building, fire, and sanitation codes.

23 The major effect of this exemption was
24 that charter schools located in state land use
25 agricultural districts did not have to obtain a

1 special permit.

2 The school asked the director of DLNR for
3 a list of properties in the Hilo area that would be
4 suitable for construction of a K-12 charter with
5 agriculture in force for projects integrated with
6 the academic program.

7 On March 28, 2008, the DLNR provided in
8 principle a direct lease to the school of a 72.43
9 acre undeveloped agricultural zone sited in Kaumana,
10 upper Hilo.

11 Consultants were hired by the school and
12 an environmental assessment was prepared. The draft
13 EA was published in August of 2009. Supporting
14 materials included a biological survey, an
15 archeological assessment, and a traffic impact
16 assessment report.

17 Concerns about the project's potential
18 impacts on Kaumana Caves and possible historic
19 resources were raised during that 30-day public
20 review.

21 In response to these concerns, the school
22 paid for an archeological field inspection of the
23 accessible portion of the part of the cave that
24 underlies the upper parcel of the property. The
25 inspection only found names carved in the sides of

1 the cave walls. No historic elements were found.

2 The director of the school met several
3 times with concerned citizens and the school to
4 agree -- and the school agreed to revise the
5 conceptual plan for the campus by locating all
6 buildings and associated infrastructure on the lower
7 parcel of the property and by maintaining a 100-foot
8 buffer on both sides of the cave alignment to
9 alleviate concerns about impacting the cave's
10 ecosystem. The draft EA was amended and published
11 in August 2010.

12 Comments received were again responded to,
13 and DLNR determined that the project would not have
14 significant environmental effects and issued a
15 finding of no significant impact in November 2010.

16 The school decided to locate all
17 facilities on the lower, the eastern parcel. No
18 facilities will be built on the upper section of the
19 property. This land will be used to support a
20 developing forestry conservation program focusing on
21 forest resource management, conservation, and
22 ecosystem restoration.

23 Native species that once grew in the area
24 will be introduced. More than half of the upper
25 section of the property is suitable for

1 reforestation projects. An elevated walkway will be
2 built to provide access and viewing options with the
3 least amount of impact on the forest.

4 It will be a lightweight structure with
5 shallow footings or a pier foundation. Access to
6 the walkway will be controlled and limited by the
7 school.

8 When the lease for the Kaumana property
9 was finally signed in 2012, Connections operated
10 from two separate campuses. The elementary and
11 middle school were located in the Kress Building on
12 Kamehameha Avenue in downtown Hilo where we are now,
13 while the high school was located in leased
14 facilities 1:37:59, Nani Mau Gardens just outside of
15 Hilo.

16 In 2015, the school consolidated all of
17 the academic programs at the Kress Building. While
18 the 40,000 square foot Kress Building provides just
19 enough classroom space for the current student
20 enrollment, the building's proximity to Hilo Bay has
21 created a major challenge.

22 The sea level around the bay has risen 10
23 inches since 1950. It is currently rising at a rate
24 of one inch every four years. Increased flooding
25 from storms and big waves is affecting

1 transportation infrastructure in this older section
2 of Hilo.

3 A 16 percent increase in the downtown
4 homeless population is also exacerbating the problem
5 where we are currently located.

6 The school has begun development of the
7 first phase of the Kaumana property. Connections
8 opened as the state's first charter school in 2000.
9 The initial vision was to enable students to become
10 stewards of Hawaii's unique environment.

11 This year the school has been
12 participating in a USDA Farm to School Grant funded
13 project with our associated nonprofit, CBESS, to
14 embrace sustainable agricultural practices through
15 integrations with other school curriculum.

16 The major need identified is for more
17 locally produced agricultural products to be used by
18 the school's cafeteria. The student-centered goal
19 is to create exposure to and opportunities for
20 agricultural-related 21st century concepts and skill
21 development through project-based learning.

22 In this morning's news broadcast, the
23 floor majority leader in Hawaii spoke to the
24 importance of our school's great -- our state's
25 great food sustainability within the state, citing

1 90 percent of our food comes from out of state.

2 The school's makery program is also being
3 supported by the Kaumana property enabling students
4 to use technology to explore, create, and develop
5 essential 21st century skills that enhance and
6 enrich learning opportunities.

7 Computer-aided design and computer
8 fabrication systems enable students to transform
9 their ideas into actual projects. A collaborative,
10 cultural, and project-based learning approach will
11 integrate digital media technology and essential
12 21st century skills.

13 The integration of emergent career and
14 technical education will prepare students to become
15 skilled, adaptable, creative, and equipped for
16 success in the rapidly changing workforce.

17 On the slide, you would have seen that
18 this is information I did share at the previous
19 hearing, is that this, the breakdown of the Hawaii
20 County districts and the cities that Connections
21 students are from based on their mailing addresses.

22 The information shows that our students
23 come from Hilo, Puna, and one other area. 250 --
24 our current enrollment is 359. 250, which is about
25 70 percent of our students, reside in Hilo. Thirty

1 percent of our students reside in Puna, and there's
2 one other that one student comes from, Pahala.

3 The cities that our students live in are
4 Hakalau, Hawaiian National Park, Hilo, Honomu,
5 Keaau, Kurtistown, Mountain View, Pahala, Pahoia,
6 Papaikou, Pepeekeo, and Volcano.

7 Of our student enrollment, 188 students
8 are male, 171 are female. We have 68 students who
9 are special education, and 504 students who have
10 student support plans.

11 That comprises about 19 percent of our
12 student population, which is high for a public
13 school, and having access to land for some of these
14 students would be the best learning modality for
15 them.

16 We also have 28 students who are English
17 language learners. We have a diverse student
18 population of American Indian, black, Chinese,
19 Filipino, Native Hawaiian, Japanese, Portuguese,
20 Samoan, white, Micronesian, Tongan, other Asian,
21 other Pacific Islander as well. 138 percent of our
22 students are Native Hawaiian, 98 percent of our
23 students are white, 16 percent of our students are
24 black, and 19 percent of students are Micronesian,
25 and the numbers get smaller from there going down

1 the list.

2 We have child nutrition programs. Since
3 Connections serves predominantly low-income
4 families, 87.9 percent, we offer free nutritious
5 meals to all children throughout U.S. Department of
6 Education child -- through our child nutrition
7 program.

8 During the school closures caused by the
9 pandemic in the school year 2021, connections
10 offered meals to students in the Hilo community. We
11 have multiple grants which we use to help support
12 our agricultural program, multiple partnerships with
13 organizations like the Akaka Foundation for Tropical
14 Forests, Hawaii Afterschool Alliance, the Hawaii
15 Agricultural Foundation, the Kamehameha Schools
16 environmental education programs, the Kohala
17 Foundation, University of Hawaii system, University
18 of Hawaii Hilo and Hawaii Community College.

19 Connections alumni work at Connections,
20 they attend college, and they are in the local
21 workforce. Because Connections continues to be a
22 resource and because they have an allegiance to the
23 school based on the appreciation they have for their
24 experience as a student, we have regular visits from
25 our alumni. They come for further support and to

1 update us on their lives.

2 I wish I was able to show the slides that
3 I had, unfortunately technical difficulties. One
4 thing I wanted to highlight that would have been in
5 a video that was going to be shown was an aerial
6 view of both parcels, the upper portion, which I
7 said again will not be built, no structures will be
8 built on, and the lower portion is where we are
9 proposing to build the future campus.

10 We are quite aware of the environmental
11 impact that a school would have. I would love to
12 have been able to show you architectural renderings
13 of how schools have already been incorporated
14 through our national network, schools that have been
15 incorporated in -- in agricultural areas so as not
16 to disturb but to blend into their agricultural
17 areas.

18 So I'll stop at that point, and I guess we
19 will go on, go back to Chair.

20 **CHAIRMAN SCHEUER:** Thank you. Mr.
21 Richardson?

22 **MR. RICHARDSON:** Thank you. To briefly
23 address Commissioner Ohigashi's question about where
24 in the record this was, this is Exhibit 110, and I
25 believe Mr. Garcia's testimony starts at page 6.

1 **CHAIRMAN SCHEUER:** Thank you very much.
2 Commissioner Chang, you have questions right now for
3 the parties? I think the request of the parties was
4 to allow Mr. Hong and Mr. Thatcher to present and
5 then have questions consolidated.

6 **COMMISSIONER CHANG:** Okay. Actually this
7 is a legal question for Mr. Richardson. It's not so
8 much factual so if you don't mind, these are
9 questions I'm probably going to ask all of the
10 parties.

11 **CHAIRMAN SCHEUER:** Go ahead.

12 **COMMISSIONER CHANG:** So Mr. Richardson, I
13 just, I wanted to confirm that you and I have both
14 the same legal understanding on the applicable
15 rules.

16 So would you agree that the rules related
17 to the special use permit, both under HRS 205 and
18 specifically 15-15-95(b) related to unusual and
19 reasonable use. Would you agree that it requires
20 that all five of those conditions be met?

21 **MR. RICHARDSON:** I believe the ICA
22 decision provides some clarity on that, that all
23 considerations are taken.

24 **COMMISSIONER CHANG:** Yes, I'm reading page
25 15 of the order. Guidelines have been adopted

1 pursuant to HRS Chapter 205 that requires the
2 Planning Commission to consider the following
3 criteria in determining whether a proposed use
4 within an agricultural district is an unusual and
5 reasonable use. So you would agree that all five of
6 those one to five need to be considered?

7 **MR. RICHARDSON:** My understanding is that
8 it's a balancing test considering all factors and
9 weighing and balancing them individually.

10 **COMMISSIONER CHANG:** Okay. And then this
11 is the next question that I have because I'm trying
12 to make sure that we are all understanding the
13 Intermediate Court of Appeals, the memorandum
14 opinion, the same way.

15 So I'm looking at page 23 of their order.
16 This is in relationship to the criteria related to
17 surrounding areas, effect relating to surrounding
18 areas, specifically the traffic.

19 So on page 23, the ICA opinion says on the
20 record in this case, we cannot conclude that the
21 Planning Commission clearly erred in adopting
22 finding of facts 18, 46, and 47 and concluding that
23 even with the proposed traffic mitigation, traffic
24 stemming from the development would have an adverse
25 effect on the surrounding properties.

1 So in other words, as I'm reading the ICA
2 decision, and I just want to make sure you would
3 agree that the ICA is saying that the Planning
4 Commission made no error in those findings related
5 to the traffic, which specifically concluded that
6 there would be an adverse effect on the surrounding
7 areas due to traffic. Do you agree with my
8 interpretation of the ICA's decision?

9 **MR. RICHARDSON:** Correct, that's the --
10 that's -- those findings weren't overturned.

11 **COMMISSIONER CHANG:** Okay.

12 **MR. RICHARDSON:** Even though the entire
13 decision was vacated. There is also evidence that
14 the ICA pointed to evidence that those effects could
15 also be mitigated, that there was evidence in the
16 record from the testimony of Raul and the TIAR
17 report that the traffic impacts could be mitigated.

18 **COMMISSIONER CHANG:** But it said
19 notwithstanding that they could be mitigated,
20 traffic stemming from the development would have an
21 adverse effect on the surrounding properties.

22 **MR. RICHARDSON:** That's correct.

23 **COMMISSIONER CHANG:** So I'm just -- and
24 the last legal question I've got to ask you is would
25 you agree that the Planning Commission and the Land

1 Use Commission are obligated to comply with Article
2 XII, Section 7 of the Hawaii state constitution
3 related to the protection and preservation of
4 traditional and customary practices exercised by
5 Hawaiians to the extent feasible, would you agree
6 that that is an obligation of the Planning
7 Commission and the Land Use Commission?

8 **MR. RICHARDSON:** Where there is evidence
9 that there are customary cultural practices being
10 exercised or that were exercised in the past, yes,
11 that would be a consideration for all state
12 agencies.

13 **COMMISSIONER CHANG:** Okay. So can you
14 show me where in the record --

15 **CHAIRMAN SCHEUER:** Sorry, Commissioner
16 Chang, one moment. Commissioner Ohigashi, were you
17 wanting to ask subsequent questions or do you have a
18 procedural matter?

19 **COMMISSIONER OHIGASHI:** No, I just want to
20 ask something about location of something in the
21 record. It can wait until after.

22 **CHAIRMAN SCHEUER:** Okay. Sorry to
23 interject, just trying to understand. Please
24 continue, Commissioner Chang.

25 **COMMISSIONER CHANG:** So my question, Mr.

1 Richardson, is where in the record, specifically the
2 Commission's findings, does it relate to Article XII
3 Section 7 specifically in relationship to compliance
4 with the Ka Pa'akai analytical framework?

5 **MR. RICHARDSON:** When you talk about the
6 Ka Pa'akai legal framework, are you referring
7 generally to the public trust doctrine or --

8 **COMMISSIONER CHANG:** No, I'm specifically
9 --

10 **CHAIRMAN SCHEUER:** A legal finding, Ka
11 Pa'akai versus Land Use Commission, a Hawaii Supreme
12 Court case.

13 **COMMISSIONER CHANG:** Yeah. This is
14 specifically the Hawaii Supreme Court's guidance to
15 state and county agencies on how do you comply with
16 Article XII Section 7 and protect and preserve
17 traditional customary practices.

18 **MR. RICHARDSON:** There's no mention of Ka
19 Pa'akai in the decision; however, I believe the
20 record, if you were to look at the final
21 environmental assessment, there are -- there is
22 discussion of cultural resources or the lack
23 thereof.

24 **COMMISSIONER CHANG:** Where in the specific
25 findings in the order does it relate to Ka Pa'akai

1 and traditional and customary practices?

2 **MR. RICHARDSON:** Ka Pa'akai is not
3 specifically referenced.

4 **COMMISSIONER CHANG:** All right, very good.
5 That's all that I wanted to ask. Thank you, I have
6 no further questions.

7 **CHAIRMAN SCHEUER:** Thank you very much,
8 Commissioner Chang. Commissioner Ohigashi.

9 **COMMISSIONER OHIGASHI:** Yeah. I was
10 trying to find a diagram of what the proposed
11 development would look like, and the only one I
12 could find was in the pro bono appeal part 2, page
13 141.

14 And I printed it out and it was pretty
15 black and white and pretty grainy; so I was asking
16 Mr. Richardson if anywhere in the record that you
17 can show us where it would have some kind of figure,
18 show us what it looked like. I can put it up to my
19 camera and show you what I have here.

20 **MR. RICHARDSON:** Please.

21 **COMMISSIONER OHIGASHI:** But that's about
22 it.

23 **MR. RICHARDSON:** Oh.

24 **COMMISSIONER OHIGASHI:** Anyway, it's in
25 there, and I was just asking at some time during

1 maybe Mr. Hong's presentation or anything like that,
2 someone can direct me to a picture or if this is the
3 only one, I can work with it.

4 **MR. RICHARDSON:** I think that there are
5 several diagrams that are included as appendices to
6 the permit application, and I think that might be
7 one of the ones that you are referring to.

8 I believe that's probably, as far as
9 building renditions and whatnot, is probably the
10 most accurate one, but I defer to either Mr.
11 Thatcher or Mr. Hong.

12 **COMMISSIONER OHIGASHI:** I just was
13 curious. If they can point out to me something that
14 I can read better because when you scan these
15 things, it becomes all grainy.

16 **CHAIRMAN SCHEUER:** Thank you, Commissioner
17 Ohigashi. Let's bring that up again after the
18 presentation of Mr. Hong.

19 Commissioners, anything further for Mr.
20 Richardson or Mr. Garcia? Seeing none, it's 11:01.

21 I want to take a break until 11:11, then
22 go for about 50 minutes, take a lunch break that
23 would last 30 to 45 minutes and proceed after that.
24 So, Mr. Hong, we will get to you at 11:11.

25 **(Recess taken from 11:01 to 11:11 a.m.)**

1 **CHAIRMAN SCHEUER:** It's 11:11, we are back
2 on the record. During the break -- oh, my god, you
3 logged out again. Mr. Garcia, your name has changed
4 again.

5 You indicated you have PowerPoint images
6 and you can show them that have diagrams. My
7 specific question is can you refer to exactly where
8 in the record these images already existed? Are you
9 able to do that?

10 **MR. GARCIA:** I'm not able to point
11 directly to the record. It was part of my general
12 presentation.

13 **CHAIRMAN SCHEUER:** So just to be really
14 repetitive and try to be as clear as possible, if we
15 start to allow information into this docket that was
16 not in the record, I would assume that some people -
17 - and then we base a decision partially on those
18 items, it would be possible for a party that
19 disagreed with our decision to suggest that we were
20 not complying with the very rules that we are
21 supposed comply with.

22 That's why I'm going to be strict in terms
23 of trying to keep us to the record that was
24 presented to us. So if you cannot point to me the
25 exact point where in the record those images

1 proceed, I don't want to allow them.

2 **MR. GARCIA:** Okay.

3 **CHAIRMAN SCHEUER:** As much as I would like
4 to see them on a personal level.

5 **MR. GARCIA:** It's possible that when Mr.
6 Thatcher and Mr. Hong begin their part of the
7 presentation, that one of them can point out,
8 probably Mr. Thatcher can point out where this
9 already appeared in the record.

10 **CHAIRMAN SCHEUER:** Okay. Thank you very
11 much. With that, let's start with your
12 presentation, Mr. Hong. And could you also give a
13 road map for where you intend to take us?

14 **MR. HONG:** Good morning, Mr. Chairman, and
15 members of the Land Use Commission. My name is Ted
16 Hong. I represent the Applicant CBESS, and that's
17 the nonprofit governing board for Connections.

18 In terms of a road map this morning, I
19 basically provide some general background that is
20 already in the record. Can I give you chapter and
21 verse? Unfortunately, no. This record has been --
22 is voluminous as you know.

23 I just wanted to highlight a couple of
24 points, and then I want to turn it over to Mr.
25 Thatcher who would discuss what's already in the

1 record but also dispel some of the misconceptions
2 that have been presented to the Commission today
3 which I think are important.

4 With the Chair's permission, I would note
5 that I had some technical difficulties. I'm trying
6 to pull up the LUC record to find the diagram that
7 would relate to Mr. Ohigashi's question.

8 I think that's highly relevant based on
9 some of the testimony we have seen before. I hope
10 that during the lunch break, I can kick my PC hard
11 enough so it will actually work, and I can find that
12 information for you.

13 If not, if I can impose on the Planning
14 Department or the Planning Commission, I know that
15 they have the same access but probably better
16 computers than I do. So with the Chair's
17 permission, I'd like to start my presentation.

18 **CHAIRMAN SCHEUER:** Absolutely. Just do
19 you have a sense of how long you might want to spend
20 with us this morning?

21 **MR. HONG:** My presentation should take
22 approximately five minutes. Mr. Thatcher's
23 presentation should take approximately 20 minutes.

24 **CHAIRMAN SCHEUER:** Great, thank you.
25 Thank you very much. Please proceed.

1 **MR. HONG:** Thank you. Again, good
2 morning, Mr. Chairman, Members of the Commission, we
3 -- I submitted a written summary of our position and
4 we ask that be incorporated into the record.

5 Just as background, and this has been the
6 testimony that I've submitted previously to the
7 Planning Commission. I live in the Kaumana area,
8 about a mile away from the project. I actually walk
9 door to door in the community where some of these
10 people live that have testified earlier.

11 And forgive me if I'm passionate about
12 this project because it -- Connections is a very
13 innovative, exciting school, and this property is
14 best suited for this school's mission, and it is, I
15 think the highest and best use of the property. So
16 again, forgive me if I'm a little passionate.

17 We ask the Commission to take notice,
18 administrative notice of the findings of fact,
19 conclusions of law, decision and order regarding a
20 special use permit that was granted to Kamehameha
21 school for its Keaau campus. That's docket number
22 SP00-393 filed by the Commission on April 7 in year
23 2000.

24 Why that decision is important is because
25 it does discuss the benefits, and certainly at that

1 time, of proceeding through a special use permit
2 instead of a district boundary amendment.

3 I wanted to talk briefly about Jonathan --
4 excuse me, John Thatcher. He's an innovative
5 educator. He's the former principal and the person
6 who actually initiated this process, and why it's
7 important, it should be approved, this particular
8 property should be, in terms of its use, approved by
9 the Land Use Commission.

10 And we would highlight and correct certain
11 misconceptions that are already in the record and
12 again perpetuated earlier this morning. John, are
13 you on?

14 **MR. THATCHER:** Yes, I am.

15 **CHAIRMAN SCHEUER:** Are you able to --
16 thank you.

17 **MR. HONG:** So with the Chair's permission,
18 I'd like to introduce Mr. Thatcher and turn it over
19 to him.

20 **CHAIRMAN SCHEUER:** Yes. Please proceed,
21 Mr. Thatcher.

22 **MR. THATCHER:** Aloha.

23 **CHAIRMAN SCHEUER:** Please proceed.

24 **CHAIRMAN SCHEUER:** Sorry, kala mai. Do
25 you swear or affirm the testimony you are about to

1 give is the truth?

2 **MR. THATCHER:** Yes, I do.

3 **CHAIRMAN SCHEUER:** Please proceed.

4 **MR. THATCHER:** Aloha, and thank you for
5 this opportunity to testify. I personally want to
6 thank you, Chair, for being strict on the rules
7 because this has been a very long process, and I
8 would not like to see it derailed by a technicality.
9 So thank you again.

10 There's several things that are on the
11 record. I'm not sure exactly where things are in
12 the record. If you look at the record, it's not
13 searchable. So it is a document that is, I think,
14 printed, a printed PDF so you cannot search it to
15 find different parts, but I have lived through this
16 record.

17 In 2007 when the law was passed that would
18 allow for charter schools to get state land, we
19 asked Laura Thielen, who was the chair or the
20 director of the Department of Land and Natural
21 Resources if she could identify some -- some
22 properties on the Big Island that we might be able
23 to lease according to the new law.

24 So she sent a set of properties over. We
25 looked at the properties. We studied them

1 carefully, and the one we chose, this one in
2 Kaumana, we specifically chose it for the
3 environment, for what is available up there.

4 In my testimony, I'm not sure when, it was
5 in 2012 or '13, I believe, I testified that this
6 land was formally Crown Land or I guess it still is
7 Crown Land, and that was one of the reasons when we
8 looked at the land, there was five things that Crown
9 Land was supposed to be used for and that was in my
10 testimony.

11 The first one was support of public
12 education, and charter schools are public schools.
13 We are not private schools. So sometimes people get
14 confused that charter schools are not public
15 schools, but in Hawaii, all charter schools are
16 publicly funded schools that are bound to the same
17 laws as other public schools.

18 So we looked at the property and I also
19 live near the property and so I'm very familiar with
20 the site. I've lived here since 19-- -- since 1992,
21 and most of the houses that are up around the
22 property were not even built then.

23 There was one set of houses that were, but
24 the whole subdivision that people keep claiming
25 represents Kaumana, the Pacific Plantation

1 subdivision is one subdivision of about 60 houses in
2 Kaumana. Kaumana is probably 20,000 people or more.

3 So I live across the street from signs
4 that say No Connections in Kaumana. I know this is
5 part of the record because Mr. Gomes purchased signs
6 back then and stuck them up all over the place.

7 Now Mr. Lee Loy has been sticking up signs
8 all over the place that say No Connections in
9 Kaumana. The arguments that they are using are
10 arguments that we have already dispelled, and I'm
11 sorry to hear them coming up again.

12 One of the, and I'm not sure where in the
13 record it is, Mr. Gomes was talking about Dr. Stone,
14 Dr. Fred Stone who went down into the dry well. I'm
15 not sure if I can clear up that story.

16 Mr. Gomes had one side of the story. I
17 have a very different interpretation of that because
18 I worked a lot with Dr. Stone. So I would like to
19 respond to that, but if it's going to create a
20 problem, I won't respond to that. I would just say
21 that it's not -- it's not factually accurate, the
22 story that was told about the dry well.

23 I have been in the cave, I helped the guy
24 that was doing the cave report. We went through the
25 cave at least two times in one day, every single

1 inch of the cave that we could find. The main part
2 of the cave from where it comes into the park or
3 comes out of the park goes on to the upper land and
4 exits right at Edita Street.

5 Now the cave did -- actually does go down
6 the former director of Planning Department, Bobby
7 Jean Leithead Todd, said that it comes out by Hilo
8 library. So it's an extensive cave, but when they
9 built Edita Street, a bulldozer collapsed it, and I
10 remember reading that in the record.

11 So the bulldozer collapsed the cave; so it
12 is not accessible from there on. And that would be
13 the lower part of our property.

14 The cave comes in on the north side, it's
15 under the north side of the property, and it's where
16 we have a fenceline. And we are not developing
17 anywhere. We know exactly where the cave is
18 according to the most accurate maps that are
19 available.

20 And so the property itself, the lower part
21 of the property, I do want to say that because of
22 Dr. Stone, we completely redid our EA.

23 We -- the EA was advertised the ways it's
24 always advertised. So if it wasn't sent out to the
25 neighbors in that area, I don't know why because

1 that was not up to us to distribute the EA.

2 When we saw what Dr. Stone was saying
3 about the cave, we agreed, we will not develop that
4 upper part, but, and he agreed, we could use this
5 for forestry, for conservation projects that would
6 greatly benefit our students.

7 One of -- as one of the founders of
8 Connections, Connections was founded, primarily we
9 were starting as a school within a school on
10 Mountain View campus, and as the first charter
11 school in the state, one of our greatest missions
12 was to create a school that would help promote
13 sustainable industries on this island.

14 So agriculture is a sustainable industry.
15 Forestry conservation, definitely sustainable
16 industries. So we were very, very specific in
17 locating a land that would support this.

18 We also realized that the lower part of
19 the land, and the upper part actually, but the upper
20 part is about 80 percent Ohia forest with uluhe
21 underscore -- understory, and the lower part is
22 about 20 percent Ohia trees.

23 Now, these Ohia on the property have also
24 been greatly affected by the Ohia blight; so we are
25 working with different university partners to map

1 out which trees are affected by the blight, and we
2 are working -- our high school kids are working on
3 projects to try to collect data for the different
4 agencies that are looking for solutions.

5 So the property offers us a living
6 laboratory. It's a place where we can take
7 students, the two girls that testified, they have
8 worked up on the property. They have worked there
9 multiple times.

10 One of them we -- we actually said she
11 should probably go into this field because she was
12 really good at the stuff she was doing up there.

13 And so when we are looking at the land and
14 looking at its agriculture potential, we are not
15 looking at a traditional kind of agriculture because
16 there is very little soil up there, but agriculture
17 was a critical life skill that the ancient people
18 had.

19 All throughout the Pacific islands that
20 are mountainous islands, there was extensive
21 terracing that was happening, and this has been
22 rediscovered by western scientists, and luckily a
23 lot of that research is on this island and in the
24 state.

25 And there is a new kind of agriculture

1 that combines agriculture and forestry, it's called
2 agroforestry, and much of the land that our students
3 live on, especially those in Puna, is very similar
4 to this.

5 So what we are using is traditional
6 agricultural methods that were used by the
7 Hawaiians, used by other Polynesian peoples to
8 create areas of forest on the lower part of the
9 parcel that will actually have agriculture and
10 forestry integrated.

11 And so this property offers unique
12 property for that kind of agriculture. We also, and
13 this is right from 2012, we first submitted things,
14 we were very specific about the kinds of agriculture
15 we wanted to do, and hydroponics was a very key part
16 of this.

17 So hydroponics can be used in the
18 classrooms down at the Kress Building. They create
19 starter plants, and we can take them up to the
20 property to put them in the property there.

21 So far what we are trying to do with this
22 property is to teach students that even if you have
23 marginal land, if you have marginal land in Puna,
24 there are ways that you can do agriculture.

25 We don't have to have large-scale

1 agriculture to feed this state. It also has to be
2 dependent on the small farmers, the ones that have
3 maybe 20 acres, and it may be marginal land where
4 they are using greenhouses, hydroponics, aquaponics,
5 and agroforestry techniques.

6 And so while we probably didn't use the
7 word agroforestry in the record, what we described
8 in the record as the way we were going to be using
9 the land for agricultural purposes has now been
10 named agroforestry so I'm just throwing that in
11 there.

12 I'm not sure, Mr. Hong, was there
13 something else I was supposed to cover? I think --

14 **MR. HONG:** John, if you could talk to us
15 briefly about three issues, the water issue, the
16 intergenerational issue, and the dormitories that
17 are already in the record.

18 **MR. THATCHER:** Okay, yeah. So the water
19 issue, you know, we had said from the beginning, we
20 will use the amount of water that is available, the
21 public water that is available. The public water
22 available, the potable water for drinking.

23 We don't believe that the number is 70 or
24 72. We believe that our documented use of water
25 over the last 20 years shows that our students are

1 using or the school is using maybe four to six
2 gallons per student, and that is quite different
3 than the calculations that were there, but we said
4 we will live within whatever the water calculations
5 are.

6 We are not planning to build the school in
7 a hurry. We are planning to take our time, and some
8 of the original plans that are in the original --
9 the original documents, they show us going through
10 about nine phases of development.

11 Now, the water issue is two issues,
12 really, the water that is drinkable and then the
13 water that is used for agriculture. So I work -- I
14 am on a state technical advisory committee for urban
15 agriculture. This is a new program that the USDA has
16 started, so I am very familiar with agricultural
17 uses.

18 And in the record, a lot of this is in
19 presentations by Wil Chee Planning. In the record,
20 Celia Shen has a lot of the diagrams, I think, in
21 her presentations.

22 And we planned from the beginning to use
23 catchment systems because Kaumana gets a lot of
24 water. We are right at the edge of a rain belt and
25 so there's a lot of water that falls on the ground.

1 If anything, we have too much water, but when -- in
2 the old sugar plantation days, Kaumana was one of
3 the only places in the state where it didn't have to
4 rely on irrigation because there's enough rain, and
5 I know I've said this a whole bunch of times before
6 in the past in presentations.

7 So these are reasons why we chose it and
8 we know how to use the water catchment systems in a
9 way that the water will be safe for use. We were
10 not planning to use the water for drinking.

11 We are not planning for using it for any
12 other purpose besides agriculture, but we do want
13 our students to see how do you maintain a catchment
14 system that is safe, and that's a learning process.

15 So this is why I say this property is a
16 living laboratory because it offers us so much
17 potential for teaching our students in a hands-on
18 way. So the water issue is something that we will
19 deal with as it comes, and we will develop as it
20 comes.

21 The dormitory was initially planned
22 because we had a lot of groups of students visiting
23 our school. We have a lot of partners in different
24 parts of the country and world that we work with.

25 We have taken students to many different

1 places throughout the country. We've had visitors
2 from different countries, from Korea, from Peru, and
3 these students are very interested in what we're
4 doing, and a lot of them are very interested in the
5 kind of agriculture that we are proposing to do.

6 So we have no intention ever of putting
7 our students into the dormitories. These
8 dormitories, as we said from the beginning, would be
9 used only for visiting groups of students and
10 educators, primarily in the summer, and in
11 intersessions when school is not in session.

12 The intergenerational program was modeled
13 after something that is going on at preschools on
14 Oahu, and it was meant to be a development where we
15 may have a preschool program integrated with our
16 regular K to 12 program.

17 And the charter school commission that
18 oversees the charter schools had a grant where they
19 got a lot of money for preschools, for starting up
20 preschools, but because we hadn't -- we were not
21 certain of where we were with this project, we did
22 not push to keep developing that.

23 So we did not apply for those grant monies
24 for the preschool; so that intergenerational
25 preschool would be one of the last things that we

1 would want to do.

2 I think the Windward Planning Commission
3 made it very clear that we need to go back to them
4 every stage of development and so modifications can
5 be made at every phase of the development, and we
6 agreed that that would be fine.

7 So currently, the same as when we
8 developed this project, we are probably looking at
9 about a 20-year build to have the project completed,
10 and the only thing that might make that go a little
11 faster is if the sea starts rising faster than we
12 think it is and if the downtown Hilo area becomes
13 even more inaccessible than it has started to become
14 in the last few years.

15 So I think that's enough -- and I took my
16 glass of water out of the room -- so I have been
17 involved with this from the beginning; so I do know
18 where it's at all the way to today, and I'm helping
19 with the agricultural components today. And I
20 retired on July 1 from the school.

21 **MR. HONG:** Thanks, John. I just have a
22 couple of points that I wanted to follow up on.

23 **CHAIRMAN SCHEUER:** Sorry, Mr. Hong, if I
24 may, I'm trying to manage the proceedings here. Mr.
25 Matsukawa, your client is using the chat function to

1 sort of raise questions, and, you know, it's an
2 artifact of being in this virtual world rather than
3 in a physical meeting room.

4 He wouldn't be allowed to hand notes to
5 the Land Use Commissioners during the hearing. I'm
6 dismissing these chats as they appear, but I would
7 instruct your client to not act in a way where the
8 Chair needs to remove him from the proceedings for
9 disruptive activity. Is that understood, Mr.
10 Matsukawa?

11 **MR. MATSUKAWA:** Yes.

12 **CHAIRMAN SCHEUER:** Thank you. Please
13 continue, Mr. Hong.

14 **MR. HONG:** Just very brief points. I know
15 that Commissioner Chang had brought up the issue of
16 the traffic report. I would note that before the
17 Planning Commission, the last session, we had
18 committed to updating the plan, the traffic report.

19 That is actually being done right now at
20 our own expense. We've already engaged somebody and
21 paid that money to do that because since the
22 Puainako Extension has opened, traffic on Kaumana
23 Drive has significantly dropped off, and we wanted
24 to make sure that's documented.

25 The other point I wanted to make about the

1 water calculations is we submitted -- we, at the
2 last hearing before the Windward Planning
3 Commission, did commit to updating the water
4 calculations because in terms of the gallons per day
5 per student, we are far below that, like half below
6 the standard, the national standard.

7 With respect to Mr. Ohigashi's question, I
8 have in the Petitioner's filing that was submitted
9 to the Land Use Commission, at page 496 and page
10 503, a diagram of the property that shows where the
11 upper property and the -- upper parcel and the lower
12 parcel are.

13 And certainly if the Planning Commission
14 or the Planning Department has a better map, then
15 I'd be certainly happy to have them cite that.

16 **COMMISSIONER OHIGASHI:** Can you repeat --
17 will you repeat those pages?

18 **MR. HONG:** In the PD background report, 9-
19 28-12, that page is at 496, and then also at 503.

20 **COMMISSIONER OHIGASHI:** PD?

21 **MR. HONG:** PD, it says PD background
22 report 9-28-12. That's our Petitioner's filing.

23 **COMMISSIONER OHIGASHI:** I will look for
24 it.

25 **MR. HONG:** Thank you. Thank you, Mr.

1 Chairman, Commissioners. If you have any questions,
2 Mr. Thatcher and I would be more than happy to
3 answer.

4 **CHAIRMAN SCHEUER:** There's the matter of
5 questions for the Petitioners and also the motion
6 made by Mr. Hong for us to take judicial notice of a
7 previous decision on the special use permit from
8 this Commission. I want to take up that motion
9 first, if I may.

10 Mr. Hong, you referenced SP00-393, which
11 was a special use permit for Keaau campus of
12 Kamehameha Schools?

13 **MR. HONG:** Yes, sir.

14 **CHAIRMAN SCHEUER:** Has that been
15 incorporated into the record at any other point
16 prior to this?

17 **MR. HONG:** I believe earlier on in the
18 first initial hearings with the Planning Commission
19 that was put into the record, but I don't believe --
20 well, that's one. I can't give you chapter and
21 verse and I apologize.

22 The second point I'd like to make about
23 that is I think the Commission could take judicial
24 notice of its prior decisions.

25 **CHAIRMAN SCHEUER:** So the, I guess for me,

1 the question is twofold, and you've touched on them,
2 Mr. Hong, and I want to give all the parties a brief
3 chance to respond.

4 One is is it the kind of decision that we
5 can take judicial notice of, and second, is it
6 introducing new evidence into the proceedings at
7 this time. So I'm going to allow Mr. Richardson to
8 speak to it.

9 Do you have anything more to say at this
10 time? If you don't or if you do, that's fine. If
11 you don't, I'll go through the order of the parties
12 and give them a chance to comment and offer the
13 Commissioners a chance to question. Mr. Richardson?

14 **MR. RICHARDSON:** Just I'm in support of
15 Mr. Hong's contention that this is appropriate for
16 judicial notice.

17 **CHAIRMAN SCHEUER:** Ms. Kekai?

18 **MS. KEKAI:** I apologize, I missed exactly
19 what is being taken judicial notice of.

20 **CHAIRMAN SCHEUER:** Mr. Hong has moved that
21 the Commission take judicial notice of a previous
22 decision by this Commission regarding special permit
23 number 00-393, which was a permit apparently for the
24 Keaau campus of Kamehameha Schools.

25 And the question that I'm asking you to

1 respond to is is it the kind of document that we
2 could take judicial notice of, and if it is not
3 already in the record, is it an improper
4 introduction of new evidence on the record?

5 **MS. KEKAI:** I would support the --
6 actually let me take that back. I would say if it's
7 not already in the record, then I would say it is
8 inappropriate.

9 **CHAIRMAN SCHEUER:** Ms. Campbell?

10 **MS. CAMPBELL:** I would agree with Deputy
11 Corporation Counsel Kekai. To the extent that it's
12 not in the record, I believe it would be
13 inappropriate to introduce new material at this
14 point. Thank you.

15 **CHAIRMAN SCHEUER:** Thank you. Ms. Kato?

16 **MS. KATO:** My understanding was that if
17 it's LUC's records, then it can be looked at, but I
18 don't know this for sure. I'd have to research it.

19 **CHAIRMAN SCHEUER:** Mr. Matsukawa?

20 **MR. MATSUKAWA:** Yes. I was not involved
21 in the first round of the Windward Planning
22 Commission's hearings in the contested case, but I
23 know in the record, some people made general
24 reference that there was another school permit
25 granted for Kamehameha Schools.

1 I think it's in the traffic study
2 somewhere, but not the administrative record itself.
3 And recently in the DW Aina Le'a case that involved
4 the Commission, the Supreme Court ruled when a
5 request had been made to introduce administrative
6 records from other proceedings into the record and
7 the court denied it. So I think it would be
8 inappropriate for judicial notice.

9 **CHAIRMAN SCHEUER:** Commissioners, do you
10 have questions for any of the parties on this
11 particular matter or thoughts or comments?
12 Commissioner Chang?

13 **COMMISSIONER CHANG:** I would just have
14 one. Mr. Hong, what is your offer of proof, what is
15 the relevancy of that proceeding to the case here?

16 **MR. HONG:** It discusses, I think it's page
17 23 or four -- and actually beginning at page 24. My
18 offer of proof is that it discusses why the Land Use
19 Commission back at that period of time, including
20 our period of time when we initiated this process,
21 why a special use permit was the better vehicle
22 versus a district boundary amendment.

23 And we are not offering it as further
24 evidence or any evidentiary reason, we are offering
25 it as in terms of analysis regarding how the

1 Commission views its role and the fact for a special
2 use permit.

3 **COMMISSIONER CHANG:** That's really not the
4 issue before us today though, right, whether it's a
5 district boundary amendment or a special use permit?
6 It is applying the special use permit criteria to
7 this particular case, but I haven't seen a request
8 to do a district boundary amendment. So quite
9 frankly, I'm not sure what the relevancy of that,
10 that matter, would be to this one.

11 **MR. HONG:** Certainly. I appreciate what
12 you are saying. And what our position has been, you
13 know, we've been having to fight shadows from day
14 one in this, and I was anticipating another argument
15 that could be made against the project and why this
16 particular special use permit should be denied by
17 the Land Use Commission; so I was anticipating an
18 argument that could come up.

19 **CHAIRMAN SCHEUER:** Commissioner Ohigashi.

20 **COMMISSIONER OHIGASHI:** Mr. Hong, you
21 probably are right because I had the same -- I had
22 the same issues. What I'm thinking, I don't believe
23 that we can accept the necessary -- the decision
24 into the record at this point in time.

25 However, if the issue comes up and if we

1 are going to discuss whether or not an SUP is
2 appropriate in this matter, because if you take a
3 look at the Neighborhood Board case cited,
4 Neighborhood Board case cited at 64 Hawaii 265 it
5 talked about appropriate process to utilize a
6 special use permit, and in that case, although
7 cited, the criteria cited by the case was cited in a
8 memorandum opinion.

9 It failed to cite page 272 which the court
10 said procedural and substantive differences between
11 the two techniques, that being a DBA versus a SUP,
12 underscore the necessity for the proper application
13 to the particular land use problems they are
14 designed to address.

15 As the courts have repeatedly recognized,
16 unlimited use of the special permit to effectuate
17 what essentially what amounts to a boundary change
18 undermine the protection from piecemeal changes that
19 the zoning scheme guaranteed landowners by the more
20 extensive procedural protections of boundary
21 amendments.

22 And dealing that language in the
23 Neighborhood Board case, it doesn't seem to be
24 addressed by the memorandum opinion. I think that
25 Mr. Hong is right that there is an argument here and

1 there is -- and there is a question of law here as
2 to whether or not this is procedurally should be an
3 SUP versus DBA proceeding.

4 And I think that this case gives us,
5 places upon us the duty to make that determination
6 or at least have that determination be briefed and -
7 - briefed and found out about, among other issues,
8 I'm assuming, and I'm getting that the only
9 mechanism for that would be a remand to discuss this
10 particular issue.

11 But since Mr. Hong raised it and I've been
12 reading about it, I thought it would be appropriate
13 to mention at this point.

14 **MR. HONG:** Mr. Chairman, may I address
15 that, please, just briefly?

16 **CHAIRMAN SCHEUER:** Sure. And sorry, Mr.
17 Thatcher, just to be clear, we are having a
18 discussion among Counsel and Commissioners right
19 now. You may respond, Mr. Hong.

20 **MR. HONG:** Thank you. So we have
21 considered early on which vehicle we should pursue;
22 so in the event that this does become an issue for
23 the Commissioners, you know, based on the Mauna Kea
24 One case, we would ask that due process should allow
25 us the opportunity to submit written briefs on this

1 particular issue. Thank you.

2 **CHAIRMAN SCHEUER:** Commissioners? So let
3 me understand your last statement, Mr. Hong, but
4 I'll preface my question with I also have been,
5 having reviewed the record, been struggling with
6 this issue, whether or not this is the proper
7 procedure for this Commission to use.

8 So you are citing to the Mauna Kea One
9 case, and you have evoked due process concerns. Do
10 you believe that before this Commission you should
11 be able to do additional briefing on this matter
12 rather than this Commission in its procedures
13 specifically remanding it back to the Windward
14 Planning Commission for additional proceedings on
15 this issue?

16 **MR. HONG:** I believe that in terms of --
17 well, the Mauna Kea case talks about do we have a
18 meaningful time and a meaningful opportunity to be
19 heard on a particular issue.

20 **CHAIRMAN SCHEUER:** Right.

21 **MR. HONG:** That's what that due process
22 issue comes down to, and in this case, whether it's
23 a special use permit or district boundary amendment,
24 if that's what the Commission is going to focus on,
25 we should have the opportunity to brief that to

1 convince the Commission that this is the vehicle
2 that we've chosen 14 years ago or --

3 **CHAIRMAN SCHEUER:** I hear what you are
4 saying, Mr. Hong, but how do you reconcile that with
5 the procedures for special permits, which make it
6 fairly clear that all the argument and evidentiary
7 record is supposed to be before the Windward
8 Planning Commission, the respective planning
9 commission, rather than this body?

10 **MR. HONG:** Well, those are based on, in
11 terms of the record, the complete record on the 205.

12 **CHAIRMAN SCHEUER:** Six, I believe.

13 **MR. HONG:** Right. The complete record
14 speaks to, and if you are looking at this in pari
15 materia, it speaks to the evidentiary record that
16 was before the Windward Planning Commission at the
17 time that special use permit and those factors come
18 before it.

19 I think that you are actually looking, the
20 Commission is expressing a concern about an issue of
21 law that it has to decide, and on that issue of law,
22 those fact -- those evidentiary factors really don't
23 come into play because it's going to focus on what
24 is the proper vehicle for future developments or
25 future proposals.

1 And I don't know that -- we are not asking
2 the Commission to approve a district boundary
3 amendment, we are asking the Commission to say
4 between the two vehicles, the special use permit
5 vehicle is the appropriate one, and that's why we
6 feel that briefing would be necessary.

7 **CHAIRMAN SCHEUER:** So I understand what
8 you are saying about briefing, but the other concern
9 I just have, and I'll recognize Commissioner Chang,
10 under our rules and under the law, we have 45 days
11 to make a decision on a special permit.

12 That may indeed not allow us to
13 effectively discharge our duties or the parties to
14 effectively brief on such an issue whereas that
15 deadline, that 45-day deadline does not exist at the
16 Planning Commission level.

17 **MR. HONG:** If you condemn us to the
18 Planning Commission, the Windward Planning
19 Commission, with all due respect to the Planning
20 Commission, you know, this process has been
21 unusually long.

22 So to give you an example, the Kamehameha
23 Schools Keaau, that special use permit took less
24 than a year from the application to the actual
25 approval. We've been going at this for a long period

1 of time. Back to the ICA, to the IC, back down, and
2 further. You condemn us to an even longer process
3 with respect to this particular project.

4 **CHAIRMAN SCHEUER:** Okay. But really
5 that's just not answering my question, which has to
6 deal with the 45-day --

7 **MR. HONG:** Set a date, set the date when
8 briefs are due. You know, I've got weekends, I've
9 got nights. Mr. Matsukawa hasa got weekends. We
10 got nights. You set the date, you set the time, we
11 will submit the briefs.

12 **CHAIRMAN SCHEUER:** The other matter just
13 to throw out there is we have other matters before
14 us. The Commissioners are not -- we have weekends
15 and nights where we do our paperwork, among other
16 things. So Commissioner Chang.

17 **COMMISSIONER CHANG:** Thank you, Mr. Chair.
18 As I understand Mr. Hong's position, he's asking --
19 as I understand it, Mr. Hong, you are asking for
20 brief -- an opportunity to brief in the event the
21 Commission decides to make it -- to base its
22 decision that the more appropriate vehicle for this
23 is on -- to do a boundary amendment.

24 But if the Commission makes a decision
25 based upon the record before it, which is the

1 Planning Commission's recommendation, then you are
2 not asking for briefing. Only if one of the bases
3 for the Land Use Commission's, let's say denial, is
4 that you've got the wrong vehicle, then you are
5 asking for briefing; is that correct?

6 **MR. HONG:** That's correct.

7 **COMMISSIONER CHANG:** Okay, that's what I
8 understood.

9 **CHAIRMAN SCHEUER:** But the specific motion
10 we were discussing most immediately was whether or
11 not we take judicial notice of this.

12 **COMMISSIONER CHANG:** Right. And I don't
13 think it's relevant. I would agree with the county.
14 That's just my opinion, thank you.

15 **CHAIRMAN SCHEUER:** Anything further,
16 Commissioners? Mr. Hong, I don't think that you
17 would be prejudiced if I said that I was not going
18 to take judicial notice of it at this time but would
19 allow you to reintroduce the motion to take judicial
20 notice of it should, in the course of our
21 proceedings, we start to focus on whether or not
22 this should be a DBA versus a special permit.

23 **MR. HONG:** Thank you, Mr. Chair. I
24 understand.

25 **CHAIRMAN SCHEUER:** Okay. It's 11:55.

1 Commissioners, can I get a sense of how many
2 questions we have for Mr. Hong, Mr. Thatcher, and
3 perhaps back to Mr. Richardson and Mr. Garcia?
4 Commissioner Chang, you have some questions.

5 **COMMISSIONER CHANG:** Yes.

6 **CHAIRMAN SCHEUER:** Do you have a sense of
7 length.

8 **COMMISSIONER CHANG:** Probably no more than
9 five minutes.

10 **CHAIRMAN SCHEUER:** Okay. Any other
11 commissioners at this time? Okay. So let's --
12 Commissioner Ohigashi?

13 **COMMISSIONER OHIGASHI:** I have a few.

14 **CHAIRMAN SCHEUER:** Sorry?

15 **COMMISSIONER OHIGASHI:** I just have a few
16 questions.

17 **CHAIRMAN SCHEUER:** Okay.

18 **COMMISSIONER OHIGASHI:** I need time to
19 find it.

20 **CHAIRMAN SCHEUER:** Is it your preference
21 to take a break now and question after lunch or to
22 question now while the presentations are most
23 immediately in our mind?

24 **COMMISSIONER OHIGASHI:** My preference is
25 always lunch first.

1 **CHAIRMAN SCHEUER:** Sorry, Commissioner
2 Wong, I didn't hear you.

3 **COMMISSIONER WONG:** Sorry, Chair. That
4 would be my statement. Commissioner Ohigashi, he
5 must be muting me again.

6 **CHAIRMAN SCHEUER:** Commissioner Chang?

7 **COMMISSIONER CHANG:** Mr. Chair, I'm fine
8 if we just hold the questioning until after lunch,
9 that's fine.

10 **CHAIRMAN SCHEUER:** Okay. We did at least
11 dispense with the motion issue. So it's 11:57. I'm
12 going to ask that we reconvene at 12:30.

13 Sorry for the short lunch, but we do have
14 a lot of things to do. We want to make the most
15 efficient use of our time.

16 We will reconvene at 12:30 with questions
17 from Commissioners Chang and Ohigashi to Mr. Hong
18 and Mr. Thatcher. We are in recess.

19 **(Recess taken from 11:57 a.m. to 12:30**
20 **p.m.)**

21 **CHAIRMAN SCHEUER:** It's 12:30, going on
22 the Record again.

23 We had gotten a conclusion of presentation
24 from Mr. Hong and Mr. Thatcher, and now we were
25 going to take questions from Commissioner Chang and

1 Commissioner Ohigashi and perhaps others. Please go
2 ahead, Commissioner Chang.

3 **COMMISSIONER CHANG:** Thank you, Mr. Chair.
4 Mr. Hong I wanted to ask you the same question that
5 I asked Mr. Richardson. Is it your understanding
6 that the Planning Commission and the Land Use
7 Commission is required to comply with Article 12,
8 Section 7 related to the protection and preservation
9 of traditional and customary rights of Native
10 Hawaiians to the extent feasible?

11 **MR. HONG:** Actually three points in
12 response. Number one, when I look at the Ka Pa'akai
13 O Ka'aina case, which is at 94 Hawaii 31, which I
14 think Mr. Richardson -- Matsukawa was the attorney
15 for petitioner in that case, I'm concerned that the
16 analytical framework set out by the Hawaii State
17 Supreme Court only applies to petitions for
18 reclassification of district boundaries, and I point
19 out that that would be at 94 Hawaii pages 46 and 47.

20 They lay out three factors, and in the
21 third factor, footnote 28, footnote 28 refers to the
22 language change or the change in the environmental
23 impact statement factors or assessment that has to
24 be conducted which incorporates, certainly, those
25 cultural factors that you are concerned about.

1 So in our case, number one, I would say
2 that that distinction or that analysis in that case,
3 Mr. Matsukawa's case, only applies to petition for
4 reclassification of district boundaries. I have not
5 seen any court extend that analysis, that analytical
6 framework, to special use permits. That's saying
7 one thing.

8 The second thing I wanted to point out
9 that in the intermediate court of opinion, the court
10 of appeals opinion at page 15 through 18, it cites
11 that one of the factors in our county charter and in
12 our county general plan requires any change or land
13 -- let me rephrase that. Land use has to take into
14 consideration any cultural aspects with respect to
15 the proposed property use.

16 And I would point out finally, the third
17 point, in the record, and this is now I'm looking at
18 the Petitioner's filing that was submitted because I
19 don't have volumes, volume one, volume two, but I
20 would point out that in the record, the final
21 environmental assessment at pages 531 through 533
22 talks about how we made, my client made the effort
23 to determine if there were any traditional customary
24 practices on the property, and there were none.

25 And that's also reflected in the county

1 planning background report from the same filing.
2 The date is 4-23 and 4-24. So in answer to your
3 question, yes, it does affect, in my opinion, under
4 the law under Mr. Matsukawa's case, it does affect
5 petitions for reclassification of district
6 boundaries, and, yes, in terms of our county general
7 plan and our county charter, we do have to take
8 those factors into consideration.

9 And did we take those factors into
10 consideration in this case? Yes, we did. There
11 were no customary traditional practices found on the
12 property.

13 **COMMISSIONER CHANG:** Okay. Where do I
14 begin, Mr. Hong? First of all, I'm going to begin
15 with clearly you and I have a very different
16 understanding of the constitutional obligations
17 under Article XII.

18 Ka Pa'akai is just one case that used Land
19 Use Commission, but there is a line of cases that go
20 from Oni versus Meek down in 18- -- I want to say
21 1858 to Kalipi versus Hawaiian Trust, 1982; Pele
22 Defense Fund versus Paty, 1992; Public Access
23 Shoreline versus Hawaii Planning Commission, 1995;
24 State versus Hanapi, 1998; Ka Pa'akai, 2000; Water
25 Commission elena navi aha, 2012; State versus Pratt,

1 2012; State versus Polama, 2015; Mauna Kea Anaina
2 Hou, Mauna Kea One 2015; TMT Appeal, 2018; Ching
3 versus Case, 2019.

4 These are a series of cases that have --
5 that the Hawaii Supreme Court has applied Article
6 XII Section 7, 7-1, 1-1. So I beg to differ with
7 you. I think the constitutional obligation of state
8 and the counties apply to all lands in Hawaii.

9 With respect to your -- the attempts made
10 by the Applicant, as I read the environmental
11 assessment, their conclusion that no -- that there
12 were no adverse effect was based upon a letter that
13 they mailed to four, four agencies or four
14 individuals including Kapa'a Male, Edith Kanaka'ole
15 Foundation, and nobody responded.

16 So based upon a lack of response, the
17 conclusion was there's no traditional customary
18 practices. And I will beg to differ that that is
19 not what the court requires of government agencies
20 with respect to -- to determining impacts of the
21 project on traditional customary practices.

22 So I get where you are coming from, Mr.
23 Hong. Obviously you and I see the constitution and
24 the requirements of, in particular, government
25 agencies very differently.

1 So I appreciated your candid response.
2 That was very helpful for me to understand. Mr.
3 Chair, I've got no further questions.

4 **MR. HONG:** May I follow up, may I follow
5 up, Mr. Chair?

6 **CHAIRMAN SCHEUER:** You may respond.

7 **MR. HONG:** So all I wanted to point out on
8 page 453 was in terms of my client, even if the lack
9 of response, and I think you also left out the part
10 that our client actually held a public informational
11 meeting on April 16, 2009 for the issue of cultural
12 and traditional practices, my client has committed,
13 and I'm quoting from the EA page 452, however, if
14 any traditional or cultural practices are
15 identified, Connections will make efforts to
16 accommodate continuation of these practices, period
17 end quote.

18 So I don't know that we actually differ
19 with respect to our perspective, and again, as we
20 pointed out, our county charter, Intermediate Court
21 of Appeals opinion also pointed out, our county
22 general plan takes into consideration, makes it
23 imperative that we need to take into cultural
24 customary and traditional practices. And did we
25 make best efforts? I think we did. And so I'm a

1 little concerned --

2 **COMMISSIONER CHANG:** No.

3 **MR. HONG:** -- if people are not going to
4 respond, how we can get them to respond.

5 **CHAIRMAN SCHEUER:** Commissioner Chang.

6 **COMMISSIONER CHANG:** So, I mean, clearly,
7 Mr. Hong, you and I, we are going to differ on this.
8 I believe the requirements in particular as stated
9 under Ka Pa'akai, it is to identify the resources,
10 determine its impact, and come up with reasonable
11 mitigation.

12 More importantly, the agency cannot
13 delegate that to the developer. So we cannot leave
14 it up to the Petitioner that if there is in the
15 future traditional customary practices, that he's
16 going to ensure that they are protected. That is
17 not his obligation, that is our obligation when we
18 are reviewing a permit or some kind of entitlement.

19 So I think the question is, like in Ka
20 Pa'akai where the Land Use Commission's
21 determination was reversed and remanded back to the
22 Planning Commission for failure to have sufficient
23 findings to support the determination.

24 So that's what Ka Pa'akai, what the court
25 found in Ka Pa'akai was that the findings were

1 insufficient to make a determination that the Land
2 Use Commission protected and preserved traditional
3 customary practices.

4 So while you and I, we are going to
5 disagree on this, but like I said, I really do
6 appreciate your candid response to me and your
7 viewpoint of this, but I think we see the law a
8 little differently. So thank you. I don't -- I
9 think we are okay. Thank you, Mr. Chair.

10 **CHAIRMAN SCHEUER:** Thank you.
11 Commissioner, sorry, just a procedural matter. The
12 Q and A function should be limited by any
13 participants in this meeting to ask questions of
14 perhaps where we are in the docket or what is being
15 allowed, not to ask substantive questions.

16 I addressed this earlier. I think the
17 person who has entered something into the chat
18 recently missed my earlier announcement about that.
19 So it's not really to be directing comments or
20 questions to the Commissioners at this time.

21 We are in a formal proceeding. It is
22 somewhat the equivalent if we were in a physical
23 room that suddenly you were rushing forward and
24 handing notes to commissioners. It's not supposed
25 to work that way.

1 Commissioner Ohigashi, questions for Mr.
2 Hong and Mr. Thatcher?

3 **COMMISSIONER OHIGASHI:** Mine is more
4 factual, my question is more factual in nature. Is
5 there, and I'm sorry, Mr. Hong, I only could find
6 this.

7 **MR. HONG:** This what?

8 **COMMISSIONER OHIGASHI:** That's about it,
9 okay? Like I said, I think it's part 2 of the ICA
10 record on appeal and it's page 141. That's the one
11 I notice, but I'm asking what -- I'm not sure that
12 Mr. Thatcher or Mr. Garcia can answer this. Was
13 there in the record any plans for the infrastructure
14 of this particular property, an infrastructure plan?

15 **MR. HONG:** John, yeah, go ahead.

16 **MR. THATCHER:** Do you mean in terms of the
17 water and electricity?

18 **COMMISSIONER OHIGASHI:** No. You are
19 showing on this map that I was looking at, you are
20 showing a lot of roads and I'm presuming and
21 buildings and structures, and normally when
22 developers come before us, and for example, like in
23 DBA, district boundary amendment situation, an
24 infrastructure type of a plan would indicate how the
25 infrastructure will be built out and the time frames

1 that it may take to build, and actually it would
2 provide us a cost. Is there anything in the record
3 like that for a special use permit?

4 **MR. THATCHER:** I'm not sure if there is,
5 but I want to make a point that the drawing that you
6 are looking at is a conceptual plan. It is not a
7 plan, it was -- we had a number of different
8 drawings for different ways that we could configure
9 the property.

10 So we never got to the point of actually
11 paying for the more than just conceptual plans; so
12 we went through a series of conceptual plan
13 scenarios and that's the one that we ended up with.

14 **COMMISSIONER OHIGASHI:** So have you had
15 any kind of final plan be made part of the record in
16 this case?

17 **MR. HONG:** Commissioner Ohigashi, I would
18 point out, no, and the reason why is because once
19 the special use permit was denied, originally 2014
20 by the Planning Commission, that ended the process,
21 and then we decided to -- not decided, but we went
22 up on appeal and took a while up on appeal as you
23 well know and came back down.

24 **COMMISSIONER OHIGASHI:** So the record
25 doesn't have one. I just wanted to be sure.

1 **MR. HONG:** Right. The record doesn't have
2 one only because of the timing. And you are facing
3 a unique situation.

4 **COMMISSIONER OHIGASHI:** I understand your
5 problem, I'm just asking some questions I just want
6 to throw out. So is there any condition or any part
7 of the D and O that was passed by the Windward
8 Planning Commission that would establish where these
9 buildings would be?

10 **MR. HONG:** I would point out there's, in
11 the final EA, there's a conceptual drawing, and
12 that's at page 498.

13 **COMMISSIONER OHIGASHI:** Again, I can't
14 find that. Besides that, that conceptual drawing at
15 498, okay, that is not the final plan; is that
16 right, according to Mr. Thatcher?

17 **MR. HONG:** Yes, that's not the final plan.
18 That was our conceptual plan what buildings are
19 going to go where, and I would just note for the
20 record that the record is actually clear that in
21 terms of that conceptual plan at 498 in the final
22 EA, that that would actually be pushed more toward
23 the corner of the lower part of the property.

24 **COMMISSIONER OHIGASHI:** I'm trying to
25 figure out because it says here on my map it's a

1 biological treatment system, and there's a box in
2 there saying number 18, biological treatment system.
3 Is that the approximate area where you intend to
4 place the biological treatment system?

5 **MR. HONG:** I think Mr. Thatcher should
6 respond to that.

7 **COMMISSIONER OHIGASHI:** He, yeah, we will
8 get on him even though I may be looking at you.

9 **MR. THATCHER:** We brought in one engineer
10 already to look at that, and he was involved with
11 creating the same kind of a system as is used at
12 Puna Kai Shopping Center.

13 **COMMISSIONER OHIGASHI:** I'm not asking
14 about the system, I'm asking about the placement of
15 that particular biological system.

16 **MR. THATCHER:** That, yeah, that's about
17 the place -- that's where we envisioned it would be,
18 yeah.

19 **COMMISSIONER OHIGASHI:** And how, is there
20 anything in the record to show how that was
21 determined to be the place?

22 **MR. THATCHER:** I believe that in the
23 record, it would show that we had a number of
24 different analyses of the land. So we had people
25 that were doing, in their studies, were going

1 through there and covering different tracts of the
2 land going back and forth, and I believe the one
3 that was we were using for this one was the study
4 that was looking at the biological and so we were
5 looking at where we would locate it with the least
6 impact.

7 **COMMISSIONER OHIGASHI:** And I see here
8 that you have different types of an art music
9 building, intermunicipal classrooms, library, but
10 you said that these things would be done in phases;
11 is that right?

12 **MR. THATCHER:** Yeah. The county -- and
13 the county said in their findings that we would be
14 doing these in phases, and we would be going back to
15 the county for the permits at each phase.

16 **COMMISSIONER OHIGASHI:** Is there anything
17 in the record that shows how the phases will go?

18 **MR. THATCHER:** Yes. There was nine phases
19 that are in the record in the first part. It's in
20 the first 20 pages, I believe.

21 **COMMISSIONER OHIGASHI:** Is there -- is
22 there a finding exhibit that refers to that
23 particular phasing?

24 **MR. HONG:** Yes. Actually that's Wil Chee
25 and Associates report. And I --

1 **COMMISSIONER OHIGASHI:** A finding? I'm
2 just curious because I was looking at the findings.
3 I was trying to find some of this.

4 The next question, area of questions that
5 I really have is if you are going to phase, what is
6 your plan, initial plan that was in the record to
7 show what will initially be built and the time
8 frame?

9 **MR. THATCHER:** The county said that we
10 need -- the first things we need to do is to --

11 **COMMISSIONER OHIGASHI:** I'm not sure the
12 county -- I'm not asking what the county said you
13 should do. I'm just asking what is the phase that
14 your plans are and the timetable for the at least
15 initial phase and what does the first phase have?

16 **MR. THATCHER:** I'm not sure.

17 **MR. RICHARDSON:** I think I might be able
18 to point you to where in the record the phases are
19 listed in the permit application. If you look at
20 the ICA record on appeal, 204, it would be Exhibit
21 34. Or excuse me, page 34.

22 **COMMISSIONER OHIGASHI:** That's the way
23 it's set up. I have four parts of the record on the
24 ICA appeal.

25 **MR. RICHARDSON:** The second part, yeah.

1 And then it would be page 34 on the bottom right-
2 hand side, not the PDF.

3 **COMMISSIONER OHIGASHI:** Can you tell me,
4 then, what is the first phase?

5 **MR. RICHARDSON:** I can read it to you.

6 **COMMISSIONER OHIGASHI:** Yeah, read it to
7 me because I have to go dig it right now, and I
8 don't want to do it right now.

9 **MR. RICHARDSON:** Phase one is refinement
10 of planning and project costs and completion of
11 attendant studies, which may include a topographic
12 survey, geotechnical soil study, drainage study, and
13 water study. Estimated time to complete is one to
14 two years.

15 **COMMISSIONER OHIGASHI:** Has that been done
16 yet? Has that been started yet?

17 **MR. RICHARDSON:** John?

18 **MR. THATCHER:** The only one that -- the
19 two that we are updating are the traffic study and
20 the water study. The rest have been completed.

21 **COMMISSIONER OHIGASHI:** Has the traffic
22 study been done yet?

23 **MR. THATCHER:** It hasn't been completed
24 yet.

25 **COMMISSIONER OHIGASHI:** When is the

1 completion of that?

2 **MR. THATCHER:** Mr. Garcia was meeting with
3 them, I believe they were saying at the end of
4 January or February.

5 **COMMISSIONER OHIGASHI:** I'm going to
6 strike this conversation because I don't think that
7 that was part of the record, was it?

8 **MR. THATCHER:** No.

9 **COMMISSIONER OHIGASHI:** So let me ask you
10 this. As of the time of the permit, there was no
11 traffic study done, update; is that right?

12 **MR. HONG:** No, there was. There was a
13 traffic study done.

14 **COMMISSIONER OHIGASHI:** It wasn't updated?

15 **MR. HONG:** It wasn't updated, right.

16 **COMMISSIONER OHIGASHI:** I just wanted to
17 be clear on that. So what I'm trying to get at is
18 when does the construction start?

19 **MR. THATCHER:** That would start in the
20 phase two.

21 **COMMISSIONER OHIGASHI:** Is that what has
22 been -- and when would the completion date to the
23 construction be phase two?

24 **MR. THATCHER:** I think it says on there,
25 and I have to get it up again, but it says that it

1 could vary. So it's about 20 years.

2 **COMMISSIONER OHIGASHI:** And what would
3 that first construction phase consist of?

4 **MR. THATCHER:** It would be the -- let me
5 find it here, I had it just now. The first part --
6 well, the first phase was finishing what we talked
7 about. The second phase was the designing and
8 permitting of the caretaker's residence,
9 administrative building, and the high school
10 facilities. And that we assumed would take about
11 one to two years.

12 So the third phase would be when we start
13 the site grading, installation of utilities,
14 wastewater systems, access road, construction of the
15 caretaker's residence, administrative building, and
16 high school facilities, classrooms and high school
17 green and shade houses, and that would be a phase
18 that would last for about two and a half to three
19 and a half years.

20 **COMMISSIONER OHIGASHI:** Do you foresee
21 opening up in stages during that phase?

22 **MR. THATCHER:** I think it's going to be
23 dependent on what the Windward Planning Commission,
24 if they are putting conditions on, other conditions.

25 **COMMISSIONER OHIGASHI:** Did you have a

1 plan before in the record in regard to when --
2 whether or not you'd be occupying buildings prior to
3 the end of phase two?

4 **MR. THATCHER:** I don't think we had
5 anything in the record that said that. It was a
6 little more open.

7 **COMMISSIONER OHIGASHI:** So has there been
8 an estimate in the record of the cost of the
9 infrastructure for this project?

10 **MR. THATCHER:** In the record, it showed
11 that we had a USDA loan before, but I believe it
12 said that was for part of the construction.

13 **COMMISSIONER OHIGASHI:** I'm just asking
14 about the infrastructure. That would be the roads,
15 the sewers, the whatever type of sewage treatment
16 you have, utility lines, waterlines, et cetera, as
17 well as your catchment basin system. Has there been
18 an estimate as to what the costs are?

19 **MR. HONG:** You know, Mr. Ohigashi, I don't
20 want -- with all due respect --

21 **COMMISSIONER OHIGASHI:** No, it's no --

22 **MR. HONG:** -- even if we did, I think
23 there were, but even if we did, at this stage in
24 2022, all those prices and estimates would be
25 completely blown because I'm sure you are aware that

1 even on Maui or the Big Island, all construction and
2 everything else costs have gone up dramatically; so
3 our point is that in terms of the special use permit
4 -- and we are also faced with a time factor because
5 this case has taken so long.

6 **COMMISSIONER OHIGASHI:** No. My question,
7 so the answer would be it's not. You don't have it
8 right now, not sure if it's in the record, but if
9 it's in the record, it probably would cost more; is
10 that right?

11 **MR. HONG:** Absolutely, yes.

12 **COMMISSIONER OHIGASHI:** So if it is in the
13 record, and I'm not sure if it is, that's why I was
14 asking you. It's a voluminous record. I was trying
15 to look for it. I was wondering who would pay for
16 the cost of the infrastructure.

17 **MR. HONG:** In the current statutory
18 overlay in terms of charter schools, the charter
19 school and the CBESS would be responsible
20 exclusively, not state of Hawaii generally. It
21 wouldn't come out of the DOE budget or certainly the
22 schools' private school budget. That would be our
23 kuleana it to go get those, get that money.

24 **COMMISSIONER OHIGASHI:** In a special use
25 permit, is it required that the developer, that

1 being Petitioner in this case, show that they are
2 capable of meeting the financial obligations to
3 place infrastructure?

4 **MR. HONG:** One of the -- yes. And, yes,
5 we did show at the time of this process all the way
6 up until the appeal that we had, I think it was how
7 many, \$40 million, John? I forget how much money
8 the USDA had loaned us to do construction.

9 **MR. THATCHER:** Was going to loan us.

10 **MR. HONG:** Was going to loan us. It was
11 about 40,000, I mean 40 million, right?

12 **MR. THATCHER:** Yep.

13 **COMMISSIONER OHIGASHI:** \$40 million?

14 **MR. THATCHER:** And there is -- there is
15 something that we clarified also is that the reason
16 why CBESS is involved in this is charter schools
17 cannot own facilities, they can only lease
18 facilities.

19 So CBESS owns the Kress Building where the
20 school is currently located and works with First
21 Hawaiian Bank. First Hawaiian Bank has met with us
22 and USDA and said that, yes, they would lend us the
23 money or at least part of it to get the project
24 started. So go ahead.

25 **COMMISSIONER OHIGASHI:** But the problem

1 that the Land Use Commission has faced in the past
2 is developer saying that we are going to develop
3 this place and we are going to put in this
4 infrastructure, and later on for whatever reasons
5 it's not, infrastructure doesn't go in, and that
6 exacerbates the problem, but they start working on
7 it.

8 So you can't pull back, you can't pull it
9 back in the DBA district boundary amendment, but
10 what I'm trying to find out, does this special
11 permit give us additional hooks into you in regard
12 to making sure that you can build the infrastructure
13 because frankly, you know, that's one of our
14 concerns.

15 That's always been one of our concerns,
16 that it's actually built, being used for the purpose
17 it's being used for and it's going to be there.

18 **MR. HONG:** I think that -- oh, I'm sorry.

19 **COMMISSIONER OHIGASHI:** So I'm going to go
20 -- that's the reason why I'm not asking these
21 questions. The final area of question that I really
22 want to know, how long do you intend to stay here?
23 Assuming that you get the permit, how long do you
24 intend to stay?

25 **MR. THATCHER:** The lease is for 65 years

1 so I probably won't be around to make the decision,
2 but it would be a permanent facility. That's why we
3 looked at this because we needed something permanent
4 because we had moved from place to place.

5 **COMMISSIONER OHIGASHI:** Normally in a
6 special use permit situation, we usually give a
7 permit for five, sometimes 10; so is the developer,
8 are you, the petitioner, linked to them with a five-
9 year permit?

10 Because my understanding of special use
11 permit or my feeling of special use permit is that
12 it should not be permanent, it should be temporary,
13 even like landfills are considered to be that
14 because they will be covered up and returned to the
15 property that it is.

16 **MR. HONG:** If I can respond, two things.
17 Can the Land Use Commission put in some kind of
18 landmarks and tie it to certain specific times as
19 part of the terms and conditions of granting the
20 special use permit? I would submit, yes, that they
21 can under 205.

22 Second question that you bring up is is a
23 special use permit temporary like for five or 10
24 years, and I would have to say no because when I
25 look at, for example, the special use permit granted

1 to Kamehameha Schools, I mean, that's just
2 indefinite.

3 **COMMISSIONER OHIGASHI:** You can't make
4 that argument right now. My question specifically
5 is whether or not you guys can live with a 10-year,
6 five, 10-year special use permit. Because even,
7 like, solar facilities, for example, have a lifetime
8 under special use.

9 Even, I guess, landfills, I used that.
10 Rock quarries have a life beyond special use. What
11 do you believe makes this different that shouldn't
12 be subject to a temporary use?

13 And honestly speaking, you should revert
14 it, you should revert is back to what it was like
15 before like in any other special use permit.

16 **MR. HONG:** So the lease was for
17 educational or school purposes only and so we would
18 submit that in terms of special use permit, it would
19 last up until the end of the lease because we are
20 using it only for school or educational uses.

21 And I think that's the major difference
22 here than, let's say, a land, you know, a landfill
23 or rock quarry or something elsewhere. You are
24 talking about, you know, a specific resource or
25 definitive area.

1 We are talking about what is the lease
2 given to us for by DLNR only for school purposes,
3 education purposes, and so when we look at this as a
4 change in terms of land use, that's what the special
5 permit when we applied for it allows us, and I would
6 submit extends through the life of the lease.

7 **COMMISSIONER OHIGASHI:** My last question
8 is really rhetorical and it's more rhetorical than
9 anything.

10 My last question is given all the problems
11 with a special use permit, given all the fact that
12 it appears to be a down and dirty type of operation
13 type of thing, and I use the word down and dirty,
14 it's quick, quicker, supposedly quicker and easier
15 type of system, which it wasn't here, wouldn't a
16 district boundary amendment sort of satisfy a lot of
17 these concerns, be able to get a good EA down,
18 financing questions would be answered, length of
19 term should be no problem because it will be under a
20 lease by the Board of Land and Natural Resources,
21 limited to a certain purposes, the board can control
22 that and the board would be able to say whether or
23 not it should be fact, wouldn't that be easier, a
24 good world solution to the issue?

25 **MR. HONG:** I don't know that that's

1 rhetorical. I think it actually begs an answer
2 because in our circumstance when we started this
3 process originally, discussing this with former
4 Chairperson Laura Thielen and we discussed it with
5 Planning Department, the recommendation was this is
6 the way to go. They told us get in this bus. We
7 got on the bus.

8 Now 14 years later, all of a sudden the
9 bus isn't good enough, we should have got on the
10 other bus, right. So, you know, I'm a little
11 hesitant to condemn us to go back and start another
12 14-year process.

13 There's no guarantee in terms of time. I
14 don't think anybody here on this Zoom call can tell
15 us or give us an accurate date of time if we have to
16 go and play chutes and ladders and start over.

17 So, you know, we are at the point now
18 where we have fulfilled, I think, all our statutory
19 obligations, regulatory obligations, and it's now
20 before the Land Use Commission.

21 I think that if on a policy level you want
22 to say no more special use permits, because you are
23 right, it's kind of down and dirty, I think that's
24 one issue, but certainly my client shouldn't be
25 penalized for that and so I think that this begs a

1 larger discussion on a policy basis that the
2 Commission needs to -- needs to address.

3 **CHAIRMAN SCHEUER:** Hold on, hold on Mr.
4 Thatcher.

5 **COMMISSIONER OHIGASHI:** I just, I didn't
6 expect that answer, but nice to hear from you, Mr.
7 Hong. I have no further questions.

8 **CHAIRMAN SCHEUER:** Okay. Mr. Thatcher,
9 I'm going to allow if you wanted to say something
10 briefly in response.

11 **MR. THATCHER:** No, I just wanted to
12 clarify that when we first looked for the land back
13 in 2007, the county code said that charter schools
14 had to use agriculture zoned land and so that's what
15 we asked for.

16 All of the land around the -- developed
17 around the property has been rezoned since, and even
18 Pacific Plantations are now low density urban
19 instead of one acre ag. So the county currently
20 zones it as one acre ag.

21 So we tried to do it the way we were told
22 to do, but then there was a case with another
23 charter school, and the county changed and said that
24 we'd have to go for a special use permit.

25 **CHAIRMAN SCHEUER:** Okay. Commissioners,

1 further questions for Mr. Hong or Mr. Thatcher at
2 this time?

3 **COMMISSIONER WONG:** Yes.

4 **CHAIRMAN SCHEUER:** Commissioner Wong.

5 **COMMISSIONER WONG:** Thank you, Chair.

6 Just the question, again following up on
7 Commissioner Ohigashi. So regarding this special
8 permit that's in front of us right now, there's no
9 drawings per se, true drawings, it's only
10 conceptual; is that correct.

11 **MR. HONG:** Yes, that's correct because
12 when we applied and started this process, that's the
13 only thing that was required.

14 **COMMISSIONER WONG:** Okay. So that was in
15 2007, correct?

16 **MR. HONG:** That's correct.

17 **COMMISSIONER WONG:** So we have
18 approximately, you know, 15 years. I would say 14
19 years because we are just starting 2022; so during
20 that time period, couldn't you do something more?
21 Let's say draft, I mean, we have conceptual drawings
22 from 2007, and as you said, costs change, things
23 change, so ideas sometimes change during that
24 period.

25 Couldn't you just bring up a new plans or

1 something more finite or more that we can grab our
2 hands onto? Because to me it's like, here, I have
3 this idea, this plan, but it may change in 15 years,
4 you know?

5 It's like I used to have hair on my head
6 15 years ago, now I don't have any hair, I mean, so
7 you might say things change. I mean, I used to be
8 150 pounds and I'm over that weight.

9 So I just don't understand why we
10 couldn't, you know, you couldn't bring up at least
11 something more up to speed to this period.

12 **MR. HONG:** Well, I think that's a
13 legitimate concern and so the Intermediate Court of
14 Appeals decision was issued on January 31, 2020. It
15 took several months from the Intermediate Court of
16 Appeals decision to get a judgment and then transfer
17 back the proceeding or remand them back to the
18 Windward Planning Commission.

19 The Windward Planning Commission held a
20 hearing or started holding hearings on the remand
21 in, was it -- I think the first one was August of
22 2021.

23 So in terms of redoing this at an expense
24 to my client, because actually the special permit
25 talks about whether or not there should be a change,

1 this permitted use -- it focuses on the use, not
2 necessarily the actual nuts and bolts, you know, V8
3 engine with, you know, certain other aspects of it.

4 You know, it is conceptual, and in terms
5 of timing, we are fundamentally a victim of the
6 timing, and that's the answer to your question.

7 Would we have liked to present updated
8 plans or things like that? Yes, we would have, but
9 I would point out again, you know, we are not
10 Hualalai or someplace else.

11 We are a very small charter school, and in
12 terms of finances, we are waiting for the approval
13 of this new change of use so we could do this, and
14 then we would start that process of doing the plans
15 according to other special use permits and how it
16 went.

17 I would point out as I had mentioned
18 earlier, during the course of the last Windward
19 Planning Commission hearing, we had committed to the
20 Planning Commission and the community that we would
21 be updating the traffic report. We would be
22 updating the water calculations.

23 So, you know, unfortunately, yeah, we are
24 a victim of the timing of the situation. So we were
25 given essentially, according to your timeline, maybe

1 less than a year to update everything in terms of
2 the plans including cost estimates, blueprints,
3 diagram, that kind of thing, and I think that would
4 be burdensome and problematic.

5 **COMMISSIONER WONG:** Okay, thank you. So
6 I'm just going to give a forewarning to the
7 Commission or county or whoever I'm supposed to ask
8 that during the process after the remand, why didn't
9 they ask for, you know, new drawings or something
10 because, you know, once it hits our -- once it's
11 filed with us, we have 45 days.

12 And right now, we have -- it's almost,
13 sorry to say, don't get me wrong, it's just that
14 it's so nebulous in my mind, I would say that we are
15 going to go this pie in the sky and eventually it
16 will become a tree house.

17 I'm not saying it's going to be, you know,
18 but I -- I'm just saying that I would like to grab
19 something a little bit more around this than just,
20 you know, ideas or plan, you know, schematics, you
21 know, and some guesses. So that's all I'm going to
22 say right now. Thank you.

23 **MR. THATCHER:** Can I add something to Mr.
24 Hong's --

25 **CHAIRMAN SCHEUER:** So I'm not sure a

1 question was directed at you, Mr. Thatcher, by
2 commissioner Wong.

3 **MR. THATCHER:** Oh, I thought it was
4 directed at both of us.

5 **CHAIRMAN SCHEUER:** Okay, go ahead.

6 **MR. THATCHER:** No, I just wanted to add,
7 Mr. Wong, that one of the things that we said from
8 the beginning is that our classrooms would utilize a
9 lot of outdoor space, and that has become even more
10 important now with the pandemic.

11 And so I did have discussions with the
12 mayor and, you know, we are talking about possibly
13 when we are going back to for the permits for the
14 buildings. We have guaranteed that we want to
15 maintain that ability to use the outdoor spaces as
16 much as possible, and that's critical right now.

17 That's one of the reasons that the school
18 was able to stay open, one of the few schools that
19 was able to stay open for the entire year last year
20 except for one two-week period.

21 **CHAIRMAN SCHEUER:** Thank you.

22 Commissioners, questions for Mr. Hong and Mr.
23 Thatcher? The Chair has a series of questions.

24 I'm going to really briefly preface my
25 questions so that the parties or anybody watching

1 this proceeding doesn't sort of draw their own
2 inaccurate conclusions about my motivations.

3 Just three brief points in preface. One
4 is we are partly here because of the raw deal that
5 charter schools got given: Hey, you guys can exist,
6 but we are not going to give you any facilities, you
7 got to go find it yourselves.

8 It's a double standard in public education
9 in Hawaii that I just think is obnoxious, and you
10 have to acknowledge the sort of general injustice of
11 the situation that we are now dealing with some of
12 the subsidiary outcomes of.

13 From the descriptions of the curriculum
14 that I've gotten from the record and from the
15 presentations, you know, when I was in high school
16 at Iolani and tried to talk to them about things
17 like farming and sustainability, like let's say it
18 wasn't well received.

19 We joke that our spirits come precrushed
20 having gone to Iolani school. So, you know, it's
21 the kind of schooling I would have probably thrived
22 at, but that said, this is not the body that you
23 want judging curriculum.

24 We are not qualified to do so nor are we
25 supposed to be making our decision on how cool or

1 how poor we think a particular school is doing. We
2 are really limited to the land use decisions at
3 hand.

4 I just, in that regard, too, I just want
5 to make it really clear to the public testifiers who
6 have talked about traffic and other impacts, the law
7 is really clear that you can have substantial
8 permanent and adverse impacts and still move forward
9 with a project.

10 That's mostly, however, dealt with through
11 the DBA process rather than the special permit
12 process. So with that preface, I have, I think,
13 about eight questions, some of which are short, some
14 of which maybe longer. Two questions pertaining to
15 the record at hand, and I presume Mr. Hong's going
16 to respond to this. 15-15-95(a) of the Land Use
17 Commission's rules specify in part, and I'm going to
18 read it directly, that from Part A, the record shall
19 include evidence that the person requesting the
20 special permit has written authorization of all fee
21 simple owners to file the petition, which
22 authorization shall also include an acknowledgement
23 that the owners and their successors shall be bound
24 by the special permit and its conditions.

25 Now, I saw in the record evidence that the

1 DLNR had indicated that they were intending to issue
2 a lease, but I have not seen anywhere in the Record
3 specific compliance with this condition of 15-15-
4 95(a).

5 Where can you point me towards that
6 existence in the record where the DLNR as the fee
7 simple owner has said, yes, we actually agree to the
8 special permit conditions and we will be bound by
9 them?

10 **MR. HONG:** If I hear you correctly, you
11 are asking whether there's anything in the record
12 that DLNR specifically stated that they would agree
13 to any special -- the terms and conditions of a
14 special use permit?

15 **CHAIRMAN SCHEUER:** Understand the
16 requirements of 15-15-95(a).

17 **MR. HONG:** Other than issuing a lease, I
18 don't know that I recall seeing that. I don't know,
19 John, do you recall getting that?

20 **MR. THATCHER:** I'm not familiar with that
21 part, with the part of the law you are citing, but
22 we did go back to DLNR to modify the lease, and we
23 added the CBESS to the lease at one point.

24 **CHAIRMAN SCHEUER:** So I think let me just,
25 so it's a really specific question. And this is not

1 a hidden part of the administrative rules, it's the
2 part of the administrative rules that describes how
3 special use permits can be issued.

4 So I assume that at some point in the
5 decision to make a special use permit application,
6 this was looked at, and I'm just asking is it --
7 parties are free to argue that I'm reading this
8 wrong, but it seems fairly straightforward to me.

9 The word shall include evidence that the
10 person requesting the special permit has the written
11 authorization of all fee simple owners to file the
12 petition, which authorization shall also include an
13 acknowledgement that the owners and the successors
14 shall be bound by the special permit and its
15 conditions. Is that in the record or not?

16 **MR. HONG:** And I believe that when we
17 submitted it, the EA and everything else, the Celia
18 Shen did include letters from the Department of Land
19 and Natural Resources, and I would ask that I be
20 given the opportunity to sift through the record.

21 **CHAIRMAN SCHEUER:** You can go ahead, and I
22 think if I've read those correctly, they concurred
23 with the finding of no significant impact, but they
24 --

25 **MR. HONG:** All of them did.

1 **CHAIRMAN SCHEUER:** But they did not say
2 specifically that I saw we agree to be bound by the
3 special use permit conditions. So that's the first
4 question.

5 Second, 6E, Hawaii Revised Statute 6E,
6 Section 8 requires a letter of concurrence from the
7 State Historic Preservation Division, not a finding
8 of, yeah, we don't think there's anything there, but
9 a letter of concurrence under that language. I
10 would also ask the same question; is that in the
11 record?

12 **MR. HONG:** I am not sure. I apologize.

13 **CHAIRMAN SCHEUER:** I would like to know
14 before making a decision whether or not that is in
15 the record.

16 Third, and this is going back to an
17 assertion, Mr. Hong, if I heard you make correctly,
18 you said people told us to go get a special use
19 permit rather than a district boundary amendment.
20 Is that in the record?

21 **MR. THATCHER:** It's in the record, yeah.
22 It is in the record that we had to follow the
23 process that I said.

24 **MR. HONG:** Well, before we started again
25 on this, is it in the record, I'm not sure that that

1 was to the extent where I get a memo or a letter
2 from a Chairman Thielen or the planning director or
3 a letter from the planning director, Bobby Jean
4 Leithead Todd at the time.

5 Do I believe that's in the record that we
6 should use a special use permit versus a district
7 boundary amendment? I don't believe that that's in
8 the record.

9 **CHAIRMAN SCHEUER:** I'll say, my question
10 about that is it would be foolish to not acknowledge
11 how long this process has taken, but I do have pause
12 as Chair of the Land Use Commission that we be
13 assigned full and complete and sole blame for the
14 length of time that this process has taken.

15 **MR. HONG:** I apologize. If I've given you
16 any indication that I'm blaming, laying any blame on
17 the Land Use Commission, I certainly apologize.
18 That was never my --

19 **CHAIRMAN SCHEUER:** Okay, thank you. So is
20 the current property within the urban growth line
21 under the county general plan or is it outside of
22 the urban growth boundary?

23 **MR. HONG:** I would defer that to the
24 county, I'm sorry.

25 **CHAIRMAN SCHEUER:** Okay. You are familiar

1 with the Hawaii Supreme Court case, and I apologize
2 I don't have the full citation at my fingertips the
3 Local 5 case which had to do with how long an
4 environmental impact statement regarding the Turtle
5 Bay development was essentially good for.

6 We are looking at an EA that was done, I
7 believe, if I read the record correctly, 11 years
8 ago. And maybe we will come back to this, but I'm
9 interested in whether or not the Supreme Court's
10 directive under Local 5 should or should not apply
11 to our decision-making in this case, reliance on an
12 EA that is of some age. You can respond to that now
13 or later, that's fine.

14 **MR. HONG:** It's an interesting question,
15 you know, it's an interesting question.

16 **CHAIRMAN SCHEUER:** And perhaps fortunately
17 for everybody, I cannot read my chicken scratch of
18 my last point so I will defer. If I reread it
19 later, I will reserve the right to ask the question.

20 Commissioners, any further questions for -
21 - Commissioner Giovanni.

22 **COMMISSIONER GIOVANNI:** Thank you, Chair.
23 I'm sorry for the late question. So I think it was
24 Mr. Garcia that remarked in his testimony today that
25 moving -- one of the incentives to move from the

1 Kress Building was concern over the climate effects
2 in downtown Hilo.

3 Can you tell us what, if anything, is
4 proposed in the record where the new location of the
5 school would address in some positive way the
6 effects of climate change?

7 **MR. GARCIA:** Well, the effects of climate
8 change that we are speaking about on the Bayfront
9 have to do with the rising waters.

10 **COMMISSIONER GIOVANNI:** Let me clarify. My
11 -- this is a project of significant activity,
12 construction and ongoing operations.

13 **MR. GARCIA:** Yes.

14 **COMMISSIONER GIOVANNI:** And that activity
15 in and of itself will contribute to increased
16 loading of the atmosphere. What are you doing to
17 mitigate or compensate or otherwise neutralize the
18 effects of your activities at the new site so that
19 you don't exacerbate climate issues?

20 **MR. GARCIA:** Okay. I understand, thank
21 you. May I, as part of the team, may I defer to Mr.
22 Thatcher because as far as I know, you know, that
23 type of study in terms of the environmental impact
24 of our efforts to construct the school has not been
25 done.

1 **COMMISSIONER GIOVANNI:** I think, Chair, it
2 had to be in the record already in terms of what
3 they are responding to my question.

4 **CHAIRMAN SCHEUER:** Correct. Mr. Thatcher,
5 did you have something to add to the response?

6 **MR. THATCHER:** Yeah, I was just looking at
7 the beginning of the record, the PD1, and I -- I'm
8 not seeing anywhere in there right now where it said
9 it, but I know there is places where it came up that
10 the school's location was in the Bayfront area and
11 that was one of the reasons the school was trying to
12 move, but I'd have to look for it in the record.

13 As I said before, I can't search the
14 record so you just have to go through it page by
15 page almost.

16 **COMMISSIONER GIOVANNI:** Mr. Thatcher, my
17 question was not why are you moving. It's like what
18 are you doing to neutralize or mitigate the impact
19 of climate change through the activity you are
20 proposing at the new location, and whether or not
21 that's in the record is yes or no.

22 **MR. THATCHER:** I think it's in the record
23 where we are talking about the phases and so one of
24 the reasons we wanted to do it in phases is so that
25 we would build slowly so it wouldn't have as much of

1 an impact.

2 We are not planning on coming in and
3 building a whole school with all the waste that's
4 involved with that with construction. So I don't
5 know if we said something in there in the record,
6 but that's the part of the record.

7 Where it would be is where we are talking
8 about the phases and the reason to move it to the
9 phases, and it could be in testimony by Wil Chee
10 Planning also.

11 **COMMISSIONER GIOVANNI:** Okay, thank you.
12 Let me just make one of Commissioner Ohigashi's
13 rhetorical comments if I may, Chair.

14 **CHAIRMAN SCHEUER:** Please do.

15 **COMMISSIONER GIOVANNI:** My question was
16 stimulated by your question about the potential
17 staleness of the EA in this project, being 11 years
18 old, and in my view, a lot of EAs that were done in
19 that time period did not give adequate consideration
20 to climate change effects, and those are really far
21 more relevant today. So it kind of underscores from
22 my view, perhaps, that the EA is stale. Thank you.

23 **CHAIRMAN SCHEUER:** Thank you very much,
24 Commissioner Giovanni. I did decipher my chicken
25 scratch, and it was whether or not -- the question I

1 have is one of the conditions that I believe, if I
2 have read the record correctly, and you can correct
3 me if I haven't, is that all wastewater is required
4 by the county to be disposed on-site.

5 But one aspect of our terrestrial cave
6 ecosystems that they often have, in addition to
7 being sites of iwi kupuna and moi puu and other
8 cultural things, we also often have endemic cave
9 fauna, some of which can be quite sensitive to
10 impacts.

11 So is there something on the record that
12 talks about how you can meet the county's
13 requirement to dispose of all runoff on-site but yet
14 also not negatively impact the cave fauna or the
15 cultural artifacts that may exist? Mr. Hong or
16 somebody else?

17 **MR. HONG:** John, you want to talk about
18 that specifically?

19 **MR. THATCHER:** Well, in the record, the
20 first part on page 42, it says about one sentence.
21 Wastewater, currently there is no municipal
22 wastewater system serving the Kaumana area, and the
23 proposed project like the surrounding area
24 residents, would have to provide its own wastewater
25 system.

1 **MR. HONG:** Well, I think the question is
2 more to talk about the type of wastewater system
3 that you were alluding to earlier that's also in the
4 record.

5 **CHAIRMAN SCHEUER:** Just to be really
6 clear, I didn't ask about wastewater, which is a
7 separate concern. I was talking about a specific
8 county condition as to runoff being processed on-
9 site.

10 **MR. HONG:** Oh, runoff. That is actually
11 in the record, and thank you for clarifying because
12 that did come up in one of the hearings before the
13 Planning Commission, and they had, actually with Wil
14 Chee, Celia Shen had talked about what the plans
15 were.

16 And I can't give you, I apologize again,
17 chapter and verse where that was, but that was
18 discussed. That was -- a plan was in the record.

19 **CHAIRMAN SCHEUER:** And specifically was
20 the plan, did the plan take into account the
21 potential for infiltration into the Kaumana cave
22 system?

23 **MR. HONG:** I believe it did. It did.

24 **CHAIRMAN SCHEUER:** It would be great to
25 get, I mean, I have spent an inordinate amount of

1 time trying to review the record, but I don't, if
2 it's there, I have missed it; so I would like to
3 have attention drawn to it. Thank you very much.

4 **MR. THATCHER:** It may -- it may not -- it
5 may be affected by the fact that we agreed to build
6 on the lower portion of the property, and on the
7 lower portion of the property, the cave is all the
8 way on the northern side and so all of the runoff
9 and everything would be to the south of that and so
10 the cave would not be impacted.

11 And that part of the cave is inaccessible,
12 at least as far as we know, because the entrance on
13 that side was caved in by the bulldozer when they
14 paved Edita Street when they originally made it.

15 So there are endemic animals in Kaumana
16 Cave and we, you know, as far as the upper part of
17 the parcel goes, that was one of the reasons we
18 decided not to build on the upper portion because it
19 could have an impact on the endemic animals, endemic
20 to Kaumana Cave, not just to the state of Hawaii.

21 **CHAIRMAN SCHEUER:** Thank you for your
22 response. That's helpful, Mr. Thatcher.

23 Commissioners, anything further?

24 We have gone a full hour. If there's
25 nothing further, I would suggest we take a 10-minute

1 break, and then move on to the county, Ms. Kekai
2 followed by Ms. Campbell. It's 1:31. Let's
3 reconvene at 1:41.

4 **(Recess taken from 1:31 to 1:41 p.m.)**

5 **CHAIRMAN SCHEUER:** Okay. We are back on
6 the Record.

7 Ms. Kekai, can you, along with Ms.
8 Campbell give us your road map of your presentation?

9 **MS. KEKAI:** Oh, mine will be very short.
10 I'm sure hers will be as well. Very less -- basic,
11 basic statement about the Commission's findings,
12 less than 10 minutes.

13 **CHAIRMAN SCHEUER:** Okay. I see Ms.
14 Campbell nodding for the Record so --

15 **MS. KEKAI:** Thank you, Commissioners.
16 Thank you, Chair. We just want to keep this real
17 simple. We recognize that it's a voluminous record
18 to say the least.

19 The Commission, you know, took a lot of
20 time to review it and made the decision to make --
21 to review the record and make their decision off the
22 record.

23 And so I would just simply restate that
24 the Commission stands behind its recommendation that
25 this project application met all criteria, special

1 permit criteria, and I'm available for any
2 questions.

3 **COMMISSIONER WONG:** Chair, you are muted.

4 **CHAIRMAN SCHEUER:** Just figured that out.

5 Commissioners, questions for the Windward Planning
6 Commission? Commissioner Wong, you have a paddle,
7 that's impressive.

8 **COMMISSIONER WONG:** Yeah, so you can see
9 me now. Thank you.

10 **CHAIRMAN SCHEUER:** How much are you
11 bidding?

12 **COMMISSIONER WONG:** I have no idea, but
13 whatever it is, I can't afford it.

14 **CHAIRMAN SCHEUER:** Commissioner Wong
15 followed by Commissioner Chang.

16 **COMMISSIONER WONG:** Thank you, Chair. I
17 just have following up on the question I have
18 regarding the plans. You know, why, I mean, it was
19 2007 when, you know, through this county issue and
20 then had the Intermediate Court of Appeals that Mr.
21 Hong said was, what, 2020, 2021? So what -- and it
22 came back to the Commission or the county.

23 How come at that point in time you guys
24 didn't ask for new plans or new, you know, I mean,
25 you are using something that old.

1 **MS. KEKAI:** Initially we decided to put it
2 up to the parties to refund issue on whether the
3 record should be reopened and things should be
4 updated, and the Commission found that it was not
5 necessary and they could make the decision on the
6 record.

7 And I would add to that that the
8 Commission did not want to prejudice the Applicants
9 in the sense that making them kind of design at risk
10 or to provide drawings when their entitlements were
11 not in place is not usually a practice of the
12 Commission. You know, that's what the conditions
13 are there for.

14 We, you know, they have 10 years to
15 complete their construction and phases and such, and
16 if they cannot, then they have to come back to the
17 Commission or actually to the Department and ask for
18 extension. So there were -- there are things in
19 place, basically, without making them design at
20 risk.

21 **COMMISSIONER WONG:** Okay. So I don't know
22 if it's to you or the Planning Department so take
23 this as -- I guess during my period with the Land
24 Use Commission, almost any special permits usually
25 have a little bit more finite or little bit more, a

1 plan to say, yes, we are going to give you the
2 special permit because you are showing us the
3 finances, you are showing us, you know, good and
4 able be here, not that nebulous.

5 So, I mean, I'm not sure how long, sorry
6 to say, you have been with the Planning Commission,
7 but, you know, I guess or coming to the Land Use
8 from your, but did you ever -- do you have an
9 understanding of how much the Land Use wants or
10 needs to provide for the record to approve or
11 disapprove or modify or, you know, for these kind of
12 things?

13 **MS. KEKAI:** Let me see if I understand
14 your question. Are you asking me if your rules
15 allow you to make a decision on the present record
16 or if you guys need more?

17 **COMMISSIONER WONG:** Well, it's more, I
18 guess, a statement or, sorry, just let me figure out
19 how -- I'll just say it more, more good stuff, okay.

20 We want to do stuff correctly and we want
21 something that we can grab to say, hey, it's going
22 to cost ten dollars instead of it may cost ten
23 dollars, it may cost a hundred dollars, but we don't
24 know.

25 So we want something to say it's going to

1 be this big, you know, instead of it may be this
2 big, it may be this big. We are given something
3 that says it may look like this, but eventually it
4 will come like this.

5 So, you know, I guess when I've been
6 working at the Land Use or on the Land Use, we have
7 at least some parameters or something to say it will
8 be this much and it will cost this much, but when
9 you have the wiggle room that you can little bit
10 bigger but not this big; so, I mean, did that ever
11 come clear with the county?

12 **MS. KEKAI:** I do not recall. I believe
13 that they, you know, they thought that there was
14 information sufficient on the record to make their
15 decision and that, you know, there was a lot of
16 discussion about what this project would be on the
17 record, you know, the fact that they were going to
18 have LEEDs, it's a LEEDs project. All kinds of what
19 they, you know, the intention and the mission was.

20 And yes, again, we recognize that charter
21 schools don't have the money to go out and design,
22 predesign for these projects, but they did have --
23 there was immense discussion about what this project
24 would be and what it would present.

25 **COMMISSIONER WONG:** Okay. So the other

1 question going to come up from the Chair that I'm
2 going to ask you, it's about the turtle bay issue.
3 That EIS EIA issue and how things get stale.

4 The Planning Commission ever say, hey,
5 this may be stale, you have to go back to, you know,
6 get a more alive or whatever it's called to make it
7 more up-to-date, did that ever come into play?

8 **MS. KEKAI:** No, there was no discussion
9 that the EA was stale. They found it sufficient.

10 **COMMISSIONER WONG:** Okay, that's it.
11 Thank you, Chair. Thank you, ma'am.

12 **CHAIRMAN SCHEUER:** Thank you, Commissioner
13 Wong. Commissioner Chang.

14 **COMMISSIONER CHANG:** Thank you. Good
15 afternoon, Ms. Kekai. I'm going to ask you similar
16 questions to what I've asked Mr. Thatcher. I want
17 to just make sure that we are on the, you know, we
18 understand the legal requirements the same.

19 So with respect to special use permits and
20 looking at the reasonable -- the unusual and
21 reasonable criteria under the both 205 and 15-15-
22 95(b).

23 Would you agree that -- and similar to the
24 ICA opinion that when the Planning Commission
25 reviews the SUP, they have to consider the following

1 criteria in determining whether proposed use within
2 the ag district is an unusual and reasonable use,
3 and it has -- it lists five considerations, but it
4 has an "and" after four before you get to five; so I
5 read it as you would have to apply all five,
6 consider all five, right? Okay.

7 **MS. KEKAI:** Yes, I agree with your
8 reading, I'm sorry, go ahead.

9 **COMMISSIONER CHANG:** And if one of those
10 five -- and if one of those five criteria cannot be
11 positively or satisfactorily met by the proposed
12 project, for example, it would cause an adverse
13 effect. In your opinion, is that a basis upon which
14 to find that the SUP should not be approved?

15 **MS. KEKAI:** I agree with the statement
16 that they have to meet all five criteria. I would
17 say that if adverse impacts were found, you would
18 also have then find that they can be mitigated.

19 **COMMISSIONER CHANG:** Okay. All right. So
20 now that's going to take me both the ICA opinion,
21 the ICA's findings on the traffic.

22 So as I read the ICA decision, it
23 concludes on page 23 on the record we cannot
24 conclude that the Planning Commission clearly erred
25 in adopting findings of facts 18, 46, and 47 in

1 concluding that even with the proposed mitigation
2 efforts, traffic stemming from the development would
3 have an adverse effect on the surrounding
4 properties.

5 So as I read the ICA opinion, they are
6 saying notwithstanding the mitigation efforts, the
7 proposed project would cause an adverse effect on
8 the surrounding properties. Is that how you would
9 read the IC opinion?

10 **MS. KEKAI:** Yeah, I agree that that's what
11 was written, but I don't think that that would limit
12 the Commission to the same decision as the first can
13 Commission rendered.

14 **COMMISSIONER CHANG:** So I cannot get in
15 the minds of the Planning Commission. All I know is
16 I can read from the record there's been a tremendous
17 amount of both testimony, the TIAR was done at that
18 point in time, you know, four years, and even their
19 expert as the ICA noted, Rowell, recommended that it
20 be updated because -- and he specifically say it be
21 updated because there's, you know, proposed new
22 projects.

23 This is now -- so this is now 2021,
24 probably 13, 14 years later. What changed for the
25 Planning Commission for them to render a decision

1 that in 2014 it was an adverse effect and a basis
2 for denial of the permit to today they are saying,
3 no, we are going to grant -- we are going to grant
4 the permit?

5 So how did they deal, because the record
6 doesn't -- you relied upon the same record, there
7 wasn't any changes, no new traffic TIAR update, no
8 new studies. So how did they come to a different
9 conclusion?

10 **MS. KEKAI:** I think the Commission really
11 focused on the conditions that are being placed and
12 knowing that DPW would have to review the traffic
13 mitigation plan and such, they really were dependent
14 on the expertise of that, of DPW and so therefore,
15 you know, the fact that the conditions say that they
16 have to keep the majority of, you know, drop-off
17 pick-up on campus, you know what I mean, to not
18 create a backup and stuff like that, that that's
19 what the Commission would have depended on and that
20 the conditions would mitigate those impacts.

21 **COMMISSIONER CHANG:** So was DPW's comments
22 the same in 2014 as they were in 2021?

23 **MS. KEKAI:** Yeah, I do not believe --
24 Jeff, you can jump in if you know. I don't believe
25 that DPW submitted anything new.

1 **COMMISSIONER CHANG:** Right, because you
2 didn't -- you didn't amend the record, right?

3 **MS. KEKAI:** No.

4 **COMMISSIONER CHANG:** The record was the
5 same.

6 **MS. KEKAI:** Yeah.

7 **COMMISSIONER CHANG:** So it was just -- so
8 in 2014, the planning commission felt adverse effect
9 even if there's mitigation.

10 **MS. KEKAI:** Uh-huh.

11 **COMMISSIONER CHANG:** But in 2021, seven
12 years later, they feel based upon the same evidence
13 that, no, we think the mitigation is sufficient; is
14 that fair to say, is that how the discussion went?

15 **MS. KEKAI:** Yes.

16 **COMMISSIONER CHANG:** Were there public
17 testimony at the hearing as well?

18 **MS. KEKAI:** Yes.

19 **COMMISSIONER CHANG:** And did the public
20 testimony also raise some of the questions related
21 to the traffic concerns?

22 **MS. KEKAI:** They did, yes.

23 **COMMISSIONER CHANG:** And so
24 notwithstanding both the previous record, the ICA's
25 determination to find no error on the part of the

1 Planning Commission, no new evidence, no new TIA
2 update, the Planning Commission nonetheless felt
3 that the traffic was not going to change the
4 surrounding properties?

5 **MS. KEKAI:** Yeah, with the condition with
6 the mitigation plan that DPW would be able to
7 mitigate that impact.

8 **COMMISSIONER CHANG:** Okay, okay. My next
9 series of questions deal with, again, Ka Pa'akai.
10 So is it your understanding that the Planning
11 Commission and the Land Use Commission are required
12 to fulfill the obligations of Article XII, Section 7
13 with respect to the protection of preservation of
14 traditional customary practices?

15 **MS. KEKAI:** I would agree, yes.

16 **COMMISSIONER CHANG:** Okay. Can you direct
17 me in the record where did the Commission, what
18 evidence did they consider to make that
19 determination that there's no adverse effect?

20 **MS. KEKAI:** I apologize, I don't have the
21 record of the environmental -- the draft
22 environmental assessment and should be letters and
23 also -- but in the actual findings of fact, Exhibit
24 114, page 10 of the document, page 108 of the
25 record, you know, findings of fact number 54 does

1 state that there was no, that they found -- sorry,
2 just read it directly.

3 No traditional or customary Native
4 Hawaiian rights have been identified as being
5 exercised on the property.

6 **COMMISSIONER CHANG:** And is that --

7 **MS. KEKAI:** Sorry, so along with the
8 should be finding concurring and the EA, the
9 Commission also took into account the fact that
10 there were a lot, numerous hearings held, and the
11 public was allowed to testify at every single one
12 but contested case hearings previously and
13 currently, and at any time, anyone could have
14 brought up a traditional or customary practice, and
15 none was brought up.

16 So at that point, you know, it was
17 identified for the Pa'akai test, and, you know, the
18 third part of Pa'akai test does end with if they
19 exist, then you have to, you know, do these things.
20 And so it was determined they do not exist and
21 therefore, the remainder of the test is not
22 relevant.

23 **COMMISSIONER CHANG:** And whose obligation
24 is it to provide the information, is it the public,
25 the Hawaiian, it is the Native Hawaiians' obligation

1 to demonstrate traditional customary practice or is
2 it the Applicant's responsibility to demonstrate no
3 harm to traditional customary practices, whose
4 obligation is it?

5 **MS. KEKAI:** It definitely is the
6 obligation of the Applicant to present the evidence
7 and then the agency's obligation to weigh that
8 evidence.

9 So I would say, no, it's not technically
10 the obligation of the Native Hawaiians, but in such,
11 they do have the opportunity to provide public
12 testimony if the applicant did miss something.

13 **COMMISSIONER CHANG:** And I'm not too sure
14 your extent in working with the Hawaiian community,
15 but in my experience with respect to traditional
16 customary practices, that is not something
17 necessarily that they are going to come to a public
18 hearing, not a Kupuna, not a cultural practitioner.

19 They are not -- that's not the forum for
20 them to express their traditional customary
21 practice. Do you know whether a cultural impact
22 assessment was prepared for this EA?

23 **MS. KEKAI:** I want to say yes, but again,
24 I'd have to defer to Jeff.

25 **COMMISSIONER CHANG:** I didn't see one. I

1 didn't see one in the record.

2 **MS. KEKAI:** Okay.

3 **COMMISSIONER CHANG:** And, you know, Act 50
4 was passed in 2000, and this came --

5 **MS. KEKAI:** But I would actually add that
6 I'm very involved in the Hawaiian community, and we
7 actually do get a lot of participation at the
8 Planning Commission, a lot actually, they show up a
9 lot, yeah.

10 **COMMISSIONER CHANG:** Okay. And you are
11 very fortunate if they do, but again, I think that
12 the case law --

13 **MS. KEKAI:** But I'm not saying it's their
14 obligation.

15 **COMMISSIONER CHANG:** Yeah, right. It is
16 the Petitioner's obligation to provide, and
17 likewise, it is our constitutional responsibility,
18 both the Planning Commission and the Land Use
19 Commission to have sufficient findings to make the
20 determination that there's no adverse effect.

21 When I read the environmental assessment
22 by its archeological firm, their conclusion was
23 based upon four letters were mailed, no responses.
24 Do you think that that's adequate, do you think that
25 is a sufficient basis upon which to conclude that

1 there's no -- there's no impact to traditional
2 customary practices?

3 **MS. KEKAI:** I would defer that to the
4 courts. I don't have an opinion at this time.

5 **COMMISSIONER CHANG:** Okay. Because the
6 Planning Commission made a determination -- well, I
7 don't -- I guess actually I find that there's an
8 absence of that, absence of sufficient findings, but
9 that's just my opinion on this.

10 A final question related to the
11 environmental assessment. The Applicant indicated
12 that this is going to be a phased project.

13 Isn't there an issue regarding
14 segmentation, that they have to do -- not only is
15 the question whether the EA is stale under the case
16 that the Chair cited, but also don't they have an
17 issue of segmentation coming in just phases and not
18 doing a very comprehensive environmental EIS for a
19 project such as this?

20 **MS. KEKAI:** I would say it would only be -
21 - the phasing segmentation problem would only be if
22 the original EA didn't take into consideration the
23 impacts of the entire project, which I believe it
24 did in the sense of the full -- but it would be at
25 full buildout and how many students would be

1 involved and how many buildings and such or what
2 their imagined plan was.

3 **COMMISSIONER CHANG:** Because that seems to
4 be inconsistent with the Applicant's testimony today
5 that they didn't -- they don't have a very detailed
6 plan, it's very conceptual; that when they prepared
7 the EA before the Board of Land and Natural
8 Resources for the lease, the disposition, it really
9 was much more of a conceptual plan. It does not
10 appear as if they had a detailed plan. So is your
11 opinion still the same?

12 **MS. KEKAI:** Yeah, I --

13 **COMMISSIONER CHANG:** Okay.

14 **MS. KEKAI:** -- I think that, yes, my
15 opinion is the same.

16 **COMMISSIONER CHANG:** Okay. All right.
17 Thank you so much, Ms. Kekai, I appreciate the
18 responses.

19 **CHAIRMAN SCHEUER:** Thank you very much
20 Commissioner Chang. Commissioners, questions for
21 Ms. Kekai? Commissioning Ohigashi.

22 **COMMISSIONER OHIGASHI:** I'm going to do my
23 best, I'm going to -- you are familiar with
24 Neighborhood Board versus State Land Use Commission,
25 64 Hawaii 265?

1 **MS. KEKAI:** Sort of. I mean, I don't
2 recall the full case at this very moment, no.

3 **COMMISSIONER OHIGASHI:** That case dealt
4 with a big project. They had five point, they went
5 through the Planning Commission in Honolulu and they
6 wound up with the Land Use Commission for a special
7 use permit.

8 And the Supreme Court said, hey, this
9 doesn't fall within being done by a special use
10 permit, it should be done by a district boundary
11 amendment because of the size and impact of the
12 project.

13 However, we've heard testimony from Mr.
14 Hong saying that it was your planning director as
15 well as I think it was the head of the Board of Land
16 and Natural Resources at that time advised them to
17 seek a special use permit.

18 Do you have anything in your records that
19 would indicate that your client had made that advice
20 to Mr. Hong? Is that part of the record in this
21 case?

22 **MS. KEKAI:** I advise the Planning
23 Commission so I don't know the advice that the
24 director gave Mr. Hong.

25 **COMMISSIONER OHIGASHI:** Are you aware of

1 anything in the record that shows that advice?

2 **MS. KEKAI:** I am not aware of anything in
3 the record. I cannot recall at this time, no.

4 **COMMISSIONER OHIGASHI:** The case was 1982
5 and when I read the memorandum opinion, it indicated
6 that the -- that they were citing this case for
7 residential, and right now I believe it's applicable
8 to the present situation.

9 So I'm going to ask you the same thing I
10 asked Mr. Hong, I think, that I'm looking on page
11 273. 272, it says that the procedural and
12 substantive differences between the two techniques,
13 that being special use permit and the district
14 boundary amendment, in this court the necessity for
15 their proper application to the particular land use
16 problems they are designated to address.

17 As courts have repeatedly recognized,
18 unlimited use of the special permit to effectuate
19 essentially what amounts to a boundary change
20 undermine the protection from piecemeal changes in
21 the zoning scheme guaranteed to landowners by the
22 more extensive procedural protections of the
23 boundary amendment statutes.

24 Now, in this case, I was intrigued by one
25 of the footnotes where it talked about, footnote

1 number -- I got to use my magnifying glass, footnote
2 number 7 on page 25 in memorandum opinion.

3 And it said something about the special
4 permit application stated that at the time a
5 definitive solution was not evident, but -- and it
6 was talking about the water problem -- but the
7 potential for additional sources of potable water
8 might be a rain catchment system, a portable water
9 well, possibility of future joint developer
10 agreement whereby Connections might be able to gain
11 additional water credits.

12 Connections submitted that there was one
13 or two decade -- there was a one- or two-decade
14 period before the DWS allotment would be reached,
15 and there was ample time to identify and assess the
16 feasibility of other sources and secure the
17 necessary permits. Otherwise, campus development
18 would not proceed beyond that sustained part.

19 In a -- is that the standard that SUP uses
20 in the Hawaii County in terms of determining whether
21 or not to issue SUP, whether or not things
22 anticipated in the future can be considered in
23 granting an SUP?

24 **MS. KEKAI:** I think that that's -- I would
25 say, yes, in the sense that that's what the

1 conditions are for is to plan for things that aren't
2 completely laid out at the time of application, that
3 can't be laid out at application.

4 **COMMISSIONER OHIGASHI:** And so would that
5 also apply in a district boundary amendment
6 question, would that standard also be present in a
7 district boundary amendment? Because I just give
8 you a hint, as a LUC commissioner, I don't think I
9 would buy this.

10 **MS. KEKAI:** Yeah. And I'll just -- I'll
11 just take a little latitude and say that I also
12 don't think that a boundary amendment would apply in
13 this case in the sense that this is state land, and
14 therefore, I would say that if the state wanted this
15 to be amended, a boundary amendment, that they could
16 have issued that to the applicant instead of a
17 special use permit.

18 **COMMISSIONER OHIGASHI:** The state didn't
19 issue a special use permit.

20 **MS. KEKAI:** No, but I mean in their lease,
21 they could have said that you can go -- you should
22 go and get a boundary amendment instead of a special
23 use permit if the state wanted this piece of land
24 which, you know, is state owned to be amended or to
25 -- at the end of the day, they all have it.

1 **COMMISSIONER OHIGASHI:** For example, let
2 me, for example, I know that this is on Maui, you
3 may not know this, but school, in the Keaau, Keaau
4 school here that is being done by the DOE is not
5 owned by the DOE.

6 The underlaying land is owned by the state
7 of Hawaii, but because it's a school and the
8 agricultural -- it was in agricultural district,
9 they did a district boundary amendment to amend it
10 so that we can put specific conditions and make sure
11 that it's done correctly.

12 So the state itself didn't put into any
13 lease a requirement, but they recognize that this,
14 the district boundary amendment.

15 I'm just asking now. I don't think that
16 whether or not somebody puts it in a lease or
17 doesn't put in a lease is very important. I think
18 what's important is what the Chairman indicated to
19 you, whether or not you you do have the -- that you
20 -- you put the DLNR on the hook that said, hey, you
21 guys got to follow all the conditions or not.

22 You know, you have to have that in
23 writing, but, you know, I don't think it's important
24 to put it in a lease. So I'm going to ask you --
25 I'm trying to put it into its topic.

1 Is this a case where special use permit
2 application as identified by the ICA in that
3 footnote that I read is sort of more procedural
4 latitude, a special use permit versus DBA, a
5 district boundary amendment?

6 **MS. KEKAI:** I don't know that I really
7 understand your use --

8 **COMMISSIONER OHIGASHI:** I'll withdraw the
9 question. I'll withdraw the question.

10 **MS. KEKAI:** Sorry.

11 **COMMISSIONER OHIGASHI:** I made my point.

12 **MS. KEKAI:** Okay, good.

13 **CHAIRMAN SCHEUER:** Thank you, Commissioner
14 Ohigashi. Commissioners, further questions for Ms.
15 Kekai? I believe all the questions I have have been
16 raised by Commissioners prior to me so let's hear
17 from Ms. Campbell.

18 **CHAIRMAN SCHEUER:** Let's hear from Ms.
19 Campbell.

20 **MS. CAMPBELL:** Good afternoon,
21 Commissioners. I'm Jean Campbell, Deputy
22 Corporation Counsel for the Hawaii County Planning
23 Department. The Planning Department also does not
24 have an extensive presentation for you today.

25 As you know, the Planning Department in

1 the normal course of this special permit application
2 prepared its recommendation and background report,
3 both of which are in the record, Planning Department
4 folder, two pages, 881 and 419 respectively if my
5 review of the record is correct.

6 These, both the recommendation and the
7 report, were submitted to the Windward Planning
8 Commission for their consideration. The Planning
9 Department recommended that the Planning Commission
10 approve the special permit application and continues
11 to stand by this recommendation, and I -- the Deputy
12 Director and I are available for what I do expect
13 are your questions.

14 **CHAIRMAN SCHEUER:** Thank you, Ms.
15 Campbell. Questions. Commissioner Chang?

16 **COMMISSIONER CHANG:** Ms. Jean Campbell,
17 you know I cannot let you get away without asking
18 you the same questions. I'm -- I wanted to ask you
19 since the Planning Department made recommendations
20 to the Planning Commission, what information did you
21 have to recommend that there were no traditional
22 customary practices on the property and therefore no
23 adverse effect?

24 **MS. CAMPBELL:** As my Co-Deputy Hall noted,
25 we, the Planning Department, relied on the final

1 environmental assessment and additionally the lack
2 of public testimony at the time and continuing; so
3 the Planning Department did feel that this was an
4 adequate inquiry on our part.

5 We do agree with both you and Deputy Hall
6 that both the state and the county do have the
7 responsibility to consider and protect traditional
8 and cultural rights and practices and that this
9 obligation does extend to special permit
10 applications, and, you know, and we -- we actually
11 thank the Commission for your continuing this
12 inquiry.

13 As I noted, the Planning Department, the
14 county did feel that their inquiry was adequate, and
15 we recognize the state's both right and obligation
16 to continue that inquiry as far as you believe it
17 needs to go.

18 **COMMISSIONER CHANG:** I guess a question
19 that I asked Ms. Kekai, we both agreed upon, who's -
20 - would you agree that the obligation to come forth
21 with information to determine no adverse effect on
22 traditional customary practices is the obligation of
23 the Applicant?

24 **MS. CAMPBELL:** Yes.

25 **COMMISSIONER CHANG:** So it's not the

1 obligation of the Native Hawaiian practitioner but
2 the Applicant?

3 **MS. CAMPBELL:** That's correct.

4 **COMMISSIONER CHANG:** And are you -- are
5 you comfortable, I don't know if comfortable's the
6 right word because I'm trying to be somewhat -- do
7 you believe that reliance on the environmental
8 assessment where they mailed four letters and no
9 response, do you believe that that's adequate to
10 make a determination that there's no adverse effect
11 on cultural practitioners or Native Hawaiian
12 traditional customary practices given the fact that
13 this is a Kaumana Cave?

14 **MS. CAMPBELL:** I believe that the Planning
15 Department exercised its own expertise as well so
16 the Planning Department would have taken into
17 account its own -- its own knowledge of the area,
18 the knowledge that it received regarding the date of
19 the lava flow and the surrounding properties mostly
20 being all developed subdivisions or, you know, more
21 modern used utilized properties or modern developed
22 properties surrounding this one.

23 I believe that the determination could
24 have been different if surrounding properties were
25 undeveloped. So I believe -- I guess the short

1 answer is I don't believe that the Planning
2 Department's determination was limited solely to the
3 environmental impact statement or, I mean, I'm
4 sorry, the EA and the lack of response from four
5 letters only.

6 I believe that the Planning Department
7 would have exercised its own expertise and its own
8 discretion if its own evaluation as well.

9 **COMMISSIONER CHANG:** Does the record
10 contain that sort of that expertise and that
11 knowledge so that we can weigh that against the
12 conclusion? Because at this point in time, all we
13 have is the EA. Is there anything in the record to
14 indicate the staff's expertise and experience?

15 **MS. CAMPBELL:** I'm afraid there's not much
16 articulation of that, no.

17 **COMMISSIONER CHANG:** All right. All
18 right. Thank you very much, Jean. Good to see you,
19 thank you.

20 **MS. CAMPBELL:** You, too.

21 **CHAIRMAN SCHEUER:** Thank you Commissioner
22 Chang. Commissioner Wong.

23 **COMMISSIONER WONG:** Thank you, Chair. Ms.
24 Campbell, I guess I want to do the same question
25 that I asked Ms. Kekai. First off, again, did the

1 Planning Department think that conceptual drawing
2 was enough to make that decision to approve it to
3 send it up to us?

4 **MS. CAMPBELL:** Yes.

5 **COMMISSIONER WONG:** Okay. So then the
6 other question I would have, and I know I sound like
7 a broken record because, you know, Chair has a way
8 of saying it, but EA, did you think it was stale?

9 **MS. CAMPBELL:** No, we didn't believe that
10 it was stale.

11 **COMMISSIONER WONG:** Okay. So the other
12 question I have that was brought up that's kind of
13 brothering me a little bit is who, I mean, is there
14 anything on the record to say, hey, Petitioner, go
15 for a special permit instead of a DBA?

16 **MS. CAMPBELL:** I'm not aware that there is
17 a specific directive in the record anywhere advising
18 the applicant one way or the other about which
19 application to submit.

20 The Planning Department was presented with
21 a special permit application and so that's what they
22 processed. The Planning Department does actually
23 believe that a special permit is the most
24 appropriate application for this process and for
25 this particular property, in part because of the

1 agricultural nature of the proposed school.

2 Had this been a boundary amendment and the
3 property been changed to an urban designation, some
4 of the agricultural, the proposals wouldn't be
5 permitted any longer and so it would -- it would
6 change the nature of the school that's's being
7 proposed.

8 In addition, I believe -- I don't -- I
9 think it was Commissioner Ohigashi who referred to
10 the special permit as sort of a down and dirty
11 application, but in some ways, it's exactly perfect
12 for this because it's very limited, right?

13 It would not allow all of the other uses
14 that an urban designation for this property would,
15 which would be significantly broader than a school
16 and that would be permanent and so this special use
17 permit allows this particular use on this particular
18 property.

19 To the extent that anyone puts a time
20 limit on the use itself, it would expire. It could
21 be revoked. You know, it's very narrowly taylorred
22 and I would encourage you to look at it that way
23 rather than a shortcut.

24 And so I believe that it is actually an
25 appropriate methodology for going about this

1 particular project, and on top of that, if we look
2 at the proposed use, if they did do a boundary
3 amendment, they would then, in addition, have to
4 come in for a use permit after that.

5 And so it -- a boundary amendment at a
6 glance might seem like a good proposition, but the
7 Planning Department didn't really believe that that
8 was a better alternative, but again, the Planning
9 Department simply processed the application that was
10 in front of them as well.

11 **COMMISSIONER WONG:** Thank you. I guess I
12 better go back again. You know, most of the time
13 when someone comes up for a special permit during my
14 period, we have a little bit more firm, I would say
15 firm statement like toilets over here, you know,
16 it's more firm or finite, like this is the funding
17 stream.

18 We can guarantee we have, you know, even
19 though I know it's a charter school, but we have \$5
20 in the bank guaranteed to spend on this. It's, you
21 know, I mean, it's not -- it's a plan.

22 I know here it's part of it, but it seems
23 like very, to me, very nebulous. I'm not sure how
24 the Planning Department deals with that if you could
25 explain just a little bit, just, you know, that

1 much.

2 **MS. CAMPBELL:** Thank you. And I guess to
3 some extent, you know, this project was compared to
4 Kihei High School, which is a really different
5 project, right, and so perhaps I wouldn't suggest
6 you are confusing the two in any way because they
7 are so distinguishable.

8 There's no real ag component to Kihei.
9 It's a standard DOE school, but this project, we
10 believed based on, you know, the application needed
11 more flexibility.

12 They needed to be able to, I wouldn't say,
13 you know, come up with plans on the fly because we
14 didn't believe that that's what they were doing, but
15 we felt -- the Planning Department felt that the
16 conditions that were being imposed were adequate to
17 deal with the uncertainty.

18 **COMMISSIONER WONG:** Okay. So I guess just
19 falling back on the zoning issue again, sorry. It
20 bugs me just that, as you know, for Land Use we have
21 four designations compared to the county which has
22 multiples, right?

23 So even if a state zoning says we will
24 change it to urban, the county can say you know
25 what, you still, even though it's urban, you can do

1 it, you know, you can do some ag on it or, I'm
2 sorry, talking about Oahu now.

3 You know, you can do a more of a like a
4 Waimanalo Gulch Landfill on a urban district; so,
5 you know, you can do other things on it while the
6 county levels statements.

7 While urban is almost like anything under
8 urban, whatever the county says you can do, you
9 know, I mean, so I don't -- it's kind of -- I can't
10 put two and two together. That's the problem I'm
11 having right now.

12 So I'm not sure. I don't know if it's
13 just a statement or if you can answer that. If not,
14 that's fine.

15 **MS. CAMPBELL:** Well, the urban uses, I
16 guess it would be -- the county felt that it would
17 be most consistent to leave it in ag considering the
18 proposed ag nature of the school versus, you know,
19 something is really truly urban and then trying to
20 carve out or add in, you know, other uses that are
21 truly not urban uses.

22 It just seemed most consistent to us to
23 leave it ag. And again, we weren't presented with a
24 boundary amendment request.

25 **COMMISSIONER WONG:** Thank you, Ms.

1 Campbell. Thank you, Chair.

2 **CHAIRMAN SCHEUER:** Thank you, Commissioner
3 Wong. Commissioners? Commissioner Ohigashi.

4 **COMMISSIONER OHIGASHI:** Follow-up question
5 on that last question, Ms. Campbell. What was to
6 stop the applicant from only designating the half
7 they were going to build on as a special use permit,
8 why was it necessary to designate the entire parcel
9 if they were only going to build on the first half?

10 **MS. CAMPBELL:** You know, that was the
11 request that came to us.

12 **COMMISSIONER OHIGASHI:** No, I'm just
13 trying to follow your logic. You are saying that
14 it's supposed to remain in agriculture and a bunch
15 about special use permit, but if we were going to
16 follow that logic, then Planning Department should
17 have processed it, should have advised them why
18 don't you just do this part, then, as a special use
19 permit.

20 In fact, why don't you keep it down to 15
21 acres. That way you don't even have the Land Use
22 Commission bothering you. I'm just curious about
23 that because that's what you mentioned.

24 The second thing that bothers me is that
25 my reference to the Kamehameha school was in

1 response to a statement made by the Planning
2 Commission's attorney saying that the state would
3 have put it in the lease if they wanted a boundary
4 amendment and because they didn't do that, we are
5 free to do whatever we want.

6 My response is, hey, this is a state land
7 EA permit school. They went to a DBA. They didn't
8 do whatever they want. So I was responding to that,
9 and to make it seem like I am comparing that school
10 to this school, ridiculous.

11 Third point that I want to make is this,
12 is that did the Planning Director direct Mr. Hong's
13 clients to file for special use permit; is that in
14 the record?

15 **MS. CAMPBELL:** I don't believe that there
16 is a directive in the record from the Planning
17 Department of --

18 **COMMISSIONER OHIGASHI:** That's all the
19 questions I have.

20 **CHAIRMAN SCHEUER:** Thank you, Commissioner
21 Ohigashi. Commissioners? So at the risk of being
22 repetitive to this line of questioning, but I am
23 trying to -- because Commissioner Ohigashi and Wong
24 went where my mind was going, which can be a scary
25 thing, I realize, but, you know, there we go.

1 If I understand the record in front of me
2 correctly, the actual urban like uses, the school
3 uses, the built environment, it's going to be
4 confined to one part of the parcel, one part of one
5 half of the parcels and could be less than 15 acres;
6 am I correct?

7 **MS. CAMPBELL:** I apologize. I need to
8 defer to the deputy director about the size.

9 **CHAIRMAN SCHEUER:** I got to swear you in,
10 Jeff. Do you swear or affirm the testimony you are
11 about to give is the truth?

12 **MR. DARROW:** Yes.

13 **CHAIRMAN SCHEUER:** Thanks, Jeff.

14 **MR. DARROW:** Jeff Darrow, Deputy Planning
15 Director with the county of Hawaii. We, you know,
16 the record kind of starts where the application was
17 submitted to the Planning Department back in July of
18 2012, but prior to that, the Applicants were going
19 through all the environmental assessment process
20 that they were required to do being that this was
21 state land and they were proposing a school.

22 We did meet with them for the proposal and
23 discussed the different options. The discussion
24 came up a number of times about trying to keep the
25 school under 15 acres, but their proposal was clear

1 that they wanted to utilize the entire 70-acre
2 parcel. So it was clear that they understood that
3 that meant approval through the Land Use Commission,
4 and that was the direction that they wanted to go.

5 There was -- I don't recall a lot of
6 discussion about going through the direction of a
7 boundary amendment because again, as Deputy
8 Corporation Counsel Campbell had mentioned, that
9 this school was very focused on the agricultural
10 component for its uses.

11 And to be able to go through a urban
12 designation and then to be required to possibly have
13 to change the zone to a residential zoning to be
14 consistent and then to have going through a use
15 permit felt like a pretty, you know, pretty
16 exasperating process when this option of the special
17 permit appeared to be more in line with the
18 direction of the school. It wasn't that they were
19 trying to make an easier path.

20 And so again, I can't -- I mean, this was
21 10 years ago. I was -- I think I was the planner
22 assigned to do a lot of the work for this
23 application. I was involved in the meetings, but
24 again, their focus and direction was clear.

25 **CHAIRMAN SCHEUER:** And you would agree

1 that the path we've ended on has been an
2 exasperating for nearly everyone involved, wouldn't
3 you?

4 **MR. DARROW:** I, I mean, how many years,
5 yeah, it's been exasperating, but again, if we would
6 have gone down a different path, we are not sure how
7 long that may have taken.

8 **CHAIRMAN SCHEUER:** No. I keep thinking of
9 the motto of the Medici family, do you happen to
10 know what that was?

11 **MR. DARROW:** I don't.

12 **CHAIRMAN SCHEUER:** Translated into
13 English, Make haste slowly. So I guess the last
14 question for now on this line of questioning, it is
15 in the urban growth area, right?

16 **MR. DARROW:** Correct. General plan
17 designation for this area is low density urban.

18 **CHAIRMAN SCHEUER:** So that's why I'm like
19 just scratching my head. Like even with all the
20 other things you've said, you have an applicant in
21 the urban growth area and you are saying, no, keep
22 the land in ag when the county has actually gone on
23 record as saying, actually, it should go into the
24 urban district.

25 **MR. DARROW:** Again, the Applicant was

1 focused on the direction that they wanted to go.

2 **CHAIRMAN SCHEUER:** I know what the
3 Applicant asked.

4 **MS. CAMPBELL:** I think had the Applicant
5 come in to want to do a residential subdivision,
6 then obviously a boundary amendment would have been
7 the most appropriate way to go, but this applicant
8 came in for essentially an agricultural school and
9 so it seems consistent.

10 **CHAIRMAN SCHEUER:** But when, I mean, and
11 I'm a little bit familiar with Hawaii County
12 planning, like, I mean, when you set out the urban
13 growth boundary after the extensive community plan
14 and general plan process, it really is the statement
15 ultimately by the council that this is what we want
16 urban boundaries to be, correct? That is the policy
17 decision of the county.

18 **MR. DARROW:** Correct.

19 **CHAIRMAN SCHEUER:** What you are
20 recommending when you are going with recommendation
21 for a special permit really is contrary to what the
22 stated position of the county is for where the urban
23 growth boundary should be.

24 **MR. DARROW:** I would agree with that
25 statement, but that doesn't negate the options that

1 are available to property owners that do have
2 existing zoning that these options are available to
3 them.

4 When the planning director looked at this
5 request in light of the general plan designation,
6 they felt that the school was in line with that low
7 density type of use.

8 **CHAIRMAN SCHEUER:** Couple other questions.
9 I have not seen on the record any time limit to the
10 latest version of the permit that was issued by the
11 Planning Commission recommended to the LUC.

12 **MR. DARROW:** If I direct the Commission to
13 Condition 4 of the revised recommendation that was
14 adopted by the findings of fact, that has the time
15 frame to build the high school phase of the project.

16 The planning director at the time put time
17 conditions on the up to the high school phase. My
18 thought is that the understanding is that if they
19 have gotten to that point in their -- their project,
20 that at that point, we wouldn't need to continue
21 with time limits until they finish, but that the
22 school would be established at that point.

23 **MS. CAMPBELL:** And there is a 10-year time
24 limit on the development of the school.

25 **MR. DARROW:** Right.

1 **CHAIRMAN SCHEUER:** But that's more akin to
2 the LUC says you must commence by such and such date
3 or be subject to revocation. It's not actually a
4 time limit on the length of the special use,
5 correct?

6 **MS. CAMPBELL:** Right, but there doesn't
7 need to be an absolute time limit. If you look at
8 the HAR 15-15-95(e), the duration of the entire
9 project is permissive versus the initial buildout is
10 a shell and so this is in line with the
11 administrative rules.

12 **CHAIRMAN SCHEUER:** Except to the degree, I
13 guess, I would counter, Ms. Campbell, and with real
14 respect for your understanding of the law with the
15 case that we've talked about, the Neighborhood Board
16 case, because we are really trying to draw a
17 distinction between district boundary amendment
18 actions versus special permit actions. I think you
19 have to read 15-15-95(e) also in context of the
20 overall land use statute in this state, right?

21 **MS. CAMPBELL:** Yeah. And certainly the
22 Land Use Commission would be free to add a time
23 limit duration as --

24 **CHAIRMAN SCHEUER:** Okay, great. So you
25 are getting to exactly where I'm trying to go. What

1 in the record would be a reasonable basis for
2 placing a time condition on it, should the
3 Commission garner five votes to agree?

4 **MS. CAMPBELL:** You know, I think that's in
5 the discretion of the Commission, and I wouldn't
6 want to direct the --

7 **CHAIRMAN SCHEUER:** It has to be based on
8 the record, yeah?

9 **MS. CAMPBELL:** Right. There is an awful
10 lot of information in the record, including the
11 duration of the lease itself. I haven't looked
12 closely at that to recall whether it's got extension
13 periods, renewal options or any of those. I think
14 there's -- the record is voluminous and I'm afraid I
15 can't cite to you all of the different
16 considerations you would want to --

17 **CHAIRMAN SCHEUER:** Because in the record
18 regarding Waimanalo Gulch, we specifically got
19 dinged for placing a time condition that was not
20 related deeply to the record, yeah, so I ask that
21 question.

22 I think I'm out for now. Any others,
23 Commissioners? Okay. It's 2:37. I think we
24 started at 1:41. Am I remembering correctly? So if
25 we end off our county questions for now, then we

1 could go on to OPSD and the intervenor after a 10-
2 minute break. Okay. So let's reconvene at 2:47.

3 **(Recess taken from 2:37 to 2:47 p.m.)**

4 **CHAIRMAN SCHEUER:** It's 2:47. We are back
5 on the record, and we will now hear from OPSD, Ms.
6 Kato, questions for OPSD followed by Mr. Matsukawa.
7 Ms. Kato.

8 **MS. KATO:** Thank you, Chair. The Office
9 of Planning and Sustainable Development recommends
10 approval of this special permit subject to
11 additional conditions to address state concerns with
12 respect to the project's potential impacts to
13 archeological resources and endangered species.

14 Special permits may be granted by the
15 county Planning Commission and the Land Use
16 Commission for certain unusual and reasonable uses
17 within the state agricultural land use district.

18 Now, HAR 15-15-95(c) provides five
19 guidelines to aid in determining whether a use is
20 unusual or reasonable. OPSD believes that the
21 proposed use generally meets the special permit
22 guidelines for an unusual and reasonable use within
23 the agricultural district.

24 The property is undeveloped and poorly
25 suited for agricultural use due to its location on

1 the 1888 and '81 lava flow. Land has LSP soil
2 rating of D or poor.

3 According to the county exhibits, Exhibit
4 78, County of Hawaii Planning Department revised
5 recommendation, the proposed project with
6 appropriate mitigation will not adversely affect the
7 surrounding property and would not unreasonably
8 burden public resources.

9 The use is also consistent with the
10 surrounding area, which has developed into low
11 density residential neighborhoods.

12 While the property is considered low
13 quality agricultural land, Petitioner proposes to
14 establish agricultural and reforestation programs as
15 part of the school's curriculum. The reforestation
16 projects would include reintroducing and preserving
17 the existing Ohia forest and reintroducing some
18 native species.

19 The proposed agricultural program would
20 provide students with hands-on experience in
21 sustainable agricultural practices and may include
22 greenhouses, cultivated gardens, and we understand
23 possibly livestock.

24 These programs will help defer their
25 Hawaii's sustainability goals and is a compatible

1 and appropriate use within the agricultural
2 district.

3 OPSD notes that the county Planning
4 Commission's finding of facts number 21 reference
5 adoption of the recommended conditions contained
6 within County's Exhibit 78, the Planning
7 Department's own revised recommendation.

8 The 19 recommended conditions, however, do
9 not appear to have been incorporated into the
10 Planning Commission's D and O. The 19 conditions
11 cover public facilities and certain matters of state
12 concern, specifically the Kaumana Cave that
13 underlies the property.

14 The recommended conditions include a
15 hundred foot buffer zone and other related historic
16 sites mitigation as supported by the FEA. So OPSD
17 therefore recommends also that the LUC incorporate
18 the 19 conditions in the Planning Department's
19 revised recommendation dated October 31, 2012.

20 In addition, OPSD recommends one
21 additional condition related to endangered species
22 as recommended in the policy of the project's FEA.
23 The condition relates to avoidance of impacts to the
24 Hawaiian hawk and Hawaiian hoary bat, which are
25 species that one of the public testifiers mentioned

1 as being in the area. Specific language for this
2 additional condition is provided in OPSD's written
3 testimony.

4 Again, the Office of Planning and
5 Sustainable Development recommends approval of the
6 special permit for this project subject to the
7 imposition of the mentioned conditions. Thank you.

8 **CHAIRMAN SCHEUER:** Questions for Ms. Kato?
9 Commissioner Chang.

10 **COMMISSIONER CHANG:** Thank you, Mr. Chair.
11 Ms. Kato, I want to be consistent and ask everybody
12 the same series of questions so you would agree that
13 under special use permit as well as the IC opinion
14 that all five of those criteria must be considered
15 in determining unusual and reasonable use?

16 **MS. KATO:** I think that they should be
17 considered. I don't think that they necessarily all
18 need to be met as they are guidelines and not
19 specifically requirements.

20 **COMMISSIONER CHANG:** Okay. So you believe
21 it is within the discretion of the Planning
22 Commission to weigh the evidence and use their
23 discretion in weighing -- in determining whether
24 it's unusual and reasonable use?

25 **MS. KATO:** That's correct.

1 **COMMISSIONER CHANG:** Okay. And based upon
2 the record, the original determination in 2014, I
3 believe it was, they determined there would be
4 adverse effect on the surrounding areas, in
5 particular because of the traffic and the water
6 issues.

7 And although the record hasn't been
8 amended, no updated TIAR, no additional information,
9 you believe deference should be given to the county,
10 county Planning Commission in deciding to change
11 their mind that now they believe the permit should
12 be issued?

13 **MS. KATO:** Are you talking about the
14 difference between the Planning Commission's first
15 decision and second decision?

16 **COMMISSIONER CHANG:** Yes.

17 **MS. KATO:** I think that's the subject of
18 the IC opinion, which found that certain conclusions
19 the Planning Commission made in the first decision
20 were incorrect and reversed and remanded it.

21 **COMMISSIONER CHANG:** However they also did
22 not find error in some of their findings and
23 conclusions?

24 **MS. KATO:** Our understanding is that, you
25 know, there are potential impacts but that those

1 impacts can be mitigated with the conditions that
2 were included in the Planning Department's revised
3 recommendation --

4 **COMMISSIONER CHANG:** Okay.

5 **MS. KATO:** -- which do address traffic and
6 water.

7 **COMMISSIONER CHANG:** Do you find that the
8 EA that was prepared for the original lease from
9 DLNR is still -- is still applicable and viable 13,
10 14 years later?

11 **MS. KATO:** Generally, yes.

12 **COMMISSIONER CHANG:** Okay.

13 **MS. KATO:** We do not currently find an
14 issue with it.

15 **COMMISSIONER CHANG:** Okay. And my final
16 questions relates to Article XII Section 7. Do you
17 believe that the record, that the county Planning
18 Commission's findings are adequate for both the
19 Planning Commission and the Land Use Commission to
20 conclude the traditional customary practices have
21 been adequately addressed in the record?

22 **MS. KATO:** Well, the efforts made by the
23 Petitioner to identify the cultural resources and
24 practices are discussed in the FEA. That page is
25 532, 533.

1 You know, we understand that there were no
2 identified traditional and customary native Hawaiian
3 rights exercised on the property. I'm not sure that
4 I can speak well to efforts that were made, but it's
5 described in there, and we felt that it was
6 sufficient.

7 **COMMISSIONER CHANG:** And would you agree
8 that the burden is on the Applicant to prove that
9 there is no adverse -- no harm to traditional
10 customary practices and not on the cultural
11 practitioners to prove that there is a practice?

12 **MS. KATO:** Yes. I agree with that.

13 **COMMISSIONER CHANG:** So okay. All right,
14 thank you. You've answered my questions.

15 **CHAIRMAN SCHEUER:** Thank you, Commissioner
16 Chang. Commissioners, questions for Ms. Kato? The
17 wow, yes, bidder number 652.

18 **COMMISSIONER WONG:** Thank you, Chair. Ms.
19 Kato, let me be repetitive what I asked the county
20 also. Do you think the EA is stale?

21 **MS. KATO:** I think Commissioner Chang also
22 asked this. We did not find it to be stale.

23 **COMMISSIONER WONG:** Okay. So the other
24 question is I know you've been with us or you've
25 been with OP and with them coming in front of the

1 Land Use Commission a short period, I will say short
2 period compared to other attorneys.

3 You know, during your -- the time of
4 special permits, we usually have a little bit more
5 substantial information in terms of what -- where is
6 the toilets going, you know, so do you think that's
7 good enough for the record so we can say, yeah, go
8 for it or, no, don't go for it?

9 **MS. KATO:** Well, in my time doing these
10 matters, the SPs that I've seen come through have
11 been for projects in which the applicant or the
12 petitioner had a lot of money to create all those
13 substantial, you know, plans and things.

14 So it's a little difficult to say what is
15 required. I think it's within the LUC's discretion
16 to determine whether you think the record is
17 sufficient or there's enough information to make
18 your decision.

19 I'm not sure that it's -- I'm not sure to
20 what extent you should look at what other
21 petitioners have provided for SPs to determine
22 whether what this Petitioner has provided is
23 sufficient.

24 **COMMISSIONER WONG:** So another question I
25 have is, I guess Commissioner Ohigashi brought this

1 up, or Commissioner Giovanni, sorry, one of the
2 Commissioners brought up that why didn't the
3 Petitioner come and say, you know what, instead of
4 the whole apple, we are going to come in front of
5 just the county and just do instead, leave it at ag
6 on this part, and then come this part for rural or
7 designation with the county zoning for the
8 schoolhouse, I mean, what's your idea of that?

9 **MS. KATO:** Anything I say about why they
10 made that decision would be speculation.

11 **COMMISSIONER WONG:** Okay, no problem. The
12 other question I have, then, is as you know, the
13 Land Use Commission has four definitive, you know,
14 areas, preservation, ag, you know, urban, all that,
15 right.

16 And the counties can have other
17 designation within urban, other designation within
18 ag, et cetera, et cetera, et cetera.

19 Could the counties come and say you know
20 what, we will go for the -- or the Petitioner come
21 and say we will go for DBA urban, but let the county
22 decide what. We want to do it under urban because
23 urban can do anything, in general, you know what I'm
24 saying?

25 **MS. KATO:** You mean at the state level?

1 **COMMISSIONER WONG:** Yeah.

2 **MS. KATO:** That is possible, but, you
3 know, given that -- you know, I understand that
4 schools are normally not really the use that you
5 think of in special permits, but the reason that we
6 say that it's compatible and appropriate in an
7 agricultural district is because of the school's
8 plans for extensive agricultural programs, including
9 their agroforestry.

10 **COMMISSIONER WONG:** Right. It's just hard
11 for me, due I've been hearing that it's going to
12 take 30 years for full buildout, and 30 years is a
13 long time for a special permit. You know, usually
14 when we hear 30 years, that's a DBA pretty much.
15 You know, usually it's a finite time for special
16 permits.

17 I'm not sure if you were here for
18 Waimanalo Gulch, but we change, it says, no, come
19 back here for -- do a DBA if you really want it
20 because it shouldn't be special permits.

21 So you know what I'm trying to get at is
22 30 years is a pretty long time in my estimation. I
23 mean, I won't be here. I'm hoping I will be here,
24 but I doubt it.

25 You will be here, but you know what I say,

1 it's one of those things that it's pretty long. If
2 you don't want to answer that's fine, it's just a
3 statement.

4 **MS. KATO:** Okay.

5 **COMMISSIONER WONG:** Thank you, Ms. Kato.
6 Thank you, Chair.

7 **CHAIRMAN SCHEUER:** Thank you, Commissioner
8 Wong. Commissioners? Commissioner Ohigashi.

9 **COMMISSIONER OHIGASHI:** Ms. Kato, I'm
10 going to give you a chance to just help me out on
11 this Neighborhood Board Land Use Commission case, 64
12 Hawaii 265.

13 So I'm reading from the opinion on 266,
14 the facts part. It says that a proposed site has
15 been vacant and undeveloped since 1960. The soils
16 has been assigned a Land Study Bureau overall
17 productivity rating of E or very poor for overall
18 agriculture productivity with frequent rock
19 outcropping.

20 Immediately south between the subject
21 parcel and Kamehameha Highway, there are 13 single
22 family homes which form part of the old agricultural
23 subdivision.

24 So the facts of this case that were
25 reported to the state Land Use Commission seem to

1 imply in this particular case given the fact that
2 for very poor, we are giving it the same thing, very
3 poor land, very poor -- frequent outcroppings, in
4 this case lava flows, and it has certain amount of
5 (inaudible) wild things scattered about it, right,
6 yet -- and admittedly, it was a theme park that they
7 decided not to do it.

8 But yet they said -- this is a different
9 quote on page 273, we do not believe that the
10 legislature envisioned the special use technique,
11 they didn't use permit, technique they used, could
12 be used as a method of circumventing district
13 boundary amendment procedures to allow for the ad
14 hoc infusion of major urban area uses into
15 agricultural districts. That's on page 273.

16 Can you help me out and tell me why is
17 this again unreasonable -- is reasonable and unusual
18 that would allow the Neighborhood Board, State Land
19 Use Commission would allow it?

20 **MS. KATO:** Well, Commissioner Ohigashi,
21 I'm assuming the case you are talking about is the
22 one with the recreational theme park?

23 **COMMISSIONER WONG:** Yes.

24 **MS. KATO:** Okay. I am not prepared to
25 speak about that. I haven't really reviewed this

1 case so I'm not sure about that, but it sounds -- a
2 recreational theme park, I think, is very different
3 from a school that is planning to do a lot of
4 agriculture.

5 **COMMISSIONER OHIGASHI:** And how is it
6 factually different?

7 **MS. KATO:** That the school is planning to
8 have agricultural programs and reforestation
9 programs.

10 **COMMISSIONER OHIGASHI:** When you indicated
11 your OPS reasoning, I think you relied upon the fact
12 that it's barren land or unable to be agriculture
13 and that it's --

14 **MS. KATO:** The soils are --

15 **COMMISSIONER OHIGASHI:** And that in that
16 particular area; so I'm just trying to get a hold on
17 what is the different facts here? In fact, if you
18 take a look on 267, the lands further south of the
19 site, under sugar cultivation at the time of Oahu's
20 application, were reclassified from an agriculture
21 to urban district.

22 So they even had a classification to urban
23 district to permit construction of a residential,
24 commercial, and resort development. Northwest of
25 the site stands Hawaiian Electric Kahe Power Plant

1 beyond such.

2 Now surrounding this area are industrial
3 uses, but then they still say, A, you got to go
4 through the boundary, district boundary amendment
5 process because a special use was not meant to do
6 this type of thing.

7 So you got to help me out in this and tell
8 me what, reading after -- since you haven't read the
9 case, I can't ask you to understand the case, but
10 since -- how do we get past Neighborhood Board,
11 State Land Use Commission?

12 **MS. KATO:** I'm sorry, Commissioner
13 Ohigashi. I know you made some references to certain
14 pages, but I don't know what those reference are.

15 **COMMISSIONER OHIGASHI:** Okay, I'll
16 withdraw the question then because that's what I'm
17 getting in trouble with.

18 **MS. KATO:** Well, I did see that the, you
19 know, the land is unsuited for agriculture because
20 of the poor soils because of the lava.

21 **COMMISSIONER OHIGASHI:** That's what they
22 said in this case, too.

23 **MS. KATO:** Yeah, but they are planning --
24 I understand the Petitioner is planning to have
25 things like greenhouses, various other things that

1 can be on the property that are agriculture. And
2 specifically I think we are interested in the
3 reforest -- the planting of trees.

4 **COMMISSIONER OHIGASHI:** I would have no
5 objection if they decide to put up a farm there
6 today, anything else like that, but what they are
7 planning to do is a school, and a school is
8 basically -- let me go back, let me go back.

9 The other question that I have is in
10 truth, excuse me, time limits. Chairman mentioned
11 is it possible to make a special use permit either
12 10 years that the county has required be built, that
13 the school be built?

14 **MS. KATO:** You are asking whether a
15 special -- you can impose a time limit on the
16 special permit; is that the question?

17 **COMMISSIONER OHIGASHI:** Yes.

18 **MS. KATO:** Yes, I think you have
19 discretion to do that.

20 **COMMISSIONER OHIGASHI:** That would mean
21 that if the time comes up, we can retract the
22 special permit; is that correct?

23 **MS. KATO:** Well, the special permit would
24 expire. That's all.

25 **COMMISSIONER OHIGASHI:** Okay. Prior to

1 that, does the state Land Use Commission have the
2 authority to take away the special permit? With
3 supposing we have an evil dictator as governor, you
4 know, and things like that and force us -- say we
5 are going to go say, hey, that's it, that's the end.
6 We can terminate right there.

7 **MS. KATO:** I mean, I'm not an expert on
8 LUC's rules, I'd have to take a look. I think if
9 the Petitioner violates conditions, there's probably
10 something that allows you to withdraw special
11 permit, but I would have to check and see where that
12 is.

13 **COMMISSIONER OHIGASHI:** So the Petitioner
14 may be well aware, should be aware that if they
15 violate any of the conditions that have been placed
16 upon them, that the state Land Use Commission has
17 the opportunity to bring them in and to review the
18 special use permit; is that right?

19 **MS. KATO:** I'm sorry, what's the question
20 again?

21 **COMMISSIONER OHIGASHI:** So should the
22 Applicant be aware or Petitioner be aware that if
23 they violate any condition under the special use
24 permit, that the state Land Use Commission still has
25 the jurisdiction to call them in on our order to

1 show cause to say, hey, we are going to terminate
2 this because of your failure to follow the
3 conditions?

4 **MS. KATO:** I mean, if that's what's in the
5 rules, that's what's in the rules.

6 **COMMISSIONER OHIGASHI:** I'm asking your
7 opinion. Is that what the OP --

8 **MS. KATO:** Are you asking me if the
9 Petitioner is aware of this?

10 **COMMISSIONER OHIGASHI:** Yes.

11 **MS. KATO:** I don't know what the
12 Petitioner is aware of.

13 **COMMISSIONER OHIGASHI:** OPSD, the SD again
14 is for sustainable development.

15 **MS. KATO:** Sustainable development.

16 **COMMISSIONER OHIGASHI:** Yeah. We had a
17 talk about the other day, which I found really
18 enlightening, has this project been reviewed under
19 your department under for sustainability, the
20 sustainability guidance?

21 **MS. KATO:** Yes, we -- yes.

22 **COMMISSIONER OHIGASHI:** Have they issued a
23 report as to what the sustainability or reaction to
24 what this report is?

25 **MS. KATO:** I mean, we included a statement

1 in our written response, written testimony.

2 **COMMISSIONER OHIGASHI:** And you got to
3 forgive me because, you know, I've read so much
4 documents, can you refer me to it and tell me what
5 it says?

6 **MS. KATO:** It's at --

7 **COMMISSIONER OHIGASHI:** I can't remember
8 what I had for dinner last night.

9 **MS. KATO:** Sustainability, the Hawaii 2050
10 sustainability plan, turning a course for the decade
11 of action 2020 to 2030, page 107, Natural Resource
12 Protection Section.

13 The Petitioner's proposal for
14 reforestation program and protection of natural
15 resources meets strategy 35, protect and manage
16 watersheds, and strategy 37, to conserve working
17 forest landscapes, protect forests from harm and
18 enhance public benefits from trees and forests.

19 **COMMISSIONER OHIGASHI:** So is that -- so
20 that is your recommendation or that is in the record
21 concerning your position on sustainability?

22 **MS. KATO:** That is part of our written
23 testimony.

24 **COMMISSIONER OHIGASHI:** I just ask that
25 question because I was intrigued about Commissioner

1 Giovanni's question, and I was just wondering
2 whether or not there was anything about it in there.

3 The last question that I have is --
4 scratch that. That's all the questions I have.

5 **THE COURT:** Okay. Thank you, very much
6 Commissioner Ohigashi. Commissioners?

7 **CHAIRMAN SCHEUER:** I have six questions
8 for you, Ms. Kato. First question, Hawaii
9 Administrative Rules 15-15-95(c)(2). It says we can
10 issue a special use permit when the proposed use
11 would not adversely affect the surrounding property.

12 We have on the record, as has been
13 repeatedly pointed out by Commissioner Chang, even
14 on the record from appeal from the ICA that there's
15 going to be adverse impacts on traffic, findings
16 that were not struck, how is it that you read,
17 presumably from OPSD's position, you read this
18 provision of the rules of having an asterisk on it
19 that says or if it's mitigated to below
20 significance?

21 **MS. KATO:** I'm sorry. So what are you
22 referring?

23 **CHAIRMAN SCHEUER:** Is your -- okay, let me
24 try again. Hawaii Administrative Rules 15-15-
25 95(c)(2).

1 **MS. KATO:** You are talking about the
2 guidelines.

3 **CHAIRMAN SCHEUER:** Yes. States we can
4 issue the permit if, quote, the proposed use would
5 not adversely affect surrounding property.

6 Is it OPSD's contention that based on the
7 entire record of this case, this issuance of this
8 permit will not affect surrounding -- adversely
9 affect surrounding property?

10 **MS. KATO:** That is our understanding. We
11 -- the relevant public facilities are county
12 concerns so OPSD has relied on the recommendation of
13 the county Planning Department with respect to these
14 matters.

15 **CHAIRMAN SCHEUER:** So you've not
16 independently -- as long as the county says we're
17 good, you are good?

18 **MS. KATO:** They are not county -- I mean
19 they are not state roads. They are not -- we
20 believe that these are more appropriate for the
21 county.

22 **CHAIRMAN SCHEUER:** You disagree that the
23 ICA opinion noted that there are still adverse
24 impacts?

25 **MS. KATO:** I'm not sure.

1 **CHAIRMAN SCHEUER:** Okay, let's move on.

2 You stated that one of your reasons for supporting
3 this special use permit issuance is because
4 specifically that this school is doing farming and
5 forestry activities as part of their curriculum.

6 Did I understand you correctly?

7 **MS. KATO:** Yes.

8 **CHAIRMAN SCHEUER:** So if it is so integral
9 to the approval of the special use permit, would it
10 be appropriate for this Commission to place special
11 conditions that compliance with this permit would
12 not only include the development of physical
13 facilities, but the development of educational and
14 restoration and farming programs as committed to by
15 the Applicant?

16 **MS. KATO:** I -- I think that's your
17 discretion.

18 **CHAIRMAN SCHEUER:** No. Well, yes, I know
19 it's my discretion or our discretion, but that's not
20 the question that I asked you.

21 Your logic is the reason why -- one of
22 your things you have said is the reason why a
23 special use permit is appropriate is because farming
24 and forestry is integral to the activity that's
25 being proposed.

1 **MS. KATO:** That is just our opinion. I
2 mean, if you don't agree with it, that's fine.

3 **CHAIRMAN SCHEUER:** And that's your
4 argument, correct? Have I misunderstood your
5 argument?

6 **MS. KATO:** That's our testimony.

7 **CHAIRMAN SCHEUER:** So if we were to
8 believe your testimony, wouldn't it be appropriate
9 for us to require that those activities be required
10 as a condition of the permit?

11 **MS. KATO:** If you find that to be
12 necessary to granting a special permit and
13 appropriate, then, yes.

14 **CHAIRMAN SCHEUER:** Wouldn't that logically
15 follow if we agreed with your argument?

16 **MS. KATO:** Yes, sure.

17 **CHAIRMAN SCHEUER:** Okay. Do you believe
18 the Land Use Commission has the power to require
19 after a certain date that a DBA be filed as a
20 condition of a special use permit?

21 **MS. KATO:** I'm not sure. I haven't looked
22 at that.

23 **CHAIRMAN SCHEUER:** Fourth question, we are
24 almost through. Recently, the Office of Planning
25 and Sustainable Development set out a draft five-

1 year boundary review study that you presented to
2 this Commission, and among the contentions in that
3 study, to paraphrase, is that if lands are in the
4 urban growth boundary in the county general plan,
5 they should be converted into urban uses, and yet in
6 this docket, lands that are in the urban growth
7 boundary for Hawaii County you are specifically
8 suggesting we take an action to do the exact
9 opposite.

10 And I'm trying to understand what I'm
11 perceiving as to be two contrary positions from OPSD
12 within a month of each other.

13 **MS. KATO:** I do not recall that review
14 report, but I think I would have to defer that to my
15 client.

16 **CHAIRMAN SCHEUER:** Does your client want
17 to respond?

18 **MS. KATO:** Possibly. Rodney.

19 **MR. FUNAKOSHI:** Okay, Rodney Funakoshi
20 from the Office of Planning and Sustainable
21 Development.

22 **CHAIRMAN SCHEUER:** Do you swear or affirm
23 the testimony you are about to give is the truth?

24 **MR. FUNAKOSHI:** Yes. Okay. I understand
25 the question, and I think it was raised before, and

1 I would agree with the county's position on this
2 matter that, yes, even though it's within the urban
3 growth boundary, it's not an automatic that it
4 should be, you know, reclassified because there's
5 others -- other areas such as, for example, parks
6 that might be in the urban growth boundary, but they
7 are not necessarily you want to reclassify them.
8 And so similarly it's more an option as opposed to a
9 should be.

10 **CHAIRMAN SCHEUER:** But that's not what
11 your report said, correct? You didn't have that
12 clarification in your report.

13 **MR. FUNAKOSHI:** Again, I'm not sure
14 exactly what you are referring to, but, I mean, it's
15 not a carte blanche, you know, for everything that's
16 within the urban growth boundary should be in the
17 urban district.

18 I don't think we said that. Certainly
19 candidates for urban reclassification is probably
20 what we would find.

21 **CHAIRMAN SCHEUER:** Perhaps I read it
22 differently when I read it. This is for Ms. Kato or
23 Mr. Funakoshi. Did you consult with the Division of
24 Forestry and Wildlife or the State Historic
25 Preservation Division in preparing your

1 recommendations?

2 **MR. FUNAKOSHI:** No, we did not. Because
3 we haven't, you know, it's required that we rely on
4 the record so only what is in the county Planning
5 Commission's record. We could -- so we would not
6 independently consult with DLNR.

7 **CHAIRMAN SCHEUER:** Okay. Last question.
8 And this is for Ms. Kato. You stated that you did
9 today an analysis and concluded that under the Unite
10 Here and Local 5 decision, you did not feel that the
11 EA was stale, if you will.

12 Can you describe a little bit more about
13 the analysis that you conducted to come to that
14 conclusion?

15 **MS. KATO:** I did not -- I did not say that
16 I did a specific analysis of this.

17 **CHAIRMAN SCHEUER:** Oh, so, sorry. I
18 misunderstood you, I apologize. Could you restate,
19 please.

20 **MS. KATO:** I did not do a legal analysis
21 of this, no.

22 **CHAIRMAN SCHEUER:** So the OPSD has not
23 said -- done analysis whether or not EA is
24 sufficient under the Supreme Court's finding under
25 Unite Here?

1 **MS. KATO:** We have not specifically done
2 this legal analysis. That was not part of our
3 testimony.

4 **CHAIRMAN SCHEUER:** Okay. I misunderstood
5 your oral comments before, I'm sorry. Thank you for
6 clarifying. I have nothing further. Commissioners,
7 anything further? Thank you very much. Mr.
8 Matsukawa. You are muted.

9 **MR. MATSUKAWA:** Thank you, Mr. chairman.

10 **CHAIRMAN SCHEUER:** And if, like the other
11 parties, you could give a sort of overview of where
12 you want to go, that would be helpful.

13 **MR. MATSUKAWA:** I'll be maybe 15 minutes,
14 and what I want to help the Commission with is how
15 we got here and why we are having this extensive
16 discussion at this time.

17 **CHAIRMAN SCHEUER:** Please proceed.

18 **MR. MATSUKAWA:** Okay. When I got into the
19 case, the decision back in 2014 had already been
20 made, which was a denial. So it was the Applicant
21 Connections and CBESS who took the appeal and so in
22 that posture, Mr. Gomes as the intervenor was not
23 required to assign points of error. He did not file
24 a cross appeal, just defended the position that the
25 county had for a denial.

1 When ICA then vacated the court's -- I
2 mean the Commission's ruling, the first question
3 that was raised was what happens on remand, and at
4 that time, the supreme court had already decided the
5 Hu Honua versus Hawaii electric case when the POC
6 was overruled.

7 The court reminded the parties, especially
8 the agencies, that on remand, you only focus on what
9 we tell you to do, and you do not have the liberty
10 to rewrite the findings, and of course you base it
11 on the record.

12 So the second question then came to the
13 Planning Commission, which was do we open the record
14 to consider more information to focus on the issues
15 that we have been authorized to look at per the ICA.

16 The decision was made not to reopen the
17 record and so therefore a lot of issues that could
18 have been addressed were not. The record was
19 confined to what was created back in 2012 to 2014.

20 And in light of some of the questions that
21 have been raised by some Commissioners, the record
22 does show the testimony of a person who lives in the
23 neighborhood next door to the project site, he
24 testified at the contested case hearing, and he also
25 made a presentation to the Planning Commission as a

1 whole.

2 He raised the issue of whether it's
3 appropriate to submit a proposal based simply on
4 concepts and that we will work things out later. I
5 think that was -- I can't speak for the Commission
6 members who voted the first time, but I'm sure they
7 considered his testimony that if we are just looking
8 at concepts, are we discharging our responsibilities
9 without asking for more.

10 And this concept issue appears in the
11 transcript for the last -- during the first hearing
12 where people were asking questions about water
13 especially, when will things be done and how and
14 issues over traffic, which brings us to what the ICA
15 did and did not do.

16 The intervenor filed proposed findings.
17 That's in file nine. We filed it on September 24
18 and October 1. In our proposed findings, we
19 addressed the water issue that the Commission had
20 overlooked. They came -- I mean the ICA had
21 overlooked.

22 They could not find references to the 60
23 gallons per student standard and so we directed the
24 Planning Commission in our proposed findings to the
25 testimony of the Department of Water personnel who

1 testified to the Commission the first time as to the
2 standard itself and how to use it.

3 Among other things that we brought up in
4 the amended findings, proposed amended findings was
5 this issue of if some of the standards or criteria
6 are not met, does that itself justify denial, do we
7 need -- in other words, can you deny just on one
8 criteria not being satisfied and vice versa, could
9 you grant just on one standard or criteria because
10 the ICA at the end of its decision seemed to
11 criticize the idea of a totality of the evidence
12 type of decision-making, suggesting that the
13 Planning Commission must point directly to the
14 criteria that they are relying upon to grant or to
15 deny.

16 So it's not -- the process may be one of
17 weighing the evidence, testing the weight of each
18 point, but still someone has to identify what
19 criteria the decision is based on.

20 We also in the proposed amended findings
21 raised the issue that some of the Commissioners have
22 raised today which is one, this is on page 25 of our
23 proposed amended findings, paragraph 60D as in dog
24 where we quote the Office of State Planning who
25 wrote a letter on October 3, 2012, record on appeal

1 404, that a boundary amendment might be a preferred
2 alternative to obtain entitlements it needs to build
3 and operate a school on the property.

4 And at the end, we point out, as the IC
5 said we could, we could argue that the public trust
6 doctrine must be analyzed under a reasonable and
7 beneficial standard, and that such evidence was
8 lacking.

9 The Commission did not, pursuant to
10 statute, incorporate into its decision that's before
11 you a ruling on our proposed finding. Section 91-12
12 requires a decision on proposed findings.

13 They do not have to rule on every single
14 item, but they need to at least indicate for the
15 record that they have considered the proposed
16 amended findings. And they could say it's not
17 consistent with our ruling today or some method to
18 demonstrate they did consider the proposed --
19 proposals that had been put before them.

20 And then getting back to the ICA and as
21 Commissioner Chang has pointed out, the fact that
22 the court did not reverse some of the findings of
23 the Planning Commission the first time binds the
24 Commission. They can't deviate, they can't rewrite
25 it.

1 So on paragraph -- finding 47 on adverse
2 impacts despite mitigation, that is binding. The
3 Commission couldn't try to rewrite it, and we
4 pointed this out in our exceptions.

5 The other finding that was not reversed
6 was number 22 and 49 concerning Connections' ability
7 to develop the water sources as proposed. That --
8 those two findings stand, cannot be rewritten, but
9 the Planning Commission did in fact rewrite it.

10 And the ICA also never addressed finding
11 number 57 from the first go-around, which was the
12 change in the essential character of the property.

13 Now, this is not a state LUC criterion,
14 this is something that the county added to its
15 special permit criteria, that the proposal would not
16 change the essential character of the land.

17 The ICA never touched number 57. So
18 again, that binds the county Planning Commission.
19 The planning director's recommendation that the
20 Planning Commission then adopted the second go-
21 around is dated 2012.

22 It's based on information that was in the
23 record as of 2012 so some of the findings that were
24 not vacated are inconsistent with the planning
25 director's revised recommendations.

1 So there's inconsistency and yet the
2 Planning Commission on the remand adopted without
3 qualification the planning director's revised
4 recommendations from 2012.

5 What I think is most important, though, is
6 the ICA did allow the intervenor to present issues
7 on the public trust doctrine because the land is
8 public land.

9 In our proposed amended findings, we
10 addressed some of that issue based on the record,
11 but because the issue was closed in terms of new
12 evidence, the Planning Commission simply said in its
13 current ruling that the public trust doctrine
14 doesn't apply simply because it's not important ag
15 land.

16 And there's no qualification in the state
17 constitution that says that. It says all land,
18 including water, must be held in the public trust,
19 and if we follow the water cases that have been
20 handed down, we know that although we are dealing
21 with land, not water and most of the litigation on
22 public trust doctrine has been focused on water, the
23 same general principles apply.

24 And I think if the Kauai Springs case
25 teaches us anything, many of Mr. Ohigashi's

1 questions would have been answered had the county
2 been -- had the Planning Commission undertaken a
3 true public trust analysis because how you use the
4 land, what benefits, what impacts, all of these
5 questions would come up under a public resources
6 trust analysis.

7 That opportunity was before the Planning
8 Commission. They chose not to explore it. The
9 minutes of the hearing on November 4 are quite
10 clear. When one Commissioner says we need to address
11 it, the majority says no, and the written decision
12 is somewhat clear.

13 So based on that, the intervenor's
14 position is that the Commission should deny the
15 application. Thank you.

16 **CHAIRMAN SCHEUER:** Thank you, Mr.
17 Matsukawa. Commissioners, Commissioner Chang?

18 **COMMISSIONER CHANG:** Thank you, Mr. Chair.
19 Good afternoon, Mr. Matsukawa, it's good to see you.
20 And thank you for that summary of some of the things
21 that were not stated, and we don't -- we didn't have
22 the benefit of being there during that process after
23 the case got remanded.

24 Is it your opinion that based upon the ICA
25 opinion as well as the administrative rules and

1 chapter 205 and specifically looking at 15-15-95
2 that adverse effect, a finding of adverse effect on
3 one of those five criteria can be the basis to
4 determine that the SUP should be denied because it's
5 not consistent or it's not -- it doesn't meet the
6 unusual and reasonable use?

7 **MR. MATSUKAWA:** I believe so. And when
8 you read the ICA's opinion at the very end, they
9 seem to suggest that you can deny it on any one
10 criteria, you can grant on any one criteria, but
11 it's part of the weighing process and that is one
12 that carries the greatest weight, then I presume the
13 ICA will agree.

14 **COMMISSIONER CHANG:** Because that's how I
15 read their discussion in particular on the traffic,
16 that they looked at all of the evidence, the entire
17 record went up before them, and while they said that
18 the Planning Commission can weigh, and they did --
19 they did apply that, that analysis of the Planning
20 Commission having the discretion to weigh on some of
21 the findings and conclusions.

22 But with respect to -- because I agree
23 with you with respect to the traffic, even the ag
24 use, that it's very ironic you are saying it's
25 incompatible with ag, but yet your project is

1 focusing on ag that the ICA did seem to give great -
2 - well, one, they were not remanding it back for the
3 Planning Commission to exercise any discretion.
4 They were bound by that. Notwithstanding the
5 mitigation, they are bound by that.

6 So, okay. And let me ask you, I am
7 surprised that no one raised the issue of Article
8 XII Section 7. And wouldn't you agree that that
9 applies to this process as well?

10 **MR. MATSUKAWA:** Well, Commissioner Chang,
11 one of the dilemmas we had was it was not an issue
12 raised the first go-round because my client had
13 technically prevailed with the denial.

14 On remand, the Planning Commission by
15 ruling that they were going to stick to the record
16 and that the intervenor did not himself raise that
17 issue, I personally felt that we were prohibited
18 from raising an issue that we had not raised before.

19 **COMMISSIONER CHANG:** Okay.

20 **MR. MATSUKAWA:** And then based on that
21 Honua case, that we couldn't ask the Commission to
22 rewrite something that we never argued for the first
23 time around --

24 **COMMISSIONER CHANG:** Okay.

25 **MR. MATSUKAWA:** -- with this type of

1 decision to make.

2 **COMMISSIONER CHANG:** All right. And I
3 wasn't there so don't clearly understand sort of the
4 thought process, but would you agree that the
5 constitutional obligation is on the Planning
6 Commission and Land Use Commission, notwithstanding
7 the fact that anybody has raised it or not raised
8 it, but we have an independent obligation to
9 preserve and protect?

10 **MR. MATSUKAWA:** I agree. When you read
11 the public trust doctrine, it says the obligation
12 exists at every stage of the permitting process.

13 **COMMISSIONER CHANG:** Right.

14 **MR. MATSUKAWA:** So, yes, whether someone
15 had properly raised it at the Commission level
16 during the evidentiary hearing, it can be raised at
17 any time in the permitting process. So that would
18 apply to today.

19 **COMMISSIONER CHANG:** And the obligation to
20 -- the burden of proof to show that there is no harm
21 to traditional customary practices is on the
22 Applicant, not on the cultural practitioner; would
23 you agree with that?

24 **MR. MATSUKAWA:** Yes.

25 **COMMISSIONER CHANG:** Okay. And did you

1 read the environmental assessment that was prepared
2 for the original Land Board determination on issuing
3 this lease that they are relying on to -- they are
4 relying on the reports that were done in the EA as
5 the factual basis to say that there is no
6 traditional and customary practices, did you review
7 that?

8 **CHAIRMAN SCHEUER:** Commissioner Chang,
9 sorry, one moment. There was a power surge at the
10 LUC offices and we apparently --

11 **COMMISSIONER CHANG:** Oh, did we lose them?

12 **CHAIRMAN SCHEUER:** Yeah.

13 **COMMISSIONER CHANG:** Okay.

14 **CHAIRMAN SCHEUER:** Kala mai if I missed
15 that. I don't know exactly when they went out.
16 They are trying to reboot now.

17 **COMMISSIONER CHANG:** Okay, I'll wait. Do
18 you want me to wait, just hold on or do you want to
19 take a break? You need to leave by 4:00; is that
20 correct?

21 **CHAIRMAN SCHEUER:** Yeah. No, my hope was
22 to be finished by 4:00 today. Even the most -- even
23 the tremendous commissioners we have all have sort
24 of mental limits to how much we can process in a
25 single day to be effective and discharge our duties.

1 **COMMISSIONER CHANG:** Yeah, it would be
2 good if we can close this out, at least the
3 questioning of the parties.

4 **CHAIRMAN SCHEUER:** Yeah. I'm not sure. I
5 don't have a sense of whether -- where the other
6 Commissioners are at.

7 **COMMISSIONER CHANG:** Okay. I think, well,
8 we will just -- did you want to just wait? Because
9 I'll conclude to provide everybody else more time to
10 ask questions.

11 **CHAIRMAN SCHEUER:** So, okay. I'd rather
12 actually just wait until a couple minutes.

13 **COMMISSIONER CHANG:** Yeah, okay.

14 **CHAIRMAN SCHEUER:** Let's -- we are sort of
15 on a recess until they show up again.

16 Commissioner Ohigashi?

17 **COMMISSIONER OHIGASHI:** I just want a
18 recess.

19 **CHAIRMAN SCHEUER:** Is four minutes
20 sufficient, Commissioner?

21 **COMMISSIONER OHIGASHI:** More than
22 sufficient. More than sufficient. You keep me here
23 a little longer.

24 **CHAIRMAN SCHEUER:** Just recess subject to
25 the call of the Chair.

1 **COMMISSIONER CHANG:** Okay.

2 **(Recess taken from 3:42 to 3:45 p.m.)**

3 **CHAIRMAN SCHEUER:** Okay, 3:45 we are back
4 on the Record. Commissioner Chang.

5 **COMMISSIONER CHANG:** I've concluded, I've
6 concluded my questioning so you can go on. Thank
7 you.

8 **CHAIRMAN SCHEUER:** Thank you.
9 Commissioner Ohigashi?

10 **COMMISSIONER OHIGASHI:** Yeah, I was only
11 going to comment, but I think the Supreme Court
12 agrees with you that we can deny even on one of the
13 conditions, as I keep citing Neighborhood Board
14 versus state Land Use Commission. That case,
15 Supreme Court determined that the first condition
16 wasn't even met, therefore denied the entire or
17 vacated the entire permit.

18 So I -- I think when the ICA adopted that
19 recall when it cited Neighborhood Board in its
20 decision. That's all the comment I had.

21 **CHAIRMAN SCHEUER:** Thank you, Commissioner
22 Ohigashi. Commissioners, Mr. Wong? No? You know,
23 I'm glad, Mr. Matsukawa, you brought to our
24 attention the transcripts from the meeting where the
25 Planning Commission reconsidered the decision.

1 I have to say, well, you may or may not
2 know I actually published on the public trust
3 doctrine in Hawaii water law cases. I couldn't
4 agree more that the public trust doctrine in Hawaii
5 is expansive, does not apply solely to important
6 agricultural lands, but not only old water resources
7 without distinction but also all publicly held
8 natural resources are held in trust.

9 But I guess here's what I'm struggling
10 with. Like there was some other kind of, like, ugly
11 stuff in that hearing, too, people testifying on the
12 record like, oh, this is somebody said, and I'm not
13 -- I'm only repeating what somebody said.
14 Somebody's like, oh, this is a failing school, why
15 would you give a failing school a new campus?

16 Like even if that was true, which I don't
17 believe is true and I don't think there's anything
18 on the record to support that statement, but isn't
19 that exactly who you would support if you had a
20 school that needed -- that wasn't doing well,
21 wouldn't you want to support them?

22 I guess I'm asking you given the
23 importance of the issues that you've raised, denial,
24 how does denial further justice and get us to where
25 not only are immediate neighbors' specific concerns

1 raised but also a school that's trying to educate
2 some of the neediest kids in our islands also has a
3 chance to move forward, and not in inordinately
4 complex way, where do we go?

5 **MR. MATSUKAWA:** My answer, Mr. Chairman,
6 would be quite simple, an alternative site. Look at
7 how much time has been wasted over this particular
8 parcel. If an alternative site had been sought,
9 school could have been up and running already.

10 **CHAIRMAN SCHEUER:** Perhaps or perhaps not.
11 Do you think, however, if the Applicant had instead
12 gone for district boundary amendment, right, there's
13 not a requirement that there be no impact to
14 surrounding.

15 There's not actually -- there's not a
16 requirement in Hawaii law that all public trust
17 resources should never be harmed.

18 **MR. MATSUKAWA:** I agree.

19 **CHAIRMAN SCHEUER:** What the cases have
20 said is that only this should be done with a level
21 of diligence and foresight that meet the sort of
22 high value that those resources have in our
23 constitution and laws.

24 Hadn't -- if they had simply gone through
25 or if they simply go through for the same site a DBA

1 process, that might not be what your clients want,
2 but your clients would actually get a fairer
3 hearing.

4 **MR. MATSUKAWA:** I agree.

5 **CHAIRMAN SCHEUER:** I don't think I have
6 anything further for Mr. Matsukawa at this time.
7 Does anyone else?

8 Okay. Seeing none, it's 3:50. We cannot
9 start until 9:30 tomorrow. We will not have -- we
10 would have quorum, but we would actually set up a
11 problem if we are intending to make a decision
12 tomorrow, which is a good goal given the 45-day
13 deadline that this Commission has.

14 It would require Commissioner Giovanni to
15 review some of the record right after having missed
16 it and just the timing might not be effective on
17 that. So while the agenda says that we are going to
18 start at 9:00, and certainly the room can be opened
19 at 9:00, we are not actually going to start until
20 9:30 a.m. tomorrow morning.

21 We have closed presentations from all the
22 parties and questions from the Commissioners to all
23 the parties.

24 As I laid out in our procedures for today,
25 subsequent to that, I'm going to allow a space for

1 the Commissioners to ask any final questions of any
2 of the parties that they want to prior to moving
3 into deliberation.

4 We have closed public testimony so there's
5 not going to be any additional public testimony
6 tomorrow. Are there any other questions about our
7 procedures?

8 I'm going to go in order just to make
9 sure. Oh, did we lose Mr. Richardson? There you
10 are. You moved on your screen. I'm sorry, I had
11 put you up in the top left. Mr. Richardson?

12 **MR. RICHARDSON:** No questions.

13 **CHAIRMAN SCHEUER:** Mr. Hong?

14 **MR. HONG:** No questions, thank you. Oh,
15 wait, I do actually have a question. There were
16 three questions that you asked earlier on regarding
17 the concurrence, the bound by, 15-15-94(a), bound by
18 orders of consent, also regarding the infiltration
19 of wastewater runoff into the caves.

20 I wasn't able to provide you with the
21 record references. Would you like me to try and
22 provide those to you tomorrow?

23 **CHAIRMAN SCHEUER:** That would be good,
24 thank you. Thank you for raising those. Any
25 further questions, Mr. Hong, on procedures?

1 **MR. HONG:** Oh, no, thank you.

2 **CHAIRMAN SCHEUER:** Okay. Ms. Kekai?

3 **MS. KEKAI:** None. Thank you, Chair.

4 **CHAIRMAN SCHEUER:** Ms. Campbell?

5 **MS. CAMPBELL:** No questions, thank you.

6 **CHAIRMAN SCHEUER:** Ms. Kato?

7 **MS. KATO:** No questions, thank you.

8 **CHAIRMAN SCHEUER:** Mr. Matsukawa?

9 **MR. MATSUKAWA:** None.

10 **CHAIRMAN SCHEUER:** Okay. Seeing none,
11 it's 3:53. I'm going to adjourn -- excuse me, go in
12 a recess until 9:30 tomorrow morning. Hold on.
13 Commissioner Chang, you are on mute.

14 **COMMISSIONER CHANG:** Yeah. Could you just
15 clarify what's going to be our schedule tomorrow
16 because we've got Commissioners coming and going.
17 So we are going to start at 9:30, and we've got
18 Commissioner Wong on the phone?

19 **CHAIRMAN SCHEUER:** That is correct and so
20 he is going to be following the proceedings --

21 **COMMISSIONER CHANG:** Okay.

22 **CHAIRMAN SCHEUER:** -- the entire time.
23 Commissioner Aczon has to leave at 11:30, I believe.
24 Is that correct, Commissioner Aczon? Sorry, Ed,
25 could you orally confirm?

1 **COMMISSIONER ACZON:** Yes.

2 **CHAIRMAN SCHEUER:** Yes, 11:30?

3 **COMMISSIONER ACZON:** Eleven.

4 **CHAIRMAN SCHEUER:** Eleven, eleven o'clock,
5 okay. Commissioner Giovanni.

6 **COMMISSIONER GIOVANNI:** Yeah, I'm also
7 unavailable from 11:30 to 1:30, same time as
8 Commissioner Aczon.

9 **CHAIRMAN SCHEUER:** Okay. So we will start
10 tomorrow morning, very briefly hear if there's
11 answers to my previous questions on the record from
12 Mr. Hong.

13 We will go to any final questions for the
14 parties, then we will go into deliberations. That
15 will be from 9:30 to 11:00. Should we not be
16 finished, we will take a two-hour recess and
17 reconvene at one o'clock to continue the
18 proceedings.

19 **COMMISSIONER CHANG:** Thank you.

20 **CHAIRMAN SCHEUER:** Anything further,
21 Commissioners? Or Mr. Ordenker? Commissioner
22 Ohigashi?

23 **COMMISSIONER OHIGASHI:** I just want to ask
24 Mr. Hong, so big a record, if you do have answers to
25 those questions, could you email us not only a cite

1 but a portion of that, of the document you are
2 referring to or portion of the section so at least I
3 can read it? I have a hard time searching through
4 this thing as everybody.

5 **CHAIRMAN SCHEUER:** So most properly the
6 email would be to Ms. Quinones, who could distribute
7 it to the Commissioners --

8 **COMMISSIONER OHIGASHI:** Is that okay?

9 **CHAIRMAN SCHEUER:** -- and the parties.

10 **MR. HONG:** Very good.

11 **CHAIRMAN SCHEUER:** Okay. Is there
12 anything further, Commissioners? Parties? Seeing
13 none, we are in recess. We will reconvene at 9:30
14 a.m. tomorrow. Mahalo nui.

15 **(Meeting recessed at 3:56 p.m.)**

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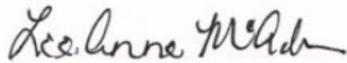
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CERTIFICATE

I, LeeAnne McAdam, do hereby certify that the proceeding named herein was professionally transcribed on the date set forth in the certificate herein; that I transcribed all testimony adduced and other oral proceedings had in the foregoing matter; and that the foregoing transcript pages constitute a full, true, and correct record of such testimony adduced and oral proceeding had and of the whole thereof.

IN WITNESS HEREOF, I have hereunto set my hand this 11th day of February, 2022.



LeeAnne McAdam