STATE OF HAWAII
LAND USE COMMISSION

Hearing held on January 20, 2021
Commencing at 9:30 a.m.
Held via Zoom by Interactive Conference Technology

VI. CALL TO ORDER

VII. CONTINUED HEARING AND ACTION (IF NECESSARY)
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)

VII. ADJOURNMENT

BEFORE:
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 Orodenker, Executive Officer
Scott Derrickson, Chief Planner
Riley Hakoda, Staff Planner
Natasha Quinones, Program Specialist/Chief Clerk
Linda Chow, Deputy Attorney General
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 Allice 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
CHAIRMAN SCHEUER: Aloha mai kakou. Good morning. This is the January 20th, 2022 Land Use Commission meeting, which is being held using interactive videoconference technology, allowing members of the Commission and other interested individuals of the public to meet via the Zoom internet conferencing program.

We're doing this, of course, to comply with state and county official operational directives during the ongoing Covid-19 pandemic.

Members of the public are able to view the meeting via the Zoom webinar platform.

As I said yesterday, I would like to remind all participants to speak slowly, clearly, and directly into your microphone.

Also, please be aware that this meeting is being recorded and transcripts are being generated from the recording of this event. The result of that is two distinct things.

First, for the transcripts, it really helps if you state your name before speaking.

Secondly, please be aware that because this is being recorded, your attendance is your implied consent to be on the official recording of this meeting. If you do not wish to be part of the official
recording, you should leave this meeting now.

As we know, this Zoom technology allows the parties each individual remote access to the meeting via our own individual devices and connections. Because of this -- because of, sometimes, matters entirely outside of our control, occasional disruptions to connectivity may occur.

If this does occur, please speak up, let us know, and please be patient as we try to restore audiovisual signals so we can continue to conduct business during the pandemic.

We -- we closed public testimony on this matter yesterday, so there will be no additional public testimony. We will continue to take breaks from time to time. Roughly speaking, we have from 9:30 to 11 today, so I actually do not anticipate taking a break for the next hour and a half. We'll try and get through as much as we can.

If we have to go beyond the 11 o'clock hour, we will take a two-hour recess between 11 and 1 when we will lose quorum, and then we will resume at 1.

My name is Jonathan Likeke Scheuer. I have the honor and pleasure of serving as the Land Use Commission Chair.
Along with me, Commissioner Dawn Chang, Commissioner Arnold Wong, Commissioner Edmund Aczon are all on the island of Oahu along with our small but incredibly talented staff, our Executive Officer, Daniel Orodenker, our Chief Planner, Scott Derrickson, our Planner, Riley Hakoda, our Chief Clerk, Natasha Quinones, and our Deputy Attorney General, Linda Chow.

Commissioner Lee Ohigashi is on Maui.
Commissioner Dan Giovanni is on Kauai.
Commissioners Gary Okuda, from Oahu, and Commissioner Nancy Cabral, from Hawaii Island, have both recused themselves from this docket.

With that, today's item is a continuation of an action item for Docket SP-21-413, Connections New Century Public Charter School/Community Based Educational Support Services (Hawaii), to consider a special permit application for the Connections New Century Public Charter School/Community Based Educational Support Services, SPP-12-000138.

Will the parties please identify themselves for the record, starting with the school?

MR. RICHARDSON: Good morning, Chair and Commissioners. Kevin Richardson, Deputy Attorney General, on behalf of Connections New Century Public
Charter School. Also with me is Romeo Garcia, Principal of Connections, and he is located on Hawaii Island.

CHAIRMAN SCHEUER: Mahalo nui.

MR. HONG: My name's Ted Hong. I represent the petitioner, CBESS. With me this morning is CBESS member, John Thatcher.

CHAIRMAN SCHEUER: Hawaii Windward Planning Commission?

MS. KEKAI: Good morning. Malia Kekai, Deputy Corporation Counsel, representing the Hawaii County Windward Planning Commission.

CHAIRMAN SCHEUER: County of Hawaii Office of Planning?

MS. CAMPBELL: Good morning. Jean Campbell, Deputy Corporation Counsel and with -- on behalf of the Hawaii County Planning Department, and with me is Deputy Planning Director Jeffrey Darrow.

CHAIRMAN SCHEUER: Thank you.

Office of Planning and Sustainable Development.

MS. KATO: Good morning. Alison Kato, Deputy Attorney General for the Office of Planning and Sustainable Development.

Also here are Rodney Funakoshi and Lorene
Maki from OPSD. Thank you.

CHAIRMAN SCHEUER: Thank you.

And Intervenor?

MR. MATSUKAWA: Michael Matsukawa for the Intervenor, Jeffrey Gomes.

CHAIRMAN SCHEUER: Thank you very much.

Okay.

Just to briefly update the record, as promised at the end of last meeting, Mr. Hong, on behalf of CBESS, sent a written response to Commissioners' inquiries, and those were emailed to Riley Hakoda.

And I want to confirm with either Riley or Ms. Quinones those responses have been posted to the LUC website?

MS. QUINONES: Good morning, Chair. This is Natasha. The response was posted to the website, and I believe Riley had forwarded those to the parties.

CHAIRMAN SCHEUER: Okay. Did any of the parties not receive this communication? Seeing none.

I'm going to provide a brief opportunity for the parties to make any final comments and Commissioners ask any final questions before we move
into deliberation.

So we'll go in the same order, starting with Mr. Richardson.

**MR. RICHARDSON:** Thank you. I just wanted to address two points that came up during the testimony. The first one is that Connections is not a private developer nor is it a state agency with adequate resources. I believe this was raised by you, Chair.

Funding for developed projects is very limited for charter schools. They receive per-pupil funding as allocated by the legislature. But that funding has a deadline.

And so for any long-term development projects, Connections has to rely on either fundraising by its nonprofit, CBESS, specific legislative appropriations, or loans and grants like the USDA loan that was mentioned in the application; however, appropriations from the legislature or for carrying grants and loans are generally conditioned upon obtaining necessary entitlements beforehand.

So Connections is in a -- excuse me -- in a unique predicament in that they have to plan for a project that relies on contingent funding.

Additionally, any funds that are used for
development projects are funds that are funneled away from current students.

So while the application that Connections CBESS submitted might not be on par with what the LUC generally receives, we submit that the application meets the minimum statutory and regulatory requirements for granting a special permit.

My second point is that Connections' proposal is unique. It straddles the line between a traditional school and an agricultural forestry program.

As far as I understand it, it's the first of its kind. The only comparable program, I suppose, would be the West Hawaii Explorations Academy, which is a charter school on the Big Island that implements a project-based curriculum. And they're a project-based curriculum that requires a specific location, and that's why they're located at the Natural Energy Lab -- Laboratory in Kona.

And so the proposed school doesn't fit neatly in the category of a traditional school, nor does it fit into a category of, you know, an agricultural program, solely.

So as the record demonstrates, this
clearly presents some exceptional problem --
exceptional circumstances, so therefore, we're
urging the Commission to at least consider
Connections' status as a charter school with finite
resources as well as the unique nature of the
proposed project in reviewing the special permit
application.

Thank you.

CHAIRMAN SCHEUER: Thank you.

Commissioners, we can do questions one by
one or just questions at the end. Seeing nobody
jump forward, we can hold off until the end.

Was Mr. Garcia going to say anything, Mr.
Richardson?

MR. GARCIA: Yes. Good morning. Thank
you very much for the opportunity.

You know, I would like to say that, you
know, as a school, it's very important to us that we
are educating our students, particularly in mind of
where we live on Hawaii Island and part of the
ahupuaa that our -- that the Kaumana property is as
a part of.

And so in regard to the concerns for
preservation of cultural practices, Indigenous and
Hawaiian cultural practices, that's something that
we -- is a part of our foundation as a school. And
so we feel like we were diligent in having the
reports provided regarding what could be found at
this time or at the time the reports were made on
the Kaumana property, on the lots there.

And so, you know, again, it's very
important to us that, as we educate our students and
our families and ourselves, that we're cognizant of
what it means to be pono here in Hawaii, and to
certainly respect the local culture, and to do what
we can to preserve that and the importance of
helping our students to understand the opportunity
to become a part of sustainability here on the
island.

And so we appreciate the opportunity to be
before the State Land Use Commission and hope that
we can get your support in moving forward to
continue to develop the school that we'd like to
build on the Kaumana property.

Mahalo.

CHAIRMAN SCHEUER: Thank you, Mr. Garcia.

Mr. Hong.

MR. HONG: Good morning, Mr. Chairman,

Members of the Commission.

I appreciate your taking the time to pay
attention to our presentation and certainly on our petition. I have three points that I want to make in terms of administrative matters.

The three administrative matters that I'd like to build up are, number one, I'd like some clarification from Commissioner Chang. Under 15-15-3, I'm concerned about whether there was an unauthorized ex parte communication.

When Mr. Matsukawa was called to testify, she referred to the name in the familiar, first-person term, "Mike." So I'm just puzzled, and I think my duty as an advocate requires me to inquire, whether or not there's some kind of relationship with Commissioner Chang and Mr. Matsukawa.

The second administrative point that -- or administrative matter that I'd like to bring up to the Commission is whether or not the Commission violated 92-7(d) of the Hawaii Revised Statutes by changing its agenda. It appears to have been a violation changing that agenda without the appropriate vote.

Third administrative point I want to bring up before I get into my closing statement --

CHAIRMAN SCHEUER: If -- if -- could you clarify -- specify what agenda change you're
alleging?

MR. HONG: My agenda change -- the -- it's not actually an allegation. It's actually fact. It was scheduled for -- the meeting this morning was scheduled for 9 o'clock, and the Commission changed it without taking a vote, without taking a motion, without any discussion, to 9:30 today.

CHAIRMAN SCHEUER: Okay. Please continue.

MR. HONG: The third administrative point I want to bring up is Mr. Matsukawa's motion regarding the objection to the untimely filing by the County of Hawaii. He filed that. I -- I don't have the file date, but I know that the certificate of service is dated January 12th, 2022.

I was wondering whether or not we should-- if the Chair would like to take it up now and address it? Because not addressing it -- without our opportunity to address it, I submit, violates my client's due process rights.

I don't want the particular factors -- particular factor or argument that Mr. Matsukawa made in his argument to be the low-hanging fruit for the Commission to deny the special use permit this morning.

So those are the three administrative --
CHAIRMAN SCHEUER: And so -- sorry, Mr. Hong. Can you repeat the third?

MR. HONG: The third is Mr. Matsukawa's motion, and I'd like to know whether or not --

CHAIRMAN SCHEUER: Motion? Which motion?

MR. HONG: On January 12th, 2022, he filed Intervenor, Jeffrey Gomes' objection to untimely filing of County of Hawaii Windward Planning Commission's complete record with the State Land Use Commission.

CHAIRMAN SCHEUER: Okay.

MR. HONG: He noticed the hearing for January 19th through 20th, 2022, at 9 o'clock. So again, my concern is whether or not we're going to be given the opportunity to address those issues that he raised, because, again, I don't want that to be the low-hanging fruit that the Commission relies on in denying our special use permit.

CHAIRMAN SCHEUER: Okay. Let's take each of these in turn.

Commissioner Chang, do you wish to respond to the statements from Mr. Hong about your using Mr. Matsukawa's first name?

COMMISSIONER CHANG: Sure.
Thank you very much, Mr. Hong. I think being a member of the Bar for such a long time, I've known Mr. Matsukawa for many years. I believe I may have also noted Jean Campbell by her first name as well.

I have had no ex parte communication with Mr. Matsukawa in this case. I hope that satisfies your inquiry.

MR. HONG: My inquiry is more specific in terms of working with him on specific cases or as co-counsel, or if you are part of any organizations, mutual organizations, I certainly would appreciate knowing that.

COMMISSIONER CHANG: I'm a member of the Native Hawaiian Bar Association. I'm not too sure if Mr. Matsukawa is a member. I don't believe that Mr. Matsukawa and I have had -- I don't recall whether we've had any cases together. We may have been on opposing sides when I was with the Attorney General's Office many years ago, but I don't recall having any cases where we were co-counsel together. And clearly, I've not spoken with him regarding this matter at all.

MR. HONG: Thank you. I appreciate that. You know, when we started this hearing, the Chair
was kind enough to -- and I think ethically -- or
ethical enough to disclose his contact with my
sister, so I just wanted to make sure that, in terms
of the Commissioners, that everybody is, you know,
fair and objective.

COMMISSIONER CHANG: No. I -- I
appreciate that, Mr. Hong, so I hope that my
responses have satisfied your inquiry. Thank you.

MR. HONG: Absolutely. Thank you.

CHAIRMAN SCHEUER: Moving to your second
matter. The -- what I called an allegation, you
called a fact that we have changed the starting time
of this meeting to 9:30, and we did so without a
vote.

I will turn to my Deputy Attorney General
for further clarification, but let me share my
first, sort of, response to that.

I checked with the Commission, and while
we did not have a roll-call vote, there was a
consensus that this could happen. All the parties,
I checked with you orally. Do you understand you
had every opportunity to object at that time if you
felt that somehow you were being harmed by the
changing of things?

In addition, we actually opened the Zoom
meeting at 9 o'clock, and at 9 o'clock there was a notice to the public, anybody who is noticing, that we were in recess and would be resuming shortly. And then we came in exactly when I orally announced the 9:30.

MS. CHOW: So guidance from the Office of Information, practices on continuation of meetings is normally that you have to announce that the meeting is going to be continued, and you have to indicate what time the meeting -- what day and time the meeting is going to be continued to and where the continued meeting is going to be.

And you should be posting a notice at the site of the next meeting, but obviously in virtual land there is -- the posting requirements are a little bit different, so I believe those requirements were met when Chair Scheuer yesterday did announce the meeting was to be continued.

It was going to be continued until today, and it was going to be continued until 9:30 today. So I believe all of the guidance and requirements that are set forth by OIP on continuation of meetings were met yesterday.

MR. HONG: So if I may, Mr. Chairman?
CHAIRMAN SCHEUER: Yes.

MR. HONG: I disagree with your analysis. 92-7(d) does not require a showing of prejudice. It requires a board agency or commission to take a vote to change their agenda. And the agenda in this case would be when the meeting happened --

MS. CHOW: And I disagree with you. They did not change the agenda. The agenda refers to what matters are to be discussed during the meeting.

The -- there was no change to the matter that is to be the subject of today's meeting and which is to be discussed by the Land Use Commission, and is only the time that the meeting was continued until today. And the requirements for continuation of a meeting, which are separate and apart from the contents of an agenda, were met by yesterday's announcement.

CHAIRMAN SCHEUER: Can I also pause for one second? I need to clarify, since you were co-counsel, essentially, on this -- co-petitioner, Mr. Richardson, do you join in these arguments?

MR. RICHARDSON: As to the argument about the agenda item or all three?

CHAIRMAN SCHEUER: All three, please.

MR. RICHARDSON: As to the -- okay.
CHAIRMAN SCHEUER: One was concern regarding the relationship of Commissioner Chang to Intervenor's attorney, Mr. Matsukawa. The second is a concern regarding the manner in which the starting time of this meeting was changed. And the third is regarding a motion -- the motion filed by Mr. Matsukawa.

MR. RICHARDSON: Okay. So with respect to the first matter, yes, we will join that objection. As to the second matter, no. To the third matter, yes.

CHAIRMAN SCHEUER: So the first matter you -- regarding Commissioner Chang --

MR. RICHARDSON: The inquiry --

CHAIRMAN SCHEUER: -- you are -- you are joining in the objection?

MR. RICHARDSON: Mr. Hong's inquiry as to whether or not there were any ex parte communications.

CHAIRMAN SCHEUER: Okay. Did you have anything further to ask Commissioner Chang about that?

MR. RICHARDSON: No. I was satisfied with her answer.
CHAIRMAN SCHEUER: And to the second?

MR. RICHARDSON: We are not -- we are satisfied with the LUC's counsel's explanation.

CHAIRMAN SCHEUER: Okay. So we'll continue with Mr. Hong on this, and then we'll make sure to check in with you on the third.

MR. RICHARDSON: Thank you.

CHAIRMAN SCHEUER: Mr. Hong?

MR. HONG: I think I've made my record. Thank you.

CHAIRMAN SCHEUER: So regarding the third item, a written objection -- sorry, Mr. Thatcher, I'm not sure why your hand is up. Okay.

MR. THATCHER: My hand is up because I wanted to make a point that I am the one that asked Mr. Hong, as my legal counsel, to bring these points up.

CHAIRMAN SCHEUER: Okay. So noted.

MR. THATCHER: Thank you.

CHAIRMAN SCHEUER: The third point raised by Mr. Hong is regarding a written objection in the record from Mr. Matsukawa.

Let me clarify with Mr. Orodenker. Is this a motion for action that we have actually not dispensed with?
MR. ORODENKER: Mr. Chair, we don't have any record of that.

MR. HAKODA: Chair, this is Riley. My recollection of what was submitted was only the notice of appearance of counsel. That's all I remember receiving unless Ms. Quinones --

CHAIRMAN SCHEUER: It's not -- so I'm not saying it's not in the record. It is a voluminous record, and I cannot, out of my brain, recite every single document that is written, but is this something that, Mr. Hong, you've received or is posted to the website?

MR. HONG: He sent it to me on the certificate of service, and we received it.

CHAIRMAN SCHEUER: Was this served on the -- can you confirm, Mr. Matsukawa, that you served such a document, and was it served on the other parties in this case?

MR. MATSUKAWA: I didn't file a motion. I filed an objection stating that I might file a motion after investigation. But I did serve it on the parties by mail and, I think, by email, including --

CHAIRMAN SCHEUER: On what date?

MR. MATSUKAWA: January 12. Including a
CHAIRMAN SCHEUER: So you filed an objection to the late filing of documents.

MR. MATSUKAWA: Of the record on appeal.

CHAIRMAN SCHEUER: Okay. And subject to investigation, you just said you might file -- you were considering filing an objection.

MR. MATSUKAWA: Yes. And based on my investigation, and especially looking at the Perry versus Planning Commission case, I think the Supreme Court has looked at that particular issue as being directory, not mandatory, so as long as the Commission is satisfied that they did receive the record, that's where it stands.

So I have no motion. I just made an objection for the record.

CHAIRMAN SCHEUER: Okay. So to clarify, Mr. Hong, your concern is that this objection is on the record unresolved?

MR. HONG: I think that would be accurate, yes.

CHAIRMAN SCHEUER: So what is the remedy that you seek?

MR. HONG: I'd like to ask Mr. Matsukawa to withdraw it, given his investigation.
Either withdraw it, or the Commission should deny it. And I'm prepared to argue if you'd like to hear it.

CHAIRMAN SCHEUER: In some ways, the Commission is satisfied with the receipt of the record on appeal, so --

MR. ORODENKER: Chair, can I interject here for a moment?

CHAIRMAN SCHEUER: Please, Mr. Orodenker.

MR. ORODENKER: The filing of the record on appeal would have no prejudice against the parties. In fact, it provides them additional opportunity. The County is required to submit the entire record of the proceedings of the Land Use Commission.

Once the entire record has been submitted, and it's deemed complete, the 45-day clock begins to run, and so the -- regardless of whether the -- those documents were received by the Land Use Commission with the original filing or a couple of weeks later, the only impact is moving the 45-day window.

We would still have had to have had a hearing at this time. There would have been no additional time for the parties to prepare. There
would have been no additional activity. It's -- it's -- it only -- as far as a procedural standpoint, the only thing it does is it moves the 45-day window down.

CHAIRMAN SCHEUER: Mr. Hong.

MR. HONG: You know, I'm on the side of the angels on this one, because, again, I agree with this ordinance. But I mean, in terms of the record, I think the County transmitted it timely.

And so, again, I ask Mr. Matsukawa, based on his investigation, to withdraw it. If he doesn't withdraw it -- if he refuses to withdraw it, then I submit that I should be allowed to argue the point.

CHAIRMAN SCHEUER: I believe you've actually already argued the point, but perhaps that is beside the point.

Mr. Matsukawa?

MR. MATSUKAWA: Yes. Based on my investigation, and I contacted a couple of attorneys who've done land use cases before, before the Commission, and I'm satisfied that the Perry case is controlling, so it's directory.

If it came in, it came in. So I would withdraw my objection.

CHAIRMAN SCHEUER: It's noted as
withdrawn.

Mr. Hong, I believe I've addressed all three of your administrative matters.

MR. HONG: Yes. Thank you very much. And I have some --

CHAIRMAN SCHEUER: Please give your final comments.

MR. HONG: Thank you. In terms of my final or closing argument, I wanted to raise -- briefly raise three points, and then I have my closing.

The first point is the Land Use Commission is engaging in unlawful rulemaking. The suggestion that the EA is stale is an arbitrary timetable in terms of a viability of an EA versus an EIS.

This is not -- this is not the Unite Here versus City case at 123 Hawaii 150. EIS, our statute, is a statutory regulatory scheme that is fundamentally different from an EA, and EIS and the admin rules include a supplemental EIS. No such formality or requirement exists with respect to an EA, not even an implied one.

In the Unite Here case, they were looking at a 20-year-old traffic study. So where do you draw the line? To the extent that you draw that
line, you are ruling, and to the extent that you believe that the EA in this case is stale, that's arbitrary and capricious.

Second, special use permit does not require final plans and financing -- proof of financing and to require us to do that or to hold us accountable to that. Or to even say that this is an incomplete or certainly not to a certain standard because we didn't provide you final plans or financing, that's not reflected in Section 15-15-95 or 205-6 of the Hawaii Statutes.

15-15-95(c) is plain, ordinary, ambiguous language that says, "The five factors that the LUC has to consider are guidelines." And that's a quote.

As much as you want to rewrite the administrative regulations and statute, holding us to a higher standard is wrong as a matter of law. Denying the permit that you feel that a district boundary amendment process would be more appropriate is also wrong as a matter of law. The LUC is supposed to focus on the use of the proposed permit or the proposed -- proposal that's before it.

Within the guidelines of the five factors in 15-15-95, the Neighborhood Board case, at 64-01-
265, again, is not applicable. Our proposed use is a small charter school, which would not change the essential character of the district nor be inconsistent therewith. That's a direct quote at page 271 of the Neighborhood Board case.

For most of us, school is not a "major recreational theme park," and to compare it to a charter school is a reflection of your intent.

In the Neighborhood Board case, it involved 103 acres. The Supreme Court said it was a major commercial undertaking, and that it would attract 1.5 million people annually.

In this case, we have less than 400 students on a school day. We have less than 500 people on campus, including staff, on a regular day. This is form over substance. It's also form over substance in terms of the district boundary amendment.

At page 271, it discusses why the -- discusses the factors of why a district boundary amendment process would be more appropriate. It says that a district boundary amended process includes a public hearing and notice. Where in the record has that not happened in this case?

The Supreme Court also pointed out that in
a district boundary amendment kind of procedural process, intervention is allowed on a timely application. Where has that not happened in this particular case?

It talks about in the Supreme Court case that intervention can be freely granted. Where has that not happened in this case?

It talks about rules governing intervention. Where has that not happened in this case?

So other than wanting us to chase our tail until we run out of money or make it near next to impossible to obtain a district boundary amendment, maybe just to beat us into submission.

What possible difference exists between a special use permit and the district boundary amendment when it's applied to this particular case, other than perhaps the entertainment value of laughing at us as we jump through more regulatory hoops.

Changing the requirement in terms of a new guideline with respect to cultural assessment is also rulemaking. Instead of reaching out to them and have them respond in a meaningful manner, you are now requiring us, under the guise and net of the
hoisted constitution, to change the requirement, but you never tell us how.

You said sending a letter is inadequate.

Yet, the record clearly shows you that the Office of Hawaiian Affairs and the Department of Hawaiian Homeland responded to our inquiry.

You said that Native Hawaiians don't respond to letters. Yet, we sent an inquiry to the Kaanapali Foundation, one of the premier advocacy groups in East Hawaii, as you know from the Monokiea case.

Your requirement is arbitrary and capricious because we are left to guess what is acceptable to you concerning community and cultural resource engagement.

In our case, we had six advertised community meetings. We went door to door in the neighborhood twice. The mail-out to property owners was 500 feet, not just 300 feet, so letters and a questionnaire.

Without any evidence, without any foundation, you speculate about why people did not respond to the letters in terms of cultural assessment.

Importantly, you failed to provide any
guidance. Should we hold signs out on the highway, fly a plane with a sign or message trailing from it, put out good vibes? You cannot hold us to a standard or requirement without telling us what that standard is. That is the template or due process violation.

The second point I wanted to make in my closing statement is that the LUC is deviating from the statutory regulatory duty. You are to focus on the use, not the (inaudible) of the project.

And the third point I want to make is we've been held to a double standard. I have continually represented from the beginning of this process that we work in collaboration with the County's Planning Director at the time. We sat and talked, and we discussed what the right vehicle was. And that was a special use permit.

You have questioned my integrity with every party and their counsel of (inaudible) the County about the special use permit process. My client, both County attorneys, and Mr. Darrow were interrogated. You wanted to show that I was lying to the LUC in front of clients, colleagues, and the general public.

I give credit to Mr. Darrow for telling
the truth. I thanked him for it. That was actually
(inaudible). It would have been easy for him to say
he couldn't recall or couldn't remember. But he
remembered precisely what I had told you about how
this happened, and then, poof, no more questions
along those lines.

I have always followed the Rules of
Professional Conduct in terms of making truthful
representations to boards, agencies, and
commissions.

I know that my license to practice law is
not based on the shape of my eyes, my ethnicity, my
bank account, my political party. That's why when I
say something, I know it has to be the truth in the
record unlike some other people.

I will bet good money that lawyers from
the big downtown Honolulu firm did not have their
integrity questioned in front of their clients and
the general public by the Commission, you know, the
Tesla-driving, Lexus-driving, Infiniti-driving
(inaudible) outrigger club types.

I'm sure the LUC lays down the red carpet
for them. Or at least that they will make the
Commissioners assume I'm lying and interrogate my
clients and colleagues. And guess what? I'm not
the one that's (inaudible).

In conclusion, you are trying to hold us responsible for the length of time in terms of the proceedings in this case. You have ignored the factors, which are the guidelines that you are required to focus on with respect to the use of the proposed property.

The record shows that a charter school in a remote location, at the bottom of a vacant large property, in a rich (inaudible) neighborhood is an unusual and reasonable use. Thank you.

CHAIRMAN SCHEUER: Thank you, Mr. Hong.

Commissioners, questions?

Seeing none, Ms. Kekai.

MS. KEKAI: Thank you, Chair. Good morning, Commission.

We'll keep this very brief. The Windward Planning Commission would just like to thank you for your service and the time that you've put into this because if anybody understands the, you know, volume of this record, they do.

Also, we would just submit that, you know, the Commission found that this application met all criteria, and, thus, would ask the Land Use Commission to approve it. Thank you.
CHAIRMAN SCHEUER: Questions for the
Windward Planning Commission?

Ms. Campbell.

MS. CAMPBELL: Good morning. Thank you, Chair. And good morning, Commissioners.

I echo Ms. Kekai's thanks for your service. This is a long and arduous process, and this was in a very voluminous record and very difficult for everyone to get through.

I'll note that the Planning Department is, was, and remains satisfied that the special permit application that they received and processed did in fact meet all of the County requirements for a special permit, and so the Planning Department continues to stand on its recommendation for approval.

That's all. Thank you.

CHAIRMAN SCHEUER: Thank you.

Questions?

Ms. Kato.

MS. KATO: Thank you, Chair, Commissioners. OPSD's position remains the same. We do not have additional comments. Thank you.

CHAIRMAN SCHEUER: Mr. Matsukawa -- I'm sorry, questions for OPSD?
Mr. Matsukawa.

MR. MATSUWA: Yes. Thank you, Mr. Chairman, Members of the Commission.

I just want to reiterate the points raised in our proposed findings that we filed with the Windward Planning Commission to which there was no ruling as to why the proposals were being rejected. Specifically, that the ICA had not rejected or vacated finding 47 as to adverse impact on surrounding properties and the inability for those impacts to be mitigated. That's binding and could not be rewritten.

The ICA also did not vacate findings number 22 or 49 concerning Connections' ability to develop an adequate potable water system. The ICA also didn't vacate finding 57, that there would be an adverse effect on the essential character of the land.

Now, this criteria is a county-based criteria. It does not appear in the LUC's rules. This is the county's own Rule 6, which adds this as a criteria. And it found the first time around that there was going to be an essential change in the character of the land. There's no appeal on this item, and the ICA never vacated that.
In our proposed findings, we also address the failure of the Planning Commission to address the public natural resources trust. And we discussed that yesterday.

And we also made note that the OSP had in fact filed a letter back in 2012, suggesting that perhaps a boundary amendment might be an alternative procedure for the applicant to consider. So that's in the record. It's nothing new.

We also filed exceptions raising these same points, and I stand on that. Thank you very much.

CHAIRMAN SCHEUER: Thank you, Mr. Matsukawa.

Questions?

COMMISSIONER OHIGASHI: I -- I'm curious about that -- the additional criteria by the Hawaii Planning Commission. On this -- on our review, are we required to determine beyond the -- I guess the five criteria, must we consider the additional two criteria that the County has places right there for their issuance of a special use permit?

MR. MATSUWKA: I believe the -- the general criteria set forth in the LUC's rules set
forth the so-called guidelines. Now, nothing
precluded the County from adding additional
criteria, as it chose to do, which was for this
essential character of the land and compliance with
the general plan.

The fact that the County reviewed the
evidence within those additional criteria, I think,
allows the Land Use Commission leave to look at what
the County did and determine whether those
additional criteria fall under one of the four
guidelines of the LUC.

And I think you could plug that in. The
additional criteria would probably fall under --
let's see, I'm looking at it -- under guideline
number 4, conditions, trends, needs, a sub criteria,
one might say.

Going back to our discussion yesterday, if
we are to consider the additional criteria by the
County of -- the County has placed on, are we -- do
we have to -- is -- is your position the same as
before, that we have to -- any one of now I think
it's seven criteria -- any one of the seven criteria
is sufficient enough to deny?

**MR. MATSUKAWA:** Yes.

**COMMISSIONER OHIGASHI:** And it's not the
five criteria -- out of the five criteria this? In other words, we're not limited to denial or on the five criteria.

And I'm not saying we're going to deny, but I'm just saying -- I'm just trying to get the concept in my head.

MR. MATSUKAWA: I -- I understand. And I would say that to the extent that additional criteria falls under one of the existing Land Use Commission's guidelines, then it speaks for itself. If it's something unique, stand-alone, and separate, I think the Land Use Commission is looking, in a sense, at the County's findings to determine whether those findings are supported by the record.

And if so, even if that is not a State criteria, whether the State in this review process can look to the additional requirements that the County Planning Commission may have utilized in its assessment of the application.

COMMISSIONER OHIGASHI: I have to mull over this a little bit more.

MR. MATSUKAWA: Yeah.

COMMISSIONER OHIGASHI: But I want to assure Mr. Hong that I understand his argument that
you have to look at all of the different criteria and judge and balance those criteria to make sure that -- that a decision is determined, and no one issue should derail the (inaudible).

I just want to -- I just want to assure Mr. Hong that I understand his argument. I'm trying to understand it.

And just as a passing comment, I drive a 2006 Honda Civic, and my wife and I share a car.

That's all.

CHAIRMAN SCHEUER: The Chair, who drives a 2015 used Prius, wants to know if there's any other questions?

Seeing none.

Commissioners, we're going to go into deliberations. What is your pleasure?

I remind the Commission we can grant the permit. We can grant the permit with additional conditions. We can deny the permit. We could remand it for further proceedings.

Commissioner Ohigashi.

COMMISSIONER OHIGASHI: If it's all right with the Chair, I have a question to ask Mr. Hong.

CHAIRMAN SCHEUER: Yes. I'm willing to entertain questions to the parties from the
Commissioners, but let me emphasize to anybody responding, your response needs to be narrowly tailored to the question asked.

Please proceed.

COMMISSIONER OHIGASHI: I was -- I'm interested in your analysis of the Neighborhood Board case that -- I didn't have time to write it down, so I was just kind of unclear.

Your first point was that this case involve -- is factually different because it involves a large 103-acre land use -- what was it? A -- some kind of theme park type of case that is within the special use permit, is that right?

MR. HONG: That would -- as the Supreme Court said, that would attract 1.5 million people to that park annually. In this case, we have less than 300 students. We have -- even with all the faculty, actually it's less than 400 people --

COMMISSIONER OHIGASHI: I'm just trying to get -- Mr. Hong, I'm just trying to get that -- that you believe it is factually different than -- there's substantial use in one case and not a substantial use in your case, is that right?

MR. HONG: That's correct.

COMMISSIONER OHIGASHI: That's why --
that's why differentiate -- you differentiate today?

    MR. HONG: That's correct, yes.

    COMMISSIONER OHIGASHI: My question to you, then, is not -- you know, I'm not trying to be argumentative, but where do we draw the line?

    MR. HONG: In terms of drawing the line --

    COMMISSIONER OHIGASHI: What do --

    MR. HONG: -- to --

    COMMISSIONER OHIGASHI: What's your --

what is -- you tell me.

    MR. HONG: The Supreme Court, at page 271, said you have to look at whether it would change the essential character of the district and not be inconsistent therewith.

    And then you have to take a look at the particular use that's going -- that's being proposed. And in this -- in that case, that is a substantial change with respect to use. In our case, it's fleas on a dog's back in terms of use.

    Because if you take your analysis --

    COMMISSIONER OHIGASHI: For example -- let me give you an example. If it was 40 acres and there was a small amount of industrial use being proposed on this, for example, like a garbage to energy plant or a recovery of -- recycling kind of
plant at a landfill that has a special use permit, would that change the nature, and would an SUP be required?

MR. HONG: So what you're suggesting, in terms of your hypothetical, is actually the facts now. When earlier you had pointed out to me that the facts shouldn't matter, whether it's a major industrial -- a major --

CHAIRMAN SCHEUER: So --

MR. HONG: -- what --

CHAIRMAN SCHEUER: Where we're get -- hello. We're getting into --

MR. HONG: Tell me how to answer, Mr. Chairman.

COMMISSIONER OHIGASHI: You're making an argument. I'm just asking you if that fact pattern would require a DBA or SUP --

MR. HONG: And I'm telling you --

COMMISSIONER OHIGASHI: -- in terms of (inaudible).

MR. HONG: And that's a false argument. It's a false assumption because now you're saying facts matter in terms of the proposed use.

I have always said that with respect to the Neighborhood Board case, you've got to look at
the proposed use. And what you're telling -- you
just told me earlier that the proposed -- the facts
don't really matter.

And now you're telling me that the facts
do matter. So I'm a little puzzled in terms of how
to answer that kind of question.

CHAIRMAN SCHEUER: Well, Commissioner
Ohigashi, do you wish to further question Mr. Hong?

COMMISSIONER OHIGASHI: No. I -- I -- all
I'm getting is an argument from him. All I'm -- and
personal attack.

All I'm trying to do is find out, under
his reading of Neighborhood Board, where do we draw
the lines.

And you're telling me that I'm -- that the
facts don't matter, so I'm just asking you that
question. But if you don't want to answer the
question, fine. I'll go on. I don't --

MR. HONG: I --

COMMISSIONER OHIGASHI: I don't have any
other questions.

MR. HONG: All I --

COMMISSIONER OHIGASHI: Oh --

MR. HONG: I would be happy to answer the
question if you'd give me a reasonable question --
CHAIRMAN SCHEUER: Hold it. What just -- just purely as an administrative matter, when two parties are talking at the same time, generating a transcript from this hearing is very, very difficult, so.

Commissioner Ohigashi, then Mr. Hong.

COMMISSIONER OHIGASHI: I -- I don't have any other questions.

CHAIRMAN SCHEUER: Thank you.

Mr. Hong.

MR. HONG: Thank you.

CHAIRMAN SCHEUER: Nothing further?

MR. HONG: Oh, I'm sorry. Nothing further.

CHAIRMAN SCHEUER: Okay.

Commissioners, we are in deliberations.

COMMISSIONER WONG: Chair, I have a question.

CHAIRMAN SCHEUER: Commissioner Wong.

COMMISSIONER WONG: So okay. Right now we're -- it seems like no one want to do anything. What happens -- let's say we have a -- we lose quorum and nothing happens at that point in time, what is the --

CHAIRMAN SCHEUER: If we do not render a
decision within 45 days, the permit is automatically approved.

    COMMISSIONER WONG: Okay. Thank you, Chair.

    MS. CHOW: I would also note that there's a question if it's automatic approval, what conditions would apply. And I don't think there's any determination of that, so if it goes into effect because of 45 days have run.

    COMMISSIONER GIOVANNI: Can we get a clarification when the 45 days will occur?

    CHAIRMAN SCHEUER: Mr. Orodenker?

    Thank you, Commissioner Giovanni.

    MR. ORODENKER: It was finalized on January 10th. 45 days from January 10th would be February 19th or 20th, I believe.

    CHAIRMAN SCHEUER: Sorry, did somebody -- Mr. Hong, we're in deliberation.

    MR. HONG: I understand that. May I make a suggestion, or is that inappropriate?

    CHAIRMAN SCHEUER: Yeah, that would not be appropriate at this time.

    So I will start, Commissioners, even though I -- I love to defer to the collective wisdom of the Commission. On one narrow issue, and this is
the issue that I raised in questions, and a written
response was given to us by Mr. Hong.

Under Hawaii Administrative Rules 15-15-95
-- and excuse me while I bring up the rule. Part A,
it requires that an application for a permit -- an
application for a permit, "the record shall include
evidence that the person requesting the special
permit has written authorization of all fee simple
owners to file the petition, which authorization
shall also include an acknowledgement that the
owners and their successors shall be bound by the
special permit and its conditions."

There are a number of records related to
this matter, including the acceptance of a finding
of no significant impact, signed on behalf of Chair
Thielen of the Board of Land and Natural Resources
at the time, by Paul Conry.

There is records related to the lease.
There is an affidavit of the fee simple -- or the
lessor or intended lessor.

I have not found in the record a clear and
unambiguous statement from the Board of Land and
Natural Resources or a designated representative
that really specifies an acknowledgement that the
owners and their successors shall be bound by the
special permit and its conditions.

Commissioner Ohigashi.

COMMISSIONER OHIGASHI: I think some of
the problems I'm having are -- one of the problems
that I think is evident is that conceptual parts of
the school, on its merits, it appears to be a good
one.

The amount of time it took to get here is
of concern to me, too. And, I guess, it is a
frustrating thing to be at the end of any process or
so-called end of a long process, having to review
the record and having to make a decision. Also, it
affords very, very difficult time for anything.

But on the other hand, I'm bothered by the
fact that we have bigger statements within Planning
Commission's findings that finds that a special use
permit -- this is not contrary -- this appears to be
contrary to objectives.

The second thing it appears to be is that
there's a finding that unreason or burden
publications (inaudible), et cetera, fire
protection, and it appears that there is a finding
that -- specific finding about desired use of --
affect the surrounding property.

My dilemma is this. I think that a
special use permit is a -- is just what it's called.

It's for special purpose. And the legislature, I believe, as well, intended it to be used for purposes that -- that are not basis towards neighboring properties is -- adversely affects surrounding property.

I think that in order to have a quick and proper process, I believe that these requirements are placed upon it so -- for the purposes of making sure that the proposed development meets those.

As a -- in the other process, the DBA process, which is supposedly a longer and more cumbersome process, there is time and -- as the Chairman said, we don't necessarily deny people because of EIS problems or other problems or because it adversely affects the surrounding property.

But what we do is try to mitigate that form, and we weigh and we're balancing all those interests. I'm not sure whether a special use permit requires -- being that it's for that purpose, to get -- make sure that this development meets all this kind of criteria, allows us to do the balancing in addition to (inaudible). That's where my quandary lies.

And I'm not sure that I'm -- I would like
to hear more argument because -- and the only way I
can foresee us making -- getting more argument on
that condition now that -- because, admittedly, like
Mr. Hong says, this is not a 103-acre high --

CHAIRMAN SCHEUER: You need --

COMMISSIONER OHIGASHI: -- some type of
project. This is a school. And I'm not --
stripping away -- adding that into the mix does make
the decision harder. It may require more additional
reason on it.

The only other way I can -- the only other
way I can think to accomplish that is to remand it
to the Planning Commission and ask them to brief
some of these issues that we have brought on, so
that we can have a clear record on the record as to
the finding as to what this is all about.

But I think that somehow to make a motion
-- because at this point in time, I'm looking at
this, and I'm trying to weigh those things in my
mind. Just trying to get my --

CHAIRMAN SCHEUER: Thank you for your
reflection, Commissioner Ohigashi.

Commissioner Chang followed by
Commissioner Aczon.

COMMISSIONER CHANG: Thank you, Mr. Chair.
I -- I -- my dilemma is I applaud this project. I think it is innovative. I like the concept of integrating forest management working with our young people.

I think the young woman who provided testimony, very impressed with her. She was very articulate, and the school seemed to provide her a really nice fit.

So I -- I find that this school, what it offers, it fits a void in our educational process. So my dilemma is the purpose of the school, the function that it provides, but then I -- I have to weigh that against what is before us.

Before us is the Planning Commission's recommendation to approve a special use permit. So then I think we have to apply what are the legal requirements based upon this proposed use.

The quandary I have is -- is the Planning Commission -- that the Planning Commission in 2014, based upon all the evidence, the same evidence that is on the record now, chose to deny the permit. The matter goes up to the ICA, and the ICA makes a conclusion -- they uphold certain findings, but they remand it back and vacate the -- for other findings.

And the Planning Commission chooses not to
reopen the record. So the Planning Commission makes a decision in 2020, based upon the same record. No additional information. No additional -- you know, nothing new on the record, but they make a totally different finding and conclusion.

So that -- that -- I am just left feeling -- it just -- it troubles me. What it does -- so what I'm faced with is looking at the rules, looking at the record that is before us, but also looking at the ICA opinion.

And I look at the ICA opinion, and it makes certain conclusions, and they found no error specifically with respect to the adverse impacts of traffic. Notwithstanding the mitigation, the adverse effects of traffic by the -- of the proposed project on traffic to the surrounding properties.

There is more than adequate testimony in the record by the surrounding property owners and others to support that, and the ICA, likewise, references the overwhelming testimony. So you know, I look at that.

But then, for me, I also look at what is our constitutional obligation. And we have an obligation under Article 12, Section 7 to preserve and protect traditional customary practices by
Native Hawaiians.

I find the record sent up by the Planning Commission to be totally inadequate to address Article 12, Section 4. When Mr. Hong says, "Well, what are we supposed to do? What's the guidance?"

Ka Pa'akai is the guidance. Ka Pa'akai provides three steps. One, identify the resources. Two, identify the potential impact of the project to those resources, and, three, if there are adverse effects, what's the mitigation?

What came up before us by the Planning Commission in the recommendations is totally absent of sufficient findings. The burden is on the applicant to provide sufficient information, and then the obligation is on, in this case, the Land Use Commission.

So for me, that is an overwhelming consideration as I -- as I evaluate this -- you know, this SUP. It is our constitutional obligation, whether it was raised or not raised previously.

So that is -- I don't know if -- Mr. Aczon, are you going to make a motion or are you just going to -- okay.

**CHAIRMAN SCHEUER:** Commissioner Aczon?
COMMISSIONER CHANG: Nope? You're not going to make a motion?

So if Commissioner Aczon is not going to make a motion -- well, I will -- I'll let Commissioner Aczon --

CHAIRMAN SCHEUER: I can call on Commissioner Aczon and then call --

COMMISSIONER CHANG: And then afterwards, I'll make a motion.

CHAIRMAN SCHEUER: Commissioner Aczon.

COMMISSIONER ACZON: If Commissioner Chang is going to be making a motion, I'll defer to her. But if not, I have something else.

CHAIRMAN SCHEUER: Okay.

Commissioner Chang.

COMMISSIONER CHANG: It is with very heavy heart, again, because of this proposed -- the project, I think it is a very, very worthy project. I think it's just not in the right place.

So my motion is to deny the special use permit. And if there is a second to the motion, I'll provide my rationale.

COMMISSIONER ACZON: I'll second that, Mr. Chair.

CHAIRMAN SCHEUER: Okay. A motion has
been made to deny by Commissioner Chang, seconded by Commissioner Aczon.

I will ask the movant and the seconder to specify the reasons for denial.

COMMISSIONER CHANG: All right. Thank you, Mr. Chair.

Based upon the record, the applicant has not provided sufficient information to demonstrate that their proposed project will not harm traditional customary practices exercised by Native Hawaiians, and, therefore, the LUC cannot fulfill its constitutional obligation to preserve and protect rights customarily and traditionally exercised by Hawaiians, as required by Article 12, Section 7 of the Hawaii State Constitution, especially in light of the proximity of the project to Kaumana Caves.

The applicant concluded that there is not evidence of traditional cultural properties or practices within the proposed area, based upon a 2010 EA, environmental assessment; however, the Planning Commission's findings of facts, conclusions in law, and proposed recommendations lacks any factual findings sufficient to support the conclusion as required by the court in Ka Pa'akai
versus Land Use Commission.

In addition, based upon the record, the traffic impacts caused by the proposed project will have an adverse impact on the surrounding properties as originally found by the Planning Commission and upheld by the Intermediate Court of Appeals.

So those are the two rationales for, at least, the proposed motion. Thank you.

**CHAIRMAN SCHEUER:** Commissioner Aczon.

**COMMISSIONER ACZON:** Thank you, Mr. Chair.

Same as Commissioner Chang, I'm really, you know, torn on this issue.

As a person that sent my kids to public schools, I really, really support public schools. And you know, I -- you know, I believe that, you know, these charter school is important to education of our children; however, we are bound to our duties as Land Use Commissioners.

And the way I feel -- same as Commissioner Chang, the way I feel is that the County just pawned the case to us and said, "hey, it's all yours."

They picked up the -- the Planning Commission. We want Planning Commission to change their decision based on what the ICA decisions were without any justifications.
So there are issues that came out during these -- these discussions that could have been answered if the County decided -- meanwhile, Planning Commission decided to -- to open the records.

With that said, we are bound to make our decision based on the records that was forwarded to us by the Planning Commission. But, see, we cannot -- we cannot -- you know, base our -- our decisions on new record, but absence of those additional discussion or records, we are bound to -- to what we have.

So I support this -- Commissioner Chang's motion based on that. For me, there's a lot of questions that would have been answered if the Planning Commission does due diligence in trying to answer some of those questions.

With that, I will support this motion.

CHAIRMAN SCHEUER: Thank you, Commissioner Aczon.

Commissioners, we have a motion before us to deny made by Commissioner Chang and seconded by Commissioner Aczon. We are in discussion.

COMMISSIONER GIOVANNI: Yeah. I have a
question. Maybe it's a question to Commissioner Chang or somebody could explain it to me.

If this motion is passed and we deny the special use permit, in effect, does that just end the whole opportunity for this school to use this property -- to move to this property, or does it go back to the -- is there an alternative where it goes back to the Commission, and they could come back to us again?

**CHAIRMAN SCHEUER:** If I may, Commissioner Giovanni. A motion to denial -- to deny certainly could be appealed by the parties. Assuming that a motion to deny prevails and an appeal is not successful, I believe that then the school still has its legal agreement with the Board of Land and Natural Resources on the lease and can pursue whatever entitlements it believes are necessary through this body or the Windward Planning Commission.

**COMMISSIONER GIOVANNI:** So, for example, hypothetically they -- if it gets to that point, the school could pursue a district boundary amendment, or it could go back and --

**CHAIRMAN SCHEUER:** I believe that is the case.
COMMISSIONER GIOVANNI: -- or it could pursue a special use permit under a reopening with -

CHAIRMAN SCHEUER: And just in the interest of sort of expanding slightly beyond the question that you've asked, should we grant this permit, parties have the opportunity to appeal.

COMMISSIONER GIOVANNI: Sure.

CHAIRMAN SCHEUER: And there would be a question of whether such an appeal would prevail or not. And then subject to that, then -- yeah.

COMMISSIONER GIOVANNI: So I have not made my mind up yet whether I'll support this motion or not. But I am swayed heavily by the arguments of Commissioner Chang and Commissioner Aczon because I feel very much the same in frustration that when it was remanded by the Intermediate Court of Appeals, that the Planning Commission did not address the specific issues of the matter and basically punted it to us. That's my feeling.

At the same time, part of my dilemma is that as much as the -- I would -- as much as I see a voluminous record, it's incredible that we're still dealing with a concept of what this school would look like on this property and how it would operate
and function.

I would like for a special use permit to have a lot more -- application to have a lot more detail in it.

On the other hand, this is not a concept where it's a green site school for a green site location. The fact that it is an operating school in the Kress Building, already has 300 students, and has a track record that is a good one is meaningful to me and, as well, a credence to it.

So I'd like very much for this school to find a permanent home, and this could possibly be it. But at this point, I'm still listening to the arguments and views of my fellow commissioners before I make a final decision on this motion.

Thank you.

CHAIRMAN SCHEUER: Commissioners, then we have nine minutes until we need to go into recess until 1 p.m.

Commissioner Chang?

COMMISSIONER CHANG: Mr. Chair, that's the question I was going to ask you is what's our time period. Thank you.

CHAIRMAN SCHEUER: Yeah.

Commissioner Ohigashi.
COMMISSIONER OHIGASHI: I was -- I was --
I was hoping that we would be able to consider a
remand in this situation; however, I understand
Dawn's position -- Commissioner Chang's position --
I'm sorry to use your first name -- Commissioner
Chang's position, and I understand the worries of
everyone.

What I would like to request, and I know
it's pretty selfish of me, but that we would be able
to recess this for some of us to gather our thoughts
and take a look at what's before us and come back at
1 o'clock.

CHAIRMAN SCHEUER: Commissioner Chang.

COMMISSIONER CHANG: I fully appreciate
the quandary placed by Land Use Commission in this
matter. And I'm -- and I've thought about this. Is
it better to remand it back to the County based upon
the same application, based upon the same record,
based upon the same studies and the community's
concern?

And I recognize that this is -- the school
has spent much more money than they had ever thought
they would have to. But you know, having a more --
having -- doing -- doing outreach, having an updated
TIL -- TIR, working with the County on perhaps a
different -- different, you know, traffic route, looking at this in a much -- in the lens of now 14 years or 11, 12, 13 years after the original application.

Maybe hindsight provides some lessons to both the applicant and the -- and the County, and maybe even DLNR. You know, is there an opportunity to refine this project and to now address the questions that were raised by the community, by the Land Use Commission, by the ICA, you know. Is this time period so that you maximize your chance of success in getting an approval the next time?

I am not as confident remanding it back to the Planning Commission is really going to be in the best interest of the applicant. This may just prolong and delay, because I don't know what the inevitable is, but I think the -- you know, the alternative is revisit what exactly the project is with a little more specificity and updating some of these reports and studies.

That's part of my thought process and why I thought the denial would be more appropriate rather than a remand, because I have -- I am not -- I wish I was more confident that -- that -- that on remand, there would be a different -- or there would
be a -- an outcome that may be different, but it may
be better if they just start all over.

Thank you. That's my comments to
Commissioner Ohigashi.

CHAIRMAN SCHEUER: Thank you.

Commissioner Aczon.

COMMISSIONER ACZON: Thank you, Mr. Chair.

I share Commissioner Chang's sentiment on
this one. That was my first inclination about
remand, but thinking about it, the County kind of
pretty much sent us a clear message that they're
done with this case.

They did everything that (audio
disruption). They even ignored the Intervenor's
motion or into being this proposed DNO, which I
think would have been if they open the record, then
there would have been answered some of those
questions.

But you know, remanding it to the County
is kind of being what's sending us -- you know,
well, I said that the County just brought it in back
to us, and brought it back to them again is not
really, you know, things that I want to do.

CHAIRMAN SCHEUER: Thank you,
Commissioner.
Commissioner Ohigashi.

**COMMISSIONER OHIGASHI:** Well, I've mulled it over again, and I think their conclusion that I'm going to support their motion (inaudible).

I think, Commissioner Chang is correct not only on the constitutional grounds, but specifically the findings that were untouched by the ICA opinion.

And in my mind, a special use permit and the way I've been voting on special use permits has been to make sure that that type of -- that type of use fits all the criteria.

And I think my vote on the Maui County Base Yard on the Maui County Landfill is an example. I think that it's important for us to preserve what a special use permit is. And it's for to make sure that those criteria listed (inaudible).

The balancing of interest, it's properly done through its additional boundary amendments. And that is what I believe should be done.

Applicants agree to modify their proposal on a more small footprint and maybe take it out of our hands or anything like that, it's up to them. But -- or appeal this decision, it's up to them. But I'm going to support the motion.

**COMMISSIONER ACZON:** Mr. Chair, I just
want to let you know that I can stay for a few more
minutes.

CHAIRMAN SCHEUER: Okay. Thank you.

Sorry. And Commissioner Giovanni, you
also had an 11 o'clock.

COMMISSIONER GIOVANNI: I need to leave at
11. I must depart at 11, yes.

CHAIRMAN SCHEUER: Okay. So it is 10:59.

Commissioner Wong?

COMMISSIONER WONG: No further questions.

CHAIRMAN SCHEUER: Are the -- Commissioner
Giovanni, are you prepared to vote?

COMMISSIONER GIOVANNI: Yes.

CHAIRMAN SCHEUER: I would also add that
denial is justified for two reasons. One is the
lack of complete compliance with the requirements
under 15-15-95(a), for an affirmative statement from
the landowner that they will agree to abide by any
special permit conditions placed upon it.

And in addition, I believe the record does
not show that there is a concurrence as specifically
required in law from the State Historic Preservation
Division.

I want to be very clear that my vote is
based on those things and not on whether the school
is a good thing or not, because I personally feel --
despite feeling somewhat attacked by certain
counsel, this is a very worthwhile project, which I
would like to succeed, and it's bothersome -- deeply
bothersome to me to -- in that sense, to vote to
deny, but I believe that's what the record requires
us to do.

Mr. Orodenker, please poll the Commission.

MR. ORODENKER: Thank you, Mr. Chair.

The motion is to deny the special permit
based upon the record and because a finding of that
lacks specific findings on various issues, including
(inaudible) facts and (inaudible) Kaumana Cave.

Commissioner Chang?

COMMISSIONER CHANG: Aye.

MR. ORODENKER: Commissioner Aczon?

COMMISSIONER ACZON: Aye.

MR. ORODENKER: Commissioner Giovanni?

COMMISSIONER GIOVANNI: Aye.

MR. ORODENKER: Commissioner Ohigashi?

COMMISSIONER OHIGASHI: Aye.

MR. ORODENKER: Commissioner Wong?

COMMISSIONER WONG: Aye.

MR. ORODENKER: Chair Scheuer?

CHAIRMAN SCHEUER: Aye.
MR. ORODENKER: Thank you, Mr. Chair. The motion passes with six affirmative votes.

CHAIRMAN SCHEUER: Thank you, parties. There being no further business for the Commission today, I declare this meeting adjourned.

(WHEREUPON, the Hawaii State Land Use Commission Meeting adjourned at 11:02 a.m.)
CERTIFICATE

I, Jodi Dean, 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.

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Jodi Dean