



COURT REPORTING

LEGAL VIDEOGRAPHY

VIDEOCONFERENCING

TRIAL PRESENTATION

MOCK JURY SERVICES

LEGAL TRANSCRIPTION

COPYING AND SCANNING

LANGUAGE INTERPRETERS



**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**



**NAEGELI**  
DEPOSITION & TRIAL



**(800) 528-3335**

**NAEGELIUSA.COM**

**BEFORE :**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**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:** Aloha mai kakou. Good  
2 morning. This is the January 20th, 2022 Land Use  
3 Commission meeting, which is being held using  
4 interactive videoconference technology, allowing  
5 members of the Commission and other interested  
6 individuals of the public to meet via the Zoom  
7 internet conferencing program.

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

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

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

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

20           First, for the transcripts, it really  
21 helps if you state your name before speaking.  
22 Secondly, please be aware that because this is being  
23 recorded, your attendance is your implied consent to  
24 be on the official recording of this meeting. If  
25 you do not wish to be part of the official

1 recording, you should leave this meeting now.

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

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

12 We -- we closed public testimony on this  
13 matter yesterday, so there will be no additional  
14 public testimony. We will continue to take breaks  
15 from time to time. Roughly speaking, we have from  
16 9:30 to 11 today, so I actually do not anticipate  
17 taking a break for the next hour and a half. We'll  
18 try and get through as much as we can.

19 If we have to go beyond the 11 o'clock  
20 hour, we will take a two-hour recess between 11 and  
21 1 when we will lose quorum, and then we will resume  
22 at 1.

23 My name is Jonathan Likeke Scheuer. I  
24 have the honor and pleasure of serving as the Land  
25 Use Commission Chair.

1 Along with me, Commissioner Dawn Chang,  
2 Commissioner Arnold Wong, Commissioner Edmund Aczon  
3 are all on the island of Oahu along with our small  
4 but incredibly talented staff, our Executive  
5 Officer, Daniel Orodener, our Chief Planner, Scott  
6 Derrickson, our Planner, Riley Hakoda, our Chief  
7 Clerk, Natasha Quinones, and our Deputy Attorney  
8 General, Linda Chow.

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

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

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

23 **MR. RICHARDSON:** Good morning, Chair and  
24 Commissioners. Kevin Richardson, Deputy Attorney  
25 General, on behalf of Connections New Century Public

1 Charter School. Also with me is Romeo Garcia,  
2 Principal of Connections, and he is located on  
3 Hawaii Island.

4 **CHAIRMAN SCHEUER:** Mahalo nui.

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

8 **CHAIRMAN SCHEUER:** Hawaii Windward  
9 Planning Commission?

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

13 **CHAIRMAN SCHEUER:** County of Hawaii Office  
14 of Planning?

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

19 **CHAIRMAN SCHEUER:** Thank you.  
20 Office of Planning and Sustainable  
21 Development.

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

25 Also here are Rodney Funakoshi and Lorene

1 Maki from OPSD. Thank you.

2 **CHAIRMAN SCHEUER:** Thank you.

3 And Intervenor?

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

6 **CHAIRMAN SCHEUER:** Thank you very much.

7 Okay.

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

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

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

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

23 I'm going to provide a brief opportunity  
24 for the parties to make any final comments and  
25 Commissioners ask any final questions before we move



1 into deliberation.

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

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

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

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

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

25 Additionally, any funds that are used for

1 development projects are funds that are funneled  
2 away from current students.

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

9 My second point is that Connections'  
10 proposal is unique. It straddles the line between a  
11 traditional school and in agricultural forestry  
12 program.

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

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

25 So as the record demonstrates, this

1 clearly presents some exceptional problem --  
2 exceptional circumstances, so therefore, we're  
3 urging the Commission to at least consider  
4 Connections' status as a charter school with finite  
5 resources as well as the unique nature of the  
6 proposed project in reviewing the special permit  
7 application.

8 Thank you.

9 **CHAIRMAN SCHEUER:** Thank you.

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

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

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

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

23 And so in regard to the concerns for  
24 preservation of cultural practices, Indigenous and  
25 Hawaiian cultural practices, that's something that

1 we -- is a part of our foundation as a school. And  
2 so we feel like we were diligent in having the  
3 reports provided regarding what could be found at  
4 this time or at the time the reports were made on  
5 the Kaumana property, on the lots there.

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

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

20 Mahalo.

21 **CHAIRMAN SCHEUER:** Thank you, Mr. Garcia.

22 Mr. Hong.

23 **MR. HONG:** Good morning, Mr. Chairman,  
24 Members of the Commission.

25 I appreciate your taking the time to pay

1 attention to our presentation and certainly on our  
2 petition. I have three points that I want to make  
3 in terms of administrative matters.

4 The three administrative matters that I'd  
5 like to build up are, number one, I'd like some  
6 clarification from Commissioner Chang. Under 15-15-  
7 3, I'm concerned about whether there was an  
8 unauthorized ex parte communication.

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

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

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

24 **CHAIRMAN SCHEUER:** If -- if -- could you  
25 clarify -- specify what agenda change you're

1 alleging?

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

8 **CHAIRMAN SCHEUER:** Okay. Please continue.

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

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

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

25 So those are the three administrative --

1           **CHAIRMAN SCHEUER:** And so -- sorry, Mr.  
2 Hong. Can you repeat the third?

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

5           **CHAIRMAN SCHEUER:** Motion? Which motion?

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

11           **CHAIRMAN SCHEUER:** Okay.

12           **MR. HONG:** He noticed the hearing for  
13 January 19th through 20th, 2022, at 9 o'clock.

14           So again, my concern is whether or not  
15 we're going to be given the opportunity to address  
16 those issues that he raised, because, again, I don't  
17 want that to be the low-hanging fruit that the  
18 Commission relies on in denying our special use  
19 permit.

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

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

25           **COMMISSIONER CHANG:** Sure.

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

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

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

14 **COMMISSIONER CHANG:** I'm a member of the  
15 Native Hawaiian Bar Association. I'm not too sure  
16 if Mr. Matsukawa is a member. I don't believe that  
17 Mr. Matsukawa and I have had -- I don't recall  
18 whether we've had any cases together. We may have  
19 been on opposing sides when I was with the Attorney  
20 General's Office many years ago, but I don't recall  
21 having any cases where we were co-counsel together.

22 And clearly, I've not spoken with him  
23 regarding this matter at all.

24 **MR. HONG:** Thank you. I appreciate that.  
25 You know, when we started this hearing, the Chair



1 was kind enough to -- and I think ethically -- or  
2 ethical enough to disclose his contact with my  
3 sister, so I just wanted to make sure that, in terms  
4 of the Commissioners, that everybody is, you know,  
5 fair and objective.

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

9 **MR. HONG:** Absolutely. Thank you.

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

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

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

25 In addition, we actually opened the Zoom

1 meeting at 9 o'clock, and at 9 o'clock there was a  
2 notice to the public, anybody who is noticing, that  
3 we were in recess and would be resuming shortly.  
4 And then we came in exactly when I orally announced  
5 the 9:30.

6 Ms. Chow, do you wish to add anything?

7 **MS. CHOW:** Sure. So guidance from the  
8 Office of Information, practices on continuation of  
9 meetings is normally that you have to announce that  
10 the meeting is going to be continued, and you have  
11 to indicate what time the meeting -- what day and  
12 time the meeting is going to be continued to and  
13 where the continued meeting is going to be.

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

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

25 **MR. HONG:** So if I may, Mr. Chairman?

1           **CHAIRMAN SCHEUER:** Yes.

2           **MR. HONG:** I disagree with your analysis.  
3 92-7(d) does not require a showing of prejudice. It  
4 requires a board agency or commission to take a vote  
5 to change their agenda. And the agenda in this case  
6 would be when the meeting happened --

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

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

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

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

24           **CHAIRMAN SCHEUER:** All three, please.

25           **MR. RICHARDSON:** As to the -- okay.

1 Sorry, I'm trying to remember each objection, but --

2 **CHAIRMAN SCHEUER:** One was concern  
3 regarding the relationship of Commissioner Chang to  
4 Intervenor's attorney, Mr. Matsukawa. The second is  
5 a concern regarding the manner in which the starting  
6 time of this meeting was changed. And the third is  
7 regarding a motion -- the motion filed by Mr.  
8 Matsukawa.

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

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

15 **MR. RICHARDSON:** The inquiry --

16 **CHAIRMAN SCHEUER:** -- you are -- you are  
17 joining in the objection?

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

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

24 **MR. RICHARDSON:** No. I was satisfied with  
25 her answer.

1           **CHAIRMAN SCHEUER:** And to the second?

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

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

7           **MR. RICHARDSON:** Thank you.

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

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

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

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

18           **CHAIRMAN SCHEUER:** Okay. So noted.

19           **MR. THATCHER:** Thank you.

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

23           Let me clarify with Mr. Orodanker. Is  
24 this a motion for action that we have actually not  
25 dispensed with?

1           **MR. ORODENKER:** Mr. Chair, we don't have  
2 any record of that.

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

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

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

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

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

24           **CHAIRMAN SCHEUER:** On what date?

25           **MR. MATSUKAWA:** January 12. Including a

1 copy to the Executive Director.

2 **CHAIRMAN SCHEUER:** So you filed an  
3 objection to the late filing of documents.

4 **MR. MATSUKAWA:** Of the record on appeal.

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

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

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

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

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

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

24 **MR. HONG:** I'd like to ask Mr. Matsukawa  
25 to withdraw it, given his investigation.

1           Either withdraw it, or the Commission  
2 should deny it. And I'm prepared to argue if you'd  
3 like to hear it.

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

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

9           **CHAIRMAN SCHEUER:** Please, Mr. Orodenker.

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

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

23           We would still have had to have had a  
24 hearing at this time. There would have been no  
25 additional time for the parties to prepare. There



1 would have been no additional activity. It's --  
2 it's -- it only -- as far as a procedural  
3 standpoint, the only thing it does is it moves the  
4 45-day window down.

5 **CHAIRMAN SCHEUER:** Mr. Hong.

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

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

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

17 Mr. Matsukawa?

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

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

25 **CHAIRMAN SCHEUER:** It's noted as

1 withdrawn.

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

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

6 **CHAIRMAN SCHEUER:** Please give your final  
7 comments.

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

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

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

23 In the Unite Here case, they were looking  
24 at a 20-year-old traffic study. So where do you  
25 draw the line? To the extent that you draw that

1 line, you are ruling, and to the extent that you  
2 believe that the EA in this case is stale, that's  
3 arbitrary and capricious.

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

12 15-15-95(c) is plain, ordinary, ambiguous  
13 language that says, "The five factors that the LUC  
14 has to consider are guidelines." And that's a  
15 quote.

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

24 Within the guidelines of the five factors  
25 in 15-15-95, the Neighborhood Board case, at 64-01-

1 265, again, is not applicable. Our proposed use is  
2 a small charter school, which would not change the  
3 essential character of the district nor be  
4 inconsistent therewith. That's a direct quote at  
5 page 271 of the Neighborhood Board case.

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

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

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

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

25 The Supreme Court also pointed out that in

1 a district boundary amendment kind of procedural  
2 process, intervention is allowed on a timely  
3 application. Where has that not happened in this  
4 particular case?

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

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

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

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

21 Changing the requirement in terms of a new  
22 guideline with respect to cultural assessment is  
23 also rulemaking. Instead of reaching out to them  
24 and have them respond in a meaningful manner, you  
25 are now requiring us, under the guise and net of the

1 hoisted constitution, to change the requirement, but  
2 you never tell us how.

3           You said sending a letter is inadequate.  
4 Yet, the record clearly shows you that the Office of  
5 Hawaiian Affairs and the Department of Hawaiian  
6 Homeland responded to our inquiry.

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

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

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

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

25           Importantly, you failed to provide any

1 guidance. Should we hold signs out on the highway,  
2 fly a plane with a sign or message trailing from it,  
3 put out good vibes? You cannot hold us to a  
4 standard or requirement without telling us what that  
5 standard is. That is the template or due process  
6 violation.

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

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

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

25 I give credit to Mr. Darrow for telling

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

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

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

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

22 I'm sure the LUC lays down the red carpet  
23 for them. Or at least that they will make the  
24 Commissioners assume I'm lying and interrogate my  
25 clients and colleagues. And guess what? I'm not



1 the one that's (inaudible).

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

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

12 **CHAIRMAN SCHEUER:** Thank you, Mr. Hong.

13 Commissioners, questions?

14 Seeing none, Ms. Kekai.

15 **MS. KEKAI:** Thank you, Chair. Good  
16 morning, Commission.

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

22 Also, we would just submit that, you know,  
23 the Commission found that this application met all  
24 criteria, and, thus, would ask the Land Use  
25 Commission to approve it. Thank you.

1                   **CHAIRMAN SCHEUER:** Questions for the  
2 Windward Planning Commission?

3                   Ms. Campbell.

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

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

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

17                  That's all. Thank you.

18                  **CHAIRMAN SCHEUER:** Thank you.

19                  Questions?

20                  Ms. Kato.

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

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

1 Mr. Matsukawa.

2 **MR. MATSUKAWA:** Yes. Thank you, Mr.  
3 Chairman, Members of the Commission.

4 I just want to reiterate the points raised  
5 in our proposed findings that we filed with the  
6 Windward Planning Commission to which there was no  
7 ruling as to why the proposals were being rejected.

8 Specifically, that the ICA had not  
9 rejected or vacated finding 47 as to adverse impact  
10 on surrounding properties and the inability for  
11 those impacts to be mitigated. That's binding and  
12 could not be rewritten.

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

19 Now, this criteria is a county-based  
20 criteria. It does not appear in the LUC's rules.  
21 This is the county's own Rule 6, which adds this as  
22 a criteria. And it found the first time around that  
23 there was going to be an essential change in the  
24 character of the land. There's no appeal on this  
25 item, and the ICA never vacated that.

1 In our proposed findings, we also address  
2 the failure of the Planning Commission to address  
3 the public natural resources trust. And we  
4 discussed that yesterday.

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

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

13 **CHAIRMAN SCHEUER:** Thank you, Mr.  
14 Matsukawa.

15 Questions?

16 Commissioner Ohigashi.

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

24 **MR. MATSUKAWA:** I believe the -- the  
25 general criteria set forth in the LUC's rules set

1 forth the so-called guidelines. Now, nothing  
2 precluded the County from adding additional  
3 criteria, as it chose to do, which was for this  
4 essential character of the land and compliance with  
5 the general plan.

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

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

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

24 **MR. MATSUKAWA:** Yes.

25 **COMMISSIONER OHIGASHI:** And it's not the

1 five criteria -- out of the five criteria this? In  
2 other words, we're not limited to denial or on the  
3 five criteria.

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

7 **MR. MATSUKAWA:** I -- I understand. And I  
8 would say that to the extent that additional  
9 criteria falls under one of the existing Land Use  
10 Commission's guidelines, then it speaks for itself.

11 If it's something unique, stand-alone, and  
12 separate, I think the Land Use Commission is  
13 looking, in a sense, at the County's findings to  
14 determine whether those findings are supported by  
15 the record.

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

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

23 **MR. MATSUKAWA:** Yeah.

24 **COMMISSIONER OHIGASHI:** But I want to  
25 assure Mr. Hong that I understand his argument that

1 you have to look at all of the different criteria  
2 and judge and balance those criteria to make sure  
3 that -- that a decision is determined, and no one  
4 issue should derail the (inaudible).

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

8 And just as a passing comment, I drive a  
9 2006 Honda Civic, and my wife and I share a car.  
10 That's all.

11 **CHAIRMAN SCHEUER:** The Chair, who drives a  
12 2015 used Prius, wants to know if there's any other  
13 questions?

14 Seeing none.

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

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

21 Commissioner Ohigashi.

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

24 **CHAIRMAN SCHEUER:** Yes. I'm willing to  
25 entertain questions to the parties from the

1 Commissioners, but let me emphasize to anybody  
2 responding, your response needs to be narrowly  
3 tailored to the question asked.

4 Please proceed.

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

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

14 **MR. HONG:** That would -- as the Supreme  
15 Court said, that would attract 1.5 million people to  
16 that park annually. In this case, we have less than  
17 300 students. We have -- even with all the faculty,  
18 actually it's less than 400 people --

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

24 **MR. HONG:** That's correct.

25 **COMMISSINER OHIGASHI:** That's why --



1 that's why differentiate -- you differentiate today?

2 **MR. HONG:** That's correct, yes.

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

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

7 **COMMISSIONER OHIGASHI:** What do --

8 **MR. HONG:** -- to --

9 **COMMISSIONER OHIGASHI:** What's your --  
10 what is -- you tell me.

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

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

20 Because if you take your analysis --

21 **COMMISSIONER OHIGASHI:** For example -- let  
22 me give you an example. If it was 40 acres and  
23 there was a small amount of industrial use being  
24 proposed on this, for example, like a garbage to  
25 energy plant or a recovery of -- recycling kind of

1 plant at a landfill that has a special use permit,  
2 would that change the nature, and would an SUP be  
3 required?

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

9 **CHAIRMAN SCHEUER:** So --

10 **MR. HONG:** -- what --

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

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

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

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

19 **COMMISSIONER OHIGASHI:** -- in terms of  
20 (inaudible).

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

24 I have always said that with respect to  
25 the Neighborhood Board case, you've got to look at

1 the proposed use. And what you're telling -- you  
2 just told me earlier that the proposed -- the facts  
3 don't really matter.

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

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

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

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

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

19 **MR. HONG:** I --

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

22 **MR. HONG:** All I --

23 **COMMISSIONER OHIGASHI:** Oh --

24 **MR. HONG:** I would be happy to answer the  
25 question if you'd give me a reasonable question --

1           **CHAIRMAN SCHEUER:** Hold it. What just --  
2 just purely as an administrative matter, when two  
3 parties are talking at the same time, generating a  
4 transcript from this hearing is very, very  
5 difficult, so.

6           Commissioner Ohigashi, then Mr. Hong.

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

9           **CHAIRMAN SCHEUER:** Thank you.

10          Mr. Hong.

11          **MR. HONG:** Thank you.

12          **CHAIRMAN SCHEUER:** Nothing further?

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

15          **CHAIRMAN SCHEUER:** Okay.

16          Commissioners, we are in deliberations.

17          **COMMISSIONER WONG:** Chair, I have a  
18 question.

19          **CHAIRMAN SCHEUER:** Commissioner Wong.

20          **COMMISSIONER WONG:** So okay. Right now  
21 we're -- it seems like no one want to do anything.

22          What happens -- let's say we have a -- we  
23 lose quorum and nothing happens at that point in  
24 time, what is the --

25          **CHAIRMAN SCHEUER:** If we do not render a

1 decision within 45 days, the permit is automatically  
2 approved.

3 **COMMISSIONER WONG:** Okay. Thank you,  
4 Chair.

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

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

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

13 Thank you, Commissioner Giovanni.

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

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

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

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

23 So I will start, Commissioners, even  
24 though I -- I love to defer to the collective wisdom  
25 of the Commission. On one narrow issue, and this is

1 the issue that I raised in questions, and a written  
2 response was given to us by Mr. Hong.

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

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

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

21 I have not found in the record a clear and  
22 unambiguous statement from the Board of Land and  
23 Natural Resources or a designated representative  
24 that really specifies an acknowledgement that the  
25 owners and their successors shall be bound by the

1 special permit and its conditions.

2 Commissioner Ohigashi.

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

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

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

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

25 My dilemma is this. I think that a

1 special use permit is a -- is just what it's called.  
2 It's for special purpose. And the legislature, I  
3 believe, as well, intended it to be used for  
4 purposes that -- that are not basis towards  
5 neighboring properties is -- adversely affects  
6 surrounding property.

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

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

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

25 And I'm not sure that I'm -- I would like



1 to hear more argument because -- and the only way I  
2 can foresee us making -- getting more argument on  
3 that condition now that -- because, admittedly, like  
4 Mr. Hong says, this is not a 103-acre high --

5 **CHAIRMAN SCHEUER:** You need --

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

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

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

21 **CHAIRMAN SCHEUER:** Thank you for your  
22 reflections, Commissioner Ohigashi.

23 Commissioner Chang followed by  
24 Commissioner Aczon.

25 **COMMISSIONER CHANG:** Thank you, Mr. Chair.

1 I -- I -- my dilemma is I applaud this  
2 project. I think it is innovative. I like the  
3 concept of integrating forest management working  
4 with our young people.

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

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

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

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

25 And the Planning Commission chooses not to

1 reopen the record. So the Planning Commission makes  
2 a decision in 2020, based upon the same record. No  
3 additional information. No additional -- you know,  
4 nothing new on the record, but they make a totally  
5 different finding and conclusion.

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

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

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

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

1 Native Hawaiians.

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

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

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

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

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

25 **CHAIRMAN SCHEUER:** Commissioner Aczon?

1           **COMMISSIONER CHANG:** Nope? You're not  
2 going to make a motion?

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

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

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

10          **CHAIRMAN SCHEUER:** Commissioner Aczon.

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

14          **CHAIRMAN SCHEUER:** Okay.

15          Commissioner Chang.

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

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

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

25          **CHAIRMAN SCHEUER:** Okay. A motion has

1 been made to deny by Commissioner Chang, seconded by  
2 Commissioner Aczon.

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

5 **COMMISSIONER CHANG:** All right. Thank  
6 you, Mr. Chair.

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

18 The applicant concluded that there is not  
19 evidence of traditional cultural properties or  
20 practices within the proposed area, based upon a  
21 2010 EA, environmental assessment; however, the  
22 Planning Commission's findings of facts, conclusions  
23 in law, and proposed recommendations lacks any  
24 factual findings sufficient to support the  
25 conclusion as required by the court in Ka Pa'akai

1 versus Land Use Commission.

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

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

9 **CHAIRMAN SCHEUER:** Commissioner Aczon.

10 **COMMISSIONER ACZON:** Thank you, Mr. Chair.  
11 Same as Commissioner Chang, I'm really, you know,  
12 torn on this issue.

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

19 And the way I feel -- same as Commissioner  
20 Chang, the way I feel is that the County just pawned  
21 the case to us and said, "hey, it's all yours."  
22 They picked up the -- the Planning Commission. We  
23 want Planning Commission to change their decision  
24 based on what the ICA decisions were without any  
25 justifications.

1 So there are issues that came out during  
2 these -- these discussions that could have been  
3 answered if the County decided -- meanwhile,  
4 Planning Commission decided to -- to open the  
5 records.

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

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

18 With that, I will support this motion.

19 **CHAIRMAN SCHEUER:** Thank you, Commissioner  
20 Aczon.

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

24 Commissioner Giovanni.

25 **COMMISSIONER GIOVANNI:** Yeah. I have a



1 question. Maybe it's a question to Commissioner  
2 Chang or somebody could explain it to me.

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

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

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

24 **CHAIRMAN SCHEUER:** I believe that is the  
25 case.

1           **COMMISSIONER GIOVANNI:** -- or it could  
2 pursue a special use permit under a reopening with -  
3 -

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

8           **COMMISSIONER GIOVANNI:** Sure.

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

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

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

1 and function.

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

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

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

16 Thank you.

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

20 Commissioner Chang?

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

24 **CHAIRMAN SCHEUER:** Yeah.

25 Commissioner Ohigashi.

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

8           What I would like to request, and I know  
9 it's pretty selfish of me, but that we would be able  
10 to recess this for some of us to gather our thoughts  
11 and take a look at what's before us and come back at  
12 1 o'clock.

13           **CHAIRMAN SCHEUER:** Commissioner Chang.

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

21           And I recognize that this is -- the school  
22 has spent much more money than they had ever thought  
23 they would have to. But you know, having a more --  
24 having -- doing -- doing outreach, having an updated  
25 TIL -- TIR, working with the County on perhaps a

1 different -- different, you know, traffic route,  
2 looking at this in a much -- in the lens of now 14  
3 years or 11, 12, 13 years after the original  
4 application.

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

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

21           That's part of my thought process and why  
22 I thought the denial would be more appropriate  
23 rather than a remand, because I have -- I am not --  
24 I wish I was more confident that -- that -- that on  
25 remand, there would be a different -- or there would

1 be a -- an outcome that may be different, but it may  
2 be better if they just start all over.

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

5 **CHAIRMAN SCHEUER:** Thank you.  
6 Commissioner Aczon.

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

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

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

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

24 **CHAIRMAN SCHEUER:** Thank you,  
25 Commissioner.

1 Commissioner Ohigashi.

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

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

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

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

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

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

25 **COMMISSIONER ACZON:** Mr. Chair, I just

1 want to let you know that I can stay for a few more  
2 minutes.

3 **CHAIRMAN SCHEUER:** Okay. Thank you.

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

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

8 **CHAIRMAN SCHEUER:** Okay. So it is 10:59.  
9 Commissioner Wong?

10 **COMMISSIONER WONG:** No further questions.

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

13 **COMMISSIONER GIOVANNI:** Yes.

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

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

24 I want to be very clear that my vote is  
25 based on those things and not on whether the school



1 is a good thing or not, because I personally feel --  
2 despite feeling somewhat attacked by certain  
3 counsel, this is a very worthwhile project, which I  
4 would like to succeed, and it's bothersome -- deeply  
5 bothersome to me to -- in that sense, to vote to  
6 deny, but I believe that's what the record requires  
7 us to do.

8 Mr. Orodenger, please poll the Commission.

9 **MR. ORODENKER:** Thank you, Mr. Chair.

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

14 Commissioner Chang?

15 **COMMISSIONER CHANG:** Aye.

16 **MR. ORODENKER:** Commissioner Aczon?

17 **COMMISSIONER ACZON:** Aye.

18 **MR. ORODENKER:** Commissioner Giovanni?

19 **COMMISSIONER GIOVANNI:** Aye.

20 **MR. ORODENKER:** Commissioner Ohigashi?

21 **COMMISSIONER OHIGASHI:** Aye.

22 **MR. ORODENKER:** Commissioner Wong?

23 **COMMISSIONER WONG:** Aye.

24 **MR. ORODENKER:** Chair Scheuer?

25 **CHAIRMAN SCHEUER:** Aye.

1           **MR. ORODENKER:** Thank you, Mr. Chair. The  
2 motion passes with six affirmative votes.

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

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

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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.



---

Jodi Dean