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BEFORE THE WINDWARD PLANNING COMMISSION
COUNTY OF HAWAII
STATE OF HAWAII

In Re: Application of Connections)	SPP 12-000138
New Century Public Charter School)	(on remand after appeal)
for a Special Permit on land in the)	
State Land Use Agriculture District)	INTERVENOR'S BRIEF
)	ON SCOPE OF HEARING
Ponahawai, Kukuau 2d, South)	ON REMAND; CERTIFICATE
Hilo, County and State of Hawaii)	OF SERVICE
(TMK 2-5-006:141))	
_____)	

INTERVENOR'S BRIEF
ON SCOPE OF FURTHER HEARING ON REMAND

The Windward Planning Commission (the "Commission") requested the parties to respond to the following question:

- "Whether the Commission should make a [new or amended] decision on the record as presented or open the record and consider new evidence?"

As a preface, Intervenor directs the Commission to the Intermediate Court of Appeals' decision that was filed on January 31, 2020 as to points that require more clarity on the part of the Commission's final decision and order.

A. POINTS FOR CONSIDERATION ON REMAND

First, the Court resolved “technical” arguments that had been raised on appeal regarding (a) the decision criteria for a Special Permit,¹ (b) the binding effect and interpretation of the County of Hawaii zoning ordinance as to the kinds of activity that are permitted in the State Land Use Agriculture District without a Special Permit ² and (c) the implementation of the County of Hawaii General Plan.³

Second, the Court then focused on the Commission’s findings and conclusions that were assigned as error on appeal and determined whether the evidence in the record supports or does not support the Commission’s decision and order. These points are:

1. The school’s adverse effect on surrounding properties (Point 1, Pages 18 to 23);
2. The burden placed on public agencies to support the school and affected communities (Point 2, Pages 23 to 27);
3. The unusual conditions, trends and needs that have arisen since the land was assigned to the State Land Use Agriculture District,

¹ See Decision, Pages 13 to 18 regarding Section 205-6, HRS, the Land Commission’s rule 15-15-95(b) and the County of Hawaii’s Rules of Practice Rule 6-3(b)(5).

² See Decision, Pages 13 to 14 regarding the standard to use in determining if a particular use is “permissible” in the State Land Use Agriculture District.

³ See Decision, Pages 32 to 39 regarding the Commission’s duty, authority and power to implement the County of Hawaii General Plan.

specifically the “restrictive” interpretation and application of this provision (Point 3, Pages 27 to 29);

4. The “conundrum” regarding the suitability of the land for agriculture use in context of the applicant’s proposal to incorporate agriculture activity in its proposed project (Point 4, Pages 29 to 32);

5. The uses contemplated by the General Plan that are allowed in low density urban areas as “ancillary” activity (Point 5, Pages 32 to 42);

6. The need for more specificity in the Commission’s findings and conclusions (Page 43).

B. CASE POSTURE ON REMAND

The Commission may address the foregoing points, within the limits established by the Court’s ruling, and the Commission also has the discretion to address points that the Court did not address, based on the existing record and without having to reopen the evidentiary portion of the hearing to receive additional evidence. See discussion in Part D, below.

The Commission’s authority on remand is similar to that of a circuit court after its decision is vacated on appeal and the case is sent back to the circuit court on remand for further action. Hawaii precedent is that the posture of the case on remand is restored to its original status as it was in immediately before the decision-maker rendered its decision the first time. See *Wall v. Focke*, 22 Haw. 2231, 223 (1914); *Bailey Bakery, Ltd. v. Borthwick*, 38 Haw. 83 (1948) (per curiam). In other words, the “clock is turned back” to the

date when the Commission closed its hearing, considered arguments presented and entered into executive session to begin its deliberations.

B. ADDITIONAL EVIDENCE REQUIRED, IF ANY

1. The Commission can amend its findings and conclusions based on the existing record without opening its proceeding to take additional evidence. If, for example, the Commission needs information that pertains to Point 2 (the 60 gallons per day standard), the Commission can “comb” its record, including the expert’s report on water consumption, to identify the source of that standard and/or can consider published agency materials that pertain to Point 2.

Point 2: Page 25. Use of the *60 gallons per day standard*, because it is not clear “where that figure came from.” However, the Court added that the “Commission may nonetheless reconsider any weight it assigned to” Finding No. 49.

2. The Commission has the discretion to amend its other findings and/or conclusions based on the existing record as well and without taking further evidence that pertain to:

Point 3: Pages 28 to 29. Support for a “restrictive” interpretation of the change in “conditions, trends and/or needs” decision criterion;

Point 4: Pages 31 to 32. Assessment of the applicant’s proposal to employ agricultural activity on the land as part of the school’s operations and the effect on the “suitability” for agriculture use decision criterion;

Point 5: Page 39. Explanation of why a school is not consistent with activity on land in a low density urban area (as an “ancillary community and public use” or “neighborhood ... commercial use”) under the General Plan decision criterion;

Point 6: Page 43. Refinement of the Commission’s decision by articulating the specific decision criterion relied upon (or multiple

decision criteria relied upon) as opposed to reliance solely on the “totality of the evidence.”

3. To the extent that the Commission might need additional information on legislative history or agency practice (a) as to Point 3 to support its interpretation of the change in “conditions, trends and/or needs” decision criterion or (b) as to Point 5 to support its interpretation of the General Plan decision criterion (allowable “ancillary” activity in low density urban areas), the Commission can obtain that information from public sources (if not already in the existing record) without taking further evidence, unless such information can be obtained only by soliciting testimony from appropriate agency officials.

D. UNADDRESSED SUBJECTS

As is stated above, the Court limited its ruling to the issues set forth in its opinion. As such, on remand and pursuant to *Wall v. Focke, supra*, and *Bailey Bakery, Ltd. v. Borthwick, supra*, the Commission may address points that the Court did not address without having to reopen the evidentiary portion of the hearing to receive additional evidence.⁴ For example, in his Answering Brief, Intervenor directed the Court to the Public Natural Resource Trust, which is based on the State Constitution, Article XI, Section 1, but the Court did not address this argument. Arguably, the Court assumed that the

⁴ No doubt, some might argue that the Commission should exercise caution if the Commission were to entertain changing a finding or conclusion that the Court did not address on appeal. One might argue that it might be error to altogether change a prior finding or conclusion that had been made by earlier commissioners without good cause. Of course, the Commission should not be deterred from making new and additional findings or conclusions if it can set forth justifiable reasons for the same.

Commission would, on remand, address this argument and supplement its findings and conclusions accordingly, without taking further evidence thereon.

Also, in the original hearing, Intervenor had asked the Commission to consider the impacts that the applicant's project would have on Kaumana Cave and the protective measures that must be employed to ensure that Kaumana Cave, which is a "surrounding property," is not adversely affected by the applicant's project (which is designed to take place in stages over a period of years). Pursuant to this request, the Commission had to determine whether mitigation measures do in fact exist and if so, can and will provide the requisite degree of protection (if at all) for Kaumana Cave over the entire life of the applicant's project. The Commission's Finding No. 31 (Page 7) and Finding Nos. 46 and 47 (Page 10) do not specifically address these impacts except to say that if proper mitigation measures are employed, those impacts will probably be minimized (but without more explanation).⁵

CONCLUSION

The only evidentiary matter that the Commission might want to address is the 60 gallons per day standard (Point 2). However, that standard may already be imbedded in expert's report on water consumption and/or in

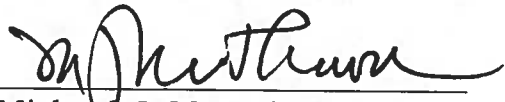
⁵ Intervenor did not file a cross-appeal before the circuit court or the Intermediate Court of Appeals on this point in light of the Commission's original decision to deny the applicant's request for a Special Permit. On remand, this issue remains open for discussion since the record contains evidence on this point. Nothing precludes Intervenor from seeking relief on this point on remand.

the Department of Water Supply's published standards and if so, there would be no need to take evidence on the same by testimony.⁶

The Commission can address the other points without taking additional evidence. And, of course, the Commission has the discretion to address issues that the Court did not address if the Commission believes that is necessary. *Wall v. Focke, supra, and Bailey Bakery, Ltd. v. Borthwick, supra.*

Dated at Kailua-Kona, Hawaii: July 22, 2021.

JEFFREY GOMES, Intervenor

By 
Michael J. Matsukawa
His Attorney

⁶ The Intermediate Court of Appeals stated that it could not find that standard in the record. However, the Court, prior to entering its decision on appeal, did not ask the parties for supplemental briefing on this subject.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the attached document on the following individuals by mailing said copy to them at their addresses noted below, postage prepaid, at the U.S. Post Office at Kailua-Kona, Hawaii on July __, 2021 and, further, emailed said copy to their respective email addresses noted:

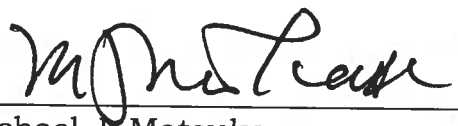
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Dated at Kailua-Kona, HI: July 27, 2021.



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