



TED H.S. HONG
ATTORNEY AT LAW, LLC

EMPLOYMENT,
WORKPLACE LAW & LITIGATION

P.O. Box 4217, HILO, HI 96720

TELEPHONE: (808) 933-1919
FAX: (808) 935-8281

July 28, 2021

Hon. John R. Replogle
Chair
Windward Planning Commission
Aupuni Center
101 Pauahi Street, Suite 3
Hilo, Hawaii 96720

JUL 28 2021
RECEIVED
COUNTY OF HAWAII
PLANNING
DEPT.

REC'D HAND DELIVERED

RE: Remand of SPP 12-000138 to the Windward Planning Commission
Applicant: Connections New Century Public Charter School/Community Based Education Support Services (CBESS)
Tax Map Key: 2-5-006:141

Dear Chairperson Replogle and Windward Planning Commission Members:

The purpose of this letter is to respond to Mr. Replogle's email letter dated July 6, 2021. I am submitting this letter-brief response on behalf of CBESS. My understanding is that legal counsel for Connections New Century Public Charter School, will join in my response.

I. OBJECTION

My client and I appreciate the opportunity of addressing this issue, however, and with all due respect, the Commission and the Planning Department have their own, separate, legal counsel from the Office of the Corporation Counsel. I am sure that in the Executive Session held a few weeks ago addressed the issue of how the Commission should proceed.

My objection is giving legal advice to the Commission. I am having to invoice my client for the time it takes to submit this letter-brief on an issue that the Commission thoroughly discussed and decided with its legal counsel.

From my perspective, it appears that the Commission is asking CBESS what it should do to foreclose CBESS from raising other grounds for appeal from what could be the next denial of my client's permit application.

I object to this process and certainly do not feel I should be placed in the position of contradicting my colleagues at the Corporation Counsel, or prejudicing my client's appeal.

P.O. Box 4217, HILO, HI 96720

TELEPHONE: (808) 933-1919
FAX: (808) 935-8281
WEB: TedHongLaw.com



II. EXECUTIVE SUMMARY

The Windward Planning Commission is **NOT** required to hold an evidentiary hearing on remand. There are three (3) factors identified by the Intermediate Court of Appeals which were vacated. From the perspective of CBESS, those three (3) issues should be considered as favorable to the applicant, Connections/CBESS. The Commission should NOT conduct an evidentiary hearing, including taking new and additional testimony and documents concerning the three (3) factors the Intermediate Court of Appeals ruled in my Client's favor.

III. LAW and ANALYSIS

A. What are the requirements of a judicial "Remand."

In May of 2021, the Hawaii State Supreme Court issued a decision concerning the scope of remanding proceedings to an administrative agency. *In re Matter of Hawai'i Electric Light Company, Inc.*, 149 Hawai'i 239, 487 P.3d 708 (2021). Originally, the administrative agency's, Public Utilities Commission ("PUC"), decision was vacated and remanded back to the PUC. *Id.*, 149 Hawai'i at 240, 487 P.3d at 709. The PUC read the Court's original decision to mean that the proceedings on remand would be a complete "do over." *Id.*, 149 Hawai'i at 240-241, 487 P.3d at 709-710.

The Hawaii State Supreme Court vacated and reversed the "do over." *Id.*, 149 Hawai'i at 242, 487 P.3d at 711. The decision is particularly noteworthy for its unusually direct and blunt language. It began by citing the general rule concerning "remanded" proceedings:

On remand, a trial court must closely adhere to the true intent and meaning of the appellate court's mandate. See *State v. Lincoln*, 72 Haw. 480, 485, 825 P.2d 64, 68 (1992) (quoting 5 Am.Jur.2d Appeal and Error § 991 (1962 & Supp.1991) (footnote omitted)). **Likewise, administrative agencies are bound by reviewing courts' remand orders.** See *Fed. Power Comm'n v. Pac. Power & Light Co.*, 307 U.S. 156, 160, 59 S.Ct. 766, 83 L.Ed. 1180 (1939). (Emphasis added)

Matter of Hawai'i Elec. Light Co., Inc., 149 Hawai'i 239, 241, 487 P.3d 708, 710, 2021 WL 2071970 (2021).



The State Supreme Court then identified what an agency must consider when a case or decision is remanded back:

The “true intent and meaning” of a reviewing court's mandate is not to be found in a solitary word or decontextualized phrase, but rather in the opinion, as a whole, read in conjunction with the judgment and interpreted in light of the case's procedural history and context. See *Frost v. Liberty Mut. Ins. Co.*, 813 S.W.2d 302, 305 (Mo. 1991)(“It is well settled that the mandate is not to be read and applied in a vacuum. The opinion is part of the mandate and must be used to interpret the mandate”) (cleaned up). (Emphasis added)

Matter of Hawai'i Elec. Light Co., Inc., 149 Hawai'i 239, 241, 487 P.3d 708, 710, 2021 WL 2071970 (2021).

The factors/issues the Intermediate Court of Appeals reversed and remanded in its decision, *Connections, et al., v. Windward Planning Commission, et al.*, 146 Hawai'i 155, 456 P.3d 1002, 2020 WL 508136 (2020), does not require the Windward Planning Commission to conduct an evidentiary hearing and allow the introduce additional testimony and documents.

B. What issues did the ICA rule in favor of the Applicant?

In *Connections New Century Pub. Charter Sch. v. Windward Planning Comm'n*, 146 Hawai'i 155, 156, 456 P.3d 1002, 1003, 2020 WL 508136 (Ct. App. 2020), the Intermediate Court of Appeals concluded:

For the foregoing reasons, **the Circuit Court's July 14, 2015 Order Affirming and January 13, 2017 Final Judgment and the Planning Commission's May 12, 2014 Decision and Order are vacated**, and this case is remanded to the Planning Commission for further proceedings consistent with this Memorandum Opinion. (Emphasis added)

Connections New Century Pub. Charter Sch. v. Windward Planning Comm'n, 146 Hawai'i 155, 156, 456 P.3d 1002, 1003, 2020 WL 508136, at *19 (Ct. App. 2020).

The appeals court vacated the Third Circuit Court's decision. “Redo-ing”



or conducting an evidentiary hearing would be the same mistake the PUC committed in *Matter of Hawai'i Elec. Light Co., Inc.*, 149 Hawai'i 239, 487 P.3d 708, 2021 WL 2071970 (2021). The Intermediate Court of Appeals identified the three issues that the Applicant successfully appealed:

(1) CONNECTIONS/CBESS can meet the water commitments (Findings of Fact #21, 48 and 50).

The Intermediate Court of Appeals held:

There is nothing in the record to suggest that Connections would not or could not be held to its commitments. FOFs 21, 48, and 50 are clearly erroneous and not supported by the evidence. FOF 49 is not clearly erroneous, as there was no definitive evidence in the record that Connections would be able to develop potable water sources. However, the Planning Commission may reconsider any weight it assigned to this finding in light of the Planning Director's testimony regarding the burden placed on applicants for special permits at this stage and Connection's agreement to limit the number of persons on the campus to the amount of water it can obtain. **COL 51 is also vacated in light of the above.** (Footnote omitted) (Emphases added)

Connections New Century Pub. Charter Sch. v. Windward Planning Comm'n, 146 Hawai'i 155, 156, 456 P.3d 1002, 1003, 2020 WL 508136, at *12 (Ct. App. 2020).

On remand, the Commission is required to find in the Applicant's favor including: (a) The available County water supply is sufficient to support the first phase of the proposed development (FOF #21; *Connections, supra*, at *11); (b) the available water, based on the estimates provided by Connections/CBESS would NOT unreasonably burden the Department of Water Supply (FOF #48; *Connections, supra*, at *11); and (c) the potable water limitations and mitigation proposals are sufficient (FOF #50; *Connections, supra*, at *11).

The Intermediate Court of Appeals decision specifically vacated and reversed FOF 63, which was the Commission's unlawful finding that the School could not adhere to the County imposed water limitations. The Commission is NOT required to take new evidence on this issue.



2. CONNECTIONS/CBESS' proposed use is suited for agricultural purposes (FOF 55).

The Intermediate Court of Appeal also held:

We conclude that it would be an absurd result to read the “unsuited for agricultural use” consideration so strictly and narrowly, particularly under circumstances such as those presented here, to deny a special permit due to an applicant's attempt to incorporate an agricultural component into its proposed use. See, e.g., *Morgan v. Planning Dep't, Cty. of Kaua'i*, 104 Hawai'i 173, 181, 86 P.3d 982, 990 (2004) (planning commission is required to give effect to the policies and objectives of land use statutes and not to interpret them in a manner that would lead to an absurd result).

Accordingly, in view of the reliable, probative, and substantial evidence on the whole record, and in light of the aforementioned considerations, **we conclude that FOF 55 must be vacated in order for the Planning Commission to assess the evidence in this light.** (Emphases added)

Connections New Century Pub. Charter Sch. v. Windward Planning Comm'n, 146 Hawai'i 155, 156, 456 P.3d 1002, 1003, 2020 WL 508136, at *14–15 (Ct. App. 2020).

The plain and unambiguous language of the ICA's decision requires the Commission to find that Connections/CBESS' proposal to include an agricultural component and conservation practices as part of its curriculum would be well “suited for agricultural use.”

The Intermediate Court of Appeals decision specifically rejected the Commission's FOF 55, which was the Commission's unlawful finding that the School's agriculture focus made it “unsuitable for agricultural use.” The Commission is NOT required to take new evidence on this issue.

3. CONNECTIONS/CBESS' school is a permissible use in a low density urban area, consistent with the County's General Plan. (FOF #59 and 62; COL #5)

The Intermediate Court of Appeals clearly rebuked the Commission's



original decision:

However, **a plain reading of the General Plan does not forbid or even discourage the building of school facilities in low density urban areas. There is no satisfactory explanation provided as to why building a school in a low density urban area is contrary to the General Plan. The general goals of the General Plan stated above do not support the proposition that community concern generally can serve as a veto over a special use permit. How much “community concern,” however calculated, is required before a special permit is found to be contrary to the general plan is unclear and is ripe for arbitrary and capricious abuse.** Given the sparsity of factual findings or explanation in the Planning Commission's decision, this Court has no way to meaningfully evaluate the Planning Commission's conclusion regarding the permit being contrary to the general plan. See *Kauai Springs II*, 133 Hawai‘i at 164, 324 P.3d at 974 (an agency's findings should allow the reviewing court to track the steps by which the agency reached its decision). **Without additional findings by the Planning Commission, the Planning Commission's FOFs 59 and 62, finding that the Development would be contrary to the General Plan, are arbitrary and capricious. COL 5, stating that the Development is not consistent with the County General Plan, must also be vacated.** (Emphases added)

Connections New Century Pub. Charter Sch. v. Windward Planning Comm'n, 146 Hawai‘i 155, 156, 456 P.3d 1002, 1003, 2020 WL 508136, at *18 (Ct. App. 2020).

Connections/CBESS plans can be built in a low density urban area, under the County's General Plan. The Court clearly rejected NIMBY type of objections or testimony and ruled it was impermissible. Clearly, the skewing or slanting of factors in favor of a few influential friends and neighbors, was unequivocally rejected on appeal. No further fact finding is needed, as a matter of law.

C. “Vacate” means a reversal.

The Intermediate Court of Appeals opinion, which “vacated” the Planning



Commission's unlawful finding, is not only a rejection of the Planning Commission's Findings of Fact and Conclusions of Law, but the effect is that the Planning Commission is directed to rule in the favor of the Applicant. Recently, in *Local 402, Am. Pharamond Conille v. Council 93, Am. Fed'n of State, County, & Mun. Employees*, No. 17-CV-11495, 2021 WL 2383021 (D. Mass. June 10, 2021), the court noted:

Turning to Plaintiffs' argument with respect to the First Circuit's order to **"vacate" rather than "reverse" Count III, such contention does not warrant a different outcome.** The First Circuit vacated the district court's dismissal of Count III because the internal union appeal had not yet concluded. *Conille*, 935 F.3d at 9. **"Although the word reverse shares vacate's meanings of to annul and to set aside, it has an additional, more extensive definition: '[t]o reverse a judgment means to overthrow it by contrary decision, make it void, undo or annul it for error.'**" *Kelso v. U.S. Dep't of State*, 13 F. Supp. 2d 12, 18 (D.D.C. 1998) (internal quotation marks and citations omitted) (emphasis removed). The Court does not consider the Circuit's decision to reverse and remand Count II and, by contrast, its decision to vacate and order dismissal without prejudice Count III to be an unintentional differentiation. (Emphases added)

Local 402, Am. Pharamond Conille v. Council 93, Am. Fed'n of State, County, & Mun. Employees, No. 17-CV-11495, 2021 WL 2383021, at *4 (D. Mass. June 10, 2021).

Similarly, in *In re IBM Credit Corp.*, 222 N.C.App. 418, 731 S.E.2d 444 (2012), the appeals court also addressed what "vacate" and "reverse" in appeal means:

In *IBM II*, as discussed above, we again remanded the case to the Tax Commission for reconsideration. The final mandate is stated simply as "Reversed and remanded." See *IBM II*, 201 N.C.App. at 354, 689 S.E.2d at 494. **The Tax Commission may have construed the fact that *IBM I* used the term "vacate" and that *IBM II* used the word "reverse" as creating some sort of meaningful difference in the portions of its final decision approved or disapproved by this Court. But a full reading of *IBM II***



reveals that the entire second final decision by the Tax Commission was reversed. *IBM II* did not approve some portions of the second final decision and disapprove other portions. As a practical matter, the terms “vacate” and “reverse” are synonymous as used in most cases. The term “reverse” is defined as “[t]o overthrow, vacate, set aside, make void, annul, repeal, or revoke; as, to reverse a judgment, sentence, or decree, of a lower court by an appellate court, or to change to the contrary or to a former condition.” Black's Law Dictionary 1319 (6th ed.1990) (emphasis added); See *D & W, Inc. v. *427 City of Charlotte*, 268 N.C. 720, 722, 152 S.E.2d 199, 202 (1966) (“To reverse an injunction is to vacate it.”)

In re IBM Credit Corp., 222 N.C.App. 418, 426–27, 731 S.E.2d 444, 448–49 (2012).

In the present case, as it relates to the three (3) issues that the Intermediate Court of Appeals “vacated” given the plain language of the appeals court’s decision, there can be no doubt that the Commission erred and should have ruled in favor of the Applicant, CONNECTIONS/CBESS.

IV. CONCLUSION

The instructions of the Intermediate Court of Appeal, in *Connections New Century Pub. Charter Sch. v. Windward Planning Comm’n*, 146 Hawai’i 155, 456 P.3d 1002, 2020 WL 508136 (Ct. App. 2020), were clear. The Commission should NOT hold an evidentiary hearing to accept additional testimony and documents. The Commission is required to make a factual and legal determination that the proposal brought by Connections/CBESS fulfills the requirements set out in Sec. 205-6, Hawaii Revised Statutes and Rule 6 of the Windward Planning Commission.

Thank you for your kind attention to this matter.

Respectfully,

Ted H. S. Hong

cc: CBESS
Carter Siu, Esq.
Michael Matsukawa, Esq.
Jean K. Campell, Esq.