

County of Hawai'i Planning Commission
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BEFORE THE COUNTY OF HAWAI'I
PLANNING COMMISSION

In the Matter of

CONNECTIONS NEW CENTURY PUBLIC
CHARTER SCHOOL AND COMMUNITY
BASED EDUCATION SUPPORT
SERVICES

Application for Special Permit Application
No. 12-000138

TMK: (3) 2-5-006-141; Kaūmana, South
Hilo, Hawai'i

SPP No. 12-000138

COUNTY OF HAWAI'I WINDWARD
PLANNING COMMISSION'S
FINDINGS OF FACT, CONCLUSIONS OF
LAW AND DECISION AND ORDER;
CERTIFICATE OF SERVICE

Argument and Decision:

Date: 5/1/14

Location: Aupuni Center, Hilo, Hawai'i

COUNTY OF HAWAI'I WINDWARD PLANNING COMMISSION'S
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION AND ORDER

The County of Hawai'i, Planning Commission submits its Findings of Fact, Conclusions of Law and Decision and Order pursuant to the request of the Windward Planning Commission of the County of Hawai'i at its May 1, 2014, meeting in Hilo, Hawai'i. Present before the Commission were Ted H. S. Hong, counsel for Applicant Community Based Education Support Services; Carter K. Siu, Deputy Attorney General, for Applicant Connections New Century Public Charter School (hereinafter collectively referred to herein as "Connections"); Amy G. Self, Deputy Corporation Counsel, for County of Hawai'i Planning Director (herein as "Director"); Jeffery K. Gomes (herein as "Gomes"), Intervenor, Pro Se; and Sandra Pechter Song, the Hearing Officer (herein as "Hearing Officer"). The contested case hearings by the

Hearing Officer were held on October 21, and 22, 2013, November 12, 2013, January 8 and 22, 2014.

FINDINGS OF FACT

I. Procedural Background

1. This matter involves an application filed by Connections on July 25, 2012, for a special permit, pursuant to Section 205-6, Hawai‘i Revised Statutes (“HRS”) and Rule 6 of the County of Hawai‘i Planning Commission Rules of Practice and Procedure (hereinafter “Commission Rules”) to allow the development of a charter school campus with dorm facilities and related improvements for students in kindergarten through twelfth grade (hereinafter, the “Development”), on 70.15 acres of land situated within the State Land Use Agricultural District, at Ponahawai, Kūkūau 2nd, South Hilo, Hawai‘i, commonly referred to as the Kaūmana area of Hilo, designated by State of Hawai‘i Tax Map Key (“TMK”) (3) 2-5-006:141 (hereinafter, the “Property”).

2. Connections has leased the Property on which the Development is proposed from the State of Hawai‘i under General Lease No. S-6029.

3. Notices of the Windward Planning Commission of the County of Hawai‘i (hereinafter “Commission”) hearings on the proposed Development were provided to property owners surrounding the proposed Development.

4. The Commission held public hearings on the Connections application on November 9, 2012 [sic], December 6, 2012 and January 10, 2013. At the hearing held on January 10, 2013, the Commission moved [sic] to deny the Connections application and instructed the Commission staff to prepare proposed findings of fact, conclusions of law and order, which would be considered for adoption by the Commission at its meeting of March 7, 2013.

5. At the Commission meeting of March 7, 2013, the Commission suspended the preparation of the findings of fact, conclusions of law and order, and granted a request by Connections for a contested case on the subject application. Gomes submitted a petition to intervene in this matter on March 7, 2013, and the Commission admitted him as a party to the proceeding.

6. A petition to intervene in this proceeding was filed by Terrence Yoshioka on November 4, 2013, after the contested case hearing in this proceeding had already commenced. On November 8, 2013, the Hearing Officer denied this petition in accordance with Rule 4-6 of the Commission Rules, on the ground that the subject petition was untimely filed.

7. The Director is a party to this proceeding pursuant to Rule 4-7(a) of the Commission Rules. The Director initially recommended approval of the Connections application, subject to specific conditions, but took no position on the application at the contested case hearing.

8. The subject application involves a parcel of land greater than fifteen acres in area. Therefore, any permit approved by the Commission is subject to final approval by the State Land Use Commission.

II. Proposed Development

A. General Description

9. The Connections application proposes the development of a K to 12 charter school campus with dorm facilities, and an intergenerational program that would provide childcare and elder care at a single facility on the Development, together with related uses on the 70-acre parcel of land. As the site is bisected by Edita Street, the lower portion of the Development would consist of the major school or campus facilities, while the upper portion would be used for outdoor type of educational programs, including a forestry preservation program.

10. The lower campus would support a projected 167 elementary students, 107 intermediate students, 107 high school students (381 K through 12 students) and 25 intergenerational clients. Also included would be a dormitory capable of supporting 30 students, a gymnasium, kitchen/dining facility, library/resource center, caretaker's residence and other related facilities. Two parking lots capable of supporting 140 parking stalls would be provided.

11. The Development would relocate and expand the existing charter school which is presently operating from two separate campuses. The elementary and middle schools are located in the Kress Building on Kamehameha Avenue, in downtown Hilo, and the high school is located in leased facilities at the Nani Mau Gardens, just outside of Hilo town.

12. Connections proposes having 50 full-time and 17 part-time employees at full build-out of the Development, which is the same number presently employed for this charter school.

13. Connections anticipates that 50% of the student population will come from the Hilo area and 50% from the Puna area miles away from the Development. The present student population for this charter school is composed primarily of students from these two geographic areas.

14. The Development does not propose to establish a charter school on the Property to serve the needs of the immediate vicinity in the Kaūmana area of Hilo, although some students from the area may attend this school.

15. The Development is intended to be constructed in 9 phases and completed within 16 to 25 years. The first phase would include the caretaker's residence, high school and administration building, with the projected opening to be within 2.5 to 3.5 years.

B. Public Utilities and Services

Access/Traffic

16. Access to the Development is proposed from Edita Street which connects with Kaūmana Drive, a major Hilo artery. Both roads are owned and maintained by the County of Hawai'i. Edita Street has a 60-foot right-of-way width, with a 48-foot wide pavement width fronting the Development. The paved area accommodates two 20-foot wide travel lanes, a 20-foot wide shoulder on the northeast side of the road, and an 8-foot wide shoulder on the southwest side. Edita Street is in good condition; however, the Hawai'i County Police Department recommended that the unpaved shoulder along Edita Street extending from Kaūmana Drive to the Development should be paved so that pedestrians could safely walk along the shoulder.

17. A Traffic Impact Analysis Report ("TIAR") dated June 28, 2010, was prepared in conjunction with the Connections application for the purpose of evaluating the Development's impact at the Development's entrance at Edita Street and at the Edita and Kaūmana Drive intersection. Based upon traffic counts taken on May 28, 2009, the TIAR found that the current level of service or LOS operates as LOS "A" or "B", meaning that the traffic service is uncongested. The TIAR also concluded that upon full build-out of the Development, the LOS will continue to operate at levels "A" or "B". Although the TIAR concludes that traffic will not be adversely affected by reason of the Development, the County Department of Public Works

recommended that a separate left turn lane onto the Development from Edita Street should be constructed to alleviate congestion, and that Connections should prepare a comprehensive traffic management plan for the Development.

18. Notwithstanding the findings of the TIAR and the recommendations of the Police Department and Department of Public Works, the area residents uniformly expressed concerns about the adverse traffic impact of the Development along Edita Street and Kaūmana Drive. Also, residents objected that the TIAR was four years old and the traffic counts contained in the TIAR were taken when certain schools were not in session.

Water

19. A maximum of 4,200 gallons per day (hereinafter "gpd") of water or seven (7) water units from an existing 8-inch waterline on Kaūmana Drive for the upper campus and from an existing 8-inch waterline on Edita Street for the lower campus, is available from the County of Hawai'i municipal water system to service the entire Development. Based on a 60 gpd per student standard, 4,200 gallons of County water could only support 70 students. At full build-out the entire Development would require 26,100 gpd.

20. Notwithstanding the unavailability of potable water from the County system for the Development, the existing 8-inch waterline within Edita Street is adequate to provide the required 2,000 gallons of water per minute for fire protection of the proposed Development.

21. The available water from the County of Hawai'i municipal water system is insufficient to support the first phase of the Development.

22. Connections has proposed using water efficient fixtures and supplementing the available County water with either a catchment system for non-potable water or developing an additional water source. However, Connections has not produced any evidence to demonstrate that it has or can develop sufficient water for the Development.

Wastewater

23. Connections is proposing to provide its own wastewater system meeting the requirements of the State of Hawai'i Department of Health (hereinafter "DOH"). Connections prefers installing an ecological/biological wastewater system called the "Living Machine."

However, should such a system prove to be unfeasible, Connections would install a traditional septic system with leach fields or any other system required by DOH.

Drainage

24. The Property is located within Zone "X" on the U.S. Department of Army Corps of Engineers Flood Insurance Rate Map, which means that the Property is outside the 500-year flood plain. Notwithstanding this flood designation, during severe storms water has been known to overtop the concrete channel and flow across Edita Street, resulting in flooding of adjacent properties. Connections proposes to prepare detailed engineering studies for the purpose of developing appropriate drainage plans to address the potential flood hazard posed by the present condition of Edita Street.

Utilities

25. Electrical and telephone services are available to the Property through overhead lines along Edita Street and Kaūmana Drive.

Public Safety

26. *The Hawai'i County Police Department expressed concern that the Development would increase noise, crime and traffic. However, there was no evidence that the Police Department lacks the ability to provide police protection for the Development.*

III. PHYSICAL CHARACTERISTICS OF THE PROPERTY AND SURROUNDING AREAS

27. The Property is presently vacant and undeveloped.

28. Surrounding lands to the south and west of the Property are zoned A-1a, with properties further south being zoned A-20a and A-10a [sic]. Lands to the north of the Property are zoned RS-10 and RS-15, with some lands zoned A-3a further north across Kaūmana Drive. One parcel is also zoned Open adjoining the northeast corner of the lower portion of the Property. Surrounding uses consist mainly of single-family residences with some vacant lands, and a small percentage of agricultural activity.

29. The soils on the Property are primarily composed of pāhoehoe lava flow. The State Department of Agriculture's map showing agricultural lands of importance to the State of Hawai'i shows the Property as being unclassified. Also, the Land Study Bureau classifies the

soil on the Property under its detailed land classification system, as “D” or “Poor” for agricultural activity.

30. No archaeological sites have been found on the Property, and it is surmised that any pre-existing sites would have been destroyed by the lava flow of 1880-1881. Although Connections submitted a request to the State Historic Preservation Division (“SHPD”), by letter dated August 17, 2010, requesting a “no-effect” determination from that agency, SHPD has not responded to the request.

31. A portion of the Kaūmana Cave is accessible from the upper portion of the Property. Connections is proposing to refrain from constructing any major school facilities on the upper portion of the Property and to maintain a minimum 100-foot buffer on either side of the cave alignment to alleviate concerns about impact from the Development on the cave ecosystem.

32. A botanical survey of the Property identified 11 native plant species, but none of those species are considered protected species.

33. Invertebrate, mammalian and field surveys were conducted on the Property. *No protected species were documented to be present on the Property.*

34. No traditional or customary native Hawaiian rights have been identified as being exercised on the Property. Likewise, there is no known public access to the mountains or the shoreline that runs through the Property.

IV. STATE AND COUNTY PLANS

35. The Property is within the State Land Use Agricultural District. A school is not a permitted use within the Agricultural district; however, a school may be permitted in this district if a special permit is obtained for such use pursuant to Section 205-6, HRS and Rule 6 of the Commission Rules.

36. The County of Hawai‘i General Plan Land Use Pattern Allocation Guide (“LUPAG”) Map designates the Property for low density urban uses. The LUPAG designation of Low Density urban use, allows for residential uses, with ancillary community and public uses, and neighborhood and convenience-type commercial uses. The Development is not proposed to be a community or public use for the Kaūmana area of Hilo.

37. The County of Hawai'i zoning for the Property is Agricultural with a minimum lot size of one acre (A-1a). Under Section 25-5-72(d) of the Hawai'i County Code, a school is permitted in an Agricultural zoned district provided that a special permit is issued for the use if the land is within the State Land Use Agricultural District.

38. The Development, which is proposed to be located on State land, is subject to the Hawai'i State Environmental Impact Statement law, Chapter 343, HRS. Connections prepared an environment assessment in accordance with Chapter 343, and declaration with a finding of no significant impact was issued for the Development by the State of Hawai'i Department of Land and Natural Resources.

39. The Property is not situated within the Special Management Area ("SMA"), since it is located over three miles from the nearest shoreline. Thus, the coastal environmental considerations relating to the SMA are not applicable to the subject Property.

V. SPECIAL PERMIT REQUIREMENTS

40. HRS Section 205-6, which governs special permits, provides in pertinent as follows:

“(a) The county planning commission may permit certain unusual and reasonable uses within agricultural . . . districts other than those for which the district is classified. Any person who desires to use the person's land within an agricultural . . . district other than for an agricultural . . . use. . . may petition the planning commission of the county within which the person's land is located for permission to use the person's land in the manner desired.

...

“(c) The county planning commission may, under such protective restrictions as may be necessary, permit the desired use, but only when the use would promote the effectiveness and objectives of this chapter...

...

“(d) Special permits for land the area of which is greater than fifteen acres. . . shall be subject to approval by the land use commission. The land use commission may impose additional restrictions as may be necessary or appropriate in granting the approval including the adherence to representations made by the applicant.”

41. Planning Commission Rule 6-7, provides, in pertinent part, that:

“[t]he Commission shall not approve a Special Permit unless it is found that the proposed use

“(a) Is an unusual and reasonable use of land situated within the Agricultural. . .District. . .; and

“(b) Would promote the effectiveness and objectives of Chapter 205, Hawaii Revised Statutes, as amended.

“The Commission shall also consider the criteria listed under Section 6.3(b)(5)(A) through (G).”

42. The seven criteria under Planning Commission Rule 6.3(b)(5)(A) through (G) are:

“(A) Such use shall not be contrary to the objectives sought to be accomplished by the Land Use Law and Regulations;

“(B) The desired use shall not adversely affect surrounding properties;

“(C) *Such use shall not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, and police and fire protection;*

“(D) Unusual conditions, trends and needs have arisen since the district boundaries and regulations were established;

“(E) The land upon which the proposed use is sought is unsuited for the uses permitted within the district;

“(F) The proposed use will not substantially alter or change the essential character of the land and the present use; and

“(G) The request will not be contrary to the General Plan and official Community Development Plan and other documents such as Design plans.”

43. Although Gomes asserts that the criteria for a use permit should be considered in the subject application, that criteria is not relevant to a special permit determination.

VI. APPLICATION OF SPECIAL PERMIT CRITERIA TO THE DEVELOPMENT

A. Land Use Law Objectives

44. The purpose of the State Land Use Law is to preserve the lands of high agricultural potential for agricultural use. The Property consists of land that is not considered highly valuable for agricultural uses. Thus, the use of the Property for a school is not contrary to the objectives sought to be accomplished by the State Land Use Law.

45. Likewise, the Development, which proposes the construction of a school for 381 students and related facilities is not akin to a major recreational theme park attracting 1.5 million people each year to the area. Therefore, such a development would not frustrate the objectives and effectiveness of the Hawai'i's land use scheme and would not require a State land use boundary amendment in lieu of a special permit. *Neighborhood Board No. 24 vs. State Land Use Commission*, 64 Haw. 265, 272, 639, P.2d 1097, 1103 (1982).

B. Affect on Surrounding Properties

46. Based upon the testimony from surrounding and neighboring property owners, the *Development will have an adverse effect on surrounding properties by creating noise, traffic, and impacting the quality of life of the adjoining residents.*

47. Measures proposed by Connections, regarding the establishment of building setbacks and roadway improvements to Edita Street do not appear to be sufficient to mitigate the overwhelming concerns raised by surrounding property owners.

C. Burden on Public Agencies to Provide Services

48. There is insufficient water available from the County system to service the Development. Therefore, to allow the Development would unreasonably burden the Department of Water Supply to provide water for its facilities.

49. There is no evidence that Connections has the ability to develop a potable water source as a mitigating measure, previously proposed by the Director.

50. A mitigating measure previously proposed by the Director of limiting the number of students to the amount of potable water available to the project is not reasonable because Connections is proposing to construct a high school for 107 students its first phase, when the potable water available would only allow for 70 students.

51. As such, the proposed use may unreasonably burden the County Department of Water Supply to provide water to the Development.

D. Unusual Conditions, Trends and Needs

52. Unusual conditions and needs have arisen since the establishment of this land use district in the 1970s, because the area in which the Property is located has essentially become residential in character. Also, the County General Plan LUPAG map recognizes this trend by designating the area for low density urban use. However, there was no evidence presented to demonstrate that location of a school that is not intended to specifically service the needs of the immediate community is such an unusual condition, trend or need that justifies location of the Development at this location.

E. Suitability of Land for Agricultural Uses

53. The Land Study Bureau soil classification rating for the Property is "D" or "Poor," which suggests that the land may be unsuited for agricultural uses.

54. Connections is proposing to maintain the upper portion or nearly one-half of the Property for forestry use. In addition, Connections is proposing to construct greenhouses on the Property and conduct an agricultural program in conjunction with its curriculum.

55. Based upon the representations of Connections, it cannot be found that the Property is unsuited for agricultural uses.

F. Alteration or Change of the Essential Character of the Land and Present Use

56. The Property is presently a forest and is vacant of any structures. The lower half of the Property will be converted into a school with classrooms, dormitories, a gymnasium cafeteria and parking lots.

57. The Development of a school will change the essential character of the forested land and its undeveloped use.

G. Consistency with the General Plan

58. The County General Plan LUPAG map designates the Property for low density urban use. "Low density uses" under the General Plan include residential, with ancillary community and public uses, and neighborhood and convenience-type commercial uses.

59. The Development, which proposes a charter school that is not specifically intended to service the immediate community surrounding the school, is not consistent with the uses permitted in areas of low density urban use.

60. The Economic, Public Facilities and Land Use elements of the County General Plan all require consideration of social and community concerns as follows:

Economic Element - Goal

“Provide an economic environment that allows new, expanded, or improved economic opportunities that are compatible with the County’s cultural, natural and social environment.”

Public Facilities Element - Goal

“Encourage the Provision of public facilities that effectively service the community and visitor needs and seek ways of improving public service through better and more functional facilities in keeping with the environmental and aesthetic concerns of the community.”

Land Use Element - Policy

“Encourage the development and maintenance of communities meeting the needs of its residents in balance with the physical and social environments.”

61. The evidence has established significant concerns from the community regarding the compatibility of the Development with the surrounding community.

62. Although the County General Plan Public Facilities-Education course of action for South Hilo encourages the establishment of additional schools as the need arises, the proposed Development, at the subject location, is contrary to the General Plan.

VII. UNUSUAL AND REASONABLE USE OF LAND

63. The construction of a school on the Property is an unusual use of the land because a school is not a permitted use in the State Land Use Agricultural District. However, the evidence presented does not demonstrate that the Development is a reasonable use of the Property. Specifically, Connections has not demonstrated how this school can be built without sufficient potable water resources. Nor, has Connections demonstrated how the development of a regional

charter school on the Property that does not specifically service the needs of the immediate community and that is overwhelmingly objected to by the immediate community is a reasonable site for this facility. In addition, Connections has not demonstrated that the Development meets most of the criteria to be considered by the Commission in the subject application.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission makes the following Conclusions of Law:

1. To the extent that any of the Findings of Fact constitute Conclusions of Law, or Conclusions of Law constitute Findings of Fact, they shall be considered and construed as such.
2. The Commission has jurisdiction over the subject special permit application, including the ability to deny or recommend its approval to the State Land Use Commission, pursuant to Section 205-6, HRS and Rule 6 of the Commission Rules.
3. *Connections had the burden of proof on this matter before the Commission, including the burden of producing evidence as well as the burden of persuasion, by a preponderance of evidence, to demonstrate how its request is consistent with the guidelines for a special permit as outlined by Section 205-6, HRS and Rule 6 of the Commission Rules. Connections has failed to meet this burden.*
4. The Development does not adequately meet the requirements or guidelines for a special permit as required by Section 205-6, HRS and Rule 6 of the Commission Rules.
5. The Development is not consistent with the County General Plan, particularly as to the impacts on the immediate community.

ORDER

Based upon the preceding Findings of Fact and Conclusions of Law, Special Permit Application SPP No. 12-000138 of Connections New Century Public Charter School and Community Based Education Support Services to develop a K to 12 charter school campus with

dorm facilities and related uses on 70.15 acres situated within the State Land Use Agricultural District is hereby denied.

Dated: Hilo, Hawai'i, MAY 1 9 2014

By 
RONALD GONZALES, Chairman
Windward Planning Commission

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SPP No. 12-000138

CERTIFICATE OF SERVICE

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I hereby certify that on this date, a copy of the foregoing was duly served upon the following parties by depositing the same in the U. S. mail, postage prepaid, and by e-mailing a copy, addressed to:

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