

Minutes of the February 6, 2008, Legacy Land Conservation Commission Meeting

DATE: February 6, 2008

TIME: 11:00 a.m. to 4:00 p.m.

PLACE: Board Room, Kalanimoku Bldg., 1151 Punchbowl Street, Honolulu, Hawai'i

COMMISSION MEMBERS PRESENT:

Dr. Dale B. Bonar, Chair

Dr. Carl J. Berg

Dr. Joan E. Canfield

Dr. Charles ("Chip") Fletcher

Mr. Herbert ("Monty") Richards

Dr. Robert J. Shallenberger

Mr. Kaiwi Nui

Ms. Karen G.S. Young

STAFF:

Molly Schmidt, DLNR, DOFAW

Linda Chow, Deputy AG

Ian Hirokawa, DLNR, Land Division

Randall Kennedy, DLNR, DOFAW

Paul Conry, DLNR, DOFAW

Emma Yuen, DLNR, DOFAW

Morris Atta, DLNR, Land Division

Sheri Mann, DLNR, DOFAW

PUBLIC:

Lea Hong, Trust for Public Land

Harry Yada, County of Hawaii

Bob Jacobson, County Council, County of Hawaii

David Santisteven, Laulima Eco-friendly Alliance of Farms (LEAF)

Meredith Speicher, Rivers, Trails & Conservation Assistance, National Park Service

Kristin Kline, aide to Representative Maile Shimabukuro

ITEM 1. Call to order and introduction of members and staff.

ITEM 2. Approval of minutes from December 14, 2007, Legacy Land Conservation Commission meeting.

Corrections on minutes for the last meeting were given to Ms. Schmidt. Member Canfield moved to approve the minutes as amended by the corrections. Member Shallenberger seconded the motion and all were in favor.

Chair Bonar stated that the agenda could be adjusted to allow for Representative Shimabukuro's testimony, or the item could be postponed. An aide for Representative Shimabukuro stated that she would most likely not attend.

ITEM 3. Discussion and possible action on Commission policy regarding the award of funds to nonprofit land conservation organizations for acquisition over the appraised fair market value; and discussion of whether any change in this policy will affect recommendations on current and previous year grants.

Chair Bonar stated that, at the previous meeting, the Commission had recommended to fund a project in which the fair market value had been estimated to be below the sale price of the land. Chair Bonar asked DLNR staff if it was prepared to comment on DLNR policy on the issue of whether projects involving an acquisition for over fair market value can be funded through Legacy Land.

Staff commented that there was no official DLNR policy, but that the item could fall within Commission's decision-making criteria, therefore, it was important to have the Commission's stance on the subject.

Mr. Paul Conry, Administrator of the DLNR, Division of Forestry and Wildlife, explained to the Commission that the statute does not prohibit grants to nonprofits for purchases above fair market value. The Board of Land and Natural Resources (Board) would be setting a policy, but had not yet decided on the matter, and the Commission has advisory role with Board so it could establish position on policy. The Commission could make a recommendation to the Board. At this point, there is a need to operate on a case by case basis. The matter may eventually be sorted out by a change to the statute.

Mr. Conry stated that there were several issues with funding acquisitions for a price above fair market value. He stated that his concern was whether allowing this would be good for program long-term. The issue of using government funds to purchase above fair market value had raised concerns, on the mainland and in Congress, about sweetheart deals for tax benefits. Mr. Conry questioned whether allowing purchases for over fair market value would jeopardize the program in the future. While fair market value is a hard and fast measuring stick, it is hard to determine which standard to use if going above it – which percentage is allowable? Mr. Conry outlined three positions that the Commission could take: 1) grants to nonprofits should be only for fair market value acquisitions; 2) the State will not pay more than its share of fair market value; a non profit grant can raise additional money; or 3) the State could consider paying above fair market value. Mr. Conry's recommendation was to not pay above fair market value with public funds.

In response to questions from the Commission, Mr. Conry stated that State agencies could not pay over fair market value when acquiring land and he was not aware of any federal programs allowing payment over fair market value, and that counties were probably included. Ms. Chow stated that this was likely.

Chair Bonar commented on the possibility of requiring Yellowbook certification for appraisers to give appraisers more scrutiny. Ms. Chow stated that appraisals for conservation land acquisitions were undergoing more scrutiny nationwide because of tax

credits being claimed for purchase of acquisition for conservation easements. The scrutiny is mostly on the tax credit side.

Mr. Conry commented that here are provisions within the law for how to handle fair market value disputes. There can be multiple appraisals within a range, and if there are disputed values among appraisers there is arbitration process to have consensus of opinion of what fair market value is. The State can hire a third appraiser to come up with arbitrated fair market value. The law does not allow payment above fair market value, but there is room to dispute what fair market value is.

Chair Bonar stated that the DOFAW position is to not provide an award for a purchase above fair market value.

Mr. Conry stated that the Department would also consult with the Senate President and Speaker of the House of Representatives on the issue if it affects any upcoming grants.

Mr. Morris Atta, Administrator, DLNR, Land Division, stated that Mr. Conry's comments also summarize Land Division's position. He commented on the trend of tax liability issues – there was a case that slammed an owner for paying above fair market value for a conservation easement on the mainland. The concern is that there is increased federal scrutiny. If public entity is in a transaction that the IRS or state taxation department deems to be improper, and possibility that the Commission or Program would be part of scrutiny for impropriety and facilitating an improper transaction, knowing it is above fair market value.

The Commission can make a policy recommendation to Board, and can also make a decision as a part of its criteria-forming process.

Chair Bonar stated that the Commission is sensitive to this issue, since it is recommending a release of state funds.

Ms. Schmidt stated that DOFAW and Land Division would also be providing recommendations to the Board.

Chair Bonar clarified that decision regarding criteria would be set as interim criteria now until it could be done as part of a rulemaking process.

Ms. Lea Hong, Trust for Public Land, Hawaii Islands Program, spoke on behalf of the MA`O Organic Farm project. She stated that the group had wanted to re-appraise, and due to several real estate transactions in the area that occurred in past months, the appraised value of the property is now above the landowner's asking price.

With respect to the whole issue, Ms. Hong commented that all federal programs require appraised fair market value as basis of cost share. A non profit cannot buy a property above fair market value, because they might be under scrutiny for private benefit, thus threatening its 501(c)(3) status. A nonprofit has to justify how much it is paying for the

land through fair market value. Ms. Hong cautioned that, regarding appraisal standards, the federal Yellowbook standard is very expensive; one can pay up to \$40,000 for a Yellowbook appraisal. She stated that she was worried about smaller non profits that can't afford to pay for Yellowbook appraisals.

Mr. Hirokawa stated that grants for Legacy Land are subject to DLNR's review of the appraisal – Land Division will review the second appraisal for the MA'O project, however, it can't review the appraisal until the Board approves the grant. Chair Bonar asked whether Land Division *can't* or *won't* give preliminary appraisal comment. He stated that there was a need to have time to reallocate project funds if a recommended project does not work, all has to work their way through the board. Mr. Atta replied that they *do not* (rather than *cannot*) comment on the appraisal. Mr. Hirokawa reviews appraisals when he receives them.

Ms. Chow stated that most of the time, the groups do not have an appraisal until award is made. Ms. Hong stated that the sooner the review appraisal happens, the better. The longer you wait the more likely it is that there will be a wrench thrown in with grantor and grantee. Transactions have gone awry because the review was not there.

Ms. Schmidt asked whether the selection of alternates takes care of the issue.

Chair Bonar stated that it provides a backup; however, the prioritization process may allow time for appraisals to be done and evaluated.

Member Kaiwi asked whether the Commission is being asked by the Board to come up with a policy. Mr. Conry stated that it was not. Member Kaiwi stated that the issue may not be the Commission's kuleana, but more in-house policies of DLNR.

Chair Bonar stated that these are critical issues, and that the Commission should want to be viewed as doing the best thing as it can, whether the Board chooses to do this whether it is a Commission policy. He stated that it should be resolved so that applicants know the criteria.

Member Shallenberger stated that the issue is not whether the Commission has alternates. It wouldn't result in having an alternate needed. He would like to consider the issue on a case-by-case basis.

Chair Bonar stated that the Commission would be in danger contributing to the acquisition of things well above fair market value. Member Fletcher stated that, like Member Shallenberger, his reaction has been to go case by case and not set a precedent. The Commission should want to have all the flexibility possible to put money toward entities like MA'O Farms. Chair Bonar stated that, except in extreme cases, non profits paying over fair market value would give it extreme scrutiny.

Ms. Hong stated that, for the State, when a difference in appraisal of fair market value is really small, the Attorney General has to decide whether that is OK.

Member Canfield stated that she liked the idea of a recommendation statement to the applicants; it lets everyone know what the expectations are.

Member Shallenberger asked what the hazards in the possible proposal of Legacy Land Conservation Program to contribute money to above-fmv acquisitions?

Chair Bonar stated that there is a problem for non profit that is contributing.

Member Fletcher stated that fair market value is the amount a disinterested buyer would pay for property.

Ms. Hong stated that, for one acquisition, the appraised fair market value had been appraised to be an amount below the purchase price; however, a group of citizens gave non-deductible dollars to the owner to pay the difference in a separate agreement. It is possible to have official agreement and then enter a side agreement to collect more. The deal, however, needs to remain between entity buying and seller, and this price needs to be fair market value.

Member Young stated that, because of the current economic climate and its effect on real estate fluctuations, she favored a case-by-case approach / and the second option presented by Mr Conry. Chair Bonar disagreed.

Mr. Conry stated that program supporters may choose to go to Legislature to change the statute, but that the Commission has prerogative to make any recommendation it wants. Member Fletcher asked Ms. Hong what her opinion was. Ms. Hong stated that allowing acquisitions for over fair market value would be contrary to all the grant criteria. The seller must understand the official agreement and side agreement.

Member Fletcher stated that he is retracting his former opinion and now supported not granted funds for above-fmv...but that the program should alert people to flexibility in transaction. Chair Bonar stated that encouraging such transactions would raise red flags.

Chair Bonar stated that he would take a recommendation, for Commission criteria and for the Board, that Legacy Land Conservation Program moneys are not give to any project where the sale price is not at or below the appraised fair market value. Member Berg made the motion and Member Richards seconded.

Member Shallenberger added the recommendation that, once the Department is presented with an appraisal, it should be Land Division policy to review the appraisal as soon as possible. If Board gives approval to this, next round of grants this fall you can put them on the grant application.

The motion passed unanimously.

The Commission requested confirmation from MA`O that the bargain sale would be OK even though the asking price is below the appraised value, the landowner will not renege.

The Commission asked if previous year grants were facing trouble because the appraisal was below purchase price. Ms. Schmidt replied that the applicants had been able to bring the purchase price down.

A member of the Commission asked if Land Division could review the appraisals that are submitted after the first is not approved, or if DLNR has the onus to get another State-contracted appraisal done.

Chair Bonar stated that by statute, the DLNR may order an appraisal. Land Division staff added that a non profit can order its own appraisal and DLNR can accept their appraisal or reject.

Ms. Mann stated that in projects with an appraisal would be more competitive if it is approved by DLNR up front – it is better to have an appraisal up front, however, the problem is the cost of appraisals. Chair Bonar asked for a ballpark figure for legitimate appraisals. Even small appraisals can cost a few thousand.

ITEM 4. Discussion and possible action on method to resolve ties that result from ranking project proposals.

Member Fletcher had requested this item. Member Fletcher asked: if we are satisfied with the voting mechanism, why not apply same process with case where there is a tie? If there are two tied projects, the Commission should engage in a discussion and have same ranking process, but only on the tied ones. In situations where two projects are tied, and there is not enough money to fund both, we should fully award everyone until we can't... so last project gets partial funding, but if there is a tie, the person who gets the higher score gets all the money and then the second gets the last amount. We should want to give awards based on excellence rather than our available funds.

Member Fletcher proposed that, in a case where two projects are tied and there is not enough money to fund both, the Commission should fully fund based on ranking of excellence. If there is a tie, vote again so they are ranked, and then fully fund the higher rank and partially fund the lower.

Chair Bonar stated that his concern in these situations was whether the applicants can or cannot do the deal with the funding provided. Another commission member noted that sometimes the applicants are not in the room to tell the Commission whether they can still do the deal if they are partially funded.

Ms. Schmidt asked: if you are going to revote on a tie what is the rationale for ranking them differently a second time around? Member Canfield stated that they would rank differently because they are being compared against each other and not nested with other projects.

Chair Bonar restated his concern that more could be accomplished with the grant funds if two projects could complete with less funds.

Another Commission member commented that applicants may be reluctant to state whether they can make a project succeed with less funding if it will lead to them not being funded.

Another Commission member commented that, each year's situations may vary; the Commission does not have the experience yet to decide what is the best rule or process.

A Commission member stated that it would be helpful to have site visits and truly understand a site before ranking. Those who have been to sites seem to weigh in more heavily. Members could take pictures and notes to help the decision making process.

Member Richards moved that, in case of a tie, at the bottom end, the two parties be voted upon again. Member Fletcher seconded the motion.

Chair Bonar opened the motion for discussion. Ms. Schmidt asked Ms. Chow if there would be any problem with the arbitrary and capricious legal standard if the Commission re-votes. Ms. Chow responded that, if the Commission was using slightly different criteria the second time, the decision would not be arbitrary or capricious.

Ms. Hong stated that the Commission was not required to lock itself in a policy at this time, available to do a case by case basis. There may be cases where Member Fletcher's approach is the better one, and times where Member Shallenberger's process is better.

Without a set process, the Commission is open to renegotiation or ability for community to add to a partial funding process. Member Fletcher stated that he was sympathetic to the idea, in his experience a hurried discussion can result in an unsatisfactory policy, so he would like policy that is more flexible. The policy could lay out several options to us. He would like to give the Commission flexibility but also provide it the tools to figure out a tie. Chair Bonar suggested putting off decisions on ties when there are site visits until the next Commission meeting to bring other info.

Member Richards stated that, if all else fails, and the Commission needs to make a closure, need to make a policy for options do deal with ties.

A Commission member noted that it was important for all members to visit all sites, but it was not practical for budgetary and logistical reasons... the Commission won't know how many applicants they will have. It would have to be a two-day affair in order to have a longer meeting. Maybe it will have too many applicants. If the Commission has a policy it might settle the issue.

Member Fletcher mentioned that grant seeking is a difficult business, and sometimes applicants ask for more than is needed.

Ms. Schmidt stated that, since there were many policy issues that need to be dealt with in the rule making process, she could put together a proposal for the next meeting that would outline how the Commission could organize and deal with the different issues. The current item could be left until the next meeting.

Motion withdrawn.

ITEM 5. Discussion and possible action on 2007-2008 projects: potential selection of alternates, re-arrangement of rankings, designation of funding amounts, or other recommendations to the Department and the Board regarding 2007-2008 project selection.

Ms. Schmidt stated that, at the last meeting, some motions had not been finely worded. There had been a motion to fund the five projects as they were awarded; however, it was not clear what would happen if a recommended project fell through.

Ms. Schmidt asked if the Commission wanted to bring the two tied ones up to full funding before funding the next on the list. A Commission member asked whether the Commission should wait to discuss this until the event occurs, and then call an urgent meeting? Ms. Schmidt stated that, with the timeline for the program was set, and the process involved other steps, like meeting with Senate President and Speaker of the House. If go through process again, recommendations won't be able to go to Board on time.

Member Kaiwi stated that, if the Commission needs alternates now, need to approve next ones on the list, but he would like to propose fully funding ones that are partially funded right now. Another member added that the recommendation would be to go down the list of excellence.

Member Canfield moved to recommend that the top 5 be funded as shown on list, provided that if one of the top three drops out, the recommendation is to try to fully fund those that are partially funded, and then with remaining funding work down the list to fund the rest of the projects. Member Young seconded the motion. The motion passed unanimously.

ITEM 6. Briefing by Program staff on: (a) Current initiatives to amend Hawaii Revised Statutes, Chapter 173A, to allow the use of Land Conservation Fund monies for maintenance and management; and (b) Potential State purchase of Turtle Bay property as stated by Governor Lingle in the State of Hawaii address.

Ms. Schmidt provided a handout of HB3188 and SB3102. She stated that the bill allows public and private moneys put in fund and allows moneys to be spent for maintenance and management of lands acquired through Legacy Land. In response to questions, she added that 5% of the total budget could be given to maintenance and management, and that award of these funds would be through same process as they are currently awarded.

Chair Bonar stated that his worry is that the extra 5% would become a pot of money for shortfalls in management funding. His preference would be to only fund acquisitions.

Member Shallenberger stated that there will always be shortages on the management side. Some lands that Legacy gives funds to will need management and realistically they will be deteriorated lands.

Chair Bonar stated that the Natural Area Reserve Fund is taken from for several uses.

In response to a question, Ms. Schmidt stated that an estimated \$4.8 million per year would go in the Land Conservation Fund from the land conveyance tax in the next few years.

Member Berg asked if the bill came from DOFAW to maintain DOFAW properties to get management money for past properties that Legacy Land helped to fund.

Member Richards stated that there was a need to provide safe public access to properties when the State buys a property. There needs to be recognition that some money must be spent on maintenance.

The Commission discussed how the change might be implemented if it occurs. Member Shallenberger stated that he doesn't see a problem with the change if the Commission has the power to approve or not. Chair Bonar stated that he thought the 5% grant for operations and management would be a slippery slope.

Chair Bonar stated that he would communicate the Commission's thoughts to the DOFAW Administrator. He stated that the way the operations/management change is stated now, it gives a great deal of flexibility. Priority could be given to specific uses like management plans rather than on the ground infrastructural management. Member Fletcher added that, if the Commission would not have the ability to establish criteria for the fund, there would need to be a lot more content in the bill.

Ms. Schmidt went through the rest of the proposed bills related to the program, giving brief summaries.

Chair Bonar asked Ms. Schmidt to provide the Commission with DLNR's testimony on bills relating to the Legacy Land Conservation Program. Ms. Schmidt stated that, at this point, the DLNR had not adopted official testimony, and that she would not be allowed to distribute until it was completed.

Ms. Schmidt stated a brief summary the proposition by Governor Lingle to purchase Turtle Bay property that had been given in the State of the State address. Chair Bonar stated that Legacy funds could be used to bond in the future and be locked into paying off large acquisitions over a period of several years. Ms. Schmidt asked Ms. Hong to brief

the Commission on any additional facts surrounding the possibility of an acquisition of Turtle Bay property.

Ms. Hong stated that the Trust for Public Land had not been aware of the Governor's intent before the address. The Turtle Bay acquisition is not a project that TPL is currently pursuing but TPL supports it and wants to help in whatever way they can. She stated that Governor Lingle is in the process of consulting with good people. She did not think that Legacy Land funds should be directed by bills, rather, the statutory process (Commission, Senate/House consultation, Board approval) should be allowed to work.

Ms. Hong stated that foreclosure for the Turtle Bay property had been postponed until April, possibly leaving longer to allow for a private sale.

Member Kaiwi mentioned a bill involving the Galbraith properties. He asked what the possibilities were for obligating future funds from Legacy Land, and whether the Governor's approval was required for grants.

Ms. Schmidt stated that the Governor's approval is required for grants. Ms. Chow clarified that the Governor must release the funds for grants to be expended.

ITEM 7. Brief presentation by Commission Member Kaiwi Nui on Native Hawaiian cultural beliefs and practices.

Member Kaiwi gave a brief presentation on Native Hawaiian cultural beliefs and practices and how they relate to the Commission's role.

ITEM 8. Set next meeting date(s).

ITEM 9. Announcements. (a) 9th member.

ITEM 10. Adjournment.