

**Minutes of the September 27, 2007, Legacy Land Conservation Commission Meeting**

**COMMISSION MEMBERS PRESENT:**

Dr. Dale B. Bonar, Chair  
Dr. Joan E. Canfield  
Dr. Charles (“Chip”) Fletcher  
Mr. Herbert (“Monty”) Richards  
Dr. Robert J. Shallenberger  
Mr. Wesley Kaiwi Nui Yoon (in at 8:44 a.m.)  
Ms. Karen G.S. Young

**COMMISSION MEMBERS ABSENT:**

Dr. Carl J. Berg

**STAFF:**

Linda Chow, Attorney General’s Office  
Molly Schmidt, DLNR, DOFAW  
Ian Hirokawa, DLNR, Land Division  
Barbara Lee, DLNR, Land Division

**VISITORS:**

Kevin Chang, Trust for Public Land  
Abbey Seth Mayer, Moloka`i Enterprise Community  
Bob Jacobson, Hawaii County Council

**ITEM 1:** Call to order and introduction of members.

Chair Bonar called the meeting to order at 8:36 a.m. The members introduced themselves. Staff and members of the public introduced themselves.

**ITEM 2:** Minutes of the July 6, 2007, meeting.

Member Fletcher moved to approve the Commission minutes of the July 6, 2007, meeting, with one correction (page 7, last paragraph, “could *not* be used,”). Member Canfield seconded and all were in favor.

**ITEM 3:** Revisions to interim criteria information form. Research on revisions to form to be presented by Member Joan Canfield.

Chair Bonar prefaced that, at the last meeting, Member Canfield had taken on the task of revising the Commission’s criteria form to better suit the application.

Member Canfield stated that she had followed the suggestions of Member Shallenberger from the last meeting by revising the form to match the application and having the scoring system simplified to plus or minus symbols rather than numerical rankings. She suggested the Commission go over the revisions.

Chair Bonar led the Commission through the form revisions.

Member Shallenberger mentioned that the Commission should discuss, at a future meeting, whether the Commission should give a project more weight because it met a greater quantity of criteria. Chair Bonar added that the Commission had discussed at its last meeting how making the comparisons between projects was a comparison of apples to oranges, and that there was a need for a ranking method with both quantitative and qualitative approaches. Being that this is the second round, and the first round was very quick, some of the Commission's policies are still in formation.

Beginning the discussion of the form, Member Fletcher stated that he like the idea of having sheet as brief summary form and can see putting in either numbers or symbols on the form because it is a useful tool to improve thinking and note-taking abilities, and is an organizational tool for the Commission's personal decision-making.

Member Young stated that she wanted to be sure that the criteria form comports with the application form, mentioning that "letters of support" appears on the criteria form. Member Canfield stated that she had revised it with this goal in mind, and, regarding the letters of support, the applicants had turned them in last time without request.

County of Hawaii Council Member Bob Jacobson introduced himself and asked whether eminent domain or condemnation fall within the program's purview. Chair Bonar stated that the issue had not been addressed.

Member Young suggested that there be a statement on the applications regarding letters of support. Chair Bonar asked whether the information can be passed onto applicants at this point. Ms. Schmidt responded that there was no way to be certain applicants would receive the information. Member Shallenberger suggested waiting until the applications were in. Ms. Chow and Ms. Schmidt said that it would be OK to provide this information to applicants after the deadline.

Ms. Chow stated that she was concerned about making public support a criterion without proper notice in the application. Ms. Canfield responded that the criteria form is a tool and does not preclude the Commission from considering other criteria. Ms. Chow stated that the goal of the Commission should be to avoid arbitrary and capricious decision-making. Member Fletcher asked whether, if the criteria form was exactly mirrored to the application form, if that would be proper notice of criteria. Ms. Chow stated that a section on the form for "other considerations" may be acceptable; however, no additional listed criteria that do not comport with information asked for on the form are acceptable.

Member Shallenberger suggested taking public support off of the criteria form and requesting it from all applicants post-deadline.

After noting that the application instructions did not clearly ask for letters of support, the Commission agreed to take the item off of the criteria form (item G1) and consider including it next year; and to provide the criteria form to applicants and request letters of support and additional information through Ms. Schmidt.

Mr. Jacobson asked whether letters of support ought to be listed for the Commission's convenience. Member Fletcher suggested that the reasons for support be abstracted.

Ms. Schmidt stated that DLNR has the ability to take a preliminary look into title issues and other technical information if the Commission would find it useful. Mr. Hirokawa stated that he could produce this information for the Commission's guidance.

Chair Bonar asked to what extent title needed to be clear, and whether the Commission should consider this.

The Commission then went through the items on the criteria form to discuss edits. A record of the revisions was taken by Chair Bonar and passed to Ms. Schmidt for finalization and submission to the Board for approval.

Ms. Chow asked how the Commission would assess "missing information." Ms. Schmidt stated that she would ask for any required missing information before turning the applications over to the Commission. Member Canfield clarified that missing information may still occur afterwards if an applicant is not able to obtain a letter, etc., and the Commission would need to decide how to deal with it. Member Fletcher suggested wording the criterion to avoid giving it any unintended legal implications.

In discussing the wording of D9, Member Richards asked whether including "production" under item D9 would affect the rights of bordering property owners or water users. Member Fletcher stated that the grant recipient's duty would only be to the specific land acquired.

In discussion the wording of D4, Member Richards asked whether the use of the term "adjacent" would obligate or affect neighboring landowners. Chair Bonar stated that the uses of neighboring properties and the consideration of "continuity" would only be considered by way of making a decision regarding the property to be acquired. Ms. Chow agreed that using the terms in the criteria would not have any legal effect on surrounding properties.

For item D5, Member Shallenberger suggested inserting "important" in lieu of the word "significant" to avoid any construal of technical legal meaning. Ms. Chow reiterated an earlier suggestion from Member Fletcher regarding placing comment boxes under each criterion. For item D7, the subject of public access is discussed and left in as a descriptor for the criterion. For D8, Ms. Chow clarifies that listing examples in parentheses does not limit consideration to the examples that are listed.

For items D9 and D10, minor wording changes were made.

In regards to Section E, the Commission discussed potential liabilities and how to factor them in to its recommendations. Wording about natural hazards was included into the section to better reflect the wording of the application.

For Section F, Ms. Schmidt clarified that the wording “clear title” is misleading, because, at this point in the process, the Commission will not be able to tell for certain if it is clear. Mr. Hirokawa added that Land Division was only able to investigate title issues up to a certain extent until the current title report is available and clarified which information he would be able to provide for the Commission. Member Canfield asked Ms. Schmidt to include this in the table of information for the Commission. Chair Bonar asked Mr. Hirokawa to look for red flags in the applications.

For Section F.5, Mr. Jacobson asked how the ability to float bonds should be classified. Chair Bonar stated that those funds would be classified as “pending.” Member Young questioned the method of valuing the property to be acquired. Chair Bonar stated that there is some difficulty in having applicants appraise land before funding is awarded.

For Section G, the Commission threw out section G.1. (relating to public support) in order to stay consistent with the information asked for in the application. Upon Member Canfield suggestion, the Commission changed wording of G.2. from “and” to “and/or.”

In Section H, the Commission changed wording to “manage” instead of “maintain” to provide a more inclusive term. Member Shallenberger stated that there should be emphasis on the duration of the protection for the land. Chair Bonar stated that Senator Hanabusa had seemed concerned at one point about ownership and duration of property interests, and that further discussions with legislators may provide some direction on this topic. Ms. Chow stated that federal programs often reserved the right to their financial or property interests from a land acquisition grant. Member Young asked about the possibility of the State being the backup holder of the interest in land. She added that point of the program is to protect land, not financial interests. Ms. Schmidt stated that this was the purpose of the statute, however, the statute also contained a provision stating that the State gets its proportionate amount of funding back upon the sale of the land. The Commission also added “long term management” to the language in this section to more clearly indicate its meaning. The Commission added a criterion involving startup, operational, and maintenance funding availability.

Member Kaiwi excused himself for a meeting at 10:42 a.m. Chair Bonar called a 15 minute recess.

The Commission resumed at 11:06 a.m. Ms. Chow gave a rundown of laws surrounding criteria formation and told the Commission that it needed to avoid arbitrary and capricious decision-making.

Chair Bonar stated that his view is that the Commission sees the decision process as a semi-quantitative analysis, and is aware of the need for rational, logical decision-making.

Member Shallenberger stated applicants might be mistaken if they thought that decisions were based entirely on the form. Member Canfield suggested including a statement to inform applicants. Ms. Chow stated that the statute requires the Commission to eventually develop criteria under the rulemaking process. Ms. Chow stated that a

statement on the criteria form alerting the Commission to the fact that other information would be considered would be helpful. Member Canfield agreed to author a statement for the form.

Chair Bonar entertained a motion that the Commission adopt the interim grant evaluation form as amended at the meeting. Member Shallenberger moved, Member Fletcher (?) seconded. All were in favor. The Commission thanked Member Canfield for her work on the form.

Ms. Schmidt stated that Sunshine and freedom of information laws state that forms that are written on and discussed at a meeting are public record. Ms. Chow added that they can withhold the forms until after the decision is made.

Member Fletcher asked whether the members could turn the forms over to the Department. Ms. Chow answered in the affirmative.

**ITEM 4:** Review process, meeting dates, and site visits for incoming 2007 (Fiscal Year 2008) Legacy Land Conservation Program applications. Possible formation of subcommittees or task forces for project site visits.

Chair Bonar asked Ms. Schmidt for a timeline of the decision-making process. Ms. Schmidt stated that the deadline for the applications is October 17, 2007; the Program could have the applications to the Commission by the end of October. Chair Bonar stated that the Commission aimed to have decisions made by the end of December. Ms. Schmidt stated that a Board submittal reported the Commission deadline as January or sooner, and that the Commission recommendations and legislative consultation would go to the Board in March.

Member Young stated that land deals could change within that timeframe. Chair Bonar stated that there were ways the applicants could deal with the situation. Ms. Schmidt stated that the process could be done sooner if circumstances allowed.

Ms. Lee asked whether grants may be un-awardable if due diligence requirements are not met, and whether applicants have notice of this. Ms. Schmidt answered that the Board approval was contingent on due diligence requirements being met, and that these requirements are made available to applicants in the Grant Recipient Guidelines.

Chair Bonar asked whether the State's position on a particular due diligence issue would affect the outcome of a grant. Mr. Hirokawa stated that these considerations could affect the strength of the Commission's recommendations and that Land Division's goal was to inform the Commission and let it make its decisions.

Member Young asked the status of last years grants. Ms. Schmidt stated that they were about halfway through the due diligence.

The Commission requested an update on current status of awards at every meeting.

Chair Bonar stated that he would need to remove himself from the upcoming decision on an application from Maui Coastal Land Trust.

Chair Bonar stated that the Commission needed to discuss several topics that had recurred at past meetings.

Ms. Chow stated that a catch-all phrase, with examples, could be used on agenda to provide proper notice to the public of what would be discussed. Member Fletcher stated that at every single meeting, the Commission should have the opportunity to discuss what it wants to discuss. Ms. Chow stated that the Sunshine law discourages that, but that staff would help the Commission to the degree possible; however, there is no catch-all phrase that will allow the Commission to discuss whatever it wants at a meeting.

The Commission produced a list of topics to discuss at the next meeting, under the agenda heading of “policy considerations (or visions) in making recommendations”:

- Weight by island and selection process, islands weighted by size or population, spatial distribution of funding among counties
- Types of agricultural lands
- Conservation easements and State ownership
- Clear title and clouded title issues
- Balancing among the 9 criteria, making comparisons of apples and oranges
- Are eminent domain or condemnation allowed, and does Commission want to support it
- Should repeat applicants be dealt with differently, or should an applicant’s history of receiving awards matter
- Culture

Chair Bonar stated that Member Kaiwi should be present for discussions on all issues that affect cultural concerns.

Chair Bonar discussed his meeting with Speaker Say, stating that legislature is clearly interested in protecting prime agricultural lands and that he had asked what the leg can do to help. Chair Bonar said that he had suggested line iteming or appropriating funds for certain projects. He also stated that it might be worthwhile for DLNR to work with Legislature in gaining more funding for the program.

**ITEM 5:** Set next meeting date(s). Discussion of appropriate meeting time.

Chair Bonar stated that the Commission would be trying to perform meeting dates and site visits between the end of October and the end of December. He confirmed with Ms. Chow that the maximum number of members on a visit should be two. Ms. Chow stated that, offhand, there didn’t appear to be legal implications for visiting some sites and not others. Member Kaiwi stated interest in visiting all sites

Member Young stated concern over conflicts of interests regarding applicants from Waianae. Ms. Schmidt stated that each member of the Commission should contact the Ethics Commission with the facts of each situation for specific advice.

Member Shallenberger stated that the topics (listed above) mentioned could not be discussed in the same meeting as applications were discussed. The Commission agreed to hold separate meetings for the discussion and the applications.

The Commission discussed meeting dates and agreed tentatively on November 6, 2007. Site visits will be discussed at this meeting. Member Fletcher suggested having time dedicated at each meeting where each member can present his or her reasons for being on the Commission and share his/her expertise. Member Fletcher volunteered for the first presentation.

Mr. Mayer announced that he would like to see someone from Moloka`i on the Commission. Chair Bonar responded that the appointment would be done by the Governor.

The Commission agreed on December 14, 2007, as a tentative second meeting date.

Member Richards stated that meetings should begin at 9:00 am as a standard. The Commission agreed.

Chair Bonar suggested putting up an application on the website as an example. Ms. Schmidt stated that the application had changed from last year, so it might be a poor example. Member Young asked if old applications were public record. Ms. Schmidt stated that they were and added that putting up one application on one type of project might also be a poor example for different types of projects.

Chair Bonar asked if the Commission wanted to discuss anything else under the agenda item. The Commission declined, and adjourned the meeting.