

Minutes of the April 27, 2012, Legacy Land Conservation Commission Meeting

Date: April 27th, 2012

Time: 9:00 a.m.- 2:00 p.m.

Place: Room 322B, Kalanimoku Bldg., 1151 Punchbowl St., Honolulu, Hawai'i

COMMISSION MEMBERS PRESENT:

Dr. Carl J. Berg

Dr. Dale Bonar

Ms. Lori Buchanan

Dr. Joan E. Canfield

Mr. Kaiwi Nui

Mr. Herbert ("Monty") Richards

Dr. Robert J. Shallenberger

COMMISSION MEMBERS ABSENT:

Ms. Karen Young

STAFF:

Ian Hirokawa, DLNR, Land Division

Molly Schmidt, DLNR, DOFAW

Cassandra Smith, DLNR, DOFAW

PUBLIC:

Thorne Abbott

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

The meeting was called to order and everyone introduced themselves. Member Buchanan stated she would be joining the group shortly, and Member Young was absent due to illness.

ITEM 2: Approval of Legacy Land Conservation Commission minutes from the December 13, 2011, and December 14, 2011, meetings.

The Commission briefly discussed the meeting minutes from meetings on December 13, 2011, and December 14, 2011. Member Canfield had sent in non-substantive edits. Member Berg moved to pass both sets of minutes including the edits, Member Richards seconded it, all members present were in favor. Member Buchanan joined the meeting.

ITEM 3: Update from staff, discussions, and possible action regarding draft rules for the Legacy Land Conservation Program.

Ms. Schmidt stated that the public meetings for the rules were held from March 27 to the March 30, 2012, in six different locations. The last day for the public to submit written

testimony was April 14, 2012, however, she had waited until April 17 for any last minute papers. She then drafted a submittal for review and signature by the DOFAW Administrator. It is headed to the Chairperson for signature. Three people submitted oral testimony but more attended the meetings, four people submitted written testimony in addition to the Office of Hawaiian Affairs. The Office of Planning had sent in some comments on the draft rules before the public hearings, which had been included for consideration, too. Chair Bonar requested that Ms. Schmidt briefly go over a summary of comments. Ms. Schmidt agreed, but stated that it was awkward to summarize the comments of others because of possible misinterpretation. Chair Bonar stated he understood and they would keep that in mind.

Ms. Schmidt began to list the comments submitted. Puananionaona Theone had submitted comments stating that the rules referenced complying with Chapter 343, Hawaii Revised Statutes (HRS), but the rules did not state whether LLCP is exempt, and they should state that LLCP is not exempt from Ch 343. Ms. Schmidt stated staff opinion was that land acquisition grants are exempted under the DOFAW exemption list which is a separate process under the rules of the Office of Environmental Quality Control. They hadn't thought it appropriate to put it in the Legacy Land rules. Another comment from Ms. Theone was rules do not detail what happens if project does not adequately achieve the purposes of the LLCP. Sanctions are clarified but do not detail what happens to land, e.g., grantee keeps, eligible for transfer. Land should be transferred back to State. Ms. Schmidt stated that staff had taken the authority in the statute and expanded it to the maximum extent of what was allowed in the rules. Chair Bonar also stated that language regulating this matter was present in the conservation easements being funded, and the State or the county will be holding or co-holding an easement. Ms. Schmidt agreed that if the authority to enforce was in the conservation easement they could have more enforcement on the issue. She continued with Ms. Theone's comments, which stated that it should be clarified as to whether lands acquired under LLCP can be transferred to an entity that is not eligible for award under this chapter; it considers this but does not bar it. This was in response to draft HAR provision 13-140-34. Ms. Schmidt thought that the provision gave the Board some criteria to use in the case a grantee wants to get rid of their lands. The rule tells the Board that eligibility should be considered, it does not say grantees shall not transfer to non-eligible entities. Ms. Schmidt felt Ms. Theone had a good point, but Ms. Schmidt didn't know if it was a good idea to restrict the Board in this way. The statute indicates that lands can be sold at the permission of the Board. Assumedly, it should be to eligible resource protection agencies and organizations, but if for some reason the land has changed in physical characteristics she was not sure that this was an absolute.

Ms. Schmidt also wanted to clarify, before they went through any more testimony, that the AG's office had advised that the Department of Land and Natural Resources (DLNR) must go back to public hearings again if they want to make substantive changes to the rules.

Ms. Schmidt stated that the last comment from Ms. Theone was that the match requirement of twenty-five percent limits recipients to those that already have sufficient

capitol to do land acquisitions. Ms. Schmidt stated that staff opinion was that entities that can't raise that amount may have trouble taking care of the long term costs relating to managing land.

Ms. Schmidt continued to read testimony. Cory Harden from the Big Island had submitted a comment saying the fifty cents a page for records is too high, ten to twenty-five cents would be more reasonable. Ms. Schmidt stated that as the payee she could understand not wanting to pay that amount, however that is the same amount that is being charged by other divisions. Also, for most documents it would be feasible to PDF and e-mail it, so if anyone is actually submitting requests for copied documents there isn't any reason why they can't have it emailed to them. Ms. Harden's next comment was nonprofits must be land conservation organizations; please don't limit it to land conservation organization nonprofits. Ms. Harden stated that about two years ago, Malu 'Āina, an organic farm and peace action nonprofit, was awarded a grant to start a community farm. Such farms could be important for food self-sufficiency. Ms. Schmidt felt this was a valid point, however the definition that they put forth in the administrative rules is broad enough to include non-profit organization that protects agricultural production as part of its mission or activities.

Ms. Schmidt said that the next few testimonies came from the Honolulu hearing where a group of law students attended and submitted testimony as part of an assignment. Kylie Wager had suggested they amend draft HAR 13-140-39 to include "capacity to adapt to sea-level rise and climate change impacts" as one of the criteria the LLCC considers, because 1) risks to low-lying communities, 2) building resiliency / reduce vulnerability, 3) consistent w LLCP purposes / priorities of the Commission. Ms. Schmidt's thoughts were that this topic should ultimately go to the Commission for response. Ms. Wager had submitted a thoughtful and valuable analysis of the values of acquiring coastal lands, however, the term suggested was not really appropriate as a criterion because it does not apply to all projects that can be submitted and it more fittingly belongs on the list of resources that needs to be protected, where it is already present. Chair Bonar said it was interesting because eventually all lands will be affected when you look at the change in climates. Member Berg stated that point had been brought up at previous meetings between a few of the Commission members and it should be considered because it will affect the forests and the shorelines. He thought part of the response to Ms. Wager was that this was definitely something the Commission is aware of and considers in decision making.

Ms. Schmidt stated that Andrew Chianese had submitted testimony stating that Subchapter 8 in regard to enforcement should grant more authority to the Board. Ms. Schmidt commented that staff drafted it to clarify the maximum extent of the authority already allowed to the Board under existing law. They can't really do much with the administrative rules to grant more authority than is already authorized by statute. Next comment from Mr. Chianese was BLNR needs authority to issue an injunction on holder of land to ensure breach ends and restorative actions implemented. Withholding payments is not in furtherance of protection of state's resources. Chair Bonar stated that language should be in a conservation easement. Ms. Schmidt stated that giving a grant or

even holding the easement didn't create the right to issue an injunction without going through the same process any other party would.

Thorn Abbott joined the meeting; he will be sitting on the Commission as of the first of July. Mr. Abbott and the Commission introduced themselves, and Chair Bonar filled him in on what they were currently discussing.

They went back to Mr. Chianese's comments; regarding draft HAR 13-140-55, which Mr. Chianese stated should explicitly authorize the BLNR to be able to revoke the grant and title should a breach occur. Ms. Schmidt stated they are able to revoke the grant if a breach occurs, and revoking title may be too far of a reach, especially where Legacy Land partially funded an acquisition, if the State takes land away from a private owner, in some cases it becomes eminent domain and they must be compensated. Another comment was that "necessary" in 13-140-57 was vague and undefined; Ms. Schmidt stated that the term was in the context of something being taken straight from statutory language.

Ms. Schmidt reiterated that she was providing a summary of testimony and staff comments and they are not necessarily adopted by the Division or Department.

Next was testimony was submitted by Kamana'opono M. Crabbe of the Office of Hawaiian Affairs. His first comment was about Senate Bill 2378, and if enacted it may require a rules update because it requires conservation easements be held by the Board of Land and Natural Resources over lands acquired by non-profits in addition to a few more changes in the LL application. Ms. Schmidt had consulted the AG on this issue. If the bill passes in current form, it trumps the rules anyway. Mr. Crabbe's next comment was that the term "accredited nonprofit land conservation organization" is vague and undefined. He had asked that it be replaced with "nonprofit land conservation organization," which is clearly defined in the draft rules. Staff response was it was a good point, DOFAW will propose that the term accredited shall be disposed of and this was one of the few changes that they supported. The next comment was regarding the way the provision 13-140-28 (b) was worded; a slight word change was recommended to provide better clarity. Staff agreed and DOFAW would propose this change. The next written comment from OHA recommend that "nonprofit land conservation organization" be amended to expressly include organizations that manage cultural sites, such as heiau, lo'i, and fishponds. Mr. Crabbe assumed that it was included already, but suggested the change to make it clearer. Staff's response to this comment was that it was indeed already included, and it seemed unfair to clarify the specifics for only one resource, they would be going down a slippery slope.

Ms. Schmidt again stated she could pull up the full records for the Commission if they would like since the comments were summarized. Chair Bonar stated that wasn't necessary and was happy to see some of these changes regarding wording issues they have dealt with in the past.

The next comment stated that Chapter 13-140-24 (c) language regarding "requirements to protect state's interests" is too broad; amend to list specific other requirements. Ms. Schmidt stated that the point of having that rule there was to leave it open and broad for the State. The next comment was to amend some of the language of the priority lists which they had taken directly from statute, it was lands containing culture sights or archeological resources that are under threat, or continued degradation, or can be restored and put to its traditional use. Ms. Schmidt's response was that it was just verbatim statute and they haven't taken the liberty of editing any of the other priorities and at this point they should leave it.

Ms. Schmidt moved on to oral testimony from Kylie Wager. She said for the definitions provisions "acquisition" is not clear and it should be clarified whether its both fee and conservation easements can be acquired. Ms. Schmidt just pointed out that it is apparent in the "land acquisitions grant" definition. For the criteria she recommended they clarify whether this is an exhaustive list or whether the Commission can consider outside information. Ms. Schmidt said it seems that most lists in statutes don't state whether they are exhaustive.

Next oral testimony was from Brenda Baker, staff from Senator Pohai Ryan's office. She submitted comments on the provision on priorities and asked the Commission to clarify whether they consider them equally or in order of importance. Ms. Schmidt stated that the AG has determined that they are equally weighted by the statute. Next comment was to clarify whether the match requirement is only 25%, or if the 25% would be matched by an equal amount to equal 50% of the total project costs. Ms. Schmidt responded that the 25% is fixed in statute, questions on the specific match requirements can be clarified further for people with in the Land Acquisition Grant Guidelines.

The next comment was from Janet Britt from Hawaiian Island Land Trust; does the state have to subordinate mineral rights for federal programs? Ms. Schmidt assumed that Ms. Britt was asking it in the context of Legacy Land funding the acquisition. Mineral rights, however, are governed by another statute, so the matter is not really not relevant to this chapter of rules. This concluded the oral testimony. The Office of Planning had submitted written comments early in the process and Ms. Schmidt had sought their permission to include them in the public comment process. The first comment was in regards to the priorities section, add "(7) Lands that provide access to beaches, and other coastal and recreation areas." Ms. Schmidt stated that the list is in the statute, and also that it's a permissible use of funding under the current list of resources, also in statute. Next comment was for greater public access in regards to management fund grants, it is the use of operations, maintenance, and management funds under 13-144-41, and however the list of eligible expenditures does not include construction costs that further enhance public enjoyment are not permissible use of the funds. Ms. Schmidt stated that the list does include equipment and materials, which are part of construction costs. The list has been limited to ensure proper oversight of all the costs, so it is a bit narrow in how it states permissible costs. Another comment was that the regular maintenance of areas is excluded as match, and maintenance is such an integral part of maintaining the value and usability of the resource it seems contrary not to include it as match. Staff response to

that was in order to have a project that is definable in terms of scope, ongoing activities like maintenance are excluded. It is limited to things that are part of the project at hand.

There are two lists of priorities in the rules and the same list is in the statute. They are repeated twice in the rules to clarify that they apply to land acquisition grants and land management grants. Office of Planning also commented that lands that provide access to beaches and other coastal recreation areas be added to priority in the second listing under management grants. It is a statutory list.

The Commission also had comments and during their first submittal to the Board, three recommendations were made at the October 22, 2012, meeting. One of them was to change the term “landowner” to clarify that it includes all interest in land and may potentially be disposed of. They had used one word “landowner” and it did not have a definition. Ms. Schmidt said she consulted with the AG and they said to add another definition at this point is a substantive change requiring additional public hearings. She talked about just separating “land” and “owner” out so that the existing definition of “land” would apply, however, the AG advised that the statute uses “landowner” in the HRS, and the best form is to stick with the statutes. The other comment was a bit more substantive; in “Land Acquisition Grants” in section 13-140-28, it was suggested that a change from the Department may require awardees, to the Department shall require awardees; and from the Department may monitor the awardees to the Department shall monitor the awardees; and so forth. Staff’s response to this is that the Department is already kind of construing the statute rather broadly is assuming affirmative duty for monitoring since it is not really mentioned. It is not beneficial to bind the Department to these activities since it is usually a lack of staff or funding caused by circumstances outside the Departments control that causes a lapse in these duties.

Ms. Schmidt went over what was changed from the first time the rules went in to the Board requesting permission for public hearing to now when they are going back to the Board for final approval. The Legislative Reference Bureau helped with editing the format and style of the rules. In Hawai‘i Administrative Rules 13-142, the definitions section, DOFAW had clarified “nonprofit land conservation organization;” the definition required that it be an IRC section 501(c)(3) nonprofit that has as part of its mission or activities protecting resources, and it references one statutory section where the resources are listed. The resources are listed twice in the statute, however, once in the definitions and again under section 173A-5 where it they’re listed. OHA made a comment referencing that the lists were slightly different so it was suggested to reference both lists so that all resources are included. The next change made was the term “accredited” was deleted. The last was another OHA comment which suggested the change of wording in one of the provisions which was mentioned earlier.

Member Shallenberger asked what obligation the Commission had to document the responses, if any. Ms. Schmidt’s response was the Commission is always advisory to the Board and the Department. The Commission could communicate to the Department in a form of a recommendation or there is always the option to submit testimony to the Board. Member Shallenberger asked if someone who had testified went to see how their

comments were considered what they would do. Ms. Schmidt stated she didn't think there was a legal obligation to report back to each commenter. After looking at some of the other Board submittals for rules, she thought that the divisions usually provided a page or two and only discussed topics that occurred in public comments repeatedly. If there is just a scattering of comments in different areas than they usually get attached as transcripts with no discussion. Chair Bonar asked what is exactly submitted to the Board. Ms. Schmidt said that all the minutes from public hearings and a copy of all of the written testimony was attached to the submittal. Member Berg asked about the Commission's comments. Ms. Schmidt said the comments had been placed in the submittal itself together with the Division's responses to them. Chair Bonar stated that the minutes from this Commission meeting will show on the record they were explained and discussed. This will be in the submittal with the recommendation for approval of adoption at the May 11, 2012, meeting. Ms. Schmidt explained that the Department had made a promise to a legislator to put the rules before the Board prior to issuing their grants for fiscal year 2013 cycle. She listed the next steps that would take place after the Board approved the rules for adoption.

Chair Bonar asked if the Commission could make a recommendation to the Board with the submitted rules. Ms. Schmidt stated that if they could, their comments would go in as testimony. Chair Bonar asked the Commission if there was anything they wanted to comment on at this time to push the Board on changing. The Commission discussed this topic and generally thought that the senate bill, if passed, will make the contradicting rules obsolete anyway, so going back to the process of public hearing at this point does not seem that wise. Ms. Schmidt felt that it would be a good idea to revise the rules in the future despite the difficulty, however, she didn't think there will be a lot of support in that from the division because of the time and expense involved. A discussion took place on what the options were to make the rules clear to the public if the contradicting statute passed, at least adding something to the packet that explains to applicants that these rules were passed interim to the statute. Chair Bonar stated they could always recommend to the BLNR that these rules be put on hold till after the senate bill is determined, but they already promised the rules would be in place for this year before grants were given out so they are in a tight position. A discussion took place regarding this issue. Ms. Schmidt stated she would rely on the AGs office to help with this if it happened.

Member Canfield asked if they should make a motion to submit a statement with the submittal to the May 11th meeting to make it clear they don't want the situation with the rules to hold up funding. Chair Bonar felt it would be irrelevant. Discussion took place about submitting suggestions to the Board at this point regarding the rules. Member Buchanan asked if Ms. Schmidt had a summary of the suggested substantive changes. Ms. Schmidt said she did not. Member Buchanan responded that she was just concerned that something may come back to bite them in the future and they had a chance to review it and make a strong recommendation as a Commission and they didn't. A discussion took place regarding the public hearing testimony and its substantive material. The Commission decided to put the final decision on whether to submit an official statement to the Board until Item 5 was addressed.

ITEM 5: Update from staff and discussion regarding the 2012 Legislative Session:
a. Senate Bill 2782, Relating to Environmental Protection;
b. Governor’s Message 233 (untitled; takes funds from the Land Conservation Fund for Public Land Development Corporation purposes);
c. Senate Bill 2378, Relating to Legacy Lands;
d. Senate Bill 1312, Relating to the Legacy Land Conservation Commission;
e. Governor’s Messages relating to the appointment of members to the Legacy Land Conservation Commission (GM900, GM901, GM902).

Ms. Schmidt updated the Commission on Senate Bill 2782; it appropriates a unspecified amount out of the Land Conservation Fund for the use of the Environmental Work Force. The bill had been deferred at this time. At this point Randall Kennedy from the Division of Forestry and Wildlife joined the meeting. Ms. Schmidt continued with Governor’s Message 233, proposing \$350,000.00 be taken from the Land Conservation Fund and given to the Public Land and Development Corporation for staff and operations. A discussion took place regarding these funds. Senate Bill 2378 was still at the conference committee; the bill, as currently drafted, would require the Board to hold or co-hold conservation easements on nonprofit acquisitions that are funded through Legacy Land. Senate Bill 1312 passed both Houses and is on its way to the Governor for signature. Member Canfield asked what the content of that bill was. Ms. Schmidt stated it allows the Commission to elect the Chair, and also separates the NARS Chair from the Legacy Land Chair (which were both the same person under statute). Governor’s Messages 900, 901, and 902; Member Canfield, Member Richard and Mr. Abbott were recommended from the Committee on Water, Land and Housing to advise and consent. Then they would be confirmed by the Senate, and after that they are usually effective as of July 1st, then the final step to becoming a Commission member is to take the oath of office. The ceremony was briefly discussed.

Member Kaiwi asked Mr. Kennedy these measures would pass, especially SB2378 and GM233. Mr. Kennedy stated that SB2378 doesn’t necessarily do them any harm it just complicates the process, the requirement to hold the conservation easement is a good thing as far as having to consult with the Agribusiness Development Corporation and the Public Land Development Corporation; that is another form for the applicant to fill out. Ms. Schmidt stated that it would change the program slightly and she has a few ideas on how to implement the changes. A discussion ensued on the difficulty the Department will have on monitoring conservation easements, and the funds that may have to be made for that. Mr. Kennedy stated that House Bill 2072 is still being heavily discussed right now and could really help them if it is edited. One section deals with the watershed initiative and they have requested that they get rid of all the funding for the bag bill that just died, and replace that with ten percent of the conveyance tax. The second section has to do with DAR, and the third is in regards to the environmental workforce that would take a huge chunk of funding. Discussion took place regarding the details of the bill. Chair Bonar asked if there was any more questions about these bills, or if the Commission wanted to submit any official statement with the rules at the next BLNR meeting. No action was taken.

ITEM 4. Update from staff, discussion, and possible action regarding the February 24, 2012, meeting of the Subcommittee on Rules and Management Funds and grants of funds from the Legacy Land Conservation Program for operations, maintenance, and management of lands acquired with lands acquisition grants from the Legacy Land Conservation Program.

The Subcommittee on Rules and Management Funds had met to discuss a Request for Proposals (RFP) drafted by staff. The State Procurement Office offers a RFP template for staff to adapt; staff had drafted one for Legacy Land management fund grants. Ms. Schmidt briefed the Commission on the issues regarding disbursing management funds grants. They first went to the Procurement Office and got a very limited exemption in October 2010 for management fund grants. Procurement law and procedures are meant to be kept private while Sunshine Law, which governs the Commission, states things must be kept public. Therefore, there were some conflicts and staff went to discuss them with the Procurement Office and the office provided exemptions for some of the rule sections that stated proposals must be kept private. However, after getting down to the details of the process for the RFP along with the Subcommittee, staff and the Subcommittee had become aware that for a part of the process called “the best and final offer,” they need to have everyone’s best and final offers at the same time and need to be at an open Commission meeting to comply with Sunshine law. However, there is a provision in the procurement administrative rules that states there can be no further discussion once you have the best and final offers, which means the Commission would not be able to discuss the final applications at a public meeting, so it turns out they did not cover everything they needed to in getting the exemption from the Procurement Office. After that meeting, Ms. Schmidt went back through the statutes and realized that additional provisions in the statute caused further conflict and they are also not exempted by SPO from the statute so now they will have to go through that process, and she wasn’t sure if management funds would be ready to go this fiscal year. Member Kaiwi asked about a Request for Quotes (RFQ) because best and final offer is not a part of that process. Ms. Schmidt stated she was not familiar with that process, but one reason they want to go through requests for proposals because it is one of the few processes which does not make them use the lowest bidder. A discussion took place regarding these different processes.

ITEM 6. Update from staff, discussions, and possible action regarding the Fiscal Year 2013 Legacy Land Conservation Program grant cycle.

Ms. Schmidt said that usually they have a meeting every year in around June to cover forms and timings of the different meetings; they don’t usually meet in April, but since they are here she wanted to update everyone. Senate Bill 2378 is going to require some changes to the application; the bill requires they have a section for public benefits, also consultation with the Public Land Development Corporation, Agribusiness Development Corporation, Department of Agriculture, and DLNR, regarding public benefits and conservation easements. She believed the best thing the Program could do to implement is to put the consultation as far in front of the application process as possible to allow applicants room to respond and plan for consultation received. The consultation with

other agencies would be for the applicants to conduct, but Legacy Land could provide a single form for them to submit so the Commission would not receive a bunch of miscellaneous letters and paperwork. Chair Bonar recommended to Ms. Schmidt that she find a point of contact at each agency whose involvement is required by the bill and get them educated on Legacy Land so there are less issues. Ms. Schmidt also suggested a timeframe for response. Discussion began on the different departments holding conservation easements and the process that would entail included the vagueness and timing of the drafted conservation easement agreements. It would probably come down to some type of template for the conservation easement in which specifics could be added to tailor each one to protect a specific set of resources. Member Kaiwi asked why OHA or SHPD had not been asked to be consultants regarding culture, and also was concerned about the expertise of conservation easement writing. Ms. Schmidt stated that she did not know why, however, the original bill would have disallowed nonprofit conservation organizations from receiving Legacy Land grants and limited funding to the four State departments. The current draft of the bill had evolved from that draft.

Ms. Schmidt informed them that it did not look like there would be management funds for this year. Chair Bonar reminded the Commission that he will done in June and they will have to elect (vote) a new chair. Member Shallenberger asked Ms. Schmidt if she had a break down of when all the different terms ended. A discussion took place regarding everyone's terms. Mr. Kennedy just got an email that the Governor just signed Senate Bill 1312 which separates the Chair persons. Also Ms. Schmidt's position was made permanent. Member Berg asked what happened with Member Buchanan's appointment. She told him the application had been late, however, the Department could request an interim position for her in the meantime.

ITEM 7. Announcements:

- a. Letter from Leslie M. Iijima, postmarked March 30, 2012, regarding support for the Fiscal Year 2012 Kahuku Coastal project.**

Ms. Schmidt stated that the letter provided in the handouts had most likely been intended for the Commission meetings in December or the Board meeting in May.

ITEM 8. Adjournment.