

Minutes of the March 7, 2013, Legacy Land Conservation Commission Meeting

Date: March 7, 2013

Time: 9:00 a.m. to 1:00 p.m.

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

COMMISSION MEMBERS PRESENT:

Ms. Rebecca Alakai

Mr. Thorne Abbott

Dr. Carl J. Berg

Ms. Lori Buchanan

Dr. Joan E. Canfield

Mr. Kaiwi Nui

Dr. Robert J. Shallenberger

Ms. Karen Young

COMMISSION MEMBERS ABSENT:

Mr. Herbert (“Monty”) Richards

STAFF:

Ian Hirokawa, DLNR, Land Division

Roger Imoto, DLNR, DOFAW

Randall Kennedy, DLNR, DOFAW

Molly Schmidt, DLNR, DOFAW

PUBLIC:

Laura Ka‘akua

Terrina Wong

MINUTES:

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

Legacy Land Conservation Commission (“Commission”) members, staff, and members of the public introduced themselves.

ITEM 2. Approval of Legacy Land Conservation Commission meeting minutes from December 5, 2012, and December 6, 2012, meetings.

Chair Kaiwi asked if there were any comments on the minutes. Member Berg moved that the minutes be accepted as revised. Member Canfield seconded, all were in favor.

ITEM 3. Review, discussion, and possible action relating to the implementation of Act 284, Session Laws of Hawaii 2012, including the agency consultation process, timeline, and review of any related input from Fiscal Year 2013 participants.

Chair Kaiwi asked staff to provide an update prior to Commission discussion. Ms. Schmidt asked if Roger Imoto, Administrator of the Division of Forestry and Wildlife (DOFAW), had wanted to say anything before she started updating the Commission. Mr. Imoto introduced himself and stated that he was attending the meeting to get a sense of how things worked. Member Buchanan asked Ms. Schmidt if she had introduced Mr. Imoto. Ms. Schmidt apologized and introduced Mr. Imoto as the official new Administrator of DOFAW. The Commission welcomed Mr. Imoto and asked about his background with DOFAW. Mr. Imoto stated that he had been with the Division for 33 years, starting on Oahu in survey, and had most recently served on the Big Island as branch manager before moving into the administrator position.

Ms. Schmidt stated that Item 3 had originally been on the October 17, 2012, agenda for discussion, and had been deferred twice until a deputy Attorney General could be present for the discussion. Ms. Schmidt thanked Deputy Attorney General Julie China for attending the meeting.

Ms. Schmidt stated that the Commission had asked staff to send out a request for feedback from those agencies and organizations that had participated in the Fiscal Year 2013 consultation process. Four responses had been received. Ms. Schmidt referred to a table in the meeting documents. Ms. Buchanan stated that the Commission had made the request because they'd originally had 12 entities submit consultation requests, but only six had submitted applications. Member Berg stated that the Commission had wanted to see if the additional procedure was what had made them drop out. Ms. Schmidt stated that she had gathered that the agencies had not had enough time to respond. Ms. Buchanan asked if they hadn't decided to just let it go if the agencies did not respond in time. Ms. Schmidt stated that this was another option; however, as the staff that had been given the task of coordinating DLNR's response, she thought more time would be useful. Member Buchanan stated that some of the agencies had not provided any feedback. Ms. Schmidt stated that the Public Land Development Corporation (PLDC) may have had a difficult time given the newness of the agency and their involvement in other tasks like promulgating administrative rules. Member Buchanan asked if Ms. Schmidt had placed PLDC on the agenda. Ms. Schmidt stated that she had not seen any reason to do that. Chair Kaiwi stated that it was relevant in terms of it being a consulting agency, whether or not it would be equipped. Ms. Schmidt stated that she did not even know if there would be a PLDC at this point. Member Buchanan stated that this was the point. Ms. Schmidt stated that she hadn't been following the status of the bills.

Member Young stated that one applicant had stated that it was uncomfortable with the form and worried that they would not be able to follow through with the recommendations in time. The applicant for the Paiko project, The Trust for Public Land (TPL), had said that other nonprofit organizations had been uncomfortable with the process. Ms. Schmidt stated that she thought that the problem may be discomfort with the requirement itself, rather than something that they could address by administering it better. Member Buchanan added that this was their

concern as well. Member Canfield stated that the process seems to be as good as sufficient as it could be. Chair Kaiwi stated that he was concerned with the State Historic Preservation Division's (SHPD) ability to provide consultation for cultural sites. Right now, the staffing and future status of SHPD was in question. It was fine to have repositories for consultation, but if the capacity isn't there, then the applicants are left holding the bag. How would they deal with this concern? Ms. Schmidt stated that it was a good question, and she did not have an immediate answer. Chair Kaiwi stated that he was asking staff to be proactive in the case that these things fall through. They should be prepared. Ms. Schmidt stated that she was open to suggestions on improvement for matters within her control. For example, she would be coordinating the response for the Department. She added that SHPD staff had followed up after last year's grant cycle to apologize for a lack of response. Chair Kaiwi asked what happened if they fell by the wayside. Ms. Schmidt stated that internally, the process had been run similar to the way the overall process was run, with an internal deadline for divisions to provide comments, after which it would be assumed that division had no comment. Member Berg asked what the timeline had been. Ms. Schmidt stated that the form and application had been made available on July 13, 2012, and due from the applicants to agencies on August 3, 2012, with the consultation form and results due back to the applicants from the agencies by September 3, 2012. That had been the consultation process timeframe, she did not have the dates for the internal DLNR response on hand, however; she had tried to set it up as favorably as possible to generate a response.

Member Young stated that applicants had said that they had not received responses from some agencies until past the deadline, and had felt that this had precluded their ability to apply to Legacy Land. Ms. Schmidt asked if the program needed to be more clear that a lack of response from the agency would not hurt an application. Members Berg and Canfield agreed. Member Berg stated that providing clear instructions for a deadline for comments, after which "no comment" would be assumed, it would help. Clearly stating that a lack of response does not hurt the applicant would help avoid having this process burden the applicant while letting the Commission comply with the requirement. He stated that he would not change anything except to be more explicit. He added that he did not see any added benefit to providing more time to agencies to respond, especially if it would mess up the timeline for the approval process. Ms. China stated that many agencies were required to do interagency consultation, and documented a lack of response from other agencies by stating "no response" in the official documentation. Mr. Imoto added that he had experienced the same thing in dealing with agencies: they would respond where something made them interested. Member Berg added that they could proceed without major changes. Ms. Schmidt read the relevant wording from last year's form and added that the idea was to be more explicit. Members of the Commission agreed. Member Buchanan added that another route of action included recommending the removal of the requirement through legislation.

Member Young added that PLDC was being repealed, so that would be one less agency. Member Berg added that the agencies may be more responsive now that they know of the requirement and annual timeframe. Ms. Schmidt could even give them a heads up and provide the timeline in advance.

Chair Kaiwi stated that no agency could respond effectively regarding cultural resources within two weeks; that is almost impossible. It was setting cultural sites up for failure. Also, what happens where comments from various agencies conflict?

Ms. Schmidt added that the conflict would be for the applicant, the consultation was between the agency and the applicant.

Member Young asked if the form required applicants to answer a bunch of questions. Ms. Schmidt indicated the location of the form in the meeting documents and stated that it was fairly general, a one-page summary of the project. Member Young stated that somebody would have to sit down and fill it out. Ms. Schmidt stated that she agreed that it was an additional burden for the applicant. Member Buchanan stated that this form, coupled with the requirement that smaller organizations partner up with larger agencies or be approved by them .

Ms. Schmidt stated that last year there had been some confusion about whether or not the administrative rule requiring this would apply, however, current guidance from the AG was that the recent act would override the rule.

Member Buchanan stated that stacking these procedural requirements would cause certain applicants problems. She added that it may even be a constitutional issue, to the extent that onerous burdens are placed on Native Hawaiian applicants.

Member Abbott asked whether an applicant could just get a letter instead of the form. Ms. Schmidt stated that the form actually specified that a letter response is preferred, with the form attached. Ms. Schmidt asked what the concern was. Member Abbott stated that skipping the form and its deadline would allow an applicant to seek and receive a response sooner. He asked if there was a rule preventing this approach. Ms. Schmidt stated that she didn't think there was a rule preventing that approach; however, the concern with omitting the project summary form might be with verifying that the applicant has submitted the same information to the agency as to the Commission. Ms. Schmidt stated that they could possibly get the form out earlier to allow for an earlier response. Member Abbott stated that the applicant could put the info in a letter for verification. Member Shallenberger asked whether using the form would not make things easier for the applicant. Member Abbott stated that his concern was with the deadline, he agreed with Chair Kaiwi's earlier comment regarding the impossibility of getting a response within a two week timeframe.

Ms. Schmidt stated that there had been a couple of comments regarding the timeline. She had planned to propose an earlier timeline later in the meeting, however, Member Abbott had stated May and she had been thinking June, so she was not sure this new timeline would address his concern. Member Abbott stated that his concern was the understaffed nature of agencies like SHPD and the ability to generate a response. Applicants should start the consultation very early in the process.

Member Canfield stated that the form itself was general enough to allow the applicant to submit it early. Member Young stated she was concerned about the question relating to management

plans. She added that she was still a little uneasy with Agribusiness Development Corporation being a consultant; they were also an applicant, so it gave them an advantage.

Chair Kaiwi stated that these filters served to pare down a specific type of applicant, and that goes against the original intent of the Commission, to serve the goal and broadly and as best as possible. If they were only allowed to fund projects A, B, and C, and forced to neglect the rest of the alphabet, that goes against their intent. His hope was that the next time there is an effort to provide consultation regarding cultural resources, some thought would be given to Native Hawaiian organizations, and which of these organizations could actually give good comments. Pretty soon the program would not need the Commission because all of these filters and rules would predetermine which projects would be funded with the amount of funds available. He thought that is what had been happening over the past few years... at first the program had a great number of diverse applicants.

Member Berg stated that the Commission had attempted to address this concern by questioning the participants of the consultation process, however, he was not certain that the results supported the conclusion that the consultation process had narrowed down applicants. He agreed with the concerns but wasn't sure the data supported them. He added that external filters would impact more as less and less funding was available.

Member Abbott stated that comments from other agencies were only additional information for the Commission to consider, and why he would consider it strongly; he didn't see it as a filter.

Member Canfield stated that the agency info went directly back to applicants. Member Abbot stated that the applicant may choose not to address the comments. Member Canfield asked if this fact was clear to the applicants. Member Abbott stated that this point was good. Ms. Schmidt asked if the wording of the applicant could have an effect. Chair Kaiwi stated that he did not think it was an information filter, rather more of a bureaucratic process filter. A Native Hawaiian applicant may not have faith that an agency would be able to see from their perspective. Member Young added that three of the comments had related back to the process being problematic. Ms. Schmidt stated that all of them had mentioned the delayed response from PLDC. Chair Kaiwi read from the comments that an organization had not wanted to go forward with the consultation because they were afraid that they would have to adopt any comments or recommendations from the four consulting agencies.

Member Abbott stated that, in his profession, he had recently been a part of an EIS project to rebuild a formerly existing structure on an industrial urbanized site. They had to consult about 64 agencies – this was the norm. When somebody says that a project has to talk to only four agencies, his first reaction would be positive. The language should be revised to make it clear that this was a conduit for information and not meant to be a hurdle or filter for certain projects. It should be clear that it is meant to serve the interests of the Commission in recommending projects.

Member Buchanan stated that the process actually served the interests of the agencies – it was the departments attempt to get the best value for taxpayer dollar on projects funded through this

program. It was obvious they wanted more agribusiness-type projects. The departments were trying to get to a certain point; it does ultimately not broaden the pool of applicants.

Chair Kaiwi asked Ms. Schmidt what would happen when the consulting agency is also the applicant. Ms. Schmidt stated that ADC had submitted an application, but she could not remember what the consultation comments had been. She said that she thought an agency would want to take the opportunity to support its own project. Member Shallenberger stated that, ultimately, the Commission could either use or ignore the info. Member Young stated that an agency could delay a project by lack of response, Members Abbott and Canfield stated that lack of response would be deemed as no comment.

Member Shallenberger stated that the Commission would not increase the number of agencies to be consulted, it was dictated by law. Member Buchanan stated that an entity that had originally been named was now proposed in five different forms; it might morph into something else, and they'd have to deal with it. Member Shallenberger stated that in terms of workload, the applicant only had to deal with a one-page summary. Member Buchanan stated that it may go to agencies that smaller organizations did not want review from. Member Shallenberger stated that it was in law, the Commission could not control that.

Member Berg stated that in the context of this discussion, the Commission could ask for a repeal of the procedure, but in the short term, they could improve the function through wording to the applicant and advice to the consulting agencies.

Member Alakai asked if the process was set by administrative rule or law. Ms. Schmidt stated that it had been imposed by Act 284, SLH 2012. The act was signed in July and the Commission and staff had scrambled to administer the new requirements in last year's grant process. Member Berg added they were trying to get it in shape for this year.

Chair Kaiwi asked for any further discussion. Ms. Schmidt stated that the Commission had asked her last time to list which divisions within DLNR had participated in the consultation. Ms. Schmidt stated that the divisions were: State Parks, Office of Conservation and Coastal Lands, Land Division, Historic Preservation, Forestry and Wildlife. Ms. Schmidt stated that she had coordinated the process by sending a request to each of these divisions and then consolidating the responses into one for Chair Aila's approval. Per a question, Ms. China stated that agency had been given a month to respond. Ms. Schmidt stated that it generally took a day or two to move from one mailbox to another, she would not mind cutting out the intermediary steps and having the forms sent to her directly.

Ms. Schmidt stated that any additional clarification of Act 284 would fall under this item. She added that she had a proposal for this year's timeline. She listed the dates for the previous year's process: the consultation form and application had been made available on July 13, 2012, and due from the applicants to agencies on August 3, 2012, with the consultation form and results due back to the applicants from the agencies by September 3, 2012. The applications had been due September 17, 2012, and were posted to the Commission on September 20, 2012. The Commission met October 17, 2012, to arrange site visits and met twice in December 5 and 6 to recommend projects for funding.

As staff, she felt that the agencies need more time to respond to the consultation request. Member Shallenberger asked if they ought to have more than a month. Ms. Schmidt replied in the affirmative and stated that the only way to provide more time without impacting the rest of the approval process would be to move things earlier in the year. This is why she had suggested a March meeting. Member Buchanan stated that she had been wondering about that. Ms. Schmidt stated that she would try to be clearer about meeting purposes in the future.

Ms. Schmidt proposed to have forms available for applicants by June 21, have the consultation forms due to agencies by July 19 (this would allow more time than last year), have them go from the agencies back to the applicants by August 30, and have applications due September 16.

Member Shallenberger asked if it would be clear to the applicants that a lack of response would not preclude a project from applying. Ms. Schmidt stated that she understood that this was the general intent of the Commission; however, the topic might be better discussed under the next item when they went through the application for wording.

Member Buchanan asked about the timeframe for site visits. Ms. Schmidt stated that staff would post and send the applications as soon as possible after they come in. She would poll Commission members for dates between October 14 to 18 for the Commission meeting to arrange site visits, and the first two weeks of December for the two meetings to form recommendations.

Member Buchanan commented that last year's site visit organization had seemed chaotic and asked if the October meeting could be earlier. Member Shallenberger stated that the Commission should have sorted more out at the meeting and saved less for afterward. Member Berg agreed and added that people had been eager to leave the meeting. Member Canfield stated that not everyone had been there. Member Berg stated they could just have the meeting and set the visits up. Member Shallenberger stated that the missing information of when the applicant was available was still a problem, and asked if they applicants could provide the info up front.

Member Canfield stated that applicants may not be able to coordinate with other parties that attend the site visits that far in advance. Member Berg stated that they ought to accommodate the Commission.

Chair Kaiwi asked if the Commission members were leaning toward setting times at the meeting. Members agreed. Chair Kaiwi asked if the four consulting agencies ought to have staff at the site visits. From a cultural standpoint, how else would they be able to meaningfully provide comment on the aina? If they are serious about the consultation being part of their kuleana, then they ought to commit the time to visit.

Member Shallenberger asked what result this requirement would have for agencies that don't care to comment. Chair Kaiwi stated that he was just proposing a way to cross-filter the filters.

Ms. Schmidt stated that the Commission could also use its own role as the advisory body for project recommendations to decide whether to give weight to an agency's consultation.

Member Young asked whether the due date to agencies could be June 22 to give the applicants another three days to fill the forms. Ms. Schmidt stated that she did not want to cut down on agency processing time and asked whether they could meet Member Young's request by making the forms available earlier. Member Young agreed. Ms. Schmidt stated that the forms would be available June 17, 2013.

Ms. Schmidt stated that they could also move the October meeting up a week per Member Buchanan's request. Ever since the applicants had started submitting PDFs, the posting and printing of applications had become much faster and easier. She thought there was room to move the meeting to the week prior.

Member Shallenberger asked whether applicants could submit a list of potential dates for site visits. Member Buchanan agreed. Member Canfield stated that there had been an issue with people responding. Member Buchanan suggested providing a time window for applicants to know site visits would be conducted. Member Shallenberger stated that he preferred a list of dates.

Ms. Schmidt stated that she could send an email to applicants prior to the October 2013 meeting to get their availability and then bring this information to the meeting. The Commission agreed.

Member Abbott asked Ms. Schmidt whether the forms were fill-able. Ms. Schmidt stated that they were, however, she had switched program versions the past year and had accidentally formatted the fields poorly. She would improve that blip this year. She added that the applicants had often converted the pdf into word anyway, and it seemed unfair that some chose to ignore the word limits, however, she would not bother with addressing this unless it was a problem for the Commission.

Member Abbott asked if they could provide more detail on the purpose of the consultation process and also clearly indicate that a lack of agency response would not hurt a project's chances. They could indicate that the consultation was to be informational, process-oriented, and not meant to be a filter. That might remove some burden from the applicant.

Member Berg asked if the purpose was outlined in the Act. Ms. Schmidt stated that the only purpose she recalled from the Act was to provide information on public benefits of a project. Member Berg stated that he then agreed with Member Abbott. Chair Kaiwi agreed.

Ms. Schmidt read from the Act. Member Berg stated that he was asking whether the Act indicated its purpose prior to the actual statutory text in the act. Ms. Schmidt replied that it did not.

Member Canfield asked if Member Thorne's proposal would go into the application form. Ms. Schmidt asked Chair Kaiwi whether it was time to discuss the application.

Ms. Schmidt stated that thus far, she had the following suggestions from the Commission: change wording on the consultation form to specify that no response from agency does not hurt applicant, plus there's a thought of putting something similar on application, move the October meeting up if possible, change the release date to June 17, work on better organization for site visits by getting dates from applicants, fix Adobe forms. Ms. Schmidt said she could move on if this list was complete.

Chair Kaiwi asked Ms. Schmidt to send an update near the end of legislative session regarding the outcome of PLDC-related bills and any effects on Legacy Land. Ms. Schmidt agreed. Ms. China added that they didn't know the outcome at this point.

DOFAW Administrator Roger Imoto left the meeting and commented that he was glad to see the Commission took a lot of care in discussing the issues.

Per Chair Kaiwi's request, Terrina Wong of the Pacific Gateway Center (PGC) introduced herself. Ms. Schmidt added that PGC had participated in last year's consultation process.

Ms. Schmidt stated that she had recently sent an email to update the Commission on proposed legislation. The bill, Senate Bill 708, would later last year's Act 284 language. She indicated that it was in the meeting documents. Ms. Schmidt stated that Act 284 had clarified which agencies and organizations could hold restrictions on lands acquired with Legacy Land funds, and also what types of restrictions could be held. The current draft of this bill would delete the counties and federal agencies as potential holders of Legacy Land restrictions, and it also clarifies that the Board can hold other forms of deed restrictions aside from a conservation easement. She stated that it seemed to help clarify the language from the last act. It also stated that the Department should make rules to implement this new language.

Member Buchanan stated that she could use further explanation. Ms. China stated an explanation of Act 284 might help. She added that she did not know whether this bill would succeed, so it might be more useful to examine that act. Chair Kaiwi asked if Ms. China had an impression of the intent of this legislation. Ms. China stated that she thought the intent was to clarify the BLNR's duties and powers.

Ms. China stated that the act (in the handouts) provides that the State, county or land conservation organization shall provide either conservation to the BLNR or an agricultural easement, deed restriction or covenant to the BLNR, the DOA, ADC, PLDC, other land conservation orgs, or a federal State or county natural resource conservation agency. It also said that the BLNR would be the holder of any such conservation easement.

The change now being proposed is pretty much that the BLNR should be a holder of anything that is given out (rather than just conservation easements).

There was some discussion as to whether more than one agency/organization could hold restrictions.

Member Abbott stated that he was glad to have the deputy AG's presence. It was clear to him that the bill removes county and federal agencies as potential holders, which would mean the BLNR gets the easement. It remains silent on whether that precludes also giving an easement to a federal, county or nonprofit. Ms. China stated that it did not preclude easements to other entities. Ms. China stated that the other agencies would be co-holders.

Ms. Schmidt stated that Section J. of last year's application was their attempt to explain the requirements in plain language for applicants. Member Berg asked how the Commission would deal with a potential change within the timeline for applications.

Ms. Schmidt stated that, prior to getting to that topic, she wanted to inform the Commission that the interpretation of Act 284 now had additional guidance – Senator Dela Cruz had gotten some advice from the AG's office. There was an emphasis on the Board's ability to exempt projects from being able to provide conservation easements.

Members of the Commission stated that this was unclear. Ms. China stated that the law that was passed stated that the BLNR shall be a holder of any such conservation easement, however, the following section provided for exemption of the requirement. She added that a type of restriction may be required by one of the agencies or organizations, but an exemption may be granted.

Ms. Schmidt stated that Section J. of last year's application attempted to describe the requirements of the law in as plain a fashion as possible. Section J. asked applicants what restrictions, if any, outside of the customary Legacy Land deed restrictions, would be imposed on their projects. It then explained the requirements – for each type of project, which entities can hold what type of restriction. It also stated that BLNR can elect to co-hold any conservation easement.

She added that last year's administrative rule relating to conservation easements held over lands acquired in fee by nonprofits had been interpreted to have been overridden by the part of Act 284 that allowed for possibility of exemption. The application allowed the applicant to state its own rationale for why it deserved an exemption. This approach was helpful in later having an approach or rationale for having the BLNR grant an exemption.

Member Buchanan asked if they should assume that the legislators did not like this approach and therefore sought to change it with this year's legislation. Ms. Schmidt stated that part of the issue might have been an article in which the author stated that staff and Senator Dela Cruz were interpreting the act differently. She apologized for her role; she did not think that they were interpreting the act differently.

Chair Kaiwi asked if BLNR was okay with holding conservation easements on all projects. Ms. Schmidt stated she could only state her opinion as staff: she did not think it was appropriate to automatically take a conservation easement on every project within the current framework of the program, but if this requirement was desired, then they would do the best they could with it.

Member Buchanan asked when executive session was appropriate within the context of a State commission meeting. Ms. China stated that she did not think that anything they were discussing required executive session.

Member Berg stated that previous Commission meetings had covered this topics, he remembered that the previous chair had said that DLNR Land Division staff did not want to deal with an ever-increasing number of conservation easement land acquisitions. Ms. Schmidt stated that her opinion as staff has been that conservation easements are perpetual commitments to be involved with management of the property, monitor, maintain a relationship with the landowner, etc., and if DLNR is to commit, it ought to have it be a part of a well-thought-out decision, e.g., part of a plan, or part of a priority for resource management for a given division, as opposed to something that is slapped on at the end of the grant process.

Member Buchanan stated that she had thought that the new access and acquisitions coordinator had been hired by DLNR as part of this requirement, and that projects that went through this Commission would be judged by a second committee.

Ms. Schmidt stated that she did not know of the committee.

Chair Kaiwi asked if this matter was supposed to be discussed in executive session. Ms. China stated that the items need to be on the agenda if the Commission knew it would be discussed. Members asked what would happen where it was unknown until meeting time. Ms. China stated that she did not think it was proper.

Member Abbott stated that originally Chapter 173A, HRS, was intended to make the BLRN a party to the easements, obligated into perpetuity to follow up on compliance. He pointed out that it could be interpreted to state that the nonprofit land conservation organizations could provide themselves an exemption from a BLNR-required conservation easement. Ms. China stated that the current interpretation was that an entity could provide an exemption if they were otherwise required to hold one.

She added that she hoped that the end product of this year's legislation would be a more easily-understood framework, however it may not be help to look ahead at this point.

Chair Kaiwi asked if it would be appropriate to add an executive session possibility to the next meeting agenda near the end of legislation to discuss legal interpretation of new legislation. Ms. China stated it would be.

Member Abbott asked about a section of SB708, SD2, relating to rules. Ms. China stated that it looks like all implementing agencies would be required to adopt rules. Ms. Schmidt added that it did not appear to require the adoption of rules prior to the disbursal of grants.

Member Abbott stated that his concern was that the PLDC, if it continues, would not be able to pass rules, and thus would not be able to participate and resultantly, projects would stall. Ms. China stated that the rules requirement did not preclude agencies administering the programs in the interim.

Chair Kaiwi stated that the four consulting agencies were already equipped to be very effective applicants. He asked if the four agencies would potentially provide support for one another's projects, resulting in a competitive edge by agencies over other applicants. He asked if this view was reasonable. Ms. China stated that she saw things differently – the Board can exempt from conservation easements and in general has been.

Ms. Schmidt stated that, setting aside this year's proposed legislation, and looking to implementing last year's legislation, this year, the DLNR had recommended to the BLNR the exemption of all current year projects from being required to hold a conservation easement. Ms. China added that they had done this to comply with Act 284, SLH.

Chair Kaiwi stated that he was generally in favor of conservation easements. Ms. China stated that every deed for the acquisition of land that receives Legacy Land funds is required to contain a covenant stated that the land would be protected in accordance with the purposes of the grant, and any disposal of the land or interests therein would require BLNR approval. The covenant ran with the land and was perpetual, so it was very restrictive.

Member Shallenberger asked what agency would enforce. Ms. China replied that it was the State, represented by the BLNR and the AG's office. Member Young asked if the enforcement would be years later. Ms. China stated that violations were not usually immediate. Member Young stated that she understood easements to require monitoring. Ms. China stated that on a practical level, the deed restriction serves the purpose of holding the grantees feet to the fire. If you wanted to get more into land management, there needs to be someone drafting these easements to be tailored to each property, there would need to be staff to monitor. It was not practical or useful to put generic easements on properties. There are entire organizations that have as their sole purpose the holding and monitoring of these easements.

Member Shallenberger stated that it might be tougher to try to manage the land when there is no conservation easement and only a deed restriction.

Ms. Schmidt stated that there was a range of options: covenants, deed restrictions, conservation easements, so on. If the strength of a conservation easement is having specific restrictions on properties to manage specific resources, e.g., prevention of erosive activities on areas of the property where topsoil is to be preserved for ag, having somebody monitoring on an annual basis and looking at those very specific restrictions, GPS point by GPS point, year after year, ... that is very labor intensive. And the conservation easement itself also has to be drafted very carefully. What we have is a grant program, a program that provides people an incentive to go out and do something because that action serves the public benefit. In this case, to provide an incentive for agencies and organizations to go out and do what we want them to do, that is, protect land and resources using conservation easement and fee land acquisition. So we have different public policy tools: grants, conservation easements, fee acquisition. When we try to superimpose conservation easements on a grant program, we have a little bit of a conflict – what are we trying to do? Are we trying to provide them an incentive so they can go do these things we want them to do? Or do we want to go out and buy land? By statute, this program is a grant program. Whether or not we can start taking conservation easements ought to be considered in

light of the fact that it would be a different type of program that would include their proper management.

Member Berg stated that it seemed Legacy Land was being asked to change by legislature. Ms. China stated that they were being asked to consider it, strongly. Member Berg stated that the Commission had strong reservations about it. We have seen a way to live with the last act; however, the new act may add another layer of onerous requirements. Unfortunately, it seems that the trend is for the State to take ownership of more lands, and Legacy Land is becoming a pawn in that context. Other members of the Commission voiced agreement.

Member Buchanan asked where it would be appropriate for the Commission to be proactive. Ms. China stated that the bill affects the Commission. She did not know if they could give testimony.

Ms. Schmidt stated that the Ethics Office had only told her that members should call on a case-by-case basis to discuss the submission of individual testimonies. She had not asked if the entire Commission could testify, however, as a practical matter, under Sunshine Law meeting requirements, and with the short notice of legislative hearings, it would be difficult for the Commission to discuss and testify on a bill. Member Abbott asked whether they could testify as individuals. Ms. Schmidt stated that individuals should call the Ethics Office.

Ms. Schmidt stated that the Commission's duties in statute included forming recommendations to DLNR and BLNR, and while it did not specify legislative matters, she did not think it was precluded.

Member Shallenberger asked whether the Department supported the bill. Ms. China stated that it was not an admin bill. Ms. Schmidt stated that the testimony, in short, stated that DLNR was okay with the bill, provided that BLNR still had the option of requiring deed restrictions over projects as it had in the past. It also noted the Department's concerns with requiring BLNR to hold conservation easements over projects.

Ms. Schmidt stated that she did not object to this year's bill, it just seemed to clarify the language from last year's bill. Ms. China stated that both versions of the bill still allow the BLNR to exempt projects from giving BLNR a conservation easement. Member Buchanan asked what the point was then. Ms. Schmidt stated that it also removes counties and federal agencies as potential holders of restrictions. She stated that her opinion was that most of the legislation came out of misunderstandings or miscommunications regarding deed restrictions and conservation easements.

Member Shallenberger stated that he thought that once people understood how hard it was to manage conservation easements, they might be happy for the federal government to take them.

Ms. Schmidt stated that the county programs which has set a precedent of taking conservation easements over projects had created some misunderstanding. When they do that, they just impose a very general conservation easement that doesn't do much in terms of protecting specific resources. Ms. China stated that in some circumstances, it can actually cause more harm

than good to take this type of conservation easement. The holder of the conservation easement is required to monitor something amorphous, it becomes very difficult.

Chair Kaiwi stated that, moving forward, he'd look forward to Ms. Schmidt keeping the Commission updated on the status of legislation so that they'd know whether to call a meeting near the end of session. He stated that the Commission would have an executive session possibility on the next agenda, and also asked staff to provide some clarity on the legislative advocacy abilities of the Commission.

Ms. Schmidt stated that she had been told that individuals ought to call in on a case-by-case basis, however, she would check back for an answer on the abilities of the Commission as a whole.

Chair Kaiwi stated that this Commission has a wide range of expertise among its members and had been able to work together to create some good things over the last five years. He would hate to see that mana dissipate because of the constant shenanigans. He stated that the set up of the Commission was fantastic, and to constantly take away from the ability of the Commission to play a meaningful role was a big mistake. It was the program's goals that would suffer – protecting aina. The people at this table care enough to put themselves on the line.

Member Abbott stated that some commissions had it on every agenda, and asked whether it would be appropriate or possible for this commission. Member Berg stated that at the county level, they had to identify the item under discussion. Ms. China stated that she did not think OIP liked the practice of putting an open executive session option for every item. Ms. Schmidt read from the OIP guide that an agenda ought to state the purpose of the executive session in as much detail as possible without jeopardizing the purpose of having the executive session.

Member Canfield asked how long legislature was in session. Ms. China stated that the first week of May was usually the end. She added that some proposals go into conference committee and it is not always apparent what will result. She added that last year's act had gone into conference.

Member Buchanan stated that politics may be played at that point, and the end loser might be the public.

Mr. Hirokawa suggested that the Department has an opportunity to recommend a veto; the Commission might have an opportunity for input then through a motion or recommendation to the Department. Ms. Schmidt added that motions on general policy matters may also work if the scheduling doesn't work out.

Chair Kaiwi called a 10-minute break. Chair Kaiwi asked if there were comments before they moved to the next item.

ITEM 4. Review, discussion, and possible recommendations regarding the amendment of Chapter 13-140, Hawaii Administrative Rules, "Legacy Land Conservation Program Rules" to reflect the passage of Act 284, SLH 2012, and to clarify related procedures.

[See previous item.]

ITEM 5. Update from staff, discussion, and possible action regarding the Fiscal Year 2014 Legacy Land Conservation Program grant cycle, including the establishment of a tentative timeline and review of forms and procedures to be implemented.

Ms. Schmidt asked the Commission if they wanted to go through the entire application or skip to the newer material relating to Act 284 implementation. Member Shallenberger asked if staff had received any suggestions for improvement over the last year. Ms. Schmidt stated she had not. Member Berg recalled that the Commission had not found any needed changes in last year's review process as they had in prior years. Member Buchanan commented that there were only four applicants. Member Berg stated that they had been good ones.

Member Young asked whether there were sufficient funds. Ms. Schmidt asked if she could discuss this under the next item.

Ms. Schmidt stated that that moving to the end of the application and the sections that had been added last year, for Section J., hopefully they could make this section cleaner in future years by putting the lengthy explanation in the guidelines, but for now, it may be best to keep the explanation next to the requirement so that applicants can see why the questions are being asked.

Member Abbott stated that they should ask the applicants in the room for any suggestions. Ms. Ka'akua stated that she was from TPL, and she did not have any comments on the application. Ms. Wong stated that she had begun with PGC at the end of August and hadn't worked on the application, so she did not have comments. She added that she did recall a discussion regarding Section J., however, compared to other federal or county programs, this application was very user-friendly.

Member Young asked why PGC had withdrawn its application. Ms. Wong stated that she was not sure as she hadn't been directly involved, however, she thought it had something to do with the easement section.

Ms. Schmidt stated that she had asked the AG to look over Section J., however, she may not have had time yet. Ms. China stated she had reviewed it last year and it was consistent with the existing law. They would have to reassess it after the adoption of any new laws.

Ms. Schmidt stated that the sections that were new as of last year were Section J and Section K. Section J was about the new deed restriction requirement and Section K was about the consultation and public benefits.

Chair Kaiwi asked if any applicants had called regarding Section J. Ms. Schmidt stated that they had during the grant application process last year, but not recently. Chair Kaiwi asked if she'd be available for questions. She stated that she would.

Ms. China suggested revising the statutory reference on Section J. Ms. Schmidt stated that she would. The correct section would be section 173A-4, HRS.

Ms. Schmidt stated that she would assume there were not comments at this point for Section J. She stated that the next section, Section K, would be the place where the Commission's previous request would go – language regarding the fact that a lack of response from the agencies does not hurt the applicant. She read the current language and asked the Commission if they wanted the text inserted there.

Member Young asked where language requesting exemptions from required conservation easements would go. Ms. Schmidt stated that it was in Section J. currently. She read the language and suggested revising it to include all applicants and not just nonprofit organizations.

Member Shallenberger asked where the Legacy Land deed restrictions that are normally applied can be found. Ms. China stated that the restrictions were in the grant agreement. She explained the contents of the restrictions, stating that it was taken from provisions of Chapter 173A, HRS. Ms. Schmidt added that additionally, plain language regarding the restrictions was in the program guidelines so that applicants would have notice.

Ms. China added that the restrictions were then in three places: the guidelines, the grant agreement, and the deed documents. Ms. Schmidt stated that the first instruction listed on the grant application is to read the guidelines prior to applying.

Member Alakai stated that she hadn't seen the statutory language relating to exemptions. Ms. China stated that it was in section 173A-4 (e), HRS. She added that it was what the BLNR used last year to exempt projects from the requirement.

Chair Kaiwi asked if anyone had further comments.

Ms. Schmidt stated that there were a few other things to discuss. She mentioned that since she knew that DLNR consultation forms would go to her, she could nix the requirement for a copy to the program.

She proposed adding another set of checkboxes to the consultation form, asking if agencies wanted to take an easement. Chair Kaiwi stated that he was concerned that agencies would check the box without full awareness of what it meant. Member Young asked if it would change the process by requiring reviews from higher-ups. Ms. Schmidt stated that the higher-ups had to sign the form anyway.

Ms. Schmidt added that the reason for the proposal was to defend against accusations that the other agencies had not been given enough notice or information. She wanted to make it visible that they were following the act as well as possible. Ms. China suggested a certification process for applicants. Commission members indicated displeasure with the suggestion. Member Abbott stated that adding more forms or language at this point might bring about death by a thousand cuts. He asked if the applicants present had input.

Ms. Ka'akua stated that her concern was that the agencies were not familiar enough with deed restrictions, conservation easements, etc., to understand what their role would be. Also, practically speaking, if all agencies check that box, who would oversee that conservation easement? She added that she did not want to overburden the agencies.

Ms. Schmidt stated that putting it on the form explicitly would put the responsibility in the hands of the agencies.

Member Berg stated that the applicant could potentially be overwhelmed by three agencies asking for conservation easements.

Chair Kaiwi stated that the agencies were supposed to be reading the forms and understanding their own actions. The checkbox would be a spoon-feeding device, and he did not support that. If they want the kuleana, they should take it seriously.

Member Abbott asked if the checkbox could be worded differently. Member Canfield read the existing language from the form and stated that it was very clear and explicit. Other members expressed agreement. Member Berg stated that he did not like the checkbox idea. Other members agreed.

Chair Kaiwi asked if there were any further subjects under this item and moved to the next item.

ITEM 6. Briefing by program staff on:

ITEM 6a. Status of the Fiscal Year 2013 grant cycle; and

ITEM 6b. Status of projects recommended in previous fiscal years.

Ms. Schmidt stated that the BLNR submittal for the Fiscal Year 2013 cycle had been sent to the Commission, the meeting was tomorrow. Chair Kaiwi asked about timing and attendance. Ms. Schmidt stated the meeting began at 9 a.m. and attendance was discretionary. Ms. China suggested that anyone testifying sign up on the move up agenda to avoid spending all morning at the meeting.

Ms. Schmidt stated that DOFAW had recommended that BLNR full fund all four projects after reviewing the estimates for conveyance tax revenues for the remainder of the fiscal year. She stated that there would likely be very little or no unencumbered balance at the end of this year. Ms. Schmidt stated that she had spoken with Mr. Kennedy about the possibility of fully funding all projects, and he agreed that it would be feasible.

Chair Kaiwi asked when the funding scenario would be clear. Ms. Schmidt stated that the paperwork for encumbering funds would be done after the Governor issues approval at the end of the fiscal year, in May, and they would be processed in June, so it would be determined by the funds available at that point.

Member Young asked about the funding for Ulupō Heiau, as they had not secured full matching funds. Ms. Schmidt stated that she did not have an update at this point. Chair Kaiwi asked if it

would have any impact on the ranking or funding of projects. Ms. Schmidt replied that she did not think so; the funding ought to follow the Commission's ranking. Member Buchanan asked if the Commission had included the pertinent language regarding fully funding projects as ranked, Ms. Schmidt replied that they had.

Chair Kaiwi asked if the last project would not know its funding situation until June. Ms. Schmidt stated that every year, there had been a low level of uncertainty regarding project funding: either the Governor could choose to not approve, or the paperwork to encumber funds could fail. This year, there was an additional factor: the conveyance tax revenues could come in horrifically low. In previous years, they had enough funds present in the fund at the point of the February or March BLNR approval. This year, they would have to wait for funds to accumulate.

Member Young asked if the funds taken to run the PLDC would be returned to the LCF. Ms. Schmidt stated that she had seen versions of proposed legislation that would require this, however, she did not know if it would pass, or whether there would be any unspent funding anyway. Chair Kaiwi suggested having the item discussed at a May meeting.

Member Buchanan asked if the program would be moving forward with management funds grants. Ms. Schmidt stated that, at this point, it may overwhelm staff to try to implement that along with other legislative changes in the upcoming grant cycle. She stated that it might be more appropriate for the following year. Member Buchanan asked if she was worried about being accused of not implementing the management funds grants. Ms. Schmidt stated that it might happen; however, she had plenty of paperwork to demonstrate the efforts thus far. Member Buchanan stated that the program would be getting an application for management funds this year.

Chair Kaiwi asked staff to refresh his memory, what the status of the rules were, and if management funds were put into effect through the rules. Ms. Schmidt asked how the applicant would apply without a form. She stated that an act that passed in 2008 had allowed the program to give out management funds in addition to land acquisition funds. She recalled that the Commission had made a motion at one point to defer the award of these funds until future years. Member Buchanan asked about rules status and the delay. Ms. Schmidt stated that the rules were complete, however, the public Sunshine Law Commission review of applications and the private procurement process seemed to conflict in some areas and the previous administrator had asked OIP for an opinion. Chair Kaiwi asked whether it was the kuleana of the AG's office. He asked what they were waiting for. Ms. Schmidt asked whether the Commission was indicating it wanted to give out management funding this grant cycle. Member Buchanan stated that people that wanted this funding might complain that Legacy Land is supposed to have the funds available. Ms. China stated that the program is not required to grant the funds. She added that the Commission had decided not to award the funds until future years. She added that Ms. Schmidt could follow up. Ms. Schmidt stated that she would prefer that Commission members communicate to her as soon as possible on matters like this one, because she did not want it to appear that there is some resistance on the part of staff.

Member Young stated that there had been more applicants in prior years.

Member Canfield asked if it would be possible to get it done this year. Ms. Schmidt stated that it might be possible to put forms out there; however, her reservation is with putting something out before the issues are resolved. Member Canfield asked if they were not prepared this year. Ms. Schmidt stated that she did not know whether or what type of response she might receive.

Member Shallenberger stated that he would like to see the process implemented, but it did not need to be this year.

Ms. Schmidt asked whether the Commission wanted staff to move forward regarding the management funds. Chair Kaiwi stated that they did not have a choice. Member Buchanan stated that it could be scheduled to allow staff to work on it. Member Canfield stated that it would be subject to staff time. Ms. China stated that the Commission had advised that the funds be held until issues were resolved, so Ms. Schmidt should continue to move forward on resolving issues. Member Shallenberger stated that it could be with a view to the grant cycle after this one.

Member Berg stated that one of his concerns had been (and former Chair Thielen had addressed this) that the grants were another way for DLNR to siphon money out of the program for its other programs. Former Chair Bonar had agreed with this view, and thought that the point of Legacy Land was more to protect land and resources through acquisition, rather than to serve as a source of management funds for DLNR. Therefore, they had prioritized this last. Ms. China stated that they could reconsider how to direct staff. Also, once the funds are made available, it will be open to all applicants that have received land acquisition grants.

Chair Kaiwi asked if the funds “must” be dedicated, Ms. China stated that the dedication of management funds for grants was optional; they “may” award them.

Member Berg asked if it was five percent of a project’s budget or five percent of the program budget. Ms. Schmidt replied that it was the latter. Ms. China added that it was the Board’s authority. Member Berg stated that the BLNR could instruct how to grant the funds, the Commission was only advisory. Chair Kaiwi asked if portions of funds from previous years should have been reserved. Ms. Schmidt stated that it does not accumulate in that fashion – it would be five percent in one given year. She stated that an annual grants budget would be divided into two amounts, with the ceiling for management funds grants limited to five percent of previous year’s revenues.

Member Buchanan stated the rules had limited it to prior applicants. Ms. China stated that the requirement was also statutory.

Ms. Schmidt stated that her prior request for Commission guidance on management funds grants wasn’t appropriate because it was not on the agenda, however, she could put it on the agenda for the next meeting. There was general agreement.

Ms. Schmidt stated that she would give a brief update on project status from previous fiscal years. Since 2006, in total, 35 grants have been awarded. Two have lapsed, 17 have closed, and 15 are pending closure. As for open projects, there are three from FY11, four from FY10, and one from FY09.

Chair Kaiwi asked if she had a breakdown of any sort for which projects had closed. Ms. Schmidt stated that timing seemed to be the most relevant factor – the early projects had closed. She listed projects by fiscal years. Member Young asked why the lapsed projects had not closed. Ms. Schmidt stated that the awardees hadn't been able to reach a final agreement with the landowners. Member Berg commented on the Kahili Beach project, stating the Fish and Wildlife Service has changed its mind regarding ownership. Ms. Schmidt stated that, during Legacy Land's involvement as a funder for the project, the issues had been with encumbrances on the title that were inconsistent with protection of the resources. Member Berg stated that the project proponents had tried to find another solution for protecting the parcel but it had been problematic. Mr. Hirokawa added that a subdivision had been required because the property was a condominium property regime. Ms. Schmidt continued to list projects by fiscal year. Member Buchanan commented that lands adjacent to the Sunset Ranch property were up for auction.

Member Berg asked if there was anything about the two lapsed projects that reflected things Legacy Land could fix or improve. Ms. Schmidt stated that she didn't think the Commission had previously requested the preliminary title reports as it did now, perhaps that might have helped. Mr. Hirokawa stated that he did not think there was anything that the Kauai project could have foreseen; it had been a lack of experience in dealing with the complicated matter at hand.

Chair Kaiwi stated that there had only been two Native Hawaiian organizations on the list that had closed projects. Member Berg stated that many of the other projects had cultural components. Member Shallenberger referred to the North Kohala projects. Chair Kaiwi stated that he was specifically referring to Native Hawaiian organizations. Member Berg pointed out that there had not been a breakdown of funding by resources other than agriculture, maybe this should be done.

Member Berg questioned whether the program was not attracting a certain category of applicant or use, and if so, should they be working on outreach? Chair Kaiwi stated that there should be more outreach efforts. Member Young stated that there should be more legislative outreach. Chair Kaiwi suggested a more aggressive approach.

Ms. Schmidt stated that she had struggled a bit in terms of figuring out what approach to outreach was appropriate. She had initially thought it best to preserve State funds. Recently, however, she was looking at other programs and the fact that they had one or more full-time outreach staff. Some programs even had outreach staff by island for specific projects. Here, about five percent of one staff person's job duties were to perform program outreach. Chair Kaiwi stated that OHA's publication Ka Wai Ola was a cost-effective way to reach people. He added that Legacy Land's effective track record was a story in itself. Ms. Schmidt stated that outreach for Legacy Land ought to be well thought-through and well done, because it was difficult: nine different types of resource to protect often meant that one person that likes ag but dislikes watersheds might see the program as flawed. Member Buchanan asked if DLNR outreach needs to be approved. Ms. Schmidt replied that it was. She added that she agreed that the outreach needed improvement. Member Berg asked about interns. Ms. Schmidt stated that professional services might be more appropriate, because interns may not produce high-quality

materials. She added that she received occasional assistance from DOFAW outreach staff, and they were good, however, they had a million other programs to look after as well. Member Young suggested better use of media outlets. Ms. Schmidt agreed and commented that she had noticed that they did not pick up press releases as often as before. Member Canfield stated that she had noticed the Hamakua project neglected to mention Legacy Land.

Ms. Ka'akua stated that TPL is willing to help. They were planning to close the Hawea project soon, and she would like to feature the two funding partners. That would be a good way to get the word out. Ms. Schmidt added that TPL did a good job giving credit to the program.

ITEM 7. Announcements.

Chair Shallenberger asked what the plan for recruitment and planning for new Commission members. Ms. Schmidt stated that she hadn't realized Member Young would be vacating the position right away, so she had not thought about replacement. Member Young stated that she may attend the May meeting. Chair Kaiwi stated that Member Young filled the "Oahu / environmental organization member" position, so this position would need to be filled. Ms. Schmidt stated that she could work on letting more people know of the position.

Chair Kaiwi and Member Berg discussed that Member Berg's position was the "Kauai / advanced science degree" position. Chair Berg stated that he had been encouraging a Kauai biologist to apply. Member Young stated that she had also notified several people of her seat becoming available.

Chair Kaiwi asked about the status of a Native Hawaiian seat on the Natural Area Reserve System (NARS) Commission. Ms. Schmidt stated that Mr. Kennedy, NARS Manager, would be able to answer that question.

Ms. Schmidt stated that she hadn't seen a firm deadline on the Boards and Commissions website, but had been told yesterday that the deadline for applications was March 8, 2013. Chair Kaiwi asked about the process. Member Berg stated that there was an online form, and applicants are asked to submit letters of support. They then go before a Senate committee for a hearing.

Member Buchanan stated that as a result of the Deputy Director sitting in at the last meeting, a bill had gone forward to address a Native Hawaiian seat on the NARS Commission. Member Alakai stated that the proposal was to replace the Dept. of Education seat with a Native Hawaiian seat. Member Buchanan specified that the bill had not yet passed.

Member Canfield asked the positions to be filled. Member Berg was a science/Kauai member and Member Young was an environmental organization/Oahu member. Ms. Schmidt then read the remaining membership roles.

ITEM 8. Adjournment.

Members clarified that the next meeting would be in May. Chair Kaiwi thanked the departing Commission members for their service.