

Minutes of the March 12, 2009, Meeting of the Legacy Land Conservation Commission Subcommittee on Rules and Management Funds

COMMISSION MEMBERS PRESENT:

Dr. Robert J. Shallenberger, Subcommittee Chair
Dr. Joan E. Canfield
Dr. Dale B. Bonar
Ms. Lori Buchanan

STAFF:

Molly Schmidt, DLNR, DOFAW
Caroline Tucker, DLNR, DOFAW
Ian Hirokawa, DLNR, Land Division

VISITORS:

Cynthia Rezentes, Oahu Land Trust

ITEM 1: Call to order and introduction of Subcommittee members and staff. Chair Shallenberger called meeting to order at 9:05 a.m., members introduced themselves, followed by staff and visitors.

ITEM 2: Discussion of purposes of the Subcommittee, including, but not limited to: (1) rulemaking and advising the Department on administrative rules concerning the Commission, and (2) advising the Department on the process for awarding grants for management funding through the Legacy Land Conservation Program.

Chair Shallenberger suggested recalling the charge for the Subcommittee on Rules and Management Funds (“Subcommittee”) and requested a briefing by Ms. Schmidt. Ms. Schmidt summarized the October 14, 2008, meeting, at which the decision had been made to create a subcommittee to decide how to advise the department on rulemaking and management funds. Ms. Schmidt explained that planning, scheduling, creating a process and figuring out if the Subcommittee agrees on that process is the main purpose of this meeting, rather than actual problem-solving. The plan for accomplishing goals is as follows: explain the circumstances surrounding each task (rulemaking and management funds), decide how to go about tackling each, and then determine how often the Subcommittee should meet.

Ms. Schmidt shared some “points on subcommittees,” and recalled the question of whether commissions can delegate to subcommittees. Ms. Schmidt had previously consulted the Office of Information Practices, which had no comment because it’s “not their law.” Deputy Attorney General Julie China had the opinion that if it is in the statute, it is the duty of the full commission, and so would need to go back to the full commission for a decision. Anything not in the statute is an advisory duty and can be delegated to a subcommittee. Member Buchanan asked if this subcommittee will decide whether to go back to the full Legacy Land Conservation Commission (“Commission”). Ms. Schmidt responded that since rulemaking is in statute, that would need to be done by the full Commission, but since the statute doesn’t specify whether the Subcommittee has to advise the department on management funds or how to handle the process,

the full Commission could delegate that responsibility to the Subcommittee; but if Subcommittee decides to include management funds in the rulemaking process, that would go back to the full Commission. Chair Shallenberger asked why just that specifically, to which Ms. Schmidt replied that HRS §173A-2.4 states that the Commission shall promulgate rules relating to the criteria that it uses to make these decisions. It's an official statutory duty of the Commission; it would need to be done by the full Commission, not just the Subcommittee. Chair Shallenberger asked if the Subcommittee would make recommendations to the full Commission, and wondered how many more steps are involved in the process. Ms. Schmidt responded that it can be done in as many steps as the Subcommittee wants, as long as the Commission votes "Yes." Member Canfield asked if they would need multiple Commission meetings for reporting and decision-making, to which Ms. Schmidt replied "no," that's just for task forces, subcommittee meetings can be reported in one meeting, as evidenced by the Sunshine law. Member Canfield and Chair Shallenberger agreed. Ms Schmidt explained that subcommittee work is done at a "Sunshined" meeting; then the decision is presented to full Commission to get technical full Commission decision.

ITEM 4: Discussion, planning scheduling, and possible assignment of tasks toward accomplishing purposes of the Subcommittee.

Chair Shallenberger, while looking at a list of topics on the agenda, wondered if there was any qualitative evaluation of the topics, and asked if there is a step to try and prioritize, or if the group should start at top and work through. Ms. Schmidt offered a staff recommendation that she begin with Item 3, a brief presentation about rulemaking and management funds, and share the background information about what was discussed at each meeting, then the group can decide on a process for proceeding. Chair Shallenberger stated that the information shared may not cover all the issues that need to be covered. Ms. Schmidt replied that she'd share general rulemaking process information and explain what's been accomplished so far, and then the management funds situation and what's been accomplished so far with that, then expand what needs to be included.

Member Bonar wanted to be reminded about what was put down on the list, and wondered if there were things that were missed. He proposed first making sure that the list is complete, then begin prioritizing and deciding on issues. Member Bonar also mentioned that the management issue came up because of the what to focus on management issue came up because of provision in the statute last year which added 5% for management, and recalled that Laura Thielen had promised they'd have a say in how the management was directed. Member Bonar asked to be brought up to speed in terms of points that were made at the last meeting.

Chair Shallenberger mentioned he had not been present when a chart of the rulemaking process was distributed, others asked if there were copies available, to which Ms. Schmidt replied there were and they were and passed them around the table.

Member Buchanan wondered at what point the Subcommittee needed to go back to the full Commission, to which Ms. Schmidt replied that it might make sense to go through rulemaking process presentation and then answer any questions that weren't addressed. Chair Shallenberger

emphasized Member Bonar's point that the group does need to make sure the list is all-inclusive and if there are old issues still on the list, they can be taken off the list.

Ms Schmidt read from the management rules. Rules should be a statement of future effect that interprets or describes law or policy. It can describe the organization procedure and practice requirements and relationship with the public. It doesn't include matters concerning internal agency management not affecting the public. When it comes to rules, agencies and other administrative bodies are delegated by legislature, without this delegation, agencies don't have any authority. The Commission has the authority to promulgate rules under HRS §173A-2.5, which says the Commission shall adopt rules to form criteria. HRS §173A-2.4 states that the Commission may adopt rules to carry out its duties. Under HRS §91, the Administrative Procedures Act, an agency can form rules for any procedures that relate to the public.

At this time Ms. Schmidt asked for any questions. Member Bonar, asked for an example of the last statement. Ms. Schmidt provided an example of the responsibility of an agency to go through rulemaking process if it's going to create rules that relate to the public under HRS §91. Member Bonar asked what type of things the Subcommittee would be doing that would be subject to this process. Ms. Schmidt gave an example of an office set up for public informational purposes, which could be considered a rule. Ms. Schmidt tried to clarify by explaining that other commissions give information to the public about hours, contact information, the way they vote and do minutes for meetings etc. and that is considered a rule. If you're trying to make up a policy or interpret a law, and you're a state agency and it affects public, you have to go through rule making to give the public input on how you do those things. Member Buchanan provided an example: for a public hearing, public has 30 days to respond, there is a framework for the public to respond, etc., and this is guided by rule.

Ms. Schmidt stated that some information is not specifically in the statute, but it grants authority to agencies to do certain things, so if the agency chooses to do them, it has to add in the details to help the public understand.

Chair Shallenberger suggested the group try to stay specific to the Subcommittee in example-making. Member Buchanan offered the example of a situation where the public felt they were treated unfairly, the Commission would have to have recourse for the public to come in and say they don't agree, there has to be a way to mitigate their issue. Chair Shallenberger suggested getting back to protocol by which the Commission made decisions in the last two years, and wondered how much of that now needs to be captured in rules.

Ms. Schmidt explained that the statute says the Commission shall adopt rules to form criteria under the priorities under the statute for making decisions. This rulemaking is mandatory if the Commission uses criteria. The statute also states that the Commission may adopt rules to carry out duties, so, if the Commission wants to set up time limit for testimony, it would have to have a rule for that in order to enforce it. Member Bonar asked for confirmation of an example, of the difference between criteria and the administrative side. Ms. Schmidt replied that if it's an internal policy or function of the Commission, you don't have to create a rule, but if it directly involves the public, then you do. Member Bonar asked for an explanation of the difference between procedure and criteria. Ms. Schmidt answered that if people read the criteria, it needs to be in

rule form. Member Bonar wanted more of a clarification of criteria vs. process. Ms. Schmidt suggested that the various categories be put into draft form and be submitted to the Attorney General rather than her try to answer them. Member Buchanan said that this type of commission needs to be transparent because public could have a legal issue with the Commission, and even the internal protocol must be decided upon in case it is called into question. Member Bonar asked for an explanation of the difference between a rule and internal procedure.

Ms. Schmidt stated that her staff recommendation was to put the criteria into rules. Member Bonar and Ms. Schmidt spoke about whether ranking of appraisals is criteria or procedure, and how to define if something affects the public. Chair Shallenberger suggested that the committee could go through the process and at certain points, things could be pointed out that are not subject to being a rule. Mr. Hirokawa suggested that the group can write a rule, but make it general. Group does not have to get extremely specific in case system is improved, then won't have to change the rules all the time. Ms. Schmidt pointed out that the flowchart shows the process that rules have to go through, and mentioned that how the rules are written is up to the Commission and subject to the approval of the Attorney General. Ms. Schmidt offered to tell the Subcommittee the definitions for rulemaking and then the group can decide what to do with the information, and Ms. Schmidt will give staff recommendation if desired.

Member Bonar wanted clarification of when, during the process, the Board of Land and Natural Resources is involved. Ms. Schmidt explained that the chart in front of the Subcommittee was a basic chart, she will get the detailed sheet to everyone, and the relevant idea is that all Subcommittee work happens at the top of the chart, at the beginning of the process. Chair Shallenberger wondered, if the Commission has been operating without rules for two years, what kind of pressure is there to create the rules by a specific date? Ms. Schmidt explained that law required creating rules, and the process has just been pushed back at each meeting so the Commission could gain experience, and this was the meeting it was pushed back to, however, the rulemaking process can help the Commission make good decisions regarding process and procedures.

There was a general discussion about how long the process can take and what factors can contribute to the speed of the process being completed, such as whether or not the public hearings are straightforward. Chair Shallenberger said that since the group has done this before, they could characterize the process, and decide with recommendations which part of the flowchart needs to be part of the rule and which can be simply done. Ms. Schmidt suggested producing drafts instead of asking Commission members to attend every meeting. Member Canfield stated that she liked Chair Shallenberger's idea, which was to lay out whole process that is being used and then decide what needs to be a rule. Chair Shallenberger replied that it would be good for public to know what directly affects them.

Ms. Schmidt said that perhaps the group could directly address the mandate, which is "shall adopt rules to form criteria," at minimum. Ms. Schmidt recalled that at past meetings, Ms. Rezentes had suggested that the Subcommittee stick to the purpose as stated by the statute and state only what it necessary.

Ms Schmidt gave a summary of what had been accomplished at past meetings. The November 6, 2007, meeting in Hilo was the first to have rulemaking on the agenda, and the Commission had talked about criteria and what should be included and excluded. The rulemaking mandate was discussed briefly and it was decided there needed to be more time to decide on criteria. At the meeting on June 2, 2008, members of the public were present, rulemaking was agenda item and the Commission decided to stick close to the statute. At this time, Ms. Schmidt dispersed a draft of the draft of rules that had resulted from that meeting. Member Buchanan asked for confirmation that this draft is a minimal version of what needs to be done, which Ms. Schmidt confirmed. Chair Shallenberger asked if the draft was focused specifically on criteria, which was confirmed. Ms. Schmidt reiterated that the Commission had requested a draft that repeated the statute.

There were questions from the group about the draft and what each part meant, which Ms. Schmidt explained. She clarified that the only thing in the statute that affected ranking is the priorities one through six, which had been included in this draft. She explained that Section A of the draft restated what types of resources the fund can be expended on. She also explained that the draft reiterates what is said in the statute as a response to Member Canfield's concern that it doesn't capture everything necessary. Section B is a repeat of the statutory priorities. Section A is relating to what the funds should be used for. Section A can be cut because those things already in statute anyway.

Chair Shallenberger asked for clarification. Ms. Schmidt concluded that Section A does not need to be included, so if the group wanted a bare minimum of what to include, they could just put in Section B. Chair Shallenberger stated that if things are not specifically stated, they could be misinterpreted. Member Canfield agreed and suggested expanding Section B.

Member Bonar asked whether, since the draft is from the statute, the Commission has to get a statutory modification in order to expand it. Ms. Schmidt said that a rule cannot conflict with the statute. If a policy falls under one of the categories in the draft, or if it's permissible under a provision of the statute, it can probably be put into rules. Chair Shallenberger said that this draft was to help establish criteria for setting priorities between the various projects, not to exclude any, and Section B says the Commission has authority to set priority based on things that are threatened. Member Canfield responded that it is not supposed to be all-inclusive, to which Chair Shallenberger replied that it refers back, and Section B applies to any of nine targets.

Ms. Schmidt finished summarizing the previous discussions on the issue. On October 14, 2008, the Subcommittee was formed, there was an agenda item on rulemaking, and some documents were distributed, including the flowchart also distributed here, as well as the policy considerations document. Ms Schmidt reviewed some of the comments and unresolved issues from this meeting, including: the issue of how to encapsulate the "pono" philosophy and incorporate it into the rulemaking process (to which Chair Bonar has stated that it is more of a philosophy and may not be fitting for a criterion); the issue of criteria versus procedure; and the fact that Deputy Attorney General Linda Chow had suggested adding management funds policies to rules at the last meeting. At the December 19, 2008, meeting, Chair Shallenberger was made chair of the Subcommittee. Comments and unresolved issues from that meeting included a request for briefing on the rulemaking process (which is why Ms. Schmidt was doing it at this

meeting) and a question about the involvement of the Board in the process. After looking into it with the AGs, Ms. Schmidt had determined that the Board needs to approve the criteria for the Commission.

Member Bonar requested a definition of a criterion. Ms. Schmidt responded that she cannot provide a legal definition at the moment, but will find a definition for the next meeting. The statute states that the Commission shall form rules for the criteria on how to make decisions. A copy of the statute was found and Ms. Schmidt read from the section on “Responsibilities of the Legacy Lands Conservation Commission” to clear up questions. Member Bonar asked if, for example, the group decided to order the priorities, it would be put into a rule, or, conversely, if the Commission would have to specify that the priorities are not ordered. Ms. Schmidt responded that some commissions have chosen to specify that. Chair Shallenberger explained that criteria are the considerations that are made in order to determine a project’s priority. He went on to explain that Section A is “where we work,” and Section B is “how we work” in terms of ranking one project ahead of another. If the group were to expand upon that draft for rulemaking or for creating protocol, it would begin to affect the public. Chair Shallenberger expressed concern that if he were a member of the public affected by it, he would want to be informed about the criteria. Chair Shallenberger stated that if the group were to adopt this draft, it would be repeating what is already in law. Chair Shallenberger then wondered as a matter of procedure, if more criteria would be added.

Ms. Schmidt stated that they could produce drafts. She recommended that, before getting into criteria, the Subcommittee make a decision about whether to do procedural rules and what the process will be. For example, if there were to be a limit set on the minutes that public can testify at a meeting, that would have to be procedural rule.

Ms. Rezendes responded that this issue could be decided informally by the Commission, to which Ms. Schmidt explained that she was told by the Deputy Attorney General that it must be a rule to enforce time limits on testimony. Ms. Rezendes asked for confirmation that that information was from the AG’s office, which Ms. Schmidt confirmed. There was some group discussion of how other meetings have been handled in terms of limiting testimony time from the public. Ms. Rezendes mentioned that she hadn’t seen a limit on testimony in any rules, and Ms. Schmidt offered to check with Office of Information Practices (OIP) about it. Chair Shallenberger suggested that, as a subcommittee, the group should start by describing steps in the process and decide one by one what falls under rules. Ms. Rezendes offered an observation regarding rules: if the group does not put rules into the process, then what is to prevent someone from contesting the way the Commission operates? Ms. Schmidt agreed, and reinforced that having rules would be strongest case, and also reminded the Subcommittee that the process requires Board approval.

Ms. Rezendes expressed concern that without rules, someone in the public may be more likely to contest the timeframe or content of the process. Ms. Rezendes recommended providing a general form to the public with guidelines and a process for the public to follow. Member Bonar responded with a related issue about when applications can be accepted, and suggested that the issue go to the Board. Ms. Rezendes replied that rules are there to guide the public through the process, and to more easily comply with an established direction. Member Bonar wondered if a published procedure approved by the Board is put in place, not rule, how much leverage does the

public have to contest the procedure? Ms. Schmidt replied that, realistically, someone applying for grant funding probably wouldn't try to manipulate the system. Member Canfield stated that if something is approved by the Board, that's the end of the question. Member Bonar stated concern that too many rules would reduce flexibility. Ms. Rezendes replied that the Commission can make the rules general so there is still flexibility, and it does not have to go through the whole process every time it wants to change something small. Rules are there to help people find information. Member Bonar agreed. Member Canfield responded that a rule will point to procedures that are not in the rule. To which Ms. Schmidt replied that it might work, depending on the wording chosen.

Ms. Rezendes gave an example from an applicant's standpoint. She recommends listing minimum requirements of the form, not including an application form itself, and to indicate that details of the requirements will be established by the Commission. Ms. Schmidt clarified that, as a State agency, DLNR needs to make rules under Chapter 91, HRS, when affecting the public. The criteria are a separate provision under Chapter 173A. Specific procedural rules regarding how the Commission operates are a different provision under Chapter 173A. Member Bonar wondered where everything falls under those three categories. Member Canfield asked for clarification that the Commission does not choose the rules for the specifics of application due dates and things like that. Ms. Schmidt confirmed that she would be the person to create a draft because she is the staff member.

Ms. Schmidt made a recommendation to the Subcommittee. She suggested that, when it comes to doing initial drafts of rules in the three categories mentioned above (criteria, Commission procedure and Program procedure), the Subcommittee should work intently on criteria, if the group wants to do rules for Commission procedure, make that decision. Ms. Schmidt offered to draft something from all the other rules from all the other commissions that can be added to by the Commission, then let department do its interaction with public according to Chapter 91 rules. The criteria rules should be promulgated by the Commission and the Subcommittee, procedure rules can be drafted by staff (Ms. Schmidt). Department rules should not be initially promulgated by the Commission because it requires research and is done by the department.

Member Canfield wondered when these actions would take place, to which Ms. Schmidt replied that they should all be done together so there aren't several different drafts floating around. Member Bonar expressed confusion on the criteria, after which there was a general discussion about the criteria under the statute. Member Buchanan added that it is important to think from the public's standpoint because it can be confusing for the public. She added that it is important to expound upon what is already in the application and define what is already there, and make a distinction about what is criteria. Chair Shallenberger stated that there is a big difference between what information is needed to make decision and how that information is used. Member Buchanan said that, for county open space programs, there are differences between applications on each island, because each island decided what they wanted on the application, some were bare bones, some were detailed. Member Buchanan recommended that the application show the public exactly how the Commission wants it filled out.

Member Bonar shared an example of criteria that asks how convincing the management plan is, and one person could use two sentences, someone else could use two pages. Ms. Schmidt

explained that the public could read the statute and know how the Commission makes decisions, but if one looks through the application and thinks about what the public sees, and thinks about the statute and decide what wouldn't necessarily be clear to the public, and resolves that by putting those things into rules, then the public knows what is being used as criteria in the decision-making process and the public can then comment on the rulemaking process. Chair Shallenberger added that the Commission asks questions to gather information from applicants, and the public should already understand that the answers are used in decision-making. Ms. Schmidt clarified that the public needs to know that they have an opportunity to comment on the rulemaking process. Chair Shallenberger suggested that the process be defined, and then decide within what needs to be clarified for the public. Ms. Schmidt reminded the group about what procedural rules are, stating that the statute says the Commission "may" promulgate rules. Member Bonar added that the procedure needs to be determined, and then see where criteria cross over. Chair Shallenberger added that the public needs to know how the Commission uses information to make decisions. In order to continue with the rulemaking, it would be good to determine the process of the Commission in terms of what occurs each year; that is, the Program process.

There was then a general discussion about what would need to be included in criteria regarding appraisals and how to determine how they would be used to make decisions. Chair Shallenberger mentioned that the Commission has created a system that produces a certain outcome, and recommended going back to look at the system and figure out if it is the best way to go about the process and if anything needs to be clarified to make it easier for the public to understand. Chair Shallenberger suggested that there are two ways to go about the rulemaking process: the group would could put the process down on paper, look at it and make decision about what parts need to be made into a rule, or make the whole package a rule, with the first part being the description of the process. Ms. Schmidt asked how the rule would be stated. Chair Shallenberger was unsure if it could be done procedurally, but stated that the law requires the Commission to develop rules, and if the first part describes the Commission's process stated generally enough, it doesn't have to be completely changed every time something little changes.

Ms. Schmidt stated that there would be a rule created to refer to the annual submittal of process proposal with application instructions and process to Board. Chair Shallenberger added that it could include a sequence of acceptance review and could single out aspects of the process that may affect public. It could also state criteria that flow directly from the act, and that information would be gathered to determine how the criteria will be satisfied. Ms. Schmidt asked if a flowchart of the Program process and the Commission decision-making process would be helpful. Member Buchanan suggested that it would be helpful to go over issues that have come up, and maybe clarify those things by putting them into criteria.

The Subcommittee took a 10-minute break at 10:11 a.m.

Ms. Schmidt offered to create a flowchart. Chair Shallenberger stated that the recommendations decided upon during this Subcommittee meeting could be listed with short descriptions and then should be taken back to the full Commission. Member Bonar and Member Canfield agreed.

Chair Shallenberger brought up the agenda item regarding management. Ms. Schmidt offered to brief the group on the issues surrounding the granting of management funds, but requested a brief recap of the rulemaking item. Ms Schmidt offered a staff recommendation to handle criteria in the Subcommittee and then bring it to the Commission, and then decide to either handle procedure in the Subcommittee and bring it to the Commission or have staff draft criteria and bring to Commission. Then, review any program or departmental procedural rules as a Commission, or it could be taken as a subcommittee first, up to the group to decide that. The three topics may overlap on paper, but for now are divided into those three sections.

Ms. Schmidt suggested that, for promulgating criteria, start with the statutory priorities, take the provided list of policies, evaluation form, application, (all things that have been previously used) and add in anything that hasn't been mentioned to get a comprehensive list of all the different things, then discuss if anything is missing. From that list, work towards a first draft. Chair Shallenberger expressed concern that would be mixing apples and oranges, so to speak. Ms. Schmidt replied that the existing list includes policies, criteria and procedures. The group needs to worry about Commission criteria and procedure and Program procedure would be handled a different way. Member Canfield asked for a clarification of those three terms.

Chair Shallenberger added that if you think about the public perspective, they just want to know how the decisions are made, and won't always make distinction between process and policy. It was suggested that the draft could be organized differently in regards to the terms used. Ms. Schmidt stated that she understood that, in reality, the distinction is not necessary clear between criteria and procedure, as both can affect the outcome. Chair Shallenberger explained that procedure goes along and at certain points, criteria or priority-setting tools are used to get to the next point. Ms. Schmidt explained that Commission rules relating to procedure would be very simple. For example, membership: there are nine members. Ms Schmidt offered to email examples of rules from other commissions to the members after the meeting. Ms Schmidt continued to explain that pretty much everything will fall under criteria, all else would fit under departmental Legacy Land Conservation Program ("Program") policy. At the end, the Commission would make recommendations on those versus promulgating them. Member Canfield expressed that it might not matter if the distinction is clear now, better to just begin the process and separate the different things as they come up. Ms. Schmidt said that staff can come up with a proposal for the departmental side. Member Canfield requested a list of what is departmental.

Ms. Schmidt reminded the Subcommittee that deciding upon the process for accomplishing rulemaking is the purpose of the meeting, and reaffirmed that she would try to send examples from other commissions of: (1) departmental and Program procedures, (2) Commission procedure, and (3) Commission criteria.

Member Canfield and Chair Shallenberger discussed the difference between process and procedure, and determined that they are at times used interchangeably and can overlap. Chair Shallenberger brought up all the issues that were put to the side along the way and suggested that the Subcommittee address them and then take the decisions and recommendations to the Commission. Ms. Schmidt asked whether the group wanted to create a laundry list of issues first or be briefed on the distinction between the two in terms of drafts.

Member Buchanan stated that the group may be feeling some confusion and suggested leaving it up to Ms. Schmidt to figure out where procedure and policy meet, and what falls into criteria and process. Member Buchanan showed some of her ideas of what would not go into rulemaking from the list distributed at the meeting, and suggested just jumping into it and letting Ms. Schmidt decide difference between the terms. Member Canfield suggested creating a flow chart and then seeing where other things would fit in. Ms. Schmidt commented that if a draft of rules was created, it would then need to go through many other reviews before coming back to the Commission or the Subcommittee. Member Buchanan offered to send Ms. Schmidt a copy of Coastal Zone Management Rules as an example and to duplicate, and stated that there is no use reinventing the wheel when it comes to the basics. The Commission needs to come up with specifics when it comes to criteria relating to the Commission's work.

Member Bonar asked for clarification about drafting something as a subcommittee and what happens after that. Ms. Schmidt explained that criteria would be intensive Subcommittee work, procedure would be easier, could be done with one draft by the Subcommittee then taken to the Commission. Rules from the department could be looked at in the Subcommittee or taken straight to the full Commission. There was a general thought by several members that it still isn't clear what any of those things mean, to which Ms. Schmidt replied that it would have to wait for the drafts and examples at the next meeting to clear up. Member Bonar stated that, whatever the Subcommittee comes up with, it would be important to make sure the full Commission doesn't have any major issues before sharing with others, so it doesn't come back to Commission and have problems later. Chair Shallenberger suggested finding the essence of the issues, making recommendations, and explaining why.

Ms. Schmidt used visual aids to explain Commission procedure, and read aloud from the statute. Ms. Schmidt answered questions from the Subcommittee about how the Commission works on a yearly basis, and there was a general consensus that the group needs to decide what part of the procedure needs to be put into rules. There was some confusion about the definition of "criteria" which was then discussed at length. Ms. Rezentes commented that there seemed to be two different levels of criteria being discussed, to which Ms. Schmidt replied that the minimum that needs to be done in terms of creating criteria is making a list of quantitative things that are being looked at when making a decision about a project.

The decision-making process was discussed, including current criteria for ranking projects. It was suggested that criteria be made general so that it will last for several years and not have to be changed and go through the rulemaking process too often. Ms. Schmidt advised that rules don't have to specify in detail how criteria will be used. The application was discussed in terms of what type of information to require from applicants and how to phrase questions and requirements, including how and where to place the requirement of a management plan.

Ms. Schmidt advised the Subcommittee to retain a balance between making information available that affects the public, and not binding itself by word choices and phrasing for the future of the applications and the Program. If policies are put into process, they will be more binding than if they are put into a criteria list. Ms. Schmidt stated that staff can assist in expanding the explanations in the guidelines, but it is not appropriate to put a full paragraph in

the rules. Member Bonar commented that it would be efficient to keep the rules as general as possible to keep them flexible for the future. Ms. Schmidt recommended making a good faith effort to get public comment on any changes. Member Bonar suggested that the guidelines go out with the proposal. Ms. Schmidt replied that instructions do go out with the applications. Member Bonar suggested that more information be added to the instructions. Mr. Hirokawa commented that the Program wants applicants to give as clear and honest a picture of their project as possible, but the group shouldn't give too much insight into the process so applicants can engineer answers. This comment was met with agreement. Ms Schmidt continued that she has looked at other state grant programs and they have guidance documents in the form of policy documents, not in the form of rules, so it seems like the appropriate way to do it.

Chair Shallenberger requested a clarification between Commission procedures and Program procedures. Ms. Schmidt explained that the Commission is an administrative body and there are rules that tell the public how it will conduct its business. The Program is also an administrative body and is a bigger entity. Chair Shallenberger wondered why the Commission isn't just under the Program. Ms. Schmidt explained that in the visual aid she created, they are different subject matters, although there is a hierarchy between them. Chair Shallenberger specified that one is general and one is specific, but if the Subcommittee is going to create a document to address Program and procedure, it would start with overall framework and move down to process.

Ms. Schmidt recommended has looked at other programs to see what they have done in this case, and will look at more to make sure, but at this point most of them seem to keep these difference items separate. Mr. Hirokawa mentioned that when Ms. Schmidt said "Program procedures," that meant everything that the Commission wasn't involved with, everything that happens after the Board. Ms. Schmidt clarified that it is the things that fall under the responsibilities of the Board, but aren't necessarily the Commission's duties. Mr. Hirokawa continued that, when there is a finished set of rules, the Commission will have input on certain sections, there will not be a separate section for the Program and another for the Commission; it will all be one document. Ms. Schmidt replied that the categories all need to be addressed separately on different levels by different bodies, but hopefully will be one draft to send through the rest of the process as smoothly as possible. Ms. Schmidt continued that the department drafts the Program rules. Criteria are done by the Subcommittee, but it sounded like the group had requested a staff draft for Subcommittee approval and Commission approval. Chair Shallenberger suggested creating a description of process as part of the package, but keep it general in order to not restrain the Commission in terms of process.

ITEM 3: Brief informational presentation by Legacy Land Conservation Program staff on: (1) rulemaking processes and (2) awarding grants for management funding through the Legacy Land Conservation Program.

Ms. Schmidt moved on to a briefing on management funds. Act 139 passed in 2008 to allow the Program to give out management funds up to %5 of the previous year's revenues. The Act specifically says "The funds shall be used for costs related to the operation maintenance and management of lands acquired by the way of this fund that are necessary to protect, maintain or restore resources that are at risk on these lands or that provide for greater public access and enjoyment of these lands. Provided that the costs related to the operation, maintenance and

management of lands acquired by the way of this fund do not exceed 5% of annual fund revenues of the previous year.” Ms. Schmidt mentioned that there is more language in another section, but it says pretty much the same thing.

Member Buchanan stated that a rule that required the department to check with the Commission before proposing changes to the law would have been good. Instead they just made the change without checking with us. Could make a rule where any decision from DLNR that will affect the Program shall be reviewed and approved by the Commission. There was some general commenting on that statement, and Ms. Schmidt responded that the Attorney General would probably bounce that back. Member Bonar added that Laura Thielen did not know that the statutory change hadn’t been discussed with the Commission. That’s why the Commission has to have a good basis for recommending how to handle that management percentage. Member Bonar continued, stating that House Bill 1741 has crossed over. It reduces Program funding to zero, unless it is revised. The alternative that was suggested by DLNR was to cut the funding back instead of zeroing it out. If that amendment is accepted, there may or may not be something in it that says that money can be used for management. Should they accept this amendment, they may amend it to say that a bigger part can be used for management. Member Bonar expressed his opposition to the bill as an individual citizen. He gave a recommendation that, after all the projects have been reviewed, the priority should be acquisition, and following that, if funds remain, allocate to management. Member Bonar also recommended that it all be done as same application cycle, although there may need to be a modified application for management.

Chair Shallenberger asked what Member Bonar meant by “if there are funds.” He stated that the Commission clearly anticipates more requests than there is money to support. Member Bonar explained that he was thinking into the future about when the money will come back, and wanted to prioritize obtaining the land and obtaining the protection on it. Ms. Schmidt mentioned that this concern had been expressed at previous meetings by others. Member Bonar shared that he doesn’t want to see DLNR siphon money off ahead of time, take the 5% off for management funds ahead of time before allocating to acquisition. Chair Shallenberger offered that he thinks the whole group can agree that it wouldn’t be good for the percentage to go out the door before doing acquisition. Ms. Schmidt responded that it is written in the statute as a grant, the fund is not just allowed expenditure, but can be given as a grant.

Member Bonar asked whether an applicant applying to get money for a property, could include \$30,000 for a management plan. Ms. Schmidt offered to continue with the briefing to attempt to answer any questions. She stated that these management funds are subject to the procurement statute right now, which is 103D, HRS. This statute sets up a bunch of different processes for procurement through the State. Almost all purchases subject to procurement unless they’re exempted. Land acquisition is not included in the procurement statute. A Deputy Attorney General gave an opinion that because Legacy Land grants are land acquisition; they are not within the purview of the statute. Chair Shallenberger asked if this pertained to hiring people. Ms. Schmidt replied that there are processes for giving out grants, for professional services, for contracts, for any kind of purchase by the state, and grants are viewed as purchases. The ones that are exempt are Chapter 42, HRS, grants, but this isn’t a Chapter 42 grant. Other grant programs like Watershed Partnerships do their grants through procurement through a formal

Request for Proposals (RFP) process. Member Bonar asked if that means that the state does not have to go through procurement for any of the Legacy Lands funds.

Ms. Schmidt replied that there are two uses of Legacy Lands funds right now, aside from the acquisition costs; there are administrative costs for staff. If, for example, staff wanted to buy training on conservation easements; we go through procurement to do that. Land acquisition is exempt; it falls out of the definition of goods and services as its own special thing. One of the AG's gave the opinion and the procurement office, at the beginning of the Program, agreed with this opinion, so our land acquisition grants are exempt from going through the procurement process. Management funds have no such exemption. There are different methods under the procurement chapter that are set up: invitation for bids, request for proposals, professional services, etc. There is basically one of these that is the closest fit for granting management funds, and that fit isn't very good, it's called the request for proposals. In order to use this process, the agency has to demonstrate it's the best process, have a procurement officer review or a designated evaluation committee review the proposals, relative importance of criteria must be shown, so would have to use a numerical ranking system, cost has to be a factor... so you can see why it doesn't fit. There are exemptions that are available from the Procurement Board, but an agency has to prove its case.

Member Bonar asked if that regarded each grant. Member Canfield asked if it pertained to the whole Program. Ms. Schmidt responded that Legacy Lands may be able to get a programmatic exemption every year. Chair Shallenberger asked if there were comparable situations where funds were appropriated to one organization. To which Ms. Schmidt replied that there are comparable situations, Watershed Partnerships is probably one of them. That program gives out grants and goes through procurement. One of the Forestry programs just recently got exemption from the Procurement Board. Member Bonar stated that since it's something that may not be used.... Ms. Schmidt interjected that the Legacy Land statute specifies how to give out funds and establishes the Commission, which is different from how the procurement statute works, so there is a really good case for an exemption. The process for seeking an exemption is by filling out a form. She passed out examples for the group to look at. Member Bonar asked if this would have to be done every year, which Ms. Schmidt confirmed. Member Bonar wondered if there could be a waiver by putting it in the statute. Ms. Schmidt responded that a statutory exemption didn't seem to be an option. Ms. Schmidt then went through the form, explaining what each piece meant, line by line. Ms. Schmidt explained that before the exemption can be sought out, there needs to be a proposed process and input on the process from the Commission.

Member Bonar recommended not going to for the exemption and just not using the money for management. Ms. Schmidt asked what would happen if someone read the statute and turns in an application? Member Bonar replied that it would be denied and it would be explained by saying that the money is all being used for acquisition. Ms. Schmidt stated that her opinion is that there needs to be some sort of process set up for giving out these funds, because legislature decided it is a good idea. There was some general discussion and speculation about how this bill was passed and why.

Chair Shallenberger offered that this is a more difficult issue than first thought, but it's a good idea. Ms. Schmidt stated her reasons for not approving of the new law: Legacy Land is a small

program run by two people. The Program may be given as a task to someone else later, it may be more trouble than its worth, too much paperwork and too confusing just to give out this small amount of money. Setting up a small program to do one kind of grant is pretty efficient. Member Canfield stated that it needs to be responded to, because it's a law. Chair Shallenberger agreed, as did Ms. Schmidt. Member Buchanan asked about what would happen if there was no exemption granted. Then it goes out as a regular state procurement request for proposals? Then the cumbersome part is on applicant, they're going to know how much money is available, and then has to go through the procurement process with the State.

Mr. Hirokawa inquired whether the Board is in a position where they have to address issues brought up by the Subcommittee, and asked if they can ignore Subcommittee recommendations.

Ms. Schmidt stated that the best case for the Commission to maintain its involvement is to set up a good process and have grounds for denying if that turns out to be the consensus. Ms. Schmidt's suggestion for setting up the process is as follows: have an application, have both requests for proposals go out at the same time, state that up to this amount of funding will be available (up to 5% of previous years revenues), rank the acquisition proposals and rank the management proposals under two separate sets of criteria, do the land acquisition awards, see what is left (this is based on what people have said at past Commission meetings about putting acquisition as priority and using the leftovers for management). Do all of that, see what's left over for management funds, and then look at management proposals. Basically, if the Commission has helped set up the process and has set up criteria, then it has the strongest case for doing things its own way, and getting the respect of Board. Of course, the Commission would make it available for public comment as it goes through forming the process and criteria.

Member Bonar asked if the form would need to be filled out every year if things were set up like Ms. Schmidt suggests. Ms. Schmidt speculated that if it is set up in this way, it would meet the requirements of the form. Even though it is frustrating, the process has to be figured out and then the exemption can be applied for. Member Bonar inquired what would happen if the exemption was not given. Ms. Schmidt replied that the best case scenario is to work with the RFP process that was previously described. Since that process is not a good fit for how things are set up, the Program has a good case for exemption. Ms. Schmidt recommended that the group come up with a process and then apply for the exemption. Member Canfield suggested not considering management applications until the exemption is granted.

Chair Shallenberger asked how to decide how much money would be available for management. Ms. Schmidt replied that if money left over from acquisition grants is not a large enough amount to fulfill any acquisition projects, it could be used for a management project that was ranked high and also fits the monetary amount.

Chair Shallenberger asked for clarification about why an exemption would need to be applied for early on. Ms. Schmidt explained that the exemption would be programmatic, and would prevent the Program from having to go through the Chapter 103D RFP process. Chair Shallenberger asked for confirmation that it would be a programmatic exemption that would avoid the process in the procurement law, and wondered what kind of chance there is to be granted this exemption. Member Buchanan stated that there is a good chance as long as the internal policies are strong

enough that they are satisfied that the Commission is not capricious and arbitrary in handing out management funds. Member Bonar asked whether management funds could only go to new Legacy Land projects, to which Ms. Schmidt replied that the management funds could only go to Legacy Land projects period. Member Bonar suggested that the management funds be given only to new projects. Ms. Schmidt stated that she had a proposal on how to set up the process. First, to clarify, it refers to “lands acquired by way of this fund” means land already acquired. It would be important to keep the processes separate to make sure land has been acquired before beginning to contract with the applicant on other funds that require them to own the land first, just in case the acquisition falls through. Those funds are bound to a specific project, if the acquisition falls through, the management funds do too.

Chair Shallenberger agreed and stated it should be on lands that are acquired; the question is whether its lands that have been acquired or lands that are awarded funds to acquire. Member Bonar expressed that the second idea is not possible. Member Bonar expressed concern about how management funds would be spent by the land owner. Ms. Schmidt responded that there are other concerns with management plans. Other divisions fund management plans and have an advisory committee to assure quality. Ms. Schmidt asked if the Commission would fill that role. Member Bonar suggested that it would be a staff job because it would require a specialized committee. Ms. Schmidt mentioned that the Program deals with a variety of types of lands and resources, which equates to large range of management plans, which could get complicated.

Member Bonar stated that the statute says “up to 5% may be used” for management, not a “shall,” and asked for clarification about the language. Ms. Schmidt explained §173A-5(h) states what the funds shall be used for. She stated that “costs related to operation and management” is listed as number four of several other uses, including debt service. The Program has not given out funds for debt service, so it may not have to give out funds for costs relating to operation and management. Ms. Schmidt stated that the deputy attorney general had agreed with this idea at the last meeting. Member Canfield asked whether the Commission could interpret “may” as not required. Ms. Schmidt stated that she was clarifying that it doesn’t specifically say “may” in the statute but it still may not be required.

Member Bonar asked if the acquisition could be stated as a priority. Ms. Schmidt stated that it is important to address the public’s needs, and figure out what applicants will want. Mr. Hirokawa stated that he would play devil’s advocate and point out that the way that the statute was worded may be interpreted differently by different people, the procurement office may interpret it as the Commission just not liking the law, and may not be willing to grant the exemption.

Ms. Schmidt responded that because the money is given as grant, and given the way that the statute is written, there is a good case for getting the exemption. Mr. Hirokawa replied that it would be good to be careful because there is a loophole and it could be scrutinized and it could be said that the Commission does not have a say in the matter under law. Ms. Schmidt stated that the best shot at getting the exemption may be to state that it can only be for groups, agencies and organizations that have previously acquired lands under the statute, which is a very limited group, and may be inappropriate for an RFP process. Chair Shallenberger asked why the process is so onerous, also asked for clarification about what happens if the exemption is not approved. Ms. Schmidt replied that there are now management fund grants in statute, and the group has to

figure out a way to get them out; it will either be subject to 103-D, HRS, or will get an exemption. Either way, people might be requesting these funds, or they may be curious about the process.

There was a discussion between Ms. Schmidt and Chair Shallenberger about the order in which funds could be given, whether it would be prudent to award management funds to an applicant that has not acquired land yet, or is the process of acquiring land. If management funds were given to an applicant who is going to be acquiring land in the future, it may be risky to grant them management funds because they cannot perform those duties without the land on which to perform them. Ms. Schmidt paraphrased the members' recurring question: "must applicants have closed their respective acquisitions in order to be considered for the award of these operation and management funds?" Ms. Schmidt then guessed that the answer would be "yes" because the provision states that lands acquired means the lands must have been acquired already. Mr. Hirokawa suggested getting a formal answer from the Attorney General's office.

Ms. Schmidt suggested finding a balance between looking at things from the applicant's perspective and also keeping the administration of the process uncomplicated. Chair Shallenberger stated that he was glad Ms. Schmidt had looked into the issue, but differs from the group in his opinion because he feels strongly about integrating management into the Program. Chair Shallenberger expressed concern not only for management funds being misused, but also for land acquisitions that have no management stipulation. Ms. Schmidt suggested only awarding land acquisition grants to organizations that can demonstrate their management plans. Member Bonar agreed with this idea and stated that long-term sustainability of management is important to demonstrate in the application.

Member Bonar expressed concerns about the departmental budget, and about DLNR trying to get management funds for their lands. He reiterated the importance of sustainable management, and stated that there should be separate parts of the State budget to support stewardship, and that, if that isn't going to happen, then those people should not be acquiring lands. Ms. Schmidt suggested other ways of working this into the process: management plans can be a stronger part of the Commission's acquisition criteria. It can decide to not award funding to those that can't prove they have plans to manage. Chair Shallenberger replied that he is more concerned about the management capacity rather than the plans. Ms. Schmidt responded that there are other ways to confirm management ability, such as requiring financial statements from organizations, to assess the ability to manage lands. Chair Shallenberger explained that it was put together as an acquisition Program and not enough attention was paid to protecting the resource values. He stated that the Commission could interpret the law to allow more emphasis to be placed on management. Something would have to be included on the application in order to evaluate the management capacity and understanding of the applicant, in order to be confident that the land will be managed.

Member Bonar brought up the issue of determining what a valid conservation organization is, and how to tell if they are competent enough to protect lands perpetually. Ms. Schmidt replied that there are different requirements for different types of lands, and it is possible to call in experts to consult or make site visits ahead of time. Chair Shallenberger stated that there is

diversity on the Commission so that they don't have to do this. Member Bonar asked how the Commission will adequately tell if an organization is capable of looking after what they acquire.

Chair Shallenberger brought the discussion back to the Act and asked if the recommendation is to come up with a structure that makes acquisition the highest priority but doesn't preclude from directing some money to management. Ms. Schmidt stated that her concern was the process be developed to the point where she could fill out the form required for a programmatic exemption.

Chair Shallenberger requested that Ms. Schmidt re-ask the question of whether management funds can be used on projects that haven't been acquired if it's in the same year in which it's requested, or if you assume that it means lands acquired last year. Ms. Schmidt stated that she was already directly referring to a written response from a deputy attorney general.

Member Bonar suggested a scenario where management funds would only be awarded after the acquisition funds are approved. Chair Shallenberger added that acquisition funds would be given, then an application for an exemption would be filed, then management funds would be granted. Member Bonar chimed in that management funds would only be awarded after acquisitions have all been given, and if there is extra, that money would go towards management projects. Ms. Schmidt responded that having management and acquisition in the same process makes things more difficult administratively. Chair Shallenberger stated that a management project that is paired with an acquisition may be given priority because of the severity of the management issue, such as invasive plants, and he would approve the whole package, considering both aspects of the project. Member Bonar and Chair Shallenberger suggested having a uniform application that includes both aspects, and then if it's possible legally, divide the money between acquisition and management later, after the project has been approved. Ms. Schmidt replied that she thought it was a bad idea. Member Buchanan replied that organizations that get the money will be able to get their act together faster; larger land trusts and larger organizations will close faster and get the land acquired a lot faster. Member Buchanan worried about the order in which management funds would be given, if the organizations that are granted lands would be given management funds first, or may miss out on getting them.

Ms. Schmidt asked how management funds will be awarded; what will applicants have to do in order to get these funds? Do they need to provide an acceptable management plan? Chair Shallenberger stated that it would help, and Member Bonar stated that it depends on what they're asking for. Ms. Schmidt summarized what needs to be determined to settle on a process for management funds: what are the awards for, can it be for management plans, etc. Chair Shallenberger expressed that the objective of the Program is to protect land, not just buy it. Now with amendment to the act, there is a specific indication that it must be managed. Mr. Hirokawa stated that the Board has to approve any recommendations, and if that is considered the official award, the Board is then awarding the funds before ownership. He asked whether there would be a legal issue with that.

Chair Shallenberger suggested getting the deputy attorneys general to answer some of the unresolved questions before proceeding. Member Buchanan said that Ms. Schmidt needed information that states that the Commission can be exempted, and ask the council for an opinion on the unresolved question.

Member Bonar asked what the management funds can be used for. Ms. Schmidt stated that there are limits in the statute about what can be done with the management funds because of the language used, and there are practical limits to what can be monitored after the awards are given. There was general conversation about monitoring, and the lack of monitoring for current projects. Ms. Rezendes offered a suggestion to look at Act 139 and all of the committee reports and look at intent of what was passed to guide as to what legislature was doing by putting it through, whether it was for management plans, for property work, etc. She stated that the intent should guide the decisions, especially if there are any legal issues. Chair Shallenberger referenced Ms. Schmidt's quote of what the funds could be used for: "operation maintenance and management." He stated that could go beyond plans. Member Bonar agreed and replied that having a good management plan in place is critical. Chair Shallenberger responded that it is already in criteria for the selection process, that specific question is asked. Member Bonar specified between a simple answer of having a plan and then having to develop a full management plan. Chair Shallenberger stated that a lot of it is based on trust, and expressed that too many federal programs go towards land acquisition and there isn't enough monitoring on the projects.

Ms. Schmidt responded that she is open to suggestions on monitoring, however the "teeth" are not in the statute, she could see if it could be put in rule, but nobody wants to commit DLNR because it might be required but not funded, which would create problems. Ms. Schmidt acknowledged that these issues needed to be addressed, but the group should focus on the exemption form. There needs to be a process created to get the funds out within a reasonable time. Chair Shallenberger wondered about getting around unintended consequences of the statutory amendment, and asked why this program needs to go through this process. Ms. Schmidt responded that it is her job to explain the Program's case against it, using the form. Chair Shallenberger stated that the Commission needs to show a good faith effort to accommodate this change in the law, and that he would start by coming up with strategies to make that happen. Member Bonar replied that, short of going for a statutory change, this is the next best thing.

Ms. Schmidt recommended setting up a process for getting out the management funds, filling in the form, and getting an exemption from the Procurement Board. The form cannot be filled out until the process and procedure are created. Member Canfield stated that it may be difficult for the Commission to create something that would encompass the huge topic operations, maintenance and management. Ms. Schmidt offered recommendations on how to do that. Do the announcement for request for proposals time it along with the acquisition RFP, state that funds are available up to the 5% ceiling, emphasize the "up to" part, then state that the management funds will be considered in competition with the land acquisition proposals or after. Ms. Schmidt pointed out that the Subcommittee needed to decide whether it wants to do that.

Ms. Schmidt stated that the application instructions should limit applications to closed projects because that is stated in the law, the State should not enter into a contract on management for lands that aren't owned yet, not with State money. A separate application form should be made for the management funds that has specific performance instructions that will answer when and what they will perform, the scope of their performance; this will be a management plan of sorts.

The land owner has to be able to prove that they have used those funds for those purposes. It is the Program's duty to make sure the funds are used in the right way.

Ms. Schmidt stated that the use of these funds for endowment was determined not to be legal. She suggested looking at the language that's in the statute and enumerating acceptable uses: what did the legislature mean by "operations, maintenance and management?" She proposed listing acceptable things with the consideration that they have to be monitor-able and prove-able. There must be an even basis for competition between projects, and enumerating specific uses will ease that process. If management plans are required, peer review would be necessary. A minimum number of years for the expenditure of the funds would need to be set, whether or not matching funds are required needs to be determined, it's not required in statute, but leverage helps ensure that there are other supporters. Chair Shallenberger mentioned that matching funds are not currently required. Ms. Schmidt continued with the process, explaining that the Commission can rank acquisition projects and use the leftovers for any management projects or specify amounts for each and then award. It is difficult to judge them equally, because they are so different. Formation of criteria will have to be subject to a public process, there will be separate criteria for each.

Ms. Rezendes pointed out that this is a performance-based grant, and it won't be paid out until an invoice comes in, which means that the applicant has to have funds before in order to do the work, and then get an invoice and be reimbursed. Ms. Schmidt replied by explaining that there are different ways to go about that, some programs provide partial funding halfway through a project and require a report, and then the rest is given at the end. The point Ms. Schmidt was trying to make is that there has to be a way to make sure that the land owner does what they said they were going to do. Ms. Rezendes expressed concern over the wording of when funding will be granted. The timing of the funding may restrict the ability of certain people to apply and use the grant. Mr. Hirokawa asked if this isn't for operations and projects that the landowners would be doing anyways. Ms. Schmidt replied that most grant programs do require the recipient to front the funds, maybe not land acquisition. It depends on if the grant is State or privately funded, where the money is coming from makes a difference on timing. There were requests from the group for staff to find out why this was added into the law, and Ms. Schmidt replied that she would look into it and share it with the Subcommittee at the next meeting, but didn't think that it would change how the decisions within the group will be made. Chair Shallenberger gave an example of another program that requires a plan in order to apply, and requires a yearly report, which Member Buchanan pointed out is the way that it is monitored. Member Bonar expressed that not giving the funding all up front is a way of preventing organizations that cannot afford to take care of the land from getting it and encountering issues later.

Chair Shallenberger responded that the issues being addressed at this meeting bring up good questions about the Program as a whole and what works and doesn't work. Ms. Schmidt asked the group to try and come up with an agreement about how to figure out what process will be. Ms. Schmidt's recommendation is for staff to draft something, Subcommittee reviews, Commission reviews. There was general agreement with this statement.

Ms. Schmidt addressed the issue of criteria for management funds, saying that there should be separate criteria included in the process. The management funds issue needs to be addressed

soon and brought before the Procurement Board. Currently it would be appropriate to report that the Commission is promulgating rules to have the criteria in place... Member Bonar interjected that it is important to have something to work with when making decisions this fall, unless it is going to be put off for another year. There was some general discussion about the future of the Program and whether there will be funds to give out. Chair Shallenberger recalled that Ms. Schmidt could not fill out the exemption application until the Subcommittee decides on a process. Ms. Schmidt confirmed that fact, and advised that a common agreement needs to be reached, even if it's not in rule form about how this is going forward before the form can be filled out. The process would go: proposal on management funds process, Subcommittee review, Commission review, Attorney General review, State Procurement Board approval, BLNR approval.

Chair Shallenberger suggested asking Paul Conry to advocate for the exemption in person. Ms. Schmidt explained a bit of her process in handling situations like this, and admitted understanding of the suggestion made by Chair Shallenberger. Chair Shallenberger stated that if Paul Conry were to speak with them first, it would set the tone. There was some general discussion about who would be the best representative for that task, and whom they would contact in the procurement office. Ms. Schmidt brought the discussion back to the process. Member Canfield reminded Ms. Schmidt that she would draft. Ms. Schmidt offered to bring a draft to next sub-com meeting, and asked if that could be addressed in one meeting and get it to the Commission. Member Bonar expressed concern over the urgency of getting this matter taken care of, and Ms Schmidt replied that if there is a good process in place, there is a better chance of the funds not being siphoned off, which was one of Member Bonar's fears.

Member Canfield asked about how this issue connects with the call for proposals, in terms of a time frame. Does the issue need to be resolved by August? Ms. Schmidt replied that she would like to put together a process, the application, the instructions, and a summary of how the process will look from beginning all the way up to dispersal of the funds, and then go to the Board before seeking applications in August, which is not a lot of time. If the Subcommittee doesn't want to act on it now, that's fine, but if a request comes in, it would be good to have something set up regarding the process. There was general discussion about how long the process may take and the hurdles to making a decision. Member Bonar brought up the question of defining "management" as an example of issues that must be resolved. Ms. Schmidt and Chair Shallenberger replied that it doesn't have to be complicated. Member Bonar expressed that it would be good to have answers to specific questions that may come in from applicants about what they can and cannot do with the funds, if awarded. Chair Shallenberger offered that those details could be left to the Commission's discretion and interpret the law to mean that the Commission can limit the awards to projects that have already been acquired, and will use it as a ranking factor in the deliberation process. Ms. Schmidt gave a brief update on the statuses of projects from Fiscal Year 2007 through Fiscal Year 2009.

Chair Shallenberger added that there would need to be a paragraph added to the application to update it, but it wouldn't have to be very specific. Ms. Schmidt offered to set up a separate application (which could be changed in the future) and a separate set of instructions and grant recipient guidelines, which can be reviewed by the Commission and adjusted. If the Subcommittee can get a process together, get it approved by the Procurement Board and get it to

the Board, there may be hope in getting the funds out by August. Member Buchanan voiced agreement, and suggested using general language on the form, and while the Board is deciding, the Commission can work on the details and the language. Ms. Schmidt offered to create drafts for the next meeting of: the process, the application, and the instructions to give the Subcommittee a basis to work off of. Member Bonar suggested that staff request that Paul Conry speak with the procurement people to see if they can provide guidance in meeting the law. Ms. Schmidt countered that it may be more prudent to provide a plan, and then get feedback and guidance based on that. The Procurement Board statute includes principles of open process, best value for the money, competition, fair treatment, and integrity in the process.

Chair Shallenberger replied that the Commission is already making some of those decisions, it decides where the money goes, and fair competition is what the procurement process is all about, but in this case the competition is through the Commission's process. Chair Shallenberger suggested starting by asking the procurement people for the solution. Member Buchanan added that if the Commission provides a plan of how it can be worked with, then an exemption can be granted. Ms. Schmidt expressed her feeling that there is a good case for getting the exemption, but that DOFAW should be prepared to ask for it. She agreed with the suggestion to seek input along the way so there are no surprises. Ms. Schmidt continued by offering again to create drafts of documents to be reviewed at the next Subcommittee meeting. Chair Shallenberger brought up the issue of what should be resolved before the next meeting. One is management, another is how to handle a last-minute change on which parcel is desired. Some solutions were discussed at the last meeting, but it needs to be resolved. Clear title is another issue. Chair Shallenberger asked Ms. Schmidt if there are others in the list that need to be discussed and then a recommendation made to the full Commission and what needs to be resolved in this cycle so they can be integrated into the RFP's and into the ranking process.

Member Buchanan pointed out some things off the list that she felt needed to be discussed. Mr. Hirokawa referred to the application; there was discussion of specifying project costs rather than having an "other" category. Ms. Schmidt explained that it might be more of a departmental responsibility than a Commission duty to check over costs. There was some general discussion of what costs are appropriate and how to specify those in terms of the application and the criteria. Ms. Schmidt expressed that it is most efficient to have rules and guidelines to help answer applicant questions about costs in advance. Chair Shallenberger suggested that everyone look at the list of unresolved issues and decide what to discuss. Member Bonar asked for a hierarchy of what needs to be addressed. Ms. Schmidt offered to look at the minutes from this meeting and make a list of considerations; Chair Shallenberger expressed more concern for what is already on the list.

Ms. Schmidt suggested deciding what items on the list will be part of the rulemaking process, and therefore need to be addressed sooner, to which Chair Shallenberger replied that it doesn't necessarily need to be related to rulemaking, but things that need to be dealt with before September, before going back to full Commission. Member Buchanan agreed that it would be nice to go back to the Commission with a recommendation. Chair Shallenberger brought up the example of culture, and how that would need to be addressed, which Member Buchanan agreed with, but also contributed that it is an issue addressed by DLNR, as it is spelled out in the law.

Member Bonar recalled that some of the topics on the list were brought up by individuals. Ms. Schmidt responded that some of the topics are too specific for discussion of rules. She then offered to create a list of proposed criteria by looking at the sheet, looking at the evaluation form, and then make a list of things to be considered, and the Subcommittee can see if there is anything they want added on, then ask the Commission is there is anything they want to add on. That way it is being organized with the end goal in mind, and is something to work from. Chair Shallenberger recalled that there are two end goals. Ms. Schmidt replied that there will be three drafts. Criteria, Commission operation rules, and Program rules. Ms. Schmidt also recommended that the topic of “getting ready for next year” should be addressed at the next full Commission meeting, as well as reviewing the application form and that kind of thing. Member Bonar interjected that everyone is set with the application form and evaluations. Ms. Schmidt replied that there will need to be a meeting if the application is changed, run by the full Commission. Member Bonar asked if that would need to be run by the Board, to which Ms. Schmidt responded that minor changes don’t, but any substantive reworking of the application does. Ms. Schmidt then expressed the opinion that it should go by the Board every year.

Chair Shallenberger brought the discussion back to the unresolved issues. Ms. Schmidt replied that she will generate drafts of the rules in the different categories, and the Subcommittee members review them and move them around between categories. Chair Shallenberger brought up some specific criteria issues and topics, which were then discussed by the group in general. Ms. Schmidt summarized that there are concerns about issues that aren’t on the list, which Chair Shallenberger is worried will not be addressed and then there will be rules later that will prevent the addressing of those issues; it will be too late. Chair Shallenberger suggested looking at the list and deciding at the next meeting about whether or not to include each. Ms. Schmidt replied that the method would be to have the three drafts of different rules and the unresolved list, and by process of elimination, place the issues into rule categories.

Chair Shallenberger called for any other issues to be added to the unresolved list. Ms. Schmidt recalled the proposal of having “acquisition areas” be eligible rather than specific parcels. Chair Shallenberger decided that it didn’t need to be discussed today, but it needs to be resolved. Member Buchanan asked for a summary of the topic just brought up, so Ms. Schmidt summarized the December 19, 2008, meeting discussion about letting applicants apply for specific resource areas. Chair Shallenberger gave an example of how it works in other organizations where a watershed is defined and an applicant wants to protect it, but opportunities come and go with changing ownerships, it would be nice to have flexibility to “grab while the iron is hot.” For the U.S. Fish and Wildlife Service, an acquisition boundary was defined, and any proposal in that area that is consistent with the overall objective can be substituted. Ms. Schmidt asked if that should be put on the next unresolved issues list. Chair Shallenberger, Member Bonar, and Member Canfield voiced agreement. There was a general discussion about how the Forest Legacy program works and how they choose their projects, and how it could potentially apply to the Program. It was agreed that the discussion should be continued at the next meeting. Member Bonar contributed another topic to add to the list of things to discuss: should it be one application due date per year, or should it be a rolling basis? Ms. Schmidt suggested that the Subcommittee should prioritize what should get done, rather than readdressing how the Program runs.

ITEM 5: Announcements

The next meeting of the Subcommittee is scheduled for April 14th from 9:00 a.m. to 2:00 p.m. in Room 325, in the Kalanimoku Building, Honolulu.

ITEM 6: Adjournment

Chair Shallenberger adjourned the meeting at 12:52 p.m.