

## **Minutes of the July 19, 2010, Legacy Land Conservation Commission Meeting**

**DATE:** July 19, 2010

**TIME:** 9:00 a.m. to 3:00 p.m.

**PLACE:** Board Room, Kalanimoku Bldg., 1151 Punchbowl St., Honolulu, Hawai`i

### **COMMISSION MEMBERS PRESENT:**

Dr. Carl J. Berg

Dr. Dale Bonar

Ms. Lori Buchanan

Dr. Joan E. Canfield

Dr. Charles (“Chip”) Fletcher

Mr. Kaiwi Nui

Mr. Herbert (“Monty”) Richards

Dr. Robert J. Shallenberger

Ms. Karen G.S. Young

### **STAFF:**

Ian Hirokawa, DLNR, Land Division

Molly Schmidt, DLNR, DOFAW

### **PUBLIC:**

Laura Kaakua, Trust for Public Land

Cynthia K.L. Rezentes

Bianca Isaki

### **MINTUES:**

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

Chair Bonar called the meeting to order; the Legacy Land Conservation Commission (“Commission”) members, staff, and members of the public introduced themselves.

ITEM 2. Approval of minutes from December 7, 2009, and December 8, 2009, Legacy Land Conservation Commission meetings; approval of minutes from the May 12, 2010, minutes of the Subcommittee on Rules and Management Funds.

Chair Bonar asked for a motion to approve the meeting minutes. Ms. Schmidt reminded the recently re-confirmed members to take the oath of office prior to taking any actions as a Commission member. Ms. Schmidt stated that there had been some proposed changes from Member Young and Member Berg, and asked that the Commission word its motion to include these changes. Member Richards motioned and Member Young seconded the motion. Ms. Schmidt stated that she would assume that the Subcommittee on Rules and Management Funds (“Subcommittee”) was fine with its meeting minutes, since they did not need formal approval and nobody had commented. All were in favor and the motion passed.

ITEM 3. Discussion of the Fiscal Year 2010 Legacy Land Conservation Program timeline, process, budget, and forms, and possible recommendations from the Commission to the Department on the Grant Application and Instructions and related forms.

Chair Bonar stated that the Commission would now consider forms for the upcoming grant cycle. He asked Ms. Schmidt to summarize. Ms. Schmidt stated that \$4.0 million was the estimated approved amount available for grants in the 2010-2011 cycle, and depending on revenues, there may be more. She proposed the following dates for the upcoming grant cycle:

- August 2, 2010, announcement of available funds
- September 16, 2010, deadline for applications
- October 1, 2010, applications staff-reviewed and sent to Commission
- October 11-15, 2010, Commission meeting to arrange site visits
- October 15 – November 24, 2010, Commission site visits
- December 2 & 3 or 6 & 7 for the two decision-making meetings

Member Shallenberger asked whether travel funds would be available for site visits. Ms. Schmidt stated that the budget policies were the same as last year, she would have to request travel permission for the Commission from the DLNR Chairperson. She stated that she would advocate for what the Commission wanted and see what happened.

Member Berg stated that conducting the October meeting by videoconference and requesting travel funds for the site visits seemed like a reasonable approach. Chair Bonar asked if Ms. Schmidt would give an update on conveyance tax revenues. Ms. Schmidt replied that the revenues to the Land Conservation Fund from last year were about \$4.0 million. Chair Bonar stated that the revenues were improving and that he agreed with Member Berg's suggestion.

Member Young asked if the funds from the Kawa project had been returned to the fund. Ms. Schmidt replied that the project had received an extension and the funds were still encumbered.

Ms. Schmidt asked whether she ought to wait to schedule the December meetings; Chair Bonar replied that he preferred to do it as soon as possible using an online scheduling tool called "Doodle." Member Berg suggested adding in extra dates to those that had been mentioned. Ms. Schmidt confirmed that she would and stated that she would schedule a meeting by videoconference in October as well. Member Richards stated that it was a difficult drive to Hilo and Member Fletcher asked whether private videoconference facilities could be added to the State's system. Ms. Schmidt stated that if the systems were compatible and the private facility is amenable to allowing public use, then it might be possible. She stated that cost might also be a concern. She asked for a contact person. Chair Bonar suggested that Member Richards make contact with the appropriate people and then contact Ms. Schmidt.

Ms. Schmidt asked the Commission to confirm that it was in favor of the following: one meeting by videoconference in October, requesting travel for site visits, and requesting travel for two December meetings. Chair Bonar confirmed, adding that the Commission would do what it could to reduce costs.

Ms. Schmidt stated that the process would be the same as in past years, however, there were several proposed revisions to the forms. The grant application form had been revised to reflect date changes, and to ensure that the end-holder of the property would be an applicant so that they did not have to go

back to the BLNR for a transfer. The acquisition cost worksheet had been revised to reflect the permissible costs. Paul Conry, DOFAW Administrator, had made a call on the eligible expenditures of grant funds earlier this year, so there may not be flexibility, however, the issue of what costs were eligible for matching funds was still open. Chair Bonar stated that baseline documentation needed to be done for every conservation easement, and would be an appropriate expenditure of grant funds and of matching funds. Ms. Schmidt stated that expenditures of grant funds would have to be run by Paul Conry. She asked whether baseline documentation was done in-house or contracted out; she was concerned about applicants being able to demonstrate the funds had been expended. Chair Bonar stated that some larger organizations did it in-house, smaller organizations tended to contract for services. Member Berg asked Chair Bonar to clarify how the item would be listed on the application. Chair Bonar replied “baseline documentation.” Member Young asked who could provide baseline documentation. Chair Bonar replied that Maui Coastal Land Trust had contracted with Frank Oppenheimer; he had been very good. It would depend on what resources were being documented. Ms. Schmidt guessed that Mr. Conry would allow it as match, but was not sure about State funds.

Member Young asked whether a nonprofit land conservation organization had to be organized in Hawaii, and whether a land donation that would not impact the cost of the specific parcel being acquired would be acceptable match.

Chair Bonar asked Ms. Schmidt about whether this item would fall under “in-kind” match.

Member Young stated that she was also concerned about the location of a nonprofit -- she stated that this issue had come up indirectly in past instances and asked if there was a policy in the law or from the Commission. Member Shallenberger stated that one out-of-state organization had been considered as a back-up holder. Chair Bonar stated that one organization had been in the process of registering in Hawaii, and it had been a simple matter to get register. Chair Bonar repeated Member Young’s question. Ms. Schmidt stated that she was not aware of any language in the statute that required organizations to be local – currently, the program was requiring IRS determination letters to demonstrate tax exempt status. Chair Bonar stated that an organization’s location could be a factor in the Commission’s consideration of the organization’s ability to manage and care for the resources. He added that this idea had been the result of past discussions.

Member Shallenberger stated that his impression had been that secondary holders did not have to be located in Hawaii. Chair Bonar added that a judge would decide what happens to the assets of a nonprofit if the nonprofit dissolved. He asked if anyone had strong feelings about non-Hawaii nonprofits holding lands.

Member Richards asked whether anything restricted the transfer of lands to out-of-state organizations. Ms. Schmidt stated that the deed restrictions, which were taken from statute, required that the holder approach the BLNR for permission to dispose of the land in any way. Chair Bonar suggested getting a legal response to Member Richards’ question. Member Canfield added that there were several shades of gray in the issue, it maybe be best handled on a case-by-case basis. Member Berg stated that according to staff, the statute did not preclude out-of-state ownership.

Chair Bonar asked Ms. Schmidt to talk about “in-kind” match. Ms. Schmidt stated that it might be a better discussion in the context of rulemaking, however, her impression was that Member Young’s example would be land value donation, not in-kind. Chair Bonar asked, in general, what would be allowable under “in-kind.” Ms. Schmidt stated that this would be in the rules. She stated that in-kind

services had been discussed by the Subcommittee and that she had revised the draft rules to include more guidance on what was allowable. It would also be coming up in the forms.

Ms. Schmidt continued to list changes to the grant application, and stated that the matching funds page had been revised to allow grant applicants to enter in the type of match and allow more flexibility.

Ms. Schmidt stated that the remaining forms (grant instructions and grant guidelines) had been revised to remove program policies from the grant application instructions and include all policies in the guidelines, and to add the shortened instructions to the grant application form, so that grant applicants would be dealing with two documents: Grant Application & Instructions and Grant Recipient Guidelines. The goal was to ensure that all policies were in one spot so that applicants would be sure to read all of them, not just the ones that had been listed in the instructions. The grant application instructions told applicants to read the guidelines before applying.

Member Young asked about advance payments in number 5 of the draft guidelines. She asked when the advance would be available. Ms. Schmidt replied that these funds would only be available after the funds were awarded, the contract executed, and the program requirements met.

Member Berg asked Ms. Schmidt how she had come up with the order of the “eligible lands” listed in the guidelines. Ms. Schmidt stated that, in response to prior requests to make materials more reader-friendly, she had taken liberties with re-arranging the order of the eligible lands. She stated that she could put in back in the order listed in the statute if the Commission preferred. Member Fletcher suggested putting “in no particular order” in parentheses. Chair Bonar agreed. Member Shallenberger preferred just putting them as they are in statute; Member Berg asked why they were not. Ms. Schmidt asked if the Commission wanted them in the statutory order, various members replied that they did.

The Commission had the following comments on the guidelines:

- add baseline documentation as an allowable expenditure of grant funds
- add baseline doc and attorney’s fees as allowable matching funds
- leave list of resources (in # 3) in guidelines as-is in statute

Per staff proposal, the Commission also agreed to add Section I from the application to the Commission’s evaluation form in the form of checkboxes that correspond to the questions asked in the application.

Chair Bonar called a five-minute break.

Chair Bonar called the meeting back into order and stated that the Commission had finished with reviewing forms. Ms. Schmidt asked whether the Commission would like to make a formal motion to: accept existing changes from staff, add baseline documentation as an eligible grant expenditure, add baseline documentation and attorney’s fees as eligible match costs, and leave the eligible resources in the order as presented in the statute.

Chair Bonar specified that “professional services” should be added, including attorney’s fees and baseline documentation. Ms. Schmidt asked whether all professional services ought to be allowable.

Mr. Hirokawa asked whether all attorney's fees would be appropriate, for example, in instances where a grant recipient does not want to comply with a requirement and uses the services of a lawyer to communicate this to DLNR. Chair Bonar stated that the costs could be defined further, but a limit would not work with the wide variety of costs that could be incurred. Member Fletcher asked about fees relating to application. Member Shallenberger stated it could be limited to the reasonable time spent on a project. Ms. Schmidt asked whether it could be limited to document drafting. Chair Bonar stated that the term was vague. Mr. Hirokawa pointed out that a cap or limit to the amount might resolve the issue. Ms. Schmidt stated that her concern was what kind of documentation would be available to evidence these expenditures, and how reliable it would be. She added that this concern should be weighed with the value of making this an eligible cost. She asked for clarification on the wording being recommended, and stated that "professional services" might be too broad.

She stated that, in regard to allowing attorney's fees, her concern, based on past experiences was that this would be encouraging attorneys to sit across the table and argue about grant program requirements. Chair Bonar asked why the nonprofit should not have access to an attorney when DLNR would have access. Ms. Schmidt stated that she had viewed the grant program as a partner in making the projects work and did not think it was appropriate to encourage opposing attorneys, and as this was a grant program, no rights would be infringed upon. Chair Bonar stated that there were very legitimate expenses for an attorney. Ms. Schmidt agreed and clarify that her concern was the ability to draw the line.

Member Young pointed out to Ms. Schmidt that these would be matching costs, not expenditures of grant funds. Ms. Schmidt stated that she had thought they were now both being proposed.

Chair Bonar stated that only match was being proposed, whether it was done pro bono or paid for by the applicant. He stated that he could see some concern for situations where all of the match was attorney's fees.

Ms. Schmidt clarified her understanding of what was being proposed. Mr. Hirokawa stated that applicants would be bound by their estimates in the application. Member Canfield asked whether there was ability to substitute one type of match for another if one fell through. Mr. Hirokawa stated that applicants were bound, at least by the amounts, to what was stated in the application. Ms. Schmidt added that, in some situations, the proportion of match had changed when the entire project increased or decreased in acreage and/or cost. While applicants were held to the application, if circumstances changed substantively, the usual policy was to do what was possible to allow the project to go through.

Chair Bonar asked whether Ms. Schmidt compared the final matching funds amount from a closing project to the amount stated in the application. Ms. Schmidt confirmed. She added that the process had gradually become stricter as the program had developed over the last few years. As "substantive change" to the grant agreement (and the grant application is attached to this agreement) requires the approval of the chairperson and an amendment to the contract. Many other grant programs went by percentage.

She asked whether the Commission was recommending baseline documentation costs as eligible expenditures of grant funds and baseline documentation and attorney's fees as eligible matching funds. Member Shallenberger pointed out that the matching funds form at least required

documentation of match. Ms. Schmidt stated that the recommendation would go to Paul Conry, as it fell under administrative matters. It might also get passed by the Attorney General's office.

Chair Bonar asked whether the recommendation would go to the BLNR. Ms. Schmidt stated that the forms would be approved by Paul Conry and the DLNR Chairperson. The rules would go to the BLNR, as worded by the Commission, as an attachment to the DOFAW submittal.

Chair Bonar stated he would entertain a motion to approve the forms as revised by staff and as revised by the Commission. Member Shallenberger motioned, Member Berg seconded. Member Canfield passed some comments on another form (self-report form) to Ms. Schmidt from Member Berg. All were in favor of the motion.

ITEM 4. Report from the Subcommittee on Rules and Management Funds on how to advise the Department and the Board on the disbursal of management funds grants through the Legacy Land Conservation Program; and possible Commission action regarding this report.

Ms. Schmidt asked if she should provide a briefing on the rules. Chair Bonar agreed. Following a brief PowerPoint presentation, Ms. Schmidt stated that, as shown in the presentation, there are different authorities for the single draft of rules that was now in front of the Commission. The Subcommittee drafted both sets of criteria and the procedures for the Commission; staff drafted the remaining rules for the operation of the program. The appropriate Commission action on the rules drafted by the Subcommittee is approval; the appropriate action for the rules drafted by staff is to submit comments to the DOFAW Administrator for consideration. Ms. Schmidt stated that she would go through the draft rules in order to explain them.

Chair Bonar asked about the number of members required for quorum and action. Ms. Schmidt clarified that a quorum of five was necessary to meet, and also to take an action as a Commission.

Ms. Schmidt continued: the first subchapters of general provisions and program administration rules were taken mostly from statute. The subchapter on grants from the land acquisition fund was taken from statute and also drafted to ensure that the Commission would retain its role in recommending uses of the funds. She stated that the AG's office would review to decide whether this interpretation of the statute was correct. The subchapter on resource land acquisition planning was drafted in accordance with the Commission's previous decision to not participate in the planning. The subchapter on Commission practice and procedure was very basic and taken from statute and expanded to meet the purposes of rulemaking, that is, to outline procedures involving the public.

The subchapter on the land acquisition grants was from statute, plus a few considerations had been added. The intended holder of the property is required to be an applicant, so that land trusts that acquire on behalf of another entity do not run into problems with HRS §§ 173A-9 and 173A-10 after the funds have been granted. Eligible expenditures had been discussed ... Ms. Schmidt asked whether, in accordance with what it had decided regarding the forms, the Commission wanted to add baseline documentation as an eligible expenditure in the rules and add baseline documentation and attorney's fees as eligible match. Chair Bonar confirmed that it did.

Ms. Schmidt stated that some of the language in the matching funds provisions had been taken from federal guidelines. Ms. Schmidt stated that the provision regarding the grant agreements were there to

provide notice. Nonprofit and county grant recipients that intended to hold the land must enter into the grant agreement. State agencies could either acquire land under the BLNR or enter into a grant agreement. In response to a question from Member Young, Ms. Schmidt explained that most agencies had to acquire land through DLNR, however, some agencies have their own statutory authority to acquire land. Chair Bonar asked which agencies had authority to acquire land, Mr. Hirokawa listed a few.

Ms. Schmidt continued: the provisions on awardee forms and requirements were drafted to be broad enough to allow the program to meet its duties in overseeing the grant funds and the acquisition, but also were specific enough to give applicants an idea of what would be required. Ms. Schmidt read briefly through the next provisions, asking whether the Commission members had questions. She read the provision regarding payment and stated that the Subcommittee and staff had discussed a few methods for payment. She stated that reimbursement had been the preferred method because of the difficulty in getting funds back after they are disbursed.

Chair Bonar questioned whether the provision was written correctly for the purpose of payments for the acquisition of land. Ms. Schmidt stated that it was not written correctly to allow these advance payments. Ms. Schmidt stated that crossing out “reimbursement” would fix it. Chair Bonar agreed.

Ms. Schmidt continued to read through the provisions, mentioning that the goal in drafting had been to stick close to the statute, otherwise, the agency would be wandering away from the authority it had to draft these rules.

Member Berg pointed out that the wording in the monitoring and reporting provisions needed revision – it was not clear what the grant recipients were required to submit or respond to within the given time period. Member Canfield asked whether the time period meant that awardees must respond to DLNR requests to visit the property within 60 days. Member Shallenberger agreed and suggested some wording. Member Fletcher commented that the time limit could refer to the previous sentence. Member Shallenberger suggested making the requirement affirmative for the awardee, and leaving off the time limit: “Upon request, the awardee will provide access to the DLNR to monitor the land acquired under the grant agreement.” Chair Bonar asked whether the time limit was necessary; Ms. Schmidt stated that it was. Member Berg stated that the sentence beginning “awardee shall respond to...” should be removed entirely. Various members agreed. Member Shallenberger suggested moving it to the provision on the next page. Member Berg stated that the language did not need to go in. Member Canfield asked whether the Department needed a different time frame. Ms. Schmidt stated that the two provisions had originally been written as one, and had lost something in the revisions. She suggested merging the provisions and putting a section “c” to take care of the time requirement. Member Shallenberger suggested dropping the monitoring provision entirely and putting the time limit on the reporting provision. Chair Bonar stated that he did not think the monitoring provision needed to be dropped. Ms. Schmidt asked for clarification on what needed fixing and the Commission members told her that the issue was the redundancy. Ms. Schmidt stated she could take the general direction to fix this. Chair Bonar asked her to clarify what requirements needed the time limit. Ms. Schmidt replied that they all did, and Chair Bonar stated that she ought to put the time requirement under the reporting provision. The other members agreed.

Ms. Schmidt continued to read through the provisions. She noted that the provision that required a subsequent (non-awardee) holder of land that had been acquired with Legacy funds to enter into a new agreement had not been taken directly from the statute, but was an effort to plan ahead for when

the current owners of Legacy lands needed to transfer them. Member Shallenberger asked if the idea was to replace the first grant agreement with another grant agreement. Ms. Schmidt stated that she was not sure – the second owner would not technically be a grant recipient, however, they would be holding lands which BLNR retained the right to receive funding from – she was not sure what kind of agreement it would be, that was a legal question. Member Shallenberger stated that the assumption was that second owner would be subject to whatever monitoring the first owner was. Ms. Schmidt added that she had not been accurate in her last statement – if the land was sold, the statute required that the money come back to Legacy Land, the BLNR only had discretion in areas where the land was transferred for no value.

Chair Bonar stated that “b” and “c” were redundant. Ms. Schmidt stated that the intent had been to require all subsequent landowners of Legacy Lands to be subject to the same conditions; she agreed that the wording was bad. Chair Bonar suggested omitting “b” and the Commission members agreed. Member Shallenberger stated that the intent should be preserved. Ms. Schmidt stated that she would fix the redundancy and make sure the intent was preserved.

Ms. Schmidt stated that the criteria had been drafted by the Subcommittee, excepting the format. The priorities had been added to demonstrate that they were the statutory source of the criteria that had been drafted. Member Shallenberger asked whether adding the priorities would further confuse the subchapter... the purpose for the rules was to clarify what standards the Commission actually used to select projects. He questioned whether the criteria cleanly matched the priorities. Member Berg commented that the priorities did not necessarily conflict; the criteria were a set of plus-or-minus factors for weighing projects. Chair Bonar added that it was important that applicants understand that the criteria were the factors used in the actual selection of projects. Member Berg added that a project that did not meet the criteria would not be considered. She added that the provision read that the Commission “may” use the criteria. Chair Bonar stated that he would change it to “shall.” Member Shallenberger asked why the wording stated that the Commission “shall” follow priorities, and “may” follow criteria. Ms. Schmidt replied that the “shall” language regarding priorities was taken from statute, so there was no wiggle room. She added that the criteria were not from statute, and she did not think that the statute required a “shall.” Member Shallenberger stated that it the current wording seemed to make the priorities more imperative than the criteria. Ms. Schmidt stated that she had viewed the criteria as the indicators for whether a project was a priority per the statute. Member Shallenberger added that some priorities did not require criteria, e.g., critical habitat either is or is not critical habitat. Member Canfield pointed out that open space and coastal resources were not listed in the priorities. Ms. Schmidt stated that those resources could be prioritized if they were at risk of damage or development. Member Shallenberger stated that the Commission had to work with the legislation that it had inherited – the nine types of resources did not match up with the priorities. Member Canfield agreed.

Chair Bonar stated that the rule permitted the Commission to “consider” the criteria – they were not necessarily weighted or prioritized. He asked whether there were any criteria on the list that the Commission would not want to consider in assessing a project. Member Shallenberger questioned whether the criteria had been derived directly enough from the priorities. Member Berg stated that the list of criteria accurately reflected what type of specific factual information the Commission would look at. Chair Bonar stated that it was a matter of wordsmithing at this point.

Member Richards pointed out that the wording of the rules was less than clear in some areas. Chair Bonar asked whether this was statutory language; Ms. Schmidt replied that it was.

Member Canfield asked whether the aim of the draft criteria had been to reflect the detailed information asked for on the application and evaluation forms, so that applicants would have notice. Ms. Schmidt replied yes. Member Shallenberger stated that it had grown from the Commission's original set of considerations. Member Canfield stated that, since the phrasing had been "the Commission may," and the criteria are all in keeping with the intent of the statute, it should be okay. Member Shallenberger stated that the "may" allowed for some flexibility. He added that appropriate public access had been discussed; it had been indicated by statute that public access is a goal; however, it was also inappropriate for some lands that are priority lands (e.g., critical habitat). He asked for feedback from Commission members that had not been on the Subcommittee. Chair Bonar asked if the members were fine with the "may" language. Member Berg stated that it was fine, other members agreed.

Ms. Schmidt moved on to the rules regarding grants of operations, maintenance, and management funds for lands acquired through Legacy Land. Ms. Schmidt stated that there had been some discussion over whether an applicant for management fund had to have acquired the land in order to receive funds; a deputy attorney general had opined that this was so. It had been an ongoing discussion in the Subcommittee meetings – there were more details in the discussion. Member Shallenberger asked whether the practical result was that the applicants can't apply for both funds at the same time. Ms. Schmidt agreed, she stated that the awardees had to have acquired the land; however, the issue had been whether there was wiggle-room, policy-wise, to grant both types of funds at the same time and hold the management funds until the acquisition is closed. Chair Bonar provided an example. Member Canfield pointed out that this method would be setting aside money for several years. Ms. Schmidt agreed and stated that the Subcommittee had leaned away from setting aside money for up to three years until a project closed. Member Berg pointed out that the funds were needed right after acquisition.

Member Kaiwi stated that he was concerned about situations where improvements would be counterproductive to greater public access. Ms. Schmidt stated that the language was from statute; she did not know how to address the concern.

Member Shallenberger pointed out that there had been previous project that had to resolve internal conflicts in resource management priorities.

Member Shallenberger asked whether the rule provision relating to eligible management fund applicants effectively allowed monies to be awarded and set aside. Chair Bonar stated that it had not been resolved. Ms. Schmidt stated that this question was still open, however, part of the discussion from the Subcommittee had been against setting aside funds. Chair Bonar stated that his preference would be to apply later.

Member Shallenberger stated that it was too bad that the funding would come after it was needed. Member Berg stated that part of the problem was that the Commission would be asking for a management plan in order to fund management activities, but some groups would need funding for the plan itself. If the funds could be allocated immediately upon acquisition, and applicants could rely on this...

Chair Bonar stated that he disagreed; applicants could present an outline of a management plan at the time of application. Ms. Schmidt added that there was a structure to the way the funds could be used:

the statute did not indicate that DLNR or the Commission could limit the way the funds were used (e.g., just for management plans). If the Commission wanted to receive applications and judge them evenly, it might have difficulty comparing uncompleted projects with projects that have held the land for years.

Chair Bonar pointed out that management planning was not specifically listed in the eligible expenditures.

Member Berg stated that recipients would not be able to do anything for two years until funds are available; this had not been the idea. Member Canfield questioned whether other funding sources would be available; Member Berg stated that the State may not have other sources. Chair Bonar added that the Commission also had to be concerned about whether entities that could not afford to manage ought to receive acquisition grants. Member Berg agreed, stating that it was a circular issue.

Chair Bonar asked whether the eligible expenditures came from statute or had been drafted by staff. Ms. Schmidt replied that she had drafted the section by referring to the statute and then using the federal circulars on eligible grant costs, and that the categories had been left broad. Member Shallenberger stated that he had thought that management planning had been included at some point. Chair Bonar stated that he would prefer that management planning be the only eligible expenditure. Ms. Schmidt stated that she did not think that this was the intent of the statute. Chair Bonar asked whether eligible expenditures were specifically listed in statute. Ms. Schmidt read aloud the following Chapter 173A, HRS, provision:

§173A-5(h)(4) Costs related to the operation, maintenance, and management of lands acquired by way of this fund that are necessary to protect, maintain, or restore resources 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 way of this fund do not exceed five per cent of annual fund revenues of the previous year.

She stated that the statute did not specifically list the eligible costs. She added that she had thought management planning would fall under “professional services;” she didn’t think the State ought to reimburse for plans that were not done by professionals. She asked if the Commission was stating that it wanted to add management planning to the list anyway. Members indicated yes. Chair Bonar stated that he could conceive of situations where management plans would not be done by professionals. Ms. Schmidt stated that she had thought it would be a good standard to help ensure that taxpayer monies were being spent justly; one of the difficulties of funding a management plan was determining whether a sufficient product had been delivered. She asked who would be able to review management plans for nine different types of resources.

Member Shallenberger stated that land applicants were pledging to perform some activities on the land; however this process had lacked oversight.

Member Young stated that she was not in favor of eliminating “equipment” and “materials and supplies” from the list; in her experience, nonprofits were in need of assistance in these areas. Member Canfield added that these costs seemed to be carrying out the statute’s intent.

Chair Bonar stated that he would put these costs at bottom priority – if the landowners did not have an idea of how they were going to garner the support for their management activities ... and have the idea that they are going to continuously apply for operational costs...

Member Young added that management planning was fine; however, she did not think the other eligible expenditures should be removed.

Ms. Schmidt stated that she was still concerned about how to monitor the funding of management plans and how to determine whether the product being delivered is acceptable. Chair Bonar asked whether DLNR had the capacity to review. Ms. Schmidt stated that it might, however, DLNR staff did not necessarily work for Legacy Land.

Member Shallenberger mentioned that Forest Stewardship funded management plans; Ms. Schmidt added that the Forest Stewardship Committee reviewed the plans. She added that the committee members were forestry experts and here there would be nine different types of resources.

Mr. Hirokawa asked whether there ought to be oversight as to whether the plan is actually implemented. Chair Bonar agreed, and stated that this was part of his concern regarding how DLNR managed the program.

Ms. Schmidt asked whether, if what the Commission wanted to encourage management planning, it might be better to award funds based on the existence of a plan. It seems like a good basis for awarding funds. Member Canfield stated that an application did not stand up well if there was no evidence of planning.

Member Shallenberger stated that there were several activities that may need to be implemented right away. For example, if a wetland was threatened by lack of water, this ought to be corrected as soon as possible. Member Shallenberger stated that the other costs would be left in because they carried out statutory uses of the funds; the Commission was only proposing adding management planning.

Ms. Schmidt stated that she was expressing the same opinion to the Commission that she would later give to her supervisor. Management planning would be a hard thing to fund if it were not done by a professional. At least requiring a professional would ensure some standard of quality for the plan. She asked what she ought to do if a subpar management plan was turned in. Would the Commission be willing to review the plans? Chair Bonar stated that this duty would be mission creep.

Member Shallenberger stated that Ms. Schmidt ought to pass the plan along to whatever agency staff had the expertise to review it. He added that the overall detriment of not having a management plan outweighed these concerns. Ms. Schmidt stated that she did not think management planning wasn't important, she just thought that the complication with administering these awards was troubling. Member Berg stated that the ease of administration was not the Commission's concern, and that none of the land acquisition applications turned in thus far had good management plans.

Member Canfield stated that perhaps as a consequence of the growth of the program, Ms. Schmidt's office needed more help.

Member Berg stated that it already had the model of Forest Stewardship (FS). Ms. Schmidt replied that the FS Committee reviewed the management plans – if this was the correct model, then the Commission would be reviewing management plans.

Member Shallenberger stated that FS was a more specific program, and maybe not the right model. He could not believe that someone within the DLNR could not take the time to review the plans.

Chair Bonar stated that it was like monitoring: the DLNR would have to step up and do it. Member Shallenberger stated that the application had asked for information about management planning to ensure the applicant had thought-out goals and plans for the property. Member Fletcher added that funds had been awarded based on planning considerations, including plans for cultural resources.

Member Richards stated that the possession of a management plan would increase likelihood of funding a project.

Member Kaiwi stated that he was concerned about DLNR's definition of a "professional."

Chair Bonar stated that The Nature Conservancy would be able to argue that its internal planning process was one of the best.

Ms. Schmidt asked Member Kaiwi what he would do if he was responsible for ensuring a decent management plan prior to releasing grant funds. She stated that she was asking him because he had told her not to use "professional" as a guidepost, however, the other Commission members could answer.

Member Kaiwi stated that, with regard to the State Historic Preservation Division, there is a lack of guideposts within DLNR and that DLNR had been inadequate for years in managing lands; he suggested getting out into the community to get a better idea of land management. Ms. Schmidt stated that this might be helpful criticism for DLNR as a whole; however, she needed help with a specific situation. Member Kaiwi stated that he did not think the issue could be resolved right away.

Member Fletcher suggested that Ms. Schmidt send the management plan around for comment within DLNR, within the nonprofit community, ask for help, and take a month or so to review.

Member Kaiwi stated that the Ko'olau Watershed Partnership was doing a good job right now with the Ko'olau Watershed Management Plan. They had recognized that the system was dysfunctional, and came to the Native Hawaiian community for consultation. It's not too late for these efforts.

Ms. Schmidt stated that she did not disagree with Member Kaiwi's general points; she was trying to figure out the specifics of the process.

Member Fletcher suggested that Ms. Schmidt get a legal intern to do the consultation process for management plans. Ms. Schmidt stated that she had liked Member Fletcher's suggestion and solution for the process – as long as the parties involved were willing to take the time to review the plan. Her concern with DLNR consultation was that she would effectively be asking unrelated employees for their time and energy, and did not want to assume that everyone would have the time or will to do this.

Chair Bonar stated that Ms. Schmidt needed a process, Ms. Schmidt agreed. Chair Bonar asked whether the funds would be advanced or reimbursed. Ms. Schmidt stated that there was subsection on payment coming up in the rules draft. Ms. Schmidt re-read the recommendation from the Commission regarding the current provision (add “including management planning” after “professional services”) and received confirmation.

Member Fletcher left the meeting.

Ms. Schmidt continued to go through the draft rules. She stated that Mr. Conry had interpreted matching funds requirements to apply to grants of management funding. She went through the next few provisions and added that Legacy Land would request an exemption from the State Procurement Office for the grants of management funds, in order to allow the program to follow the same process that it did for land acquisition grants. If Legacy Land did not receive the exemption, it may have to revise the process and the rules to incorporate the requirements of HRS 103D. She continued through the provisions. Member Young asked why staff had chosen a three-year time frame for the use of management funds. Ms. Schmidt stated that she had chosen three years as a reasonable time after considering the maximum possible award (\$200,000). She asked if the Commission thought the time was reasonable. Member Canfield stated that the rule allowed for extensions, so it should be fine. Ms. Schmidt continued through the rules and read the payment provision. Member Canfield stated that, as the rule was written, applicants would not be able to get the whole amount up front for a management plan. Chair Bonar asked about situations where applicants would need to buy a tractor in order to get work started. Member Shallenberger stated that the payment provision should allow for grants to be advanced for critical and time-sensitive activities. Ms. Schmidt asked what the percentage of advance payment should be. A few members suggested fifty percent. Member Berg stated that he had experienced projects where equipment was needed to initiate the project; at least twenty-five percent had been available in advance. He asked what would happen if an applicant was only asking for the funds for a tractor purchase. Member Canfield suggested deleting the percentage entirely, other Commission members expressed agreement.

Ms. Schmidt stated that she understood the Commission wanted to make the process as easy and rewarding as possible for those doing the conservation work; however, they ought to balance this goal with other considerations, like the difficulty in getting funds back if a project failed. Chair Bonar stated that the attorney general deputies could handle this matter. Ms. Schmidt stated that they were overworked and would not always be able to handle these matters promptly. Member Canfield asked how many failed projects they were likely to have – would there really be applicants that made it through the awards process that did not deserve an advance? Member Berg agreed.

Ms. Schmidt asked the Commission members whether they would feel comfortable dealing with personal funds in this manner. Member Berg stated that he would, if a contractor had already gone through the awards process. These were land trusts that they dealt with on a regular basis. Ms. Schmidt stated that it was not always a question of bad intent; some organizations might lack capacity to make a project succeed.

Mr. Hirokawa asked whether it was difficult for a nonprofit to front the money on credit. The Commission members answered that it was. Mr. Hirokawa stated that, while it may be DLNR’s legal right to get money back in these situations, it may be difficult to get money back from a small organization that had misspent it.

Member Shallenberger stated that the Commission had gone out on a limb already with several projects – certain projects had been funded despite concerns that the owner would be able to manage continuously. Member Young asked whether a nonprofit would be able to purchase a tractor in incremental payments. Commission members answered yes, Chair Bonar added that it would unless it had bad credit. Member Richards stated that the best way to complete a project was to put the funds down upfront. Ms. Schmidt stated that federal grant programs did not even allow these sort of purchases of equipment – if it equipment ever stops being used for the funded project, funds would have to be returned. Chair Bonar stated that the onus would be on the Commission upfront to ensure funds were granted to appropriate applicants. Member Canfield agreed. Ms. Schmidt stated that it was difficult to turn down applicants in need that had projects with potential. She stated that she would stay silent at this point and take the Commission’s recommendation.

Chair Bonar stated that the idea from Member Berg had been to remove the percentage limit on advances. Ms. Schmidt recorded the recommendation and moved on.

Ms. Schmidt stated that the management funds criteria had been drafted by Member Shallenberger, commented on by staff, and approved by the Subcommittee. Chair Bonar asked whether the priorities were the same as in the statute, Ms. Schmidt replied yes. Member Berg pointed out that the criteria were different from the land acquisition criteria. Member Berg asked about number fourteen. Ms. Schmidt stated that the criterion was worded to apply to requests for management planning funding and also allow the presence of management planning to be considered as a criterion for funding other requests. Chair Bonar asked if there were any comments, nobody replied. Ms. Schmidt moved on to the enforcement provision, stating that the program would be limited by the authority it was granted under the statute. Member Shallenberger pointed out that the term “deed restrictions” was listed twice; Ms. Schmidt stated she would omit one. Member Shallenberger asked if the wording had been intended to be inclusive. Ms. Schmidt stated that it was.

Ms. Schmidt stated that she had reached the end of the draft rules and added that a form for granting management funds had also been drafted as a rough draft to aid discussion and to give the Commission something to work off of.

Chair Bonar asked what the next step would be. Ms. Schmidt stated that the Commission could approve the subsections it had been responsible for drafting, and could make a recommendation to DLNR to adopt its comments on the remaining subsections.

Chair Bonar asked Ms. Schmidt how she suggested wording the motion, she provided suggestions.

Chair Bonar called for a motion by the Commission to adopt the rules, as drafted by the Subcommittee, for the Commission’s procedure and criteria. Member Canfield made this motion and Member Young seconded. All were in favor.

Chair Bonar called for a motion to recommend to the Department consideration of the Commission’s previous comments on modification to the Legacy Land Conservation Program administrative rules. Member Canfield moved; Member Shallenberger seconded. All were in favor.

ITEM 5. Update from the Subcommittee on Rules and Management Funds on the formation of draft rules for the Legacy Land Conservation Commission; possible recommendations regarding

administrative rules for the Legacy Land Conservation Program; and possible action regarding administrative rules for the Legacy Land Conservation Commission.

Ms. Schmidt stated that she would now be able to move forward with seeking an exemption from the State Procurement Office, however, there was a remaining issue to be addressed: whether the five percent for management funds grants would be dedicated at the beginning of a grant cycle or whether the Commission could wait until the applications were in-hand. Chair Bonar asked the members whether they wanted to dedicate five percent for management grants at the beginning or stay flexible. Member Shallenberger asked what the statute allowed for. Ms. Schmidt stated that the statute allowed funding up to five percent of the previous year's revenues. Ms. Schmidt stated that the issue was not how much, but when the funding would be set aside: would an amount be set aside, or would the Commission wait to see what the leftover amount from acquisition awards was. She stated that she had thought it would be best to apportion funds up front so that applicants knew what to expect and so that the Commission would not have to choose between acquisition and management projects when there were no criteria for doing so.

Member Shallenberger stated that, in most cases, the Commission would end up with leftover funding after completely funding the acquisition projects on the list. Member Berg stated that they would be running two sets of budgets – as an applicant, he would want to know what was available. He thought the Commission ought to set aside five percent. Member Canfield asked whether they would lose the funds if they were set aside and no suitable management projects were submitted. Ms. Schmidt stated that she thought the funds would go back to the Land Conservation Fund. Member Canfield asked whether the funds could be shifted back and forth between acquisition and management so that the ability to expend them would not be lost in a given year. Ms. Schmidt said that if the Commission were to make choices between acquisition and management projects, they would need criteria or a basis for the decisions, since the current criteria did not allow for comparison. Member Canfield stated that the Commission had not had a chance to go through this process yet, and preferred that the matter be left open until some experience could be gained. Chair Bonar said there was no need to bring the matter up now. Ms. Schmidt stated that it was an administrative decision, the Commission could make a recommendation; it would come into play if the Commission wanted to choose between acquisition and management projects, since criteria would be needed for this decision (it can't be arbitrary), and per the statute, criteria are supposed to be in rule form. If the Commission did not want to create criteria or a basis for choosing, but wanted to shift funds, then it would be forced to disqualify all of the projects on side in order to get to the funds on the other. Member Berg stated that it could be decided up front. Member Canfield stated that organizations were already taking a risk in applying, the provision of a budget was not necessarily that great of an improvement. Member Young stated that there was not currently enough funding for acquisition alone, it would be hard to take funds from this purpose. Chair Bonar stated that the funds ought to be for acquisition, he would prefer the budget be left flexible. Member Canfield asked whether the Commission could put these rules in later. Ms. Schmidt explained that the budget could be left flexible; however, if one looked ahead to this situation, one could see that the issue might arise. Member Shallenberger stated that, if the Commission had a process in place that allowed the Commission to decide yearly, it would not be an issue. He asked whether, in situations where one set of projects had been funded and there were funds left over, the funds could be used for the other budget. Ms. Schmidt stated that she did not see a problem with it in that situation. Member Berg stated that he had been concerned that this funding would be taken by DLNR to fund its projects. Chair Bonar stated that the Commission would have to have more future discussion about this and other issues, like whether awardees can keep applying. He

stated that he was pleased that the funds would not be taken for personnel; Chairperson Laura Thielen had promised him that the funds would not be taken for these purposes.

Member Berg stated that “operations and maintenance” could be interpreted to allow the funding of DLNR personnel. He stated that if the Commission set aside the amount ahead of time, there might be further impetus to allow DLNR to take these funds before they go through the process. Ms. Schmidt stated that she saw Member Berg’s concern, and thought that the rule requiring a Commission recommendation would help more than delaying the formation of the budget. Chair Bonar stated that he did not want to see the full five percent set aside. Member Shallenberger stated that the statute seemed to require this. Chair Bonar stated that the statute stated “up to.” He stated that Ms. Schmidt was saying that applicants needed to know the budget in advance. Ms. Schmidt stated that she was also worried about a situation where the Commission would have two types of grants, two sets of criteria, and no non-arbitrary way of deciding between types, i.e., between land acquisition and management projects. Member Richards stated that a five percent amount already went to the administrative budget. Member Young asked whether there would be a clear basis for demonstrating “need” in terms of management grants, with regards to State projects. Ms. Schmidt stated that it depended on what the Commission puts in the criteria. Member Shallenberger stated that the Department of Agriculture’s Adjusted Gross Income cap was partially meant to address this concern. Chair Bonar stated that he did not think there was a way to do this. Member Young stated that the site visits might help. Member Shallenberger mentioned that the tax returns of nonprofits would provide some info.

ITEM 6. Discussion of possible meeting restrictions and scheduling of future meetings, including possible action in arranging site visits for the upcoming Fiscal Year 2010 grant cycle.

Ms. Schmidt asked whether there were any additional matters to be addressed. Member Young asked Ms. Schmidt to cover the current status of awarded funds at some point. Chair Bonar reviewed the agenda, stating that Item 6 had been covered, and asked Ms. Schmidt to cover past projects. Ms. Schmidt agreed and pointed out that, for the record, she did not have a recommendation from the Commission on the management funds budget. Member Berg asked her to put this on the agenda for a future meeting.

ITEM 7. Briefing by Program staff on:

- a. Results of the 2010 legislative session
- b. Status of projects recommended in previous fiscal years
- c. Agricultural conservation easement workshops

Ms. Schmidt reviewed projects: three projects remained open for Fiscal Year (FY) 2008, and the Chairperson had granted extensions for these projects (Kilauea, Kawa, Nu‘u); from FY 2009, Honouliuli and Sunset had closed, Lapakahi, Kukuipahu and Hamakua were open (all State acquisitions). From the FY 2010 grants process, the Senate President and Speaker of the House had implemented a March 31, 2010, deadline for securing matching funds; all recommended projects had met this deadline excepting DHHL’s Paukukalo project, which had been dropped. The Governor had approved the projects, except DHHL, on June 3, 2010, and she was currently waiting to hear back from DAGS and DLNR Fiscal offices on the status of encumbering the funds for these awards.

Ms. Schmidt continued with announcements: Act 192 had taken one million dollars from the Land Conservation Fund (LCF) for the General Fund. Chair Bonar stated that LCF advocates had negotiated the amount down from a higher proposed amount. Ms. Schmidt stated that Act 209 allowed the use of the LCF for use for the Invasive Species Council for invasive species control, reforestation, and sediment runoff control. She stated that DLNR could take these funds. Chair Bonar stated that the bill had gone past Clayton Hee and had sought to find funding for the control of coqui frogs in Waimanalo. Ms. Schmidt stated that she had thought that invasive species control advocates had been successful in seeking these funds. Member Berg stated that Kauai and other outer-island invasive species committees had not set this legislative change as a priority. Member Canfield stated that it was unclear how this change would affect funding. Ms. Schmidt agreed; Chair Bonar added that it opened the door for raids.

Ms. Schmidt added that there would be upcoming workshops on land acquisition for agricultural purposes. Univ. of Hawaii Professor Richard Bowen and the Oahu Resource Conservation and Development Council were organizing the workshops by county, the main topic being agricultural easements. Members asked Ms. Schmidt to email updates regarding dates and times.

Ms. Schmidt stated that Member Young had mentioned an article in the Honolulu Weekly where Representative Lyla Berg had mistakenly stated that Legacy funds were taken for housing and called "Legacy Land" a misnomer. Member Young added that she thought Rep. Berg had been thinking of the barrel tax and hadn't been informed on the Legacy Land program. Member Young suggested that Ms. Schmidt follow up. Ms. Schmidt stated that she was open to any ideas regarding publicity. Member Berg suggested mailing packets to legislators. Chair Bonar stated that he had run into Rep. Berg and clarified the matter. Ms. Cynthia Rezentes stated that the confusion had been due to the fact that the conveyance tax, which funds the LCF, funded several programs, including housing programs. Ms. Schmidt added that these programs had united to defend and explain their programs, possibly there had been confusion from this effort. Ms. Schmidt provided an overview of outreach efforts: she stated that informational flyers were distributed to legislators in advance of session, there was also a folding brochure for general outreach, she had distributed a summary of projects and matching funds to legislative leadership ahead of the consultation appointment, and there were occasional outreach events: ag in the city, ag day at the capitol, etc., at which Legacy Land had been represented. Chair Bonar added that there had been press releases and news articles. Ms. Schmidt stated that, in news articles, credit for the program sometimes got lost in the list of different grant sources for each project – the stories tended to focus on the land and the new owner, not the funding sources. Chair Bonar mentioned that a press conference for the Sunset Ranch project would be coming up after this meeting. Member Young asked whether Legacy Land was mentioned in the deed. Ms. Schmidt replied that it was; Chair Bonar stated that these documents were not widely read.

ITEM 8. Set next meeting date(s).

ITEM 9. Announcements.

ITEM 10. Adjournment.

Chair Bonar stated that remaining agenda items had been covered and adjourned the meeting.