

**Minutes of the March 29, 2010, Meeting of the Legacy Land Conservation Commission Subcommittee on Rules and Management Funds**

**DATE:** March 29, 2010

**TIME:** 10:00 a.m. to 12:30 a.m.

**PLACE:** Videoconference locations:

Oahu: Kalanimoku Videoconference Center, Kalanimoku Building  
1151 Punchbowl Street, Room B10, Honolulu, Hawaii

Big Island: Hilo Videoconference Center, Hilo State Office Building  
75 Aupuni Street, Basement, Hilo, Hawaii

Maui: Wailuku Videoconference Center, Wailuku Judiciary Building  
Wailuku Judiciary Bldg., 2145 Main St., 1st Floor, Wailuku, Hawaii

**SUBCOMMITTEE MEMBERS PRESENT:**

Dr. Dale B. Bonar (Wailuku)

Ms. Lori Buchanan (Honolulu)

Dr. Joan E. Canfield (Honolulu)

Dr. Robert J. Shallenberger, Chair (Hilo)

**STAFF:**

Ian Hirokawa, DLNR, Land Division

Molly Schmidt, DLNR, DOFAW

**VISITORS:**

Professor Luciano Minerbi, UH Mānoa, Dept. of Urban and Regional Planning

**AGENDA**

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

Chair Shallenberger called the meeting to order; subcommittee members and staff introduced themselves.

**ITEM 2. Approval of March 12, 2009, Legacy Land Conservation Commission Subcommittee meeting minutes and April 14, 2009, Legacy Land Conservation Commission Subcommittee meeting minutes.**

Chair Shallenberger made a motion to approve the minutes. Member Canfield seconded the motion and all were in favor.

**ITEM 3. Review of April 14, 2009, Legacy Land Conservation Commission Subcommittee meeting progress and outcomes.**

Chair Shallenberger asked Ms. Schmidt to review the progress of the Subcommittee.

Ms. Schmidt stated that the purpose of the Subcommittee was to work with staff to accomplish rulemaking for the Commission and Program. She stated that, at the last meeting of the Subcommittee, April 14, 2009, the Subcommittee had reviewed two drafts of rules – regarding Commission procedures and land acquisition grants criteria – and had formed a recommendation to the Commission to advise DLNR to defer the award of management grants for another year or until procedures are in place. The last action taken regarding rulemaking / management funds was a recommendation from the Commission at its June meeting to delay the award of management funds. Ms. Schmidt stated that her hope for this meeting was to get back on track with rulemaking and management funds.

The goal at the last meeting had been for the Subcommittee to discuss the process for management funds award so that Ms. Schmidt could draft rules for the disbursement of management funds along with the rest of the rules that would be going forward. There had been an issue with procurement – land acquisition does not fall within the procurement statute but management funds awards probably would, so DOFAW would need to approach the State Procurement Office to request an exemption. To recap, going thru procurement meant going thru one of the statutorily outlined processes, which were inconsistent with the way the Legacy Land process was currently run.

She had asked Paul Conry to be at this meeting, however, he had been detained at several legislative hearings. She asked if the Subcommittee had any questions at this point.

Member Canfield asked if there had been no progress on seeking a management funds exemption. Ms. Schmidt replied that DOFAW would have to know what the process for disbursement of management funds awards would be prior to seeking the exemption because exemptions were granted based, in part, on the process. DOFAW would have to show that procurement was neither practical nor advantageous for issuing these awards; and would have to show that rules were in place to show that there would be best value, fair treatment, competition, etc.

Chair Shallenberger asked whether the narrow scope of the awards, to those that had already received land acquisition grants, would eliminate the need for competition. Ms. Schmidt stated that many things about these awards, the narrow range of applicants, the existence of the Commission, would help the case for getting an exemption. Other programs, like Watershed Partnerships grants, had to go through procurement despite the process being cumbersome.

Chair Shallenberger stated that Ms. Schmidt had jumped to the management question when the Subcommittee needed to go through the draft rules first. He noted that the discussion of the rules had been included on the agenda.

Ms. Schmidt stated her goals for this meeting, although they only had two and a half hours, had been mostly to get Mr. Conry and the Subcommittee together to discuss the process for management funds grants so that some of the issues that had arisen at the last meeting could be ironed out. Also, the Subcommittee had new draft rules: the criteria for land acquisition awards and Commission procedures that had been reviewed, plus new drafts – a general outline, general provisions, and provisions on program administration, land acquisition grants process, management grants process, and enforcement. She had kept the drafts separate initially but then created an outline to avoid confusion. She added that the rules might be reorganized at the departmental level.

Chair Shallenberger stated that the Subcommittee could spend half of the time with the rules drafts and the other half on the management funds issues. Ms. Schmidt agreed. He added that Mr. Conry may be available later. He asked Ms. Schmidt how reviewing the rules would work. Ms. Schmidt stated that the Subcommittee could either pass its recommendations to the Commission or back to DOFAW. She stated that some parts of the rules were strictly Commission rules, so admin would not edit them.

Member Bonar stated that there was a bill in legislature to propose the use of Land Conservation Fund for invasive species control. One of the committees had let Paul Conry know that the Commission would still have opportunity to provide guidance; however, Member Bonar did not feel that this was a certainty. Ms. Schmidt added that it was not a part of the process as indicated by the bill. Member Bonar asked whether, if the bill is passed and the Commission does have the opportunity to provide guidance, would an applicant be able to apply for these funds? Should the Subcommittee try to include the potential for this? These funds are supposed to be for all BLNR-owned lands, unlike the management funds which are for Legacy Lands only.

Ms. Schmidt stated that her discussions so far had been with Randy Kennedy and Paul Conry. She had requested and received confirmation that DLNR was opposing the bill, however she was not sure how strong or effective the Department's opposition was in the process. She added that she did not think the Commission would receive the opportunity to review requests for invasive species funding if this bill went forward as written.

Member Bonar stated that he had read the bill the same way. Member Canfield stated that anything that was drafted today might not be helpful. Chair Shallenberger asked whether the invasive species funds would be taken off the top without reference to the Commission; Ms. Schmidt agreed with this. Member Canfield stated that it would not be worth the Subcommittee's time at this meeting. Member Bonar stated that they might want to wait on moving forward until HB797 passed. Ms. Schmidt stated that she was against waiting because too much time had already passed, and she apologized for the delay. Member Buchanan stated she agreed; staff could not apply for the exemption until this discussion occurred. Member Bonar stated that, if someone comes to the Commission and turns in a management grant for coqui frog control, will it be covered? He stated that he is opposed to using management funds in general; however, it would be a Commission decision. Chair Shallenberger stated that, if language is left in that management funds only be used on Legacy Lands... Member Bonar stated that it might run counter to the bill. Member Canfield stated that the Subcommittee was not in a position to do anything about it. Member Bonar asked if things could be written to fit both purposes in order to save the Subcommittee future work.

Ms. Schmidt suggested that, if the bill passes on June 1, 2010, staff can propose something to the Commission at the June meeting. There were only two hours left at this meeting and still much to be done, including drafting management funds criteria and discussing process. Another Subcommittee meeting could be held in May, with a June Commission meeting. The Subcommittee could also review any proposed language first, if desired. That way, the work could move forward and leave room for adaptation. Chair Shallenberger stated that this would be okay, Member Bonar agreed.

**ITEM 4. Discussion and possible action on draft rules for the Legacy Land Conservation Commission and possible advisory recommendations on rules relating to the Legacy Land Conservation Program.**

Chair Shallenberger suggested skimming the draft rules before discussing management funds so that both processes could move forward. He stated that the outline had been an improvement. He asked why “maintenance, operations, and management” had been referred to differently in different places. Ms. Schmidt stated that that had been a mistake in the outline; however, she had defined it and then shortened it in the actual subsection for brevity’s sake.

Member Bonar stated that he did not like including “maintenance and operations;” the only kind of management funding should be for management planning. Chair Shallenberger stated that the statutory language had been added to ensure that resources that were acquired were then managed for their preservation – this could include a variety of things, and he could see Member Bonar’s point – however, should stick to the original purpose for adding the language. Member Bonar stated that he was adamantly opposed to the “operations” side of it. Member Shallenberger stated that they could not throw statutory language out and should instead seek to ensure that the funds are spent on critical management activities. Member Bonar stated that the Commission asked about management as a decision-making criterion, point being to ensure that lands acquired are cared for. When Legacy Land is one of the few sources of land acquisition funding available to meet federal match requirements.... Chair Shallenberger stated that he agreed, however, the point had passed where this was fixable, and the Subcommittee should focus on limiting the funds to the best use for management. He liked the suggestion of dropping “operations” and “maintenance.” Ms. Schmidt clarified that she had not meant to eliminate these uses by changing the wording. Chair Shallenberger confirmed that Ms. Schmidt had eliminated words for brevity; Member Bonar had proposed dropping the actual uses.

Ms. Schmidt stated that DOFAW and the Subcommittee would have to work within the wording that had been provided in the statute; she did not think rules would make it through the rulemaking process unless the intent of the statute is followed. Member Bonar asked Ms. Schmidt to read the applicable language from Chapter 173A, Hawaii Revised Statutes (HRS). Ms. Schmidt read from §173A-5: “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...”

She added that, upon Cynthia Rezentes’ suggestion at a past meeting, she had looked up indication of legislative intent. Standing Committee report 2425 had stated: “Your Committee finds that this measure will provide greater protection of lands having value as a resource to the people of the State of Hawaii. This includes, for example, protecting, maintaining, and restoring resources at risk, providing for greater public access to and enjoyment of the lands, and making needed improvements to protect native species and prevent soil erosion.”

She added that she did not think that rules could be used as a tool to narrow or edit what the statute says – rather they could be used to create procedure. She added that this was an issue that she had wanted Mr. Conry present for this discussion so that he could express his opinion on this. Her opinion was that the Commission would need to accomplish its goals of narrowing the use in some other way; it would probably not work out in the rulemaking process.

Member Bonar asked if Ms. Schmidt had ever determined where the language had come from. She thought that she had drafted the original bill with language to allow deposit of grants to the fund and that the language regarding management had come later. What came out was not what she had drafted. Member Bonar stated that it was now water under the bridge.

Chair Shallenberger stated that the Subcommittee would have to follow the statutory language and put indication of spending priorities the funds in the criteria. He asked the Subcommittee to move on to the rules drafts. He asked Ms. Schmidt about the language on eminent domain. Ms. Schmidt stated that the language had been taken directly from the statute. Member Bonar stated that the Commission had expressed disfavor for condemnation, but had never put this into policy or rule. Chair Shallenberger stated that it could be left as-is if it is from the statute, however, he recalled the same discussion.

Chair Shallenberger asked if subcommittees needed to be established by rule. Ms. Schmidt stated that she was not sure and would look into it. Member Bonar stated that he thought these things were in statute. Ms. Schmidt stated that task forces were under the Sunshine Law, however, she was not sure what the legal reference was for subcommittees. Member Buchanan added that the County of Maui had formed rules regarding subcommittees. Ms. Schmidt stated that she would look into it.

Chair Shallenberger stated some concern over the way “fair market value” was referred to under the list of eligible costs for land acquisition grants. He had thought it needed to be “at fair market value or under.” Ms. Schmidt agreed and thanked him for catching the mistake. Member Bonar stated that had been previously discussed.

Chair Shallenberger asked whether management plans should be included under expenditures. Ms. Schmidt stated that the item belonged under the “management grants” subchapter; this was only the “land acquisition” subchapter.

Member Bonar asked Ms. Schmidt whether the costs related to land acquisition had been confirmed as acceptable. Ms. Schmidt stated that there might be a procurement issue with these costs, however, she had spoken with Paul Conry, and, at this point these costs are interpreted as part of land acquisition unless there is a problem when the rules are reviewed.

Chair Shallenberger asked if “in-kind contributions” ought to be defined. Member Bonar stated that they had asked staff whether a definition existed before, and the response had been negative. Ms. Schmidt agreed. Chair Shallenberger asked whether, if someone indicated \$10,000 of volunteer labor, the Commission and staff would know how to evaluate it. Ms. Schmidt agreed that this was a problem she had sought to address by identifying acceptable costs for matching funds. The statute identified acceptable sources of match; the list gave acceptable expenditures of match. Chair Shallenberger asked where pro bono legal support would fit in if services were donated and funds not spent. Member Bonar asked where this would fit on the list. Ms. Schmidt stated that it would not fit. Chair Shallenberger stated that it was odd that they would pay for environmental inspections to be donated .... Member Bonar stated that perhaps a letter stating that the funds had been donated would work, and that acceptable evidence of matching funds was a question for attorneys. Chair Shallenberger stated that he was trying to determine if there might be more guidelines needed than were listed. Member Bonar stated that there was a policy side and a legal side to the question. Chair Shallenberger stated concern that “in-kind” might have different interpretations. He asked if Ms. Schmidt had encountered this issue. Ms. Schmidt stated that, in the most recent group of applications, Hawaii Island Land Trust (HILT) had indicated \$10,000 of matching in-kind services. She did not know if the costs had been specified yet and worried that HILT would not be able to provide enough eligible costs to cover its match. She would be put in the position of having to deal with it and saw the need for more guidance up front.

Member Bonar pointed out a typo and asked whether “to the satisfaction of the department” needed to be clarified. He thought it would be a legal question. Ms. Schmidt stated that the only guidance in the statute was “shall supply evidence of matching funds,” so; the burden on the department was to figure out what would be acceptable evidence. She stated that some costs would require exhaustive review of paperwork to determine – it might not be a black and white legal call, however, there may be a good place to draw the line in terms of policy. Member Bonar wanted to know if donated services would meet the statutory requirement. Chair Shallenberger added that in-kind services should be clarified. Ms. Schmidt repeated that the recommendation from the Subcommittee was to define in-kind contributions.

Chair Shallenberger asked whether the list of awardee requirements were for before or after the award was granted. Ms. Schmidt clarified that “awardee” was defined as an organization or agency that had been awarded a grant. The list was for post-award requirements.

She added that staff had been asking for resource value documentation after the award to demonstrate the condition of the land on the date of acquisition. Chair Shallenberger asked if it was the loose equivalent of a baseline report. Ms. Schmidt agreed. Member Bonar suggested using a baseline report for every project. Ms. Schmidt replied that baseline documentation was sometimes an ordeal to go through and, in the end; the program did not have the teeth to enforce based on the information that would be provided. The idea had been to strike a balance between time/funding issues for the applicant and the benefit to the State of keeping the baseline. Member Bonar stated that land trusts were required by law to have baselines for conservation easements. Ms. Schmidt stated that the baseline was usually based on the specific resources being protected in the easement. Without the guidance of the easement, how would she know which resources to document? Member Bonar stated that most land trusts that own land would have baselines. He did not see it as onerous or unreasonable. Member Canfield suggested leaving in the word “reasonable” to address concerns about putting a burden on applicants. Member Bonar stated it would be up to the Department to keep the record. Ms. Schmidt stated that it was her concern that the overall framework was missing to make baseline documentation worth having. Member Bonar stated that there may be future authority to do this; however, there would be no ability to enforce without a baseline. He added that he was opposed to granting funds to organizations that did not have the foresight to anticipate some documentation of the resources. Chair Shallenberger stated that he was not worried about the language due to the language on the next page regarding monitoring. If any monitoring takes place, there needs to be a baseline. Member Bonar stated that the landowner and land trust would sign the documentation; any lack of accuracy would be their problem. Ms. Schmidt stated that she was not clear what level of baseline and monitoring the Subcommittee was suggesting. Chair Shallenberger stated that it was in the Department’s authority to be monitoring and suggested putting the burden on the awardees to do the reporting. She added that there was nothing actually in the statute that authorizes monitoring, and this was already as far as she felt she could push it without getting pushback. Putting staff time and funding into it might be a waste if there was no actual authority to enforce; however, she saw Dale’s point about potential for the future. Mr. Hirokawa suggested putting the ability for enforceability in the grant agreement. Ms. Schmidt stated that there would then have to be some specifics in the grant application. Member Bonar disagreed. Mr. Hirokawa clarified that the grant agreement could refer to the baseline. Ms. Schmidt asked if they could sign off on something they hadn’t done yet. Mr. Hirokawa said yes, if they would sign it.

Member Bonar added that part of his frustration was due to the fact that a lot of things were granted money and not followed through on. Ms. Schmidt asked Mr. Hirokawa if he was certain that this could be enforced through the grant agreement and Mr. Hirokawa stated that they should check with the AGs, but he thought it would work. Ms. Schmidt stated that she was still not sure that doing a baseline report would be useful if the foundation of a conservation easement document was not there, however, these were just her concerns.

Chair Shallenberger referred to the language regarding conservation easements and deed restrictions on the next page. He questioned how to write it so that it became a part of the award process. Ms. Schmidt agreed and asked for suggestions. Chair Shallenberger specified that it should become part of the process to address instances where it was not prudent to provide grants for fee acquisition without some guarantee of future protection. Ms. Schmidt added that the Commission could review projects and provide recommendations to BLNR to take a conservation easement on a given property. Chair Shallenberger stated that giving money with not teeth for the protection of the resources might not accomplish the goals of the statute. Member Canfield suggested moving the language to be included under the grant agreement provision. Ms. Schmidt explained that the BLNR might also take a conservation easement at the time nonprofit approaches BLNR to sell a property. She suggested including the language as mentioned in addition to keeping what is currently written. Member Canfield explained to Ms. Schmidt and Member Shallenberger where the language could be located to address Chair Shallenberger's concerns.

Member Shallenberger asked if there had been some indication that the State did not want these properties reverting to another entity and wanted to be first in line. Member Bonar stated that it depends; in some situations the State had allowed the County to step in as primary holder, in some situations where federal funds went through the State, the State had taken a conservation easement. Member Canfield suggested retaining the word "may" to address the range of possibilities.

Member Bonar clarified that the language regarding easements would be repeated under the grant agreement section.

Chair Shallenberger asked about the provision regarding sale, lease, disposal of lands. Would lands be encumbered to the extent that new holders would know that they may be required to enter into a contract with the State? Ms. Schmidt replied that the deed restrictions referred to the need for BLNR approval, and the contract could be a condition of this approval, however, the deed restrictions did not specifically mention a contract.

Chair Shallenberger asked whether "enter into a contract" was the right way to state what might be required. Ms. Schmidt stated that the contract was used to put the deed restrictions on the property. Member Bonar asked whether deed restrictions were always put in the deed. Ms. Schmidt stated that it was. Member Bonar stated that this language would take care of Chair Shallenberger's concerns.

Member Bonar asked whether the inclusion of the term "lease" was optional – it could create unnecessary red tape for useful management actions. Ms. Schmidt stated that the term "lease" was in the statute.

Chair Shallenberger called for additional comments. Ms. Schmidt stated that there was a visitor present at the Honolulu location and asked the visitor for his name for the record. Prof. Luciano Minerbi introduced himself and stated that he was with the Department of Urban and Regional

Planning at the University of Hawaii at Mānoa. The members of the Subcommittee greeted Prof. Minerbi. Prof. Minerbi commented that many of the issues the Subcommittee was dealing with were common in conservation and planning. He stated that, as a professor of land use planning, he kept up-to-date on these issues and added that he was working on research with students on the National Historic Trail on the Big Island and assisting the Hawaii Island Land Trust with conservation planning. He was also a nonvoting member on the Kahana Valley cultural living parks.

**ITEM 5. Discussion and possible advisory recommendations for the process for the disbursal of management funds through the Legacy Land Conservation Program.**

Member Shallenberger moved on to the management fund process rules. He asked Ms. Schmidt to explain the priorities in the draft rules. Ms. Schmidt replied that the priorities had come from the statute, and had been added to Chapter 173A, HRS, in 2006. He asked if the wording was the same as the statute, Ms. Schmidt confirmed. She added that other programs generally repeated any statutory decision-making criteria or priorities in rules.

Member Shallenberger asked Ms. Schmidt what changes, if any, the draft criteria had been through. Ms. Schmidt responded that the criteria had been taken from the evaluation form created by Members Canfield and Shallenberger and put into rule form by Ms. Schmidt. The Subcommittee had then revised the criteria at the April 14, 2009, meeting and those edits were incorporated into this draft.

Member Bonar asked whether the ability to take care of land after it is acquired was present in the list. Ms. Schmidt replied that staff did not have any comments on this; the content of the criteria was up to the Subcommittee and Commission. Member Shallenberger suggested adding “capacity for long-term management” as a criterion and the members expressed agreement. Ms. Schmidt stated she would add the item to the draft.

Member Shallenberger asked if balance between different criteria, islands, and resources had been addressed. Member Canfield stated that the Commission had discussed evaluating the project based on the quality of the specific project. Member Bonar stated that the general policy of the Commission had been to pick the best project, regardless of location. He added that comparing resource values introduced the problems of comparing apples to oranges. He was hesitant to put any order to islands or resources.

Member Shallenberger asked if all options for simultaneous award of management and acquisition funds had been discussed. Ms. Schmidt confirmed that the statute required that the land must already be acquired. He asked whether land acquisition applicants could include a portion of the project funds for management, or whether they had to go through the whole process and then reapply. Ms. Schmidt stated that there may be flexibility to do it either way. The AG had said that projects must close before management funds can be released, so, if applicants were to apply concurrently, the grant agreement would have to include provisions to ensure the acquisition closes in two years and the management funds are awarded in the following third or fourth years. Her concern was that applicants for management funds compete in a process that is fair and allows for comparison between projects.

Member Bonar asked whether the wording of the draft rules only allowed applicants to apply after their projects had closed. Ms. Schmidt confirmed. She added that the issue had not been resolved at the last meeting ... she had been worried about the option of allowing grant applicants to apply for an



undefined management activity as a portion of a land acquisition award, however, if the applicants would all go through the same application process and if the Subcommittee did not mind funds being held for three years, then admin might be alright with rewording the draft rules to allow simultaneous grants of management and acquisition funds.

Member Shallenberger asked whether the funds would be tied up for three years. Ms. Schmidt clarified that acquisitions were generally given two years to close and that management funds, by law, could only be awarded to closed projects.

Member Bonar asked whether the wording of the rules (regarding eligible applicants for management funds) was from statute. Ms. Schmidt replied that staff had drafted the rules, and that she saw Chair Bonar's point. She had hoped that Mr. Conry would be available to discuss this issue because it had not been resolved yet. If Member Bonar wanted to propose changing the wording, she could take it to Mr. Conry.

Member Bonar stated that he agreed with the way that it was written... otherwise, most applicants would include a request for management funds, and this would tie up the funds for three years or more and less funding would be available for acquisition.

Member Shallenberger disagreed; he stated that the objective was to ensure that resources being acquired did not diminish in value for lack of management. He stated that the option of simultaneous award was still available; the Commission could accept the application but hold it until the acquisition had closed.

Ms. Schmidt stated that the Commission could not obligate future funds. Member Shallenberger stated that he was not proposing this, he was proposing accepting the application early and acting on it later. Member Canfield stated that the Commission would then be acting on an application two years later. Member Shallenberger stated that he was trying to explore the options for getting the funding out quickly and efficiently. He had wanted to put a question in the land acquisition application to ensure management planning had been done; now he was looking to accelerate the process.

Ms. Schmidt clarified that she had tossed out two years as an average for an acquisition to close – generally it takes a year and a half. The question had been asked if it was illegal, and she did not think it was, however, it was bad policy. Member Canfield asked if the funds would be encumbered from a current or future year. Ms. Schmidt stated that, if management funds were applied for concurrently with acquisition funds, all funds awarded would be taken from the current fiscal year.

Member Shallenberger clarified that he proposed having applicants specify how management funding might be used and applied for in the future, as opposed to attempting to encumber future funds. Member Bonar stated that it seemed that this would put applicants through extra effort. He added that applicants could apply in the following year... why would somebody want to submit up front when their needs might change? He agreed that applicants ought to clarify how management was to be done; however, this could just be a question on the application. Member Shallenberger stated that the Commission had already added this question. He was just looking for a way to expedite funds to recipients so that they could manage lands effectively right after acquisition.

Member Canfield asked the Subcommittee members whether they would like to have funds set aside for management that couldn't be spent up to two years later, or if they would rather just have the

applicants request management funds after the acquisition closed. Member Bonar stated that he preferred the latter. Chair Shallenberger agreed and added that the Commission did not have to set aside five percent, this amount was just the ceiling; it was “up to” five percent.

Member Bonar asked the members whether the Commission ought to consider management and acquisition awards simultaneously, or consider acquisitions awards first.

Member Canfield asked whether the Subcommittee members had agreed on the last matter of discussion – that eligible applicants should be those that have closed their acquisitions. Member Bonar agreed and Chair Shallenberger agreed.

Member Canfield asked Ms. Schmidt about the issue of prioritizing acquisitions over management funds. Ms. Schmidt stated that this issue had come up at the April Subcommittee meeting; she had hoped Mr. Conry would be present so that the issue could be discussed with all present. She thought that Mr. Conry might have had some concern over prioritizing acquisitions first, she was not sure whether he was still concerned, and she was not sure whether the department would want to have the say in this issue.

Member Bonar asked whether this issue would fall under rules or policy. Ms. Schmidt stated that she thought it would be a matter of the intent of the statute plus what would be an efficient and effective way to administer the funds. Member Bonar asked what the rights of the Subcommittee to be dealing with policy and rules. Ms. Schmidt replied that rulemaking was done under statutory authority; generally there was no authority for agencies or commissions unless it is granted by legislature through a law. For rulemaking, there were several relevant provisions in Chapter 173A, HRS: the section regarding Commission rulemaking to provide criteria; the provision relating to Commission rulemaking for their responsibilities under the statute; and the provision relating to the Board’s authority to form rules for the entire chapter. Ms. Schmidt stated that it appeared that the Commission was given authority for criteria and their responsibilities under the chapter, and the Board is given authority for regulations for implementing the entire chapter. Generally, it looked like the Commission ought to be responsible for its own criteria and procedures, and the Board and Department ought to be responsible for program procedures. She added that the Department would seek advice from the Commission on program rules because it was an important part of the program. The Subcommittee would form the Commission rules (with or without staff help) and send them through the rulemaking process and admin staff would draft the Department rules, get Subcommittee/Commission feedback, and send through the rulemaking process. She asked what the Subcommittee what they thought about this process. Member Bonar stated that it was somewhat confusing. He asked whether the Subcommittee could put into the rules that acquisition funding be used first with and leftover amounts used for management awards. Ms. Schmidt stated that the Subcommittee or Commission could make a recommendation to the Department and it would eventually be up to Paul Conry, or the DLNR Chairperson, whether this comment be included. Member Bonar asked whether it was legal to do if it went through the right process. Ms. Schmidt asked Member Bonar to repeat the proposal, he did, and she stated that she didn’t see any problems with it. Chair Shallenberger asked Member Bonar if he meant that funds should be used where there was not enough to fully fund a remaining project. Member Bonar stated that this was why he had asked about policy versus rule. His personal feelings about a rule recommendation might be different from what the Commission decided from year to year. Member Canfield stated that she did not think this would be appropriate for a rule, and that the Subcommittee might not agree on it anyway. For example, in a given year, the Commission might decide that there was a more urgent need for the

management funds. Ms. Schmidt added that, from the standpoint of somebody that wanted to set up an easy process, she recommended setting a maximum amount for awards each year suing the five percent limit as a guideline. This seemed to her to be the intent of the statute, and would also let applicants know what to expect each year. It would probably be up to administration ultimately; however, if the Commission had an alternative method, it could recommend it to administration. Member Bonar stated that he thought the whole reason for the Legacy Land statute had been acquisition funding; he disliked automatically pulling five percent and would not want to see this as a rule.

Ms. Schmidt stated that the Subcommittee could either make a recommendation to the Department or to the Commission, which would then make a recommendation to the Department. Member Shallenberger preferred to make the recommendation to the Commission, Member Bonar agreed.

Member Canfield asked if there was a need to put something in the rules at this point. Ms. Schmidt stated that the program rules would be reviewed by the AG for legality and by the Department for policy. If the Subcommittee wanted something to last beyond this particular administration, however, they might want to put it in a rule.

Chair Shallenberger stated that there needed to be some criteria relating to management funds under the land acquisition list. Member Bonar stated that his fear had been that the funds would be taken for Department staffing and operations. He trusted the current Chairperson not to do this, however, the commitment was not in writing for future administrations to consider. He preferred more flexibility and did not want it as a rule.

Chair Shallenberger recommended putting in decision-making guidance that would not tie the Commission to one use or another, but clarify the priority uses of the funding. Member Bonar replied that funding management plans funding is fine with him, however, if the applicants are asking for ongoing maintenance funds, he would be concerned. Chair Shallenberger stated that he wanted evidence that the land could be adequately managed, and to use these funds to kick-start the management.

Member Canfield clarified that the Subcommittee would need another subchapter for management funding criteria. Ms. Schmidt agreed and added that she had included this in the outline but had not felt like she knew what to draft yet, however, she would be happy to draft something. Chair Shallenberger recommended that the Subcommittee give a recommendation on the award process. Member Bonar agreed. Member Canfield added that the Subcommittee could also make the recommendation to the Department. Chair Shallenberger stated he preferred a recommendation to the Commission.

Ms. Schmidt proposed setting a Commission meeting in June with another Subcommittee meeting in May. In response to Member Bonar, she added that the purpose of the Subcommittee meeting would be to get the remaining work done. Member Bonar stated that the management fund criteria and process would take a Commission meeting to hammer out. Member Canfield stated that the management funds versus acquisition funds question was about relative priority. Member Canfield stated that she thought that the management fund criteria could be drafted by the Subcommittee, whereas Member Bonar was suggesting that the Commission needed to provide feedback on these criteria and the management versus acquisition funds issue. She asked Chair Shallenberger whether

the Commission would still need a set of criteria for management awards. Chair Shallenberger volunteers to draft a set of management criteria for the Subcommittee.

Ms. Schmidt stated that the statute gave a set of priorities for land acquisition but was silent on management funds. She thought that Mr. Conry might have a position on this. She stated the Subcommittee could go to the Commission or Department with a recommendation. Member Bonar suggested proposing some recommendations to the Commission.

Chair Shallenberger stated that the Subcommittee could draft criteria, he had come up with several to propose: consequences of not funding, efficacy of the proposed project, matching funds, immediacy of threat, availability of other funds, staff capacity to continue the project. The emphasis should be on discerning whether the funds would kick-start the project or just be a flash in the pan.

Member Bonar stated that he'd like to see the bigger questions answered: management plans versus on-the-ground activities. Member Canfield stated that Ms. Schmidt had said that the statutory language had to be considered, and that it allowed for more than just management planning to be done. Member Bonar disagreed.

Ms. Schmidt stated that a "priorities" would gauge relative importance between the uses of funds, whereas "criteria" were little tests to assess whether a project was in line with those priorities. It seemed to her that the priority question might be need to be answered first. There were priorities in the statute relating to land acquisition, but none for management funds grants.

Mr. Conry entered the meeting.

Member Bonar asked Ms. Schmidt if she was saying that there were no priorities in the statute for management funds grants. Ms. Schmidt confirmed. Chair Shallenberger stated that the priorities for land acquisition could easily be applied to management funds awards and serve as guidance. Ms. Schmidt agreed. Chair Shallenberger asked Ms. Schmidt about the specific statutory language. Ms. Schmidt suggested drafting an outline, based on the statute, for Chair Shallenberger to use to draft the management criteria. He agreed. He asked whether it ought to go back the Subcommittee before it goes to the Commission. Member Bonar stated that the Subcommittee needed to have more discussion prior to the Commission meeting.

Ms. Schmidt stated that it might be helpful to know what the process is when drafting criteria. Chair Shallenberger pointed out that the Commission hadn't had a chance to discuss this. Ms. Schmidt agreed and stated that there were three issues: the process in terms of how much funding would be apportioned to management (which they could use some guidance from admin on); management funds priorities (if the Commission saw the priorities as applicable to management funds, they might want to specify that in the management funds subsection); and management funds criteria. She asked if the Subcommittee members agreed with this.

Member Bonar stated that, in the priorities, the management planning needed to be a priority over the maintenance and operations uses. He stated that he thought management funds should be granted only after acquisition projects are taken care of and asked Mr. Conry his thoughts. Mr. Conry stated that the five percent for management did not need to be an absolute; it would fall into the Commission's prioritization of what was more important in terms of criteria.

Ms. Schmidt asked if the Subcommittee had any thoughts on how to word this in terms of rulemaking. Member Bonar stated that he and Chair Shallenberger differed in opinion and would have different resulting language to propose. Ms. Schmidt stated that she would take what she had heard so far and include it in the skeleton draft of priorities and criteria to Chair Shallenberger. Chair Shallenberger repeated Ms. Schmidt's list of three issues for clarification and asked whether the priorities would simply be repeated as written. He stated that the priorities could serve as a framework for the management criteria. Ms. Schmidt stated that she could repeat the priorities as written.

Member Canfield asked if the Subcommittee had already agreed that the first issue was not appropriate for rulemaking. Ms. Schmidt stated that she could draft something in rule form to discuss or leave it as an abstract discussion. Member Canfield stated that this was preferred. Ms. Schmidt agreed and stated that, for the draft to be written, she would simply divide the items listed in the statute into categories and hand it to Chair Shallenberger.

Member Canfield asked whether the Subcommittee would meet again or provide the draft to the Commission. Ms. Schmidt stated that it was up to the members; however, she recommended meeting again. Chair Shallenberger preferred to get feedback from the Subcommittee first. Member Bonar asked whether they could circulate feedback through email. Ms. Schmidt replied that back-and-forth discussion of Commission business was not allowed under Sunshine.

Chair Shallenberger stated that he would be fine with sending the draft to Ms. Schmidt to forward in advance of the next meeting.

Member Canfield suggested that Ms. Schmidt cover any issues with Mr. Conry while he was present. Member Buchanan agreed. Ms. Schmidt stated that most of the items she had been concerned about had been discussed: the Subcommittee had decided against simultaneous awards of management and acquisition funds; with regard to whether the Department would specify the amount to be used for management and Mr. Conry had indicated that he was open to Commission recommendations on this matter; advance payments versus reimbursements had not been discussed; and although she had been concerned that the Subcommittee would not be willing to work with the law as written, the Subcommittee had decided to work with it.

Mr. Conry apologized for not being at the meeting earlier – he had been testifying at Legislature. The proposals on the table at Legislature had been either taking Legacy Land funds in a one-time raid or reducing the amount of revenues coming in over a number of years. The Senate had gone ahead with the one-time raid and the Department had stated it was comfortable with this because it allowed for continuance of the program and its staffing. He stated that taking \$1 million out at this point would leave \$3 million for January of next year. A \$2 million raid had been proposed on the NARS fund; however, the amount had been reduced to \$500,000. There was still a House Bill (HB979) up for consideration to change the use of the fund to include invasive species.

Member Bonar stated that the bill would allow funds to be used on any BLNR-overseen lands; this would conflict with the way the Legacy Lands statute was written. Mr. Conry added that a decision-making on the bill would occur that evening.

Ms. Schmidt asked Mr. Conry if there would be Departmental guidance on how the five percent is spent. Mr. Conry stated that they would have to ensure that anything put into rule is consistent with the statute. He asked if Ms. Schmidt would draft something on this matter or if it would be handled

by the Commission. Ms. Schmidt stated that they were deciding this at the moment – due to a difference of opinions with the Subcommittee, the members were leaning towards leaving it to the full Commission. Chair Shallenberger stated that some of the information was appropriate for rule, some was not; however, the Commission ought to look at the options before it goes any higher.

Member Buchanan asked whether eligible expenditures had been addressed. Member Bonar stated that the in-kind funds needed to be described. Ms. Schmidt agreed. Member Buchanan clarified that she was talking about the potential procurement issues relating to land acquisition costs. Ms. Schmidt stated that the issue had been whether reimbursements for appraisal, title, and other costs would create a procurement problem, and that the current decision from admin was that it was acceptable. Member Bonar asked about the procurement issues on the management funds side.

Ms. Schmidt explained that the Hawaii law on government procurement did not include land acquisition grants, but might apply to management funds grants. Many other programs were subject to procurement for similar grants, however, Legacy Land had a good case for an exemption because of the conflict between the processes in Chapter 173A, HRS, and the procurement statute.

Mr. Conry stated that the process for management funds grants might be different than that for land acquisition grants because it would have to be under procurement rules – the process is worked out for other grant programs. Ms. Schmidt stated that procurement was an issue for this program because of the conflicting process that had been set up. Mr. Conry stated that they would get guidance and maybe even an exemption, but the bottom line would be that the process must be able to work with or without procurement. Other staff members in DOFAW had already worked out how to use this process for grants. He stated that the Commission could be used as the review body that is required by the statute. He stated that the right approach was being taken – to first see if an exemption is warranted.

Member Bonar asked whether pro bono services could be used as in-kind services. Mr. Conry stated it would be a matter of what documentation was acceptable as evidence. The hours would need to be documented and the paperwork would be onerous. Acceptable evidence must withstand an audit. Federal guidelines had been set up. He was not sure if there was a clear method of identifying these costs – the recipients would have to prove the cost and purpose.

Member Bonar stated that the Subcommittee would need guidance if it would make a recommendation on this matter.

#### **ITEM 6. Announcements.**

Ms. Schmidt stated that the Subcommittee had run out of meeting time. She asked if the Subcommittee would meet again prior to the next Commission meeting. Chair Shallenberger asked if the management funds application form had changed since the last draft. Ms. Schmidt replied that it had not change except for the attached table for funding.

Chair Shallenberger asked for confirmation that it was not proper to circulate his notes to the Subcommittee. Ms. Schmidt confirmed.

Member Buchanan suggested setting a Subcommittee meeting date and cancelling if it was not necessary to meet again prior to the next Commission meeting. Ms. Schmidt recommended the

Subcommittee meet again unless it is satisfied with its current recommendations to the Commission. Member Bonar stated that it had not made recommendations. Ms. Schmidt replied that another meeting might be helpful. Member Bonar agreed with Member Buchanan's suggestion. Ms. Schmidt stated that she would aim for mid-May and email the Subcommittee members.

Mr. Conry thanked the Subcommittee for its help and service.

**ITEM 7. Adjournment.**

Chair Shallenberger adjourned the meeting.