

## **Minutes of the Legacy Land Conservation Commission Subcommittee on Rules and Management Funds**

**DATE:** February 10, 2011

**TIME:** 12:00 p.m. to 4:00 p.m.

**PLACE:** Kalanimoku Building, 1151 Punchbowl Street, Room 325, Honolulu, Hawaii

### **COMMISSION MEMBERS PRESENT:**

Ms. Lori Buchanan

Dr. Joan E. Canfield

Dr. Robert J. Shallenberger

### **STAFF:**

Molly Schmidt, DLNR, DOFAW

Leah Laramee, DLNR, DOFAW

### **PUBLIC:**

Laura Ka'akua

Michael Whitt

**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.** Review of December 3, 2010, Legacy Land Conservation Commission meeting discussion and outcome regarding rules and management funds, and briefing by staff on any follow-up information.

Chair Shallenberger explained that the objective of the day was to respond to the deputy attorney general's comments on the draft rules. He asked Ms. Schmidt to start with a staff briefing.

Ms. Schmidt reviewed that at the last meeting she had a semi-finished draft that had the deputy attorney general's comments and hadn't responded to them yet. Ms. Schmidt explained that she had finished responding to the comments and what was left as the attorney general's comments to the rules that were drafted by the Subcommittee; the criteria and the procedures for the Commission. Ms. Schmidt asked the Subcommittee if they would like her to go back through what had happened in the previous meetings in more detail. She recommended that at this meeting the Commission members go through the attorney general's comments, beginning with the ones under criteria in case it turns out to be a lengthy issue in need of heavy editing and then go back and address the other rules.

Member Shallenberger asked if Ms. Schmidt was referring to the criteria on the management part. Ms. Schmidt confirmed and said that the rest were mostly technical

and minor edits on a lot of the stuff except for the management criteria. She clarified that there had been some additions to the Commissions procedures but she believed that the Commission members would all support them.

**Item 3.** Discussion of deputy attorney general comments to draft rules for the Legacy Land Conservation Commission and staff revisions to rules for the Legacy Land Conservation Program, and possible recommendations to the Legacy Land Conservation Commission on these rules.

Chair Shallenberger accepted Ms. Schmidt's recommendation and asked the Subcommittee members to review the criteria for operations, maintenance, and management ("management") grants. Member Canfield stated that this section started on page seventeen. Chair Shallenberger remembered that a lot of the discussion in this section had to do with redundancy. Chair Shallenberger asked if it would make sense to jump back to page thirteen that starts the discussion of management grants because that leads in to the criteria question. Ms. Schmidt agreed.

Chair Shallenberger asked if there was any feedback from the Subcommittee on what they saw in those pages. Ms. Schmidt said that there were no edits until page 14. Chair Shallenberger commented that there was some discussion of legal costs in regards to eligible expenditures. He asked if that was included under professional services. Ms. Schmidt said that the rough guidance from Mr. Paul Conry was that we'd be using federal guidelines, if you are familiar with them, in terms of how to quantify and value professional services that are done. Whether that includes legal services I can't recall. I thought that was not going to be allowed. After reviewing the document Member Buchanan said that it was not included. Member Canfield agreed that it would have been listed as an example of legal services if it was included. Ms. Schmidt said that it was something that was submitted as a comment that the Commission ought to include it and decided not to. Chair Shallenberger said that the wording was interesting because it doesn't say "professional services such as preparing a management plan and an environmental assessment" it says "including preparation" so you could say nothing is included but those two items. If we are in agreement that it doesn't include services then since we have seen some of that in the past we should specify and clarify that it does not. Ms. Schmidt said that back in the meeting in July, Member Bonar was quite interested in covering attorney's fees but I took that up with the administrator and the decision was to not include it for both land acquisition and land management grants. Chair Shallenberger agreed that it was a clear answer but he would like it to also be clear in the document. Ms. Schmidt asked if, in terms of wording, by stating "including" does that exclude everything else? Member Canfield asked whether it would still be useful to specify "not including legal services." Chair Shallenberger stated if the Commission really wanted to be specific you could say and "professional services to prepare a management plan or an environmental assessment." Member Canfield agreed that that would exclude the need to say no legal services are covered. Ms. Schmidt asked again for the suggested wording. Member Canfield answered "to prepare" instead of including preparation of. Ms. Schmidt asked if "professional services to prepare a management plan and or and environmental assessment" was the correct wording. Chair Shallenberger confirmed. He then said that it

goes the same under matching funds. He then asked if the sentence under federal coordination does the following had to be such a confusing sentence. “May seek to coordinate with federal grant laws rules and policies by using federal laws rules and policies.” Member Canfield pointed out the “in providing this guidance” was deleted and asked if the attorney general had said it was unclear. Ms. Schmidt confirmed. She stated that she agreed with the attorney general’s comments and saw that the Commission was trying to make a good point, but was trying to figure out how it was stated. Chair Shallenberger asked if it could be worded “the permissible costs of expenditures of matching funds consistence with federal rules laws and policies” or something along those lines. Ms. Schmidt said that it could be that she thought the best way to clarify it would be to separate it out into two sentences. Chair Shallenberger asked what she meant about seeking guidance and coordinating. Ms. Schmidt gave an example; “The department may issue further written guidance on permissible cost expenditures on matching funds.” and “The department may seek to coordinate with federal grant laws, rules and policies by using these policies provided that any applicable state laws, regulations and policies aren’t compromised.” She added that these are two separate thoughts, making them one sentence isn’t really applicable. Chair Shallenberger agreed that they are two separate thoughts but asked if there was some intent to make reference to federal laws and rules under the first thought, too. Ms. Schmidt said that she thought the idea was to avoid doing the same thing twice and follow the policies but we don’t want to bind ourselves to that in case the State wants to make stricter policies. She asked the Subcommittee if they were fine with the meaning and just wanted more clarity from it. Chair Shallenberger confirmed. Member Canfield added that she would like to have less redundancy. Member Buchanan said that it is an easier read that way for the applicants because they are your audience. Ms. Schmidt added that there was going to also be another layer of interface which is the grant guidelines. Chair Shallenberger asked if they could move on to criteria. The Subcommittee confirmed

Ms. Schmidt pointed out that nothing was done to the draft except to the punctuation. She asked the Subcommittee to look at page five of the comments. Member Canfield said that she disagreed with pretty much all the statements, I don’t think they are exactly the same. They are similar but different. Chair Shallenberger said there was one question about items seven and eight that that he though addressed long-term and short-term separately and he thought that separating them made sense. One of them is can we control predators is it likely to achieve the objective of increased production. The other is what’s the evidence that... well I guess I’m seeing both sides to that. Ms. Schmidt said eight is more specific than seven “advocacy of proposed actions” so that means that they are going to propose actions in their application and then if what they are proposing in terms of a method of controlling something isn’t demonstrating to be an effective method then that’s in fact getting at that. Chair Shallenberger said what was being discussed in number eight was what is in the proposal, not what they actually do on the ground. Ms. Schmidt asked if this was the management activity bill wouldn’t they have to list what their activities would be to accomplish their goal? Chair Shallenberger said that they would and they have to make a case that what they are proposing would make sense, that it’s likely to succeed, just like they have to make the case that there was a urgency of need. It would seem to me that if I were writing a proposal and I saw that I would want to draw on

whatever published information or whatever could demonstrated that if you do that it works. Member Canfield clarified that made sense for the number #8 part of it; they have been shown to be effective in the past. Chair Shallenberger said that he could see how there could be concern that there is overlap, but was also comfortable leaving them both there. He continued to say that #15 is long term as opposed to #8 which is short term but didn't see any reason why the Commission wouldn't be able to live with out #15 if we they left #8. Ms. Schmidt agreed that #8 is not limited to short term and therefore could be sufficient. Chair Shallenberger recommended that they modify #8 to say short and long term. Ms. Schmidt suggested that they just add short term. Chair Shallenberger asked if she meant to add another rule or to change #8. Member Buchanan recommended that the Commission just get rid of #15. Chair Shallenberger said that it almost goes without saying if you are trying to make the case that this technique will work there are a short and a long-term component to that. One would not just say "yeah, it will work but not for 20 years." He recommended that the Subcommittee make 8 short and long term and drop #15.

Chair Shallenberger said that #10 needed to stay because it's a potentially critical issue if there was a former fuel storage tank or some sort of environmental hazard. Ms. Schmidt said that the deputy attorney general was asking what "manageability of environmental hazards" meant. Chair Shallenberger said that it could be a variety of things, for example when the federal government looks at a piece of land to buy they have some very specific steps that they have to take to make sure that there is no contamination. Member canfield asked if it would be better if it said "feasibility of managing environmental hazards" or "feasibility of blank environmental hazards" Chair Shallenberger commented manageability is a long word he thought it was still okay. Ms. Schmidt asked if they wanted to write "cost and management of environmental assessments" or "cost management." Chair Shallenberger said that cost is a piece of it, can you mitigate the effects of whatever happened on that land. Ms. Schmidt said that environmental hazards could be liabilities for people when they are walking across it or it could be an underground storage tank. In terms of environmental hazards, mitigating environmental hazards is not specific enough because one of them would have to be managed or built. Chair Shallenberger said he thought it would be understood to mean anything you would have to do to mitigate the hazard whether it is people threats or environmental threats. The trick is convincing us that, whatever the problem is, it's manageable. Member Canfield asked if manageability was really a word because that is probably what the attorney general got stuck on. Chair Shallenberger said that the term mitigation would work in its place. Member Canfield if he meant to use the term as "feasibility of mitigating environmental hazards." Chair Shallenberger confirmed. Member Buchanan thought this might also be confusing. Ms. Schmidt suggested the use of "mitigating any environmental hazards" to cover all circumstances. Chair Shallenberger said that what they are trying to address is identifying issues of concern relating to the management of that parcel. It is not just identifying but how you propose to deal with it. Member Canfield suggested using "feasibility of mitigating any environmental hazards." Chair Shallenberger thought that was acceptable.

Member Buchanan asked if there was a list of hazards on the application. Ms. Schmidt said that the application is in draft stage at the moment and she could not remember if it was on there or not but it could be changed. Member Buchanan said that normally they would ignore that but now the Commission is asking them to manage that. Ms. Schmidt agreed and asked that if the Commission is asking for this information upfront at what level do they have to have the information; do they have to have an environmental site assessment done? Is that a phase one? Chair Shallenberger answered that is what the equivalent of a phase one might be.

Member Buchanan stated that management funds are for projects that have already been approved so we would have a list already. Ms. Schmidt confirmed that they should have done a phase one but they might not have because the Commission does not require it unless it is a State project.

Chair Shallenberger asked the Subcommittee to look at #12 and #14. He said he thought they were indeed different and was comfortable leaving them separate. He suggested that the word planning made them think they were the same thing. Member Canfield said that #14 is about the organization and the bigger picture. Chair Shallenberger said there were several things being asked there; is there any reference to this in existing plans, does the organization have the ability to implement any planning activities and what is the current status of what's been done. He recognized that there was some overlap but they capture really three different topics.

Laura Ka'akua entered the meeting. Ms. Schmidt gave her a copy of the documents.

Chair Shallenberger proposed leaving #12 and #14. Member Canfield suggested that they move #12 down and add it to #13 so all the stuff about planning is in one place. Ms. Schmidt said that this was done initially but then was decided that it was too confusing to leave it all together. She suggested placing them next to each other may help. Chair Shallenberger agreed that would be helpful. Member Canfield agreed to move #12 to proceed #14.

Chair Shallenberger said he agreed with the comment on #13 and it is applicable to the whole project. Ms. Schmidt said she would cross out the last line.

Chair Shallenberger stated that #11 was no longer necessary. Member Canfield agreed because #13 covers it. Ms. Schmidt deleted #11.

Chair Shallenberger referred to sentence "b" at the end and asked whether is there some kind of reward. Ms. Schmidt explained that it was a new sub-provision. Chair Shallenberger said he understood and it gets back to the basic issue, of who's going to enforce and if there is going to be enforcement what remedies does the enforcer have at their discretion to use. He commented that the Commission had discussed this previously that if a non-profit buys they land and bellies up a year later and the work doesn't get done, what authority does Legacy Land have to remedy that; if there any discretion for LLC to take it back. For that matter we are taking about enforcing management

practices, there is no enforcing section for the grant application. Member Buchanan suggested that they add them to the rules. Ms. Schmidt said that the problem was the Commission cannot write powers into the rules that we don't have by statute. After pondering this for a while and seeking deputy attorney general's advice, the problem with it was that the Commission does not have any teeth in the statute. She continued to say that what had been written before didn't do anything because the Commission can't. She said she had spoken to Bin Li, the Department's Civil Penalties Enforcement Coordinator, and asked for his opinion on what got his the Commission could do or couldn't do to have some sort of statutory authority of some sort, Mr. Li had agreed that without that the Commission does not have much. Member Buchanan asked if that meant there needed to be a bill. Ms. Schmidt confirmed and explained that if the Commission wanted to have specific powers of enforcement there would need to be a bill. She said that she could explain more in-depth if the Subcommittee would like her too. Chair Shallenberger asked her to do so. Ms. Schmidt explained in Chapter 172, HRS, there are existing provisions. One of these is that, to get rid of the land, to mortgage it or do anything with it you have to go back to the Board of Land and Natural Resources (BLNR) and get their permission. Secondly, if the BLNR should agree to dispose the land then there are payback provisions so whatever proportion was originally spent out comes back to the fund in equal proportion of the net proceeds of sale. There are deed restrictions the deed which contains those two statutory provisions and also that the land should be managed in accordance with the purpose of the grant. The deed restrictions run with the land and that affects current and future owners. There is also the fact that there is a grant agreement with the current grantee, so they have contractual obligations under that grant agreement as well as the statutory requirements and deed restrictions. That is three layers of binding that we have on them. If they should decide to sell and ignore all that then the payback provisions would come into effect. If they do come back to the BLNR to talk to them about how to dispose of the land the BLNR could require them at that point to give it to give the land to somebody else who is going to manage it for the purposes that the grant is originally given. At that point if the Commission wanted to we could go into another grant agreement with the future owner, which is something that was added to the statute in 2008 in response to the former senate president's comments.

Chair Shallenberger commented that when you talk to living up to the terms of their agreement that includes management activities. That is separate and apart from the issue of whether or not they got a grant to do management. We could leave this whole section off and they would still be obligated by having signed the contract, to manage the property they got. The State, as I understand it, would have the authority to step in and take it back if this was not done. Ms. Schmidt asked if Chair Shallenberger was asking specifically about management grants. Chair Shallenberger answered they are talking about management grants but everything that Ms. Schmidt has explained would have still existed if the section was never described. They have obligations independent of how they spend a grant for management. Depending on the terms of that contract there should be some remedies for the state and you have mentioned one of them which should be they get their money back. Chair Shallenberger asked what some of the circumstances would be for the State to get their money back. Ms. Schmidt explained one of the things you might see in the comments, additional staff comments and questions, is "do we need

more guidelines for processes for example, if an organization wants to transfer land what does it do? What should it expect from DLNR?" She said that she thought at this point what the Board will do with the property will be under the authority that the statute gives them. If they wanted it to not transfer to somebody they could say you were originally given a legacy land grant for this so we require that you keep the land for that purpose. In terms of what else they can do, they are limited.

Chair Shallenberger asked if it is the State that has authorities outside of Legacy Land Conservation Program to enforce the terms of the conservation easement. Ms. Schmidt said that conservation easements were different. In some situations LLCP gave a grant to a nonprofit to give a conservation easement. The conservation easement is monitored by the nonprofit and if anything occurs on the property LLCP could use our contractual powers to say to them they are violating their conservation easement, you should do something about it, but LLCP does not have very strong authority on that so it will be up to the nonprofit. LLCP also has the authority to take a conservation easement over properties when they come through for recommendation. Chair Shallenberger asked who the recommendation came from. Ms. Schmidt explained that it came from the Commission or the Senate President or Speaker of the House. If at some point a grant was given to an organization in fee and to develop the long-term conservation of the land the Commission could recommend that the state take a conservation easement on it. In 2008 when Senate President Hanabusa had some concerns about why we weren't taking conservation easements over properties DOFAW responded by drafting that and introducing it as a bill and it went through so the state now has the authority to do that. Ms. Schmidt commented that she had been confused on whether it needs to be the Department's discretion to say we will take a conservation easement on because that's a cost and responsibility for the Department whether the Commission can force that upon the Department or whether that needs to come from elsewhere has been left unclear. That is something to discuss at a Commission meeting.

Chari Shallenberger asked if TNC or TPL or any of the other established land trusts that take an easement all have their own enforcement provisions. Ms. Schmidt confirmed and clarified that they all have their own standards. Having DLNR take a conservation easement if it doesn't monitor to a certain standard might not be helpful. The attorney general's office can enforce conservation easements on behalf of the State so if we could get the attorney general's office to enforce that sort of a thing then the possibility is already there without DLNR taking on added costs. Ms. Ka'akua added that it could be that the state doesn't monitor and in the event that somebody raises an issue that this entity is not doing their duty then the attorney general's could come in. Then you would not have a financial burden on the State. Chari Shallenberger said that that is likely to happen. The Commission has noted enough of these proposals where at least some of the members of the Commission were spooked about whether or not these people could do what they proposed but also went along with them hoping for the best without really being comfortable that there is a mechanism in place. Ms. Schmidt added that the confusion is created by the fact that we have a grant program and a grant program is an incentive to people not necessarily a tool for oversight and enforcement. However where land acquisition is concerned it seems like the goal in the long term is to acquire it and

protect it that there out to be that component. Funding conservation easements seems to be the key.

Michael Whitt joined the meeting.

Member Buchanan asked if the attorney general does intervene at that time. If the attorney general comes in on a conservation easement for enforcement, what is the enforcement? Ms. Schmidt answered that because conservation easements are viewed to be in the public trust they might have the ability to enforce that in that doctrine. She said she was not sure how that works but there is not anything in Legacy Land Chapter 173A that gives us that.

Chair Shallenberger asked if organizationally the way the things are laid out now in this enforcement subchapter would be applicable for both management of land and acquisition of lands. Ms. Schmidt confirmed and added when it comes to management projects the contracts will be different then they are for the land acquisition grants. It will be what are your specific deliverables and meet those deliverables. Chair Shallenberger said he never felt comfortable that almost anything in the contracts for acquisition give the Commission any enforcement authority. Ms. Schmidt said that she didn't think they do and the problem was that you can't do that. By giving somebody a grant you can't take perpetual ability to enforce what they do with their land. The conservation easement has been created as the tool for that. There has been all those different things thought out and put into statute such as enforcement and what are the purposes of the conservation easement that are acceptable. Unless we are using conservation easements we don't necessarily have that. Chair Shallenberger said the Senator was right, if we look at a piece of property which we have given a significant chunk of money and have reason to be concerned about it living up to its conservation objective then the state should be ready to step in and either take it upon themselves or put some easement restrictions on it to provide some comfort. Ms. Schmidt said that she agreed but she wasn't sure the State had all the resources to take on the properties. Chair Shallenberger commented one step short of that would be requiring the new land owner to have an easement or some kind of deed restriction or to accept something that would allow us to be more comfortable that this is going to happen. That is the thing that makes me nervous about the whole process these new nonprofits come up with the purpose of making one of these deals and have no track record. Ms. Schmidt suggested that at the next Commission meeting the Commission come up with a list of criteria for what is an appropriate head of state to take a conservation easement over the property. If the Commission is in a position to be making those recommendations, then whoever needs to be sitting down and having whatever input the department needs to and the Commission has to state the criteria they think appropriate and together come up with a solution for properties that the Commission does not feel will be placed into long term protection. Chair Shallenberger responded that he hates to think that the Commission is independently thinking about that in the ranking process but he certainly does. Thought the Commission doesn't really talk about it. Member Canfield stated that the Commission should not be approving a project and giving it money if they felt that. Chair Shallenberger said that as a whole Commission it might not be discussed but it is addressed individually. We thought about

that for the lighthouse project for the Big Island. We questioned whether this group was going to go away. Member Canfield asked Ms. Schmidt if she intended the Commission to get the criteria together so that the Commission at the time of that we are making recommendations on project we could specify a particular project we think should have a State conservation easement. Ms. Schmidt explained that the specific language in the statute is to include something; I'm speaking about in real general terms. "The Board may in consultation with the senate president and the speaker of the house of representatives, require as a condition of receiving funds that the state, county, or non-profit land conservation organization receiving funding in this chapter provide a conservation easement under chapter 198 or a agriculture easement or a deed restriction or covenant to a appropriate land conservation organization or to a county, state or federal natural resource agency that shall render the land and be accorded long term protection of the land in preserving the interest of the state." Ms. Schmidt explained that the quote was read to point out that it does not have to be the State holding the easement, the Commission can recommend that somebody else takes on the easement. However, there is an issue with projects coming in with all of their plans and thoughts of what they are going to do and they are just asking for funds and then end up with a conservation easement being held over them by somebody. I don't know how that will fit into their plans or how ready they will be for it. Chair Shallenberger responded knowing that it is an issue that comes up a lot it is possible to put something in the application that says that if the recommendation would be approved with a condition that there would be a conservation easement then would this still be a viable program. If you don't want to touch an easement then perhaps they would reconsider. The language is already there it allows the Commission to make the recommendation. Member Canfield commented that the Commission should work up some criteria for it. Ms. Schmidt asked if she meant that if it's an application what is the likelihood that they would apply. Ms. Canfield confirmed and elaborated that it should be written into the application would they be willing to accept a conservation easement if the funding was contingent on them agreeing to do that. Chair Shallenberger said as it relates to this enforcement section, because it is overarching it may be packaged right after the grant stuff it applies to the whole match, it could be that the criteria could be different if you got a land acquisition grant but you didn't get a land management grant. He said that he was asking the question it did not have to be so. If there was an enforcement body, in theory I think that we have all thought from the beginning that DLNR is the appropriate agency for most of these to be determined if there needs to be and easement to go along with the funds. They are getting more then their easements worth anyway because its always less then the fee so we need to know if the applicant has considered that and would balk at the idea of putting an easement on. Ms. Schmidt then we would be putting the applicant in a position of having to approach DLNR about taking a conservation easement. She said that she didn't know whose division that is going under who is going to fund that. Theoretically it would be Legacy Land, but if in the future we are going to have fifty conservation easements from the same source of funding how is it going to work? I think maybe it would be more appropriate to put the burden on the applicant to go around to different organizations and agencies and find the right one for the type of land that is being protected. One that would see enough value in the project to take on a conservation easement. If it goes into rules it

would be a handy time for people to get a chance to comment on this, like other non-profit land trusts and other grant programs.

Chair Shallenberger stated that he wasn't sure how much they could edit the enforcement thing until there is a serious discussion with Mr. Conry and others about DLNR being the logical agency to take this stuff on but if they don't want to touch it we shouldn't be putting it into the rules. Ms. Schmidt said that if there is the option to have projects come to Legacy Land with the idea of putting on a conservation easement already then that doesn't put the authority on DLNR. So if you are into the idea of having DLNR as an enforcement agency of conservation easements that's one thing, but if it's to get conservation easements on to projects and have them monitored by a number of agencies then that's another. Chair Shallenberger said that it could be that agricultural easements are DLNR. Member Buchanan said that ag easements are on the Department of Agriculture (DOA). Ms. Schmidt said that North Shore Community Land Trust is holding a land easement as well as Maui Coastal Land Trust.

Chair Shallenberger said the Commission might need to wrestle with this because there are going to be situations where we can stretch the money further if in some cases we can acquire easements instead of fee if we are comfortable that we can manage that easement. Ms. Schmidt pointed out that is not the statute in the program that we have right now. That is something that needs to change at a legislative level before you can start doing that from down here. She continued to say that the program was set up to provide an incentive to other organizations and agencies that are willing to take on conservation easements and manage the properties. One of the reasons we give grants is so that we don't have to take on that long term burden of monitoring, enforcement and manage the properties.

Member Buchanan said that she thought for short-term the Commission can work on amending Chapter 173A; sections 9 and 10 and put more teeth into what we are concerned about, the long term management part of it and give that authority to BLNR because they have the authority now under 173A in sections 9 and 10 right? Ms. Schmidt said they have some authority. Member Buchanan said that they are able to do the deed restrictions and the land grant agreement and the contractual agreement, we can just add that to the management practices. It would be easier and faster to go down that way and then at the same time as a Commission trying to strengthen our criteria to let applicants know that we mean business because we cant have applicants coming in and saying "in the first year I'm going to plan to make a plan." They should be coming in with a plan. She continued to say that she thought that the Commission dropped the ball when we approve applicants when we are on the fence and concerned about the long-term stability of that organization and managing in perpetuity. That is three things that we can work on, because if they drop the ball I want my money back, if they drop the ball because they don't have money then it's just going to discredit them more as an organization. Ms. Schmidt said, in her view that is not the whole story, is that there are different schemes set up in statute. One of them is Chapter 198, which is the conservation easement statute; this is how to ensure the long-term protection of the land. And then there is our statute which is how to give grants as an incentive to encourage people to protect lands. The best

way we can put protections on lands is to encourage conservation easements as opposed to changing the Legacy Lands statute to eventually become Chapter 198. Member Shallenberger asked where the money for acquiring the conservation easement would come from. Ms. Schmidt explained that it would come from Legacy Land. Legacy Land is the money-giving statute that's the enforcement statute and they meet up somewhere. She added that she supports encouraging whatever needs to happen for DLNR to take on conservation easements but there will be a lot of people involved in that decision not just the Legacy Land Program and its participants. We are going through another legislation session of choppity-chop so I'm not sure on what priority level that is going to be on. Member Buchanan added that you cannot have DLNR taking on more and more things because they don't have the staff. That's just giving it over to another worst case scenario. Chair Shallenberger asked what the alternative was. Member Buchanan referred to Ms. Schmidt's quote, which read that you can give it to other conservation organizations. Ms. Schmidt said that when Malu Aina came in FY09, the year that the governor cut some non-profit projects it came back with the addition of a conservation easement HILT. That is still giving a nice clean grant over to them and HILT has merged into the bigger Hawaiian Islands Land Trust so I'm assuming that's going to be a pretty good decently-run organization for the long-term. Chair Shallenberger thought that the nonprofits, even the established ones such as TNC and TPL, will shy away from this because of the staff and funding implications for themselves. I'm not unwilling to broker these deals, particularly with TPL, but it's just to get the deal done.

Member Buchanan pointed out that it is the community to do long term management when there is no funding or coverage of a larger organization such as DLNR. Chair Shallenberger said that DLNR has already agreed to take on a management responsibility for Forest Legacy easements of which that number is going up so I'm not sure who they can see for the annual site visits and documentation and so on. I'm not sure what discussion went into that, go ahead and get it and we will worry about it later or I understood the implications of it. Member Canfield added that it seems like, independent the way funding looks for DLNR; it looks like they need to have a discussion about that topic with the Commission. Chair Shallenberger added both about how easements are going to factor into this and how are we going to enforce. What remedies do we have that are in our authority which we mentioned. He added that he would like to cover some what if scenarios. Malu Aina is a good example they doubled their amount of land they devoted to agriculture and they can't handle what they got real comfortably.

Member Buchanan said that cases like on Moloka'i where DLNR or DOA has not been there to oversee. The perfect example is Department of Hawaiian Homelands (DHHL) giving DLNR the easement and DLNR does nothing with it, or a bare minimum, everything is dilapidated. I could see something in the statute where an organization could petition DLNR for that easement or whoever, just step in and petition to take that over if they could prove they had long term funding and commitment. Chair Shallenberger commented that the Subcommittee just went through a bunch of criteria for the management branch and we are going through the same thing for acquisitions. They are ripe with the underlying theme is how are we going to get some assurances that you going to do what you said you are going to do? Yet we haven't tightened that yet, we

haven't figured how best to word it. We are going to say that your project has a better chance of success if you are willing to enter into another conservation easement with another entity or with the State. Ms. Schmidt said that's the tool at hand and the only tool that we really have, all the other tools are not as helpful or enforceable as a conservation easement. Chair Shallenberger said if it is a tool then the Commission better understand how to use it and what the limitations are so that takes us back to we really do need to all kick this issue around, both enforcement and conservations easements as a tool to prefect successful implementation of the project.

Chair Shallenberger asked how the thing works with respect to retrieving some of the funds. What would be an example? Would this be a failure to acquire or a failure to develop and manage it as it was proposed? Ms. Schmidt explained the way it is written in the statue is "...in the event of a sale or disposition of the land." Chair Shallenberger asked if this meant if you keep the ownership of it then you don't have to do anything. Ms. Schmidt said she noticed that some people intend to interpret this she thought even the current interpretation is that it's an option for the BLNR however the statute says "whenever any such land is sold by any such state agency, county or non-profit conservation organization that portion of the net proceeds equal to the proportion of the grant that the state bares at the original cost of the land shall be paid to the state." Chair Shallenberger asked if one non-profit wanted to sell it to another that wanted to do the same thing that they intended from the beginning why would they have to give the money back? Ms. Schmidt answered that she thought the current interpretation of this, though she didn't have the authority to say that that's how it's going to work until it happens, is that they can elect to allow a new organization to take it without having to kick in the payback provisions, however she wasn't certain about that. Member Canfield asked if that would be a question for Mr. Conry or the attorney general. Ms. Schmidt answered that it would be a question for the attorney general.

Ms. Schmidt informed the Subcommittee that Legacy Land is in the midst of answering a lot of questions from Senator Pohai Ryan's office. Member Buchanan asked what questions she was asking. Ms. Schmidt answer that she has asked about every aspect about the program. So far, she has asked about the Commission, about some of the projects, about our process and specifically about enforcement. In response to that we have written a memo, which is not finalized yet, its down at the Chairperson's office right now, kind of explaining what the different enforcement tools are at our disposal. She continued to say when that is finalized she could send it up to the Commission and that would be a great thing for them to have at the meeting where they would discuss this.

Chair Shallenberger asked the Subcommittee to go back to the beginning of the process and cover what has not yet been covered. Member Canfield asked if meanwhile Chari Shallenberger suggested that the Subcommittee drop the enforcement language. Chair Shallenberger explained that he was suggesting that they discuss it before they put together an enforcement subchapter. Ms. Schmidt said that she did not think the enforcement section is going to make anyone happy; we need to look at it more. Chair Shallenberger said that is the reason he asked the question of where it fits in here because

we are not just talking about management grants we are talking about enforcement provisions associated with the acquisition.

Ms. Schmidt said that her comments under enforcement, after talking it over with a couple of different people, what I came up with is just a couple of questions. My questions are going to be “what are our remedies? Am I correct in thinking that all we have is this contract and deed restrictions, etc.? If we don’t have any specific penalties then all we can do is...the conservation easement seems to be the tool for it because there are specific provisions relating to what you are and aren’t doing and when you monitor it you will get to say has this been done. Our grant agreements are too broad in the purposed of what we are giving the grants for are way too broad to specifically monitor. To protect the hala forest, does that mean all of it? Some of it? Chair Shallenberger said that those terms would be defined within an easement but we can’t go very far with this unless there is an agreement within the agency to enforce it. Ms. Schmidt stated that the Subcommittee agreed that a conservation easement is the key.

Chair Shallenberger referred to the draft rules subchapter on general provisions. He said he had a question on page three about the definition section; it refers back to page twelve where there is a definition for critical habitat, why don’t we put all definitions in the same place? Ms. Schmidt said that the document is not in the correct format, and she said she will work with the LRB or somebody else in DLNR to make sure that is in the right format. In that time if the advice is to keep all the definitions together in one section that will be done. The reason that they are separate right now is that is how we started. Chair Shallenberger sad that they may as well push it in the right direction. He continued the only other definition that he saw that there may be a need to defining some other terms. At this point we could just recommend that the provision just go to the definition section.

Chair Shallenberger pointed out on page three under the acquisition of land and the conservation easements and so on, does it work that the reference to at or below fair market value applies to a, b, c, not just c. Ms. Schmidt confirmed. She said that the one thing to fix regarding ag is the “permanent conservation easements under chapter 198 or agricultural easements” it’s in our statute, however, I don’t believe that there are agricultural easements outside of conservation easements. Member Canfield asked Ms. Schmidt what page she was referring to. Ms. Schmidt answered page three and read “...permanent conservation easements under chapter 198 or agricultural easements.” She continued that she was not sure what agricultural easements exist outside of chapter 198. Agricultural production is under the purposes in the conservation easement statute so I’m not sure why it is listed somewhere else but it is just a detail.

Chair Shallenberger said on page 4 on program administration why is eminent domain shown here for the first time. Ms. Schmidt asked where it was. Chair Shallenberger said it is number one under program administration right under the title. Ms. Schmidt said that this is taken from the statute. Chair Shallenberger said that it is saying you can buy it or you can take it. What is inferred by this is that acquisition is taking. Ms. Schmidt read “planned for and execute the purchase or acquisition by eminent domain of land.” It’s in the statute and now it’s being repeated in the rules.

Chair Shallenberger said the end of the program administration section under public records he thought the Subcommittee had already defined the department and the division under the general provisions we have also defined the Legacy Commission. He informed the Subcommittee that he was continuing ahead but if anyone had anything to discuss please interject.

Chair Shallenberger asked what the purpose of creating a vice chairpersons position. Ms. Schmidt said that is was so that if the chairperson couldn't act or would not like to act as the chair the Commission can appoint a vice chair. She added that the Commission did already elect Member Fletcher as the voice chair.

Member Buchanan asked if there was a bill now about the NARS Commission person. Ms. Schmidt confirmed and said it was the same one that was submitted previously. Now the NARS chairperson is automatically the Legacy Land Commission chair but the bill would instead say there is a NARS person on the Commission and they get to delegate that but the Legacy Commission gets to vote for a chair.

Chair Shallenberger commented in the land acquisition grants subchapter there are places where it goes back and forth saying we are acquiring and interest in land or we are acquiring land and it seems to me that it should always be there with an interest it scares people away such as under eligible expenditures. He asked if it could read for the purchase of an interest in the land in fee? Ms. Schmidt answered land in fee is an interest in land and those are two specific interests, an interest in land that can be purchased its being more specific then just saying an interest in land because it's not true that any interest in land can be purchased. Chair Shallenberger said that is it true to say an interest in land. Ms. Schmidt said that land is defined in the definition section as "Earth, water, air... included easements and rights of land and any improvement on land." Later on, when we say land in fee, that's narrowing it down to land in fee where fee is the interest.

Chair Shallenberger said that he wasn't sure if it was anything other the fear factor from having met with so many land owners that reel at the idea of being their land, "your not buying my land your buying an interest in the land." Ms. Schmidt said that is something to pay attention to in the guidelines.

Chair Shallenberger commented on the section grant agreements that beings on page 8. He said that the Subcommittee needs to be careful when talking about enforcement oversight because they sort of imply that the grant agreement will contain provisions and request evidence of the resources on the date of purchase. He asked if there was somewhere else where the Commission will require that the State has the authority to ask for information at a later date or is it all at the date of acquisition. He said he saw something under monitoring and recording. He continued to say that there are so many places that the Commission has set the State up or at least the Department to oversee the implementation of this and yet we cannot do that without coming to grips with the enforcement provisions.

Chair Shallenberger said those were his only comments up until operation and management, he has a lot of notes about the oversight but other than that nothing substantive. He asked if Ms. Schmidt was going to check whether or not the Commission had to address by definition or somehow address the difference between a “conservation easement” and an “agricultural easement.” Ms. Schmidt answered she was not sure if she was going to get an answer on that because it’s in the statute as agricultural easements or conservation easements under Chapter 198. Chair Shallenberger asked if there was a separate definition of agriculture easements. Ms. Schmidt said that there was not one that she knows of. Member Canfield asked if it was an error. Ms. Schmidt responded that it might be one of those things that is there that is to provide an assurance to people that when they see conservation easements and don’t see that agriculture easements comes under that, that provides assurance to people that that is one of the things that you are going to find. She continued to say that she was not sure it made sense in the scheme of things. Chair Shallenberger added that he had never dealt with it separately. We certainly look at agriculture lands under conservation easements. Member Buchanan stated she had looked at the important agriculture land designation and there is a lot written up on criteria to qualify for important agriculture land designation but its also an incentive program so her understanding is whatever is permissible uses under agriculture is permitted is permitted under an agriculture easement as well and that’s a lot of things. Chair Shallenberger added the provisions are all in the details on the specific document. What is permitted here can be very different there. Ms. Schmidt asked if there was a definition for agriculture easement under that that is not a conservation easement. Member Buchanan said there are criteria for the designation. Mr. Whitt said that he thought it is added to address the public perception of an agriculture easement versus a conservation easement. The public perception might be that they see conservation easement to mean that they would not be able to sustainably farm those lands that it has to go back to the natural conditions rather than just restricting future developments.

Chair Shallenberger indicated another example under awardee forms and requirements on page 9 “The department may require the use of forms supplied by the Department and may be require awardee to meet any other requirements to ensure protection of the State interest.” That implies that Legacy Land is going to put things into our contracts that... as a different thought it maybe it could be separated. Ms. Schmidt said that the language is usually something used to cover things not thought of at the moment that would actually be a really good idea to protect the State’s interests. Chair Shallenberger commented that it is an example of loading up the front end but having no idea of what is going to happen at the rear end in terms of enforcement. There isn’t even an agency that has agreed to take on that roll. Ms. Schmidt said that when the LLCP is given a mission to give grants to people for land acquisition, that we can at least ensure that that process of contracting and proving the funds to them to acquire the land is very nice and tight. When there are long term responsibilities for resource protection that are not necessarily addressed in the statute that is a lot shakier. This definitely covers at least the transaction between Department and whoever else in making sure that everything gets protected.

Chair Shallenberger asked if there were any other comments. Member Canfield asked Ms. Schmidt if there were any substantive updates on her comments. Ms. Schmidt said that the outstanding issues are: when does the Commission or the Senate President

and Speaker of the House elect to impose a conservation easement? Though, I don't know if we can give them criteria. When is it appropriate to request that a conservation easement be placed on a property, or require that in the application or project and where in the framework does that go? Chair Shallenberger added the enforcement of any provisions. Ms. Schmidt said the conservation easement is the enforcement tool. Chair Shallenberger agreed but said that if the Subcommittee is creating a structure that is not going to work already going into it knowing that no agency has the staff, the time or money to do anything; it might not be the best solution.

Ms. Schmidt said the other issue was what is actually going to happen with the payback provisions. When can the BLNR deny a sale or deny somebody's request to sell the land. And if they want to avoid the payback provisions does that mean they have to transfer to another entity? How does that work? Chair Shallenberger said it was a question of do you have a willing seller, do you have a willing buyer and is the buyer willing enough in the sense of continued management?

Ms. Schmidt said that she can't get the draft to final. Chair Shallenberger said that he thought a lot of progress was made, if we really are down to the enforcement question then that's for you to take the time to deal with. Ms. Schmidt said it is a good process to go through so that nothing is missed. It is so much better to go through things in advance and be ready when the situation arises. Chair Shallenberger asked if Ms. Schmidt was going to look into whether the Commission needs to distinguish agriculture easements from conservation easements. Ms. Schmidt said that she had brought it up as her personal pet peeve. Member Buchanan said that she would like to know and it may have an application. Ms. Schmidt added that at some point someone might come to Legacy Land and say it's an agriculture easement and not under chapter 198, so that should be clarified in case the wording causes problems for somebody. Member Buchanan said that the oversight would be with the DOA and not DLNR. Chair Shallenberger added the conservation easement that protects grazing land or something. Member Buchanan said it might be under DBEDT because of a permissible use under an agriculture easement that might include biofuels. Ms. Schmidt said that the reason that conservation easements are perpetual is that the statute says so. If you create an easement not under Chapter 198, HRS, I don't know if the easement is a perpetual easement like the conservation easement is. If there is a separate thing called an agriculture easement, LLCP needs to figure out what it is.

Member Canfield said she had a comment on page six of Ms. Schmidt's comments. The last thing under staff additions where it says, "call made by Paul Conry that we can pay but not doing in-house." She said she was not clear what meant about expenditures for management. Ms. Schmidt read "Eligible expenditures: Chapter 343, HRS, compliance is responsibility of the applicant and any funds requested for this purpose must be included in the project proposal." She explained that coming to LLCP for management fund requests will be non-profits, state, and county agencies. State and county agencies already have to deal with Chapter 343 because they are state and county agencies and by virtue of accepting state funds any non profit applicants will have to look at whether they are subject to Chapter 343 because that is a trigger for them. Mr. Whitt asked what Chapter 343 was. Ms. Schmidt explained that it is the Hawaii environmental impact statement law. She continued to say in order to create a process that considers all

applicants there should probably be some sort of consideration for the fact that nonprofits, if they are going to come to us for a project may need to do an environmental assessment. Member Buchanan confirmed and used the example of the Superferry; DHHL now requires Chapter 343 for its applicants in their general leases so at some point in time we would be subject to the same thing. Ms. Schmidt said it might be included as an eligible use for State funding to get that environmental assessment and they should include that in their proposals, and they should include that in their proposals for two reasons, so that they request the right amount of funds and so the Commission can see the over all project in terms of their requesting \$60,000 and they are going to have to do a \$30,000 environmental impact statement, its not really a good idea. Member Buchanan suggested having a process that would exempt them from that. Ms. Schmidt said that if it would be possible to exempt them they would. The question is whether these grants to nonprofits could be listed under State exemptions.

Ms. Schmidt informed the Subcommittee that the request for an exemption from the State Procurement Office (SPO) from having to go through a procurement statue is still pending. In mid-December they called with some questions and after following up this month and last month they just asked today if they could conduct a meeting with Mr. Conry and their administrator and another staff person but it has not been arranged yet. Member Buchanan asked who the head of procurement was. Ms. Schmidt said that she was not sure.

Chair Shallenberger asked what else was on the agenda. Ms. Schmidt asked if there was anything the Subcommittee would like an update on. There were no questions. Ms. Schmidt said it would be good to discuss the agenda for the next Commission meeting as what was covered in this meeting would be a large chunk of it. The ideas to discuss are to have those issues that were discussed in the Subcommittee covered. She asked if there was a guide or short course on conservation easements. Member Buchanan asked if this was for the Commission. Ms. Schmidt confirmed. Member Buchanan said she thought there was already a handbook. Chair Shallenberger said that that there is already a lot of material produced and wasn't sure who on the Commission would need it, but you can ask the question. Member Canfield said that she was not as familiar with them as she should be and asked if there was somewhere she could get information. Ms. Schmidt asked if a better thing to do would be to email out the information in advance and then let people choose whether or not they want to pick it up before the meeting instead of trying to use meeting time for it. The Subcommittee agreed.

Ms. Ka'akua said that Land Trust Alliance has a handbook called the *Conservation Easement Handbook* that was given out to the Commission members at one time. Ms. Schmidt asked if they could re-issue the handbook. Ms. Ka'akua said they could.

Member Buchanan asked if, at the Commission meeting, Ms. Schmidt could do a recap of the timeline of when the process was started up to now. Chair Shallenberger added that he would like an update on the status of projects. Member Buchanan said that she had checked on the conveyance tax and it looks good for funding if we don't get the bill. Ms. Schmidt said what she would do in the meantime is create a proposed provision or plan

for the topics discussed so that if possible in the next Commission meeting they could be inserted into the draft rules and get that done so we can keep moving on getting this draft finalized. Member Buchanan asked for clarification. Ms. Schmidt explained that the things that were discussed, like when the BLNR can deny a sale or the State might take or the Commission recommend a conservation easement go to somebody, just try to have some rule provisions ready so that if it can be discussed at that meeting and then inserted into the draft then there will be a Commission-approved draft on hand. Chair Shallenberger said it would be useful for Ms. Schmidt to talk to Mr. Conry before the meeting and maybe even have him at the meeting to participate in the discussion about easements. Ms. Schmidt agreed that there is a need to talk about the roll DLNR is going to play in that.

Chair Shallenberger asked Ms. Ka'akua and Mr. Whitt if they had any comments. Ms. Ka'akua offered to provide a 10 minute question and answer on conservation easements if the Commission would like. Chair Shallenberger commented that the information TPL has been providing for homeowners on various islands have been very useful to the Commission.

Mr. Whitt said that the discussion on whether LLCP wants to hold and manage conservation easements is something that NRCS has been through, especially with the Farm and Ranch Land Protection Program. It has been through a few iterations of the Farm Bill and changing the rules as far as where we provide cost-share to the managing entity, whether that be a nonprofit land trust, or a state or county entity to hold that easement and then there were just contingent rights in that if it is discovered that they are not enforcing it then NRCS can make them enforce them. Then it changed, in 2006 NRCS was the co-holder of the easement. If your holding entity dissolves or stops managing the easement then NRCS can take that easement and divest that to a new entity. But now NRCS is back to the contingent right of enforcement so NRCS can force that entity to manage those terms and conditions. Ms. Schmidt pointed out that every time the Farm Bill gets passed the law gets changed and asked if NRCS has to do administrative rules as well. Mr. Whitt said yes, but added that in the 2006 change that was all under one Farm Bill there were just different changes and flexibilities in the way the law was written to guide our policies and procedures. He said that he liked the contingent right in that NRCS can enforce the holding entity to enforce the easement because should something should occur there are in perpetuity should something occur a hundred, two hundred years down the road and that land trust or county government or whatever the county no longer exists, that easement is still on the land, it doesn't dissolve so there is still an opportunity for a new partner to step up.

Chair Shallenberger said that the Commission has every right to be concerned about organizations that form around an issue and once that issue is resolved interest tends to ease off and there needs to be a back up plan. Mr. Whitt said the Commission had a lot of options and something they need to look at is who has the capacity to manage and hold those easements. Is it going to be the land trust, DLNR, maybe at the county level with parks and recreation departments?

**Item 4.** Announcements.

Ms. Schmidt asked when the next Commission meeting should be scheduled. Usually one is done in June to revise forms and kickoff the next grant cycle, but there should be one a lot earlier this year because it would be nice to get it going while legislature is still in session. She asked if April was a possibility because it is not possible to move ahead on Commission rules without Commission approval. The Subcommittee thought April should be okay and asked to be sent some dates. Member Canfield asked if the meeting would be before the entire Commission. Ms. Schmidt said yes, so that the Commission can keep moving on rules and management stuff rather than have it sitting until June.

**Item 5.** Adjournment.

Chair Shallenberger thanked Ms. Schmidt for putting together the comments. Ms. Schmidt thanked the Subcommittee for the feedback. Chair Shallenberger called the meeting to adjournment at 1:38pm.