

Minutes of the October 27, 2011, Legacy Land Conservation Commission Meeting

Date: October 27th, 2011

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

Place: Board Room, Kalanimoku Bldg., 1151 Punchbowl St., Honolulu, Hawai'i

COMMISSION MEMBERS PRESENT:

Dr. Carl J. Berg

Dr. Dale Bonar

Ms. Lori Buchanan

Dr. Joan E. Canfield

Mr. Kaiwi Nui

Mr. Herbert ("Monty") Richards

Dr. Robert J. Shallenberger

Ms. Karen G.S. Young

Dr. Charles ("Chip") Fletcher

STAFF:

Ian Hirokawa, DLNR, Land Division

Molly Schmidt, DLNR, DOFAW

Cassandra Smith, DLNR, DOFAW

PUBLIC:

Brenda Baker

Laura Ka'akua

Lea Hong

Cynthia Rezendes

David G. Smith

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

Chair Bonar asked the Commission members, staff and members of the public to introduce themselves. Introductions were made.

ITEM 2. Approval of Legacy Lands Conservation Commission meeting minutes from June 20, 2011.

Chair Bonar asked if there were any questions or edits for the past minutes, and called for a resolution to accept the meeting minutes from June 20th, 2011, Member Berg approved, and Member Canfield seconded the motion. The entire commission agreed with this.

ITEM 3. Discussion of the Fiscal Year 2012 Legacy Land Conservation Program timeline, process, site visits, and meetings; possible formation of task forces for site visits to proposed project locations.

Chair Bonar asked if anyone from the public or from the committee had to leave the meeting at a certain time, no one did so he stated they would follow the agenda. Floor turned over to Ms.

Schmidt, she said she sent an e-mail out to all the applicants asking for their availability for site visits, and referenced a table she put together up on the projector showing these dates. She pointed out that there were sign up sheets in everyone's packets, and reminded everyone that permitted interactions during site visits fell under the Sunshine Law so the commission is required to conduct taskforces in three meetings, and the first meeting is to set up these taskforces of two to four people and publicly announce them. Chair Bonar asked if Ms. Schmidt could quickly list off the types of significance each site had (cultural, agricultural, etc.). Ms. Schmidt quickly stated what she could remember about the significance of each site. She then asked if everyone just wanted to go around the room and give their first choices for sites the members wanted to visit, and keep going until everything was covered. No one opposed.

Member Shallenberger pointed out that the different parcels on the Big Island would not be able to be visited in one day because of the distance in between. Chair Bonar then asked if anyone was interested in visiting any sites not on their island. Member Berg stated that as a bird watcher he was very interested in the Hāmākua properties. Discussion went on for a few minutes regarding the Commissions preference preferences, the logistics of sites, and significance that may require certain expertise. There were five members willing to do the Big Island site visits, and Ms. Schmidt reminded the Commission that only four people could be on one taskforce, and that the decision had to be made in this meeting. Chair Bonar stated that he thought it would be best if Member Buchanan visited the Maunawila site since he had a personnel conflict there and had to exclude himself from the site. Ms. Schmidt read off the slots that had been filled so far. From there the sites remaining were Paukūkalo and Kahuku mauka which were volunteered for by Members Fletcher and Canfield. There was more discussion regarding the sites on Big Island. Member Canfield suggested that there be at least a third member for each group since two is the minimum, the Commission agreed on this and more discussion took place to make sure all the sites were covered by at least three members.

Ms. Schmidt asked if she should read again where everyone had decided to visit, the Commission agreed. Chair Bonar asked how would people feel if we had the extra five or six people with the understanding that it will only be four and then Ms. Schmidt can look at the dates and availability and then say this is the final four. Ms. Schmidt stated that she thinks the decision has to be made at this meeting because that is what the Sunshine Law states. Member Berg then asked if they could look at the dates now. Ms. Schmidt said they could but for the most part she thought there weren't that many applicants who were not available, and thought it would probably work out unless everyone was extremely busy and if someone needs to drop off we have back up stability. Member Berg suggested that they set a date for the visits, and then if someone needs to drop off they can. Member Young asked a question about the difficulty of the Kalauao trail; Ms. Laramée said that it was moderate. Ms. Schmidt continued her previous statement and said that in the past they didn't pick dates in advance and everything seemed to work out pretty well. She just thought they would try it this time, but it doesn't seem to be working out and it seems like a lot to discuss in this one meeting. Chair Bonar said why don't we just go with what people have agreed to so far and you (Ms. Schmidt) and I will work on setting dates for site visits based on applicants and commissioners availability, and if someone needs to drop off they can. Ms. Schmidt agreed and said she would put the contact for each group in touch with the applicants. Chair Bonar asked if they needed to set a taskforce chair for each of these (groups). Ms. Schmidt said not necessarily, she thought it was pretty set in the record now, and maybe we can just do a motion to form the taskforces. Chair Bonar said he would entertain a motion to entertain the task forces as described here to review these

projects and report back to the Commission at our meeting in December. Member Richards supported the motion, and Member Berg seconded the motion.

Member Canfield asked if they should assign a point of contact for each (taskforce), Ms. Schmidt stated that either she could do it; it seems that in past years people like to go directly to talk to each other rather than to go through her to talk to somebody, but whatever is preferred.... Member Canfield asked if they should decide that now. Chair Bonar said he thought that would be a good idea. Ms. Schmidt asked if they should go through and pick a contact, Chair Bonar agreed. Member Shallenberger agreed to be the contact for Big Island sites since he was familiar with the areas. Member Young said she would do it for Ka'ena, Member Kaiwi said he would do Maunawila, Member Canfield for Kalauao and Kahuku mauka, and Chair Bonar agreed to do Paukūkalo. Ms. Schmidt said she would send of the taskforce lists and contact information to the applicants. Everyone on the Commission was in favor of the taskforces. Ms. Schmidt wanted to remind everyone that in past years members during site visits took pictures and did a little write up. Chair Bonar said Ms. Schmidt would send an email to remind everyone to do a little report for the meetings. Member Shallenberger asked about ground transportation. Ms. Schmidt said usually the applicants will help out whenever there is a rental car. Discussion went on about the necessity of four wheel drive on the Big Island.

Chair Bonar stated that he thought it was a good time to bring up whether anyone on the Commission felt there would be a conflict because in the past some have worked for TNC (Nature Conservancy). He stated that he has discussed this with Member Shallenberger who is now retired from TNC and is a private citizen so it shouldn't be an issue, and he thought Member Shallenberger agreed, just in the past we have made the point to discuss this with the Commission, and if anyone feels there is a conflict there because he knew TNC was involved with Kūka'iau then it probably isn't appropriate to have Member Shallenberger along. Member Richards said he was a board member of TNC so perhaps it was best to rule him out of the Kūka'iau. Ms. Schmidt stated that she thought the best thing would be to consult with the ethics office on a case by case basis for each of these, so either she could make the call for you...Chair Bonar stated that was fine, and asked if there were any others who saw conflicts of interest with anything, obviously he has one with Maunawila and will be out of the room. Member Richards asked Ms. Schmidt if she could check for him about Kūka'iau. Ms. Schmidt stated she would take on the responsibility of contacting the ethics office, or calling Members Richards and Shallenberger and letting them know if the ethics office needs to speak to them directly, but she would do the preliminary phone call. Chair Bonar asked if there was anything else on agenda number three, there was none.

ITEM 4. Update from staff, discussion, and possible action regarding draft rules for the Legacy Land Conservation Commission and the Legacy Land Conservation Program.

Ms. Schmidt stated the location of the minutes within the Commission's packet, also that the minutes had been emailed so the members could read through it before the meeting if they wanted too. She said that this draft is DOFAW's in draft edits responses to DOFAW's responses to Division of Forestry and Wildlife, responses to edits from the AG after reviewing the draft, and just to refresh past history the last Commission meeting were there was an action on the rules was on April 18th, were the Commission approved it in sections; so for drafting purposes we have kept the section of the rules separate up until the end point. So while there is different drafting authorities for the Commission and the Department they are kept separate because it makes more sense for people to read it as one whole draft, so the sections that the Commission are responsible for drafting were

the criteria so that is management, funds criteria, land acquisition grants criteria, and the Commissions procedures; and then DOFAW is responsible for drafting the other sections, and so as far as the Commission has been working on these its drafted and approved so three Commission sections, and then provided comments on the DOFAW sections. On the 18th the Commission approved its sections, and approved DOFAW's draft rules to go forward with six voting yes, and one abstaining. And she thought there were a couple of recommendations from the Commission to DOFAW regarding the rules, which were either incorporated or rejected before they were passed on to the AG: the provision relating to the mandatory conservation provision on fee properties that receive grants from Legacy Lands, that was not adopted and the rules went to the AG; add baseline documentation for LL natural expenditures for land acquisition grants, and DOFAW declined that one. Chair Bonar asked why, because he had that highlighted as a really bad idea...Ms. Schmidt clarified that it went in as eligible match, and for eligible expenditures it did not. She said that the reason it didn't go in for expenditures, even though its acceptable match, is because when it comes to baseline documentation there is a large number of things that people can charge to grant funds that would be difficult for DOFAW to track; since of a lot of this is going to be done in-house by people...so for every grant expenditure the invoice is received from all those things and then do it as a reimbursement unless its an acquisition and we can advance the funds. She continued by saying if someone is going to hire a firm to do their baseline documentation and provide a product that can be cut and dry, but if someone is going to do it in-house then you have to look at a long list of travel expenses and it will open up a whole can of worms for things that we are going to have to figure out whether or not it went in to the baseline documentation.

Chair Bonar stated that as an organization that does that, or is required by law to do all of the these things that makes us a non-profit able to do this and we have to keep records and we know exactly what it costs to do all this, usually we do have an outside contractor who gets charged for it...I am not happy with that, he strongly recommended that DLNR address this even though it may seem like a lot of work. Ms. Schmidt said his concern was noted, and continued by saying that a definition for agricultural easements was of concern at the 4/18 meeting, that had been addressed in the draft and they will see it as they go through. She thought the most appropriate way to handle issues where the Commission diverges from what the Division has drafted would be to decide if they're speaking as a Commission or as an individual so they can form a motion for their recommendations at the end of the discussion for DLNR, so it goes in the record. After the April 18th meeting the rules were sent to the AG, and we got them back beginning of October...so we can go through the draft page by page if you like. Chair Bonar said he had a number of comments so it would be good to touch base on those.

Ms. Schmidt began to go through the draft rules; she said on pg. 6 instead of saying "the delegation for the authority for the program is delegated to the division by the department", instead of saying "it may be" it says "it is hereby delegated". On pg. 7 it was recommended that we put in an actual amount for the bottom of pg. 7, public records, part B under 13-140-8 "50 cents per page". Chair Bonar asked where they had come up with that number. Ms. Schmidt thought that is what few other divisions in the Department use. Chair Bonar asked if on each of the these kind of rules they put a number like that, cause those things strike me as kind of a bad thing to do because three years from now it going to cost more or less and it means going back a redoing rules which creates a real hassle. Ms. Schmidt says she agreed with Chair Bonar, except the law states you have to have it in your rules in order to be charging for it. Chair Bonar then asked if you could just specify a reasonable cost as determined by...Ms. Schmidt said that is what they originally had in there and

the advice from the AG was to specify an amount. Chair Bonar thought this was foolish, and thought that there must be some standard that somebody uses somewhere to determine, if you're going in for a freedom of information acts somewhere there has to be...someone can just reference that automatically. Ms. Schmidt thought it would be better to be doing it by department.

Ms. Schmidt moved on to pg. 11, in the second edit the point was to clarify what the division is saying a little bit more. The first part was deleted that says "the Department may issue further written guidance on permissible costs, expenditures, and matching funds". She said the point of putting that in there was sort of to alert people to the fact that there is a guideline that will make whatever is in rule, whatever policies are user friendly, but that didn't really need to be in there so it got chopped. The rest of the edits on this page were wording changes. On pg. 12, Ms. Schmidt continued to go over the changes made. Chair Bonar stated that he did have a comment on pg. 12 awardee forms and requirements, says it may require awardees, and he is concerned about number 9 in that awardees "submit a copy of proposed deed along with any baseline documentation". He continued by saying those are "mays" and not "shalls" and he thought it was critical for baseline documentation for every single parcel, most of that whole section he wasn't sure why it wasn't "shall". Member Young stated that they were all requirements so it should be "shall", and asked if it was too late to make changes. Chair Bonar stated that there could be another section in the rules that requires all these things, but he couldn't find it elsewhere. Ms. Schmidt responded to Member Young's question and wanted to clarify where the plan of process was at, and stated the next step would be to go to the board and ask for a public hearing and they had a little bit of a time-frame to work with getting the rules done, so she thought rather than revising this yet again and sending it back to the AG again what we would do is just make a note of the comments in the submittal and try to move it forward anyways because there is still the entire public comments process to get through. Chair Bonar asked if it would go to the Board before the AG. Ms. Schmidt said this last one was to the AG so basically if it's a minor rule change it goes straight to the board, and then AG for a signature before it goes to public hearing but since this an entire chapter of new rules it went to the AG first so that we could later when we go back to the AG after the Board meeting we could at least have some reasonable idea that she might sign it. So the technical steps are Board, approval, AG signature but we went AG, board, AG again. Chair Bonar stated that his concern is that things like this tend to get lost, and I would like it to be brought to the attention of the Department.

Ms. Schmidt stated that they could put it in the official recommendation and continued on to pg. 13 to the section about voluntary landowner and said it had been trimmed down a bit because it was a little confusing but it still met the same goal. She stated the idea was if a landowner comes to Legacy Land with the applicant and submitted a letter saying they support this acquisition and potentially selling to this person (entity/organization), if that land owner then sells the land to another group as opposed to the applicant...the idea is just to make sure they are all willing partners in the acquisition as opposed to having any shady business occur. She continued by saying basically we don't want to support an applicant who is trying to pull something on someone, so just making sure everyone is a willing partner. Member Shallenberger asked whether, if the land is transferred to another land owner prior to acquisition by the awardee, the deal would die there. Ms. Schmidt responded not necessarily because in some situations like that we would want to keep supporting an applicant, and what this says is that we're not. Chair Bonar said there is an instance that has come up so far where this was happening and there is concern if that kills the deal, and as he understood it the law was unclear on that and it would be good to clarify and it's a good correction.

Ms. Schmidt moved on to pg. 14 and said it was mostly just wording, getting rid of some redundant language and making it more clear. Pg. 15 some of the same edits...Chair Bonar stated the on pg. 15 under "monitoring and recording" 13-42 b, it states the department "may" require reports to be submitted, and stated it should be "shall". He continued by saying one of the biggest problems nationally is that there are easements being held by governmental entities, and many jurisdictions don't even track where all their easements are and once your gone and the next person doesn't have a good record these things fall to the side. He has stated this before, but he feels the department needs to seriously look at the kind of monitoring that is done within the conservation community for easements as required by us, by law. Member Berg asked if he thought it was covered at the top of the paragraph where it states awardees "shall" respond to any requests made by the Department? Chair Bonar stated sure, if the Department makes a request, and his point was around the country departments don't, and that we lose all credibility if someone does something totally inappropriate with the land and there is never a follow up, and once again strongly expressed his concern that be a "may" and not a shall". He continued by addressing section c, number 1, section ii, and wanted to clarify that the definition of "landowner" in the section could be either a fee or an easement holder. Ms. Schmidt mentioned that they forgot to go over the definition of an agricultural easement in the beginning so they should go over that at some point. Member Berg responded to Chair Bonar's concern by asking if his point was by using the term entity it could be the landowner or the easement owner. He agreed and stated that when they're talking about the sale or lease or disposal of lands, does that include easement parts of the interest in land or just the fee part. Member Canfield responded that under the definition of land in the front it says it includes easements and rights in land. Chair Bonar stated he thought what they needed then was a definition of landowner for the context here that can refer either to the holder of the fee interest or the easement holder and other rights in lands, and stated that from a legal stand point he had no idea what landowner meant. Member Berg suggested that perhaps they reject the term landowner and go back to entity. Member Richards said leases are a question mark, you have Hawaiian Homes leases which are 99 years, and Chair Bonar stated again that he thought clarification was needed.

He went on the say that he had further concerns about the "proceeds" section under section 140-35. Ms. Schmidt pointed out that the text was right out of the statute. Chair Bonar continued by saying the problem is we rent for somebody for \$10.00 a year which lawyers all make us put in to our lease arrangements, technically we are in violation and you guys could take Waihe'e back...because we have never gone through this and when you have this kind of language there when it's a lease it does create...the reality is they could come after us for a \$10.00 a year lease, but for us that's part of our fire prevention plan is keeping the land mowed down. Ms. Schmidt clarified that Waihe'e was not LL so there isn't a violation, Chair Bonar stated he knew that but Nu'u is and others that have been done here were there might be these things that are necessary for management but they're not a profit for us, basically its like hiring a contractor to make sure you get your management done and especially in agricultural lands leases might fall under that and this may be something that needs to be dealt with my ledge at the statutory level, but DLNR needs to recognize that this creates possible limitations...technically we are in violation. Ms. Hong had a concern about the lease division because as you know there is a conservation easement project and a agricultural easements, and it is disclosed in our application that there is multiple applications we have for farmers, the land have 469 acres they are not farming it all themselves, they have about 15 leases and it is a very cumbersome thing that every time they want to lease land they have to come before the board every single time. She didn't know if they had thought about it in an agricultural context but...Ms. Schmidt asked if what she was suggesting was a statutory revision because it was exactly from the

statue. Chair Bonar said this is something the AG or the Board to figure out how we get around this, is it get around or is it the only way you can get do it is statutorily, and at the point he encouraging to get legislation in and correct it. Ms. Schmidt responded by saying that probably our intent was not to get around things put in to statue. Chair Bonar said he knew this but if there was a legal ways of getting around it, or if it is hard and fast statue...the State is making it harder for farmers as it is and this is a another one of those example of how...and thought it was simply thoughtless, no one has had this presented before. Ms. Schmidt responded by again clarifying that this was language was in the statute so if it was a concern for the Commission then they can make a recommendation...Chair Bonar said it was an enormous concern because the Turtle Bay properties, the one I did last year...Ms. Schmidt stated that she understood his concern but wanted to put in to context because they were in a Commission meeting, the Commission has advisory powers, so if you want to put a recommendation in or something like that it would be good. Chair Bonar agreed with this and told Ms. Schmidt that the Commission also depends on her to be carrying the passion of the Commission on some of these things to her bosses, its a lot easier for DLNR to get statutory changes. Ms. Schmidt said then that he should make the recommendation to DLNR. Chair Bonar then thanked Ms. Hong for bringing that point up because he had never thought about that side of things which is critical to keeping those lands in agriculture.

Ms. Schmidt wanted to clarify that she was not trying so skip through the draft, but because they had already went over it and made recommendations and she had taken not of the all the changes she was just trying to get through it as quickly as possible. Chair Bonar proceeded on to subsection five and addressed the section about net proceeds and said that a lot of what they try to do to look at permanent maintenance of our land would be to build up the stewardship from there, and from a non-profit sense net proceeds could be interoperated that way. But since there are thinking in perpetuity saying that anything that goes in to the direct expense would have to go back to the fund throws that some problem on us...we are trying to plan for the permanent management of this land...and stated he wasn't sure if this was statutory language, Ms. Schmidt confirmed that it was. Chair Bonar stated then it can be included in the recommendations to the Department to see if they can get that corrected.

The discussion continued and Ms. Schmidt pointed out that there were no AG edits of the rules drafted by the Commission. Chair Bonar stated that on pg. 22 he had an issue again with there being a "may" instead of a "shall", for the department "may" require management grant awardees to do something. He said he just wanted to make sure things were being done right. Member Berg pointed out to Chair Bonar that there were lots of "mays", and he stated he was more concerned about the "mays" in regards to requirements. Ms. Schmidt moved along to pointing out that there was definition for agricultural easements on the first line of pg. 5. Chair Bonar was satisfied with this.

Ms. Schmidt asked if there were any further comments on the draft. Member Berg suggested they make a list of the suggested changes that they have discussed and then make them as a motion. Ms. Schmidt did a quick review of the concerns the Commission had addressed during the discussion, and mentioned she would leave the statutory concerns out of this discussion. Member Canfield wanted to make sure that the define landowner part included easements. Chair Bonar asked if they could include the lease thing as a separate recommendation to the Department. Ms. Schmidt stated that one concern with that is that it was not on the agenda for the discussion in terms of legislative things, and said usually when action is taking it has to be in the agenda under sunshine law. Chair

Bonar stated that it was in the agenda because the draft rules were, Ms. Schmidt stated they could approach it that way if they wanted to. The Commission decided to do it as a separate motion. Chair Bonar wanted to entertain a motion that the concerns as expressed that Ms. Schmidt listed be brought to the attention of the Department as issues that we see need to be addressed. Ms. Schmidt asked if she could bring it back to the framework that they were in, and wanted to hear from Chair Bonar if he accepted these to be put in to the draft rules right now, or whether you are recommending the rules go forward...Chair Bonar stated his personal recommendation is that the rules do not go forward until the Department addresses these issues here, but would like to have a discussion with the Commission about that. He then asked for a motion to hold the rules and request the department review these recommendations before the Commission votes to keep these. Member Canfield asked if the rules would then have to go back to the AG if the Department changes it. Ms. Schmidt didn't know if she would be able to consult by phone, or whether she would have to hand it back in...Chair Bonar stated if it doesn't happen now its going to have to happen later, the encouragements and recommendations to the department...there is a better chance it will get lost through the public hearing process. Member Canfield asked what the time frame was for getting the rules done. Ms. Schmidt responded that the goal was to have them ready for Fiscal Year 2012. Member Shallenberger and Member Young agreed with Chair Bonar that the effort would be worth taking care of these issues now.

Member Fletcher stated that he disagreed with changing the "mays" to "shalls", and the other two issues are statutory and that they could make a recommendation because otherwise its defining landowner upfront and changing "mays" to "shalls". Member Berg asked him if he was suggesting they push it through and then those changes can come through at the time of the public hearing. Member Fletcher clarified that he was not in favor of changing the "mays" to "shalls" at all, and the reason is that he sees these as minor issues that are taking away the prerogative of DLNR to manage this for us. Member Berg asked Member Fletcher if he had any problem with the definition of land owner, Member Fletcher stated he did not completely understand the issue and was not talking about that. Member Berg said his suggestion was to separate the two and discuss them separately. Member Shallenberger stated that it wasn't that the rules were wrong, it's just not clear that it can apply to someone with an easement. More discussion ensued about addressing these issues separately. Member Shallenberger asked if with the "mays" and "shalls" they were going to do it consistently or in some places is it more critical. Chair Bonar stated that his issue was the failure in jurisdictions throughout the United States there is failure to do the monitoring enforcement. More discussion continued on this matter. He then stated he would be happy to entertain a motion on the issue of defining land owners and allowing the baseline cost to be a matching fund. Member Buchanan asked if they motion this will it have to go back to the AG. Ms. Schmidt responded that she would first talk to her supervisor about the Commission's recommendations and see if they should go back a revise the draft at this point and then see what needs to be done from the AG office for these changes to occur and then move forward again, or if they want to incorporate the Commission's comments in to the Board submittal and move forward anyway so to not lose time, the next meeting is December 10th and the deadline for the Commission in terms of putting in a submittal is tomorrow. Her recommendation was to move forward and incorporate the comments in to the submittal because there is still the entire public comment process to go through which she then quickly laid out all the steps that still needed to take place before it could go to the public.

Ms. Hong stated that she had concerns about how land was defined and how a fee owner could deal with Legacy Land. Member Young asked if the fee owner decided to make profit, and the land is

suppose to be in a conservation or agricultural easement does that still allow for the fee owner to be profitable because they supposedly have to do that in order to still be agriculture, and didn't know if public money could support this, and didn't know what the balance was. Discussion ensued with Ms. Hong regarding this issue. Member Berg stated that it was very unlikely that the agricultural interest would bring in enough revenue to offset what it would be to sell it in to housing. Discussion continued on the definition of landowner between Chair Bonar and Ms. Hong. Member Fletcher stated that they should put the landowner definition in to motion and move on, and then asked Member Buchanan if she had wanted to say something, and she stated that she did want to move on but wanted to make sure they could resolve whatever issue they had. Ms. Schmidt then stated she thought the main point was to make sure the Commissions recommendations go down in to record because they are still just advisory to the Division. Chair Bonar stated that he understood.

Member Fletcher suggested someone with an issue regarding the definition of land owner raise the motion. Chair Bonar then said the Commission makes the recommendation to the Department that they include a definition of landowner in the rules, and that they provide baseline cost as part of legitimate matching funds....Ms. Schmidt wanted to clarify the baseline documentation part and said the place this is mentioned in the land acquisition grant section on pg. 9, and on the next page there is eligible expenditures and matching funds under number 7 under section b is the baseline documentation for conservation easements and eligible expenditures there is no baseline documentation so she thought if he was making the motion for baseline documentation it would be to include it as eligible expenditure grant funds because its already there as potential matching funds. Chair Bonar couldn't find where he had taken notes on the issue, and Ms. Schmidt reiterated what she had just previously stated. Chair Bonar asked if what she was discussing was it would be too hard for the state to look at all the various expenditures and organizations and matching funds was simply referring to those of direct grant funds. Ms. Schmidt said that in terms of managing state grant funds...we still have to do some type of documentation for a match but when it comes to expenditures for State grant funds...Chair Bonar said they will have to revisit this at another time and asked that they move forward with just the landowner definition with the makers of the motion (Member Richards and Member Canfield) focus just on that. The Commission was all in favor except for Member Fletcher.

Chair Bonar then made a motion to change the following section: in Subchapter 4, "Land Acquisition Grants," in section 13-140-24 (a), change "the department may require awardee" to "the Department shall require awardee;" in Subchapter 4, "Land Acquisition Grants," section 13-140-32 (a), change "the Department may monitor the awardee" to "the Department shall monitor the awardee;" and in Subchapter 6, "Operations, Maintenance, and Management Grants," in section 13-140-49 (a), change "the department may require status reports" to "the Department shall require status reports." Discussion ensued about what would happen to the draft for these edits to be made. Ms. Schmidt again reiterated the she was sure the suggestions of the board would not be overlooked, and that her recommendation is that is go in the Board submittal and that they don't hold the rules back, and again the idea is that the Commission is keeping a record of the disagreements with the administrative rules. She thought they were kind of in a tight spot for the rule making process because they still had to begin the process where public comment comes into play.

Chair Bonar stated then there wasn't a resolution on the floor, then said Member Young moves and Member Berg seconded it, and asked if there was anymore discussion. Member Kaiwi said yes and

proceeded to say that even if the rules had “shall” it is still up to the Department to enforce, and to echo what Member Fletcher was saying they have to have some level when they are talking about land and ‘aina...and didn’t want to see the rules get held up because the process that Ms. Schmidt described was still going to be another few months and they were trying to have it completed by FY 2012. He thought that Chair Bonar had valid points but where they are at currently they have to have some level of faith, and concluded that with out the enforcement of these rules “shall” doesn’t have any mana. Discussion ensued about the progress of the rulemaking. Member Shallenberger thought the benefits of moving forward outweighed the costs of holding it up. Member Richards stated they were not the Legacy Land legal team, and that when it came to legal language and “mays” and “shalls” he backed away...they were changing things so minutely and their main focus was suppose to be to protect the land. Ms. Rezendes had a comment and said that she had been through this rule process before, and once the rules hit public hearings...unless there was something that was overlooked...those are the rules that are going to go forward, and unless there is some action down the line legislatively you won’t come back and touch these rules for years. Ms. Schmidt asked why not? Ms. Rezendes stated its not that you cant, it just that it is expected that the rules once they hit public hearing are the rules because it has been through all the processes. More discussion proceeded regarding the statement made by Ms. Rezendes about public hearing and rule change. Member Kaiwi came brought back the point of the “mays” and “shalls” and shared his thoughts again on the subject that it shouldn’t be a major concern of the Commission. Member Berg asked if it was the Commission who drafted the “shall” to “may” change. Ms. Schmidt stated no, that the Commission drafted three sections of the rules which was criteria, criteria and procedure section. Chair Bonar said at this point it seems it is up to Paul Conry, DOFAW Administrator, and whether or not he will address these issues. Ms. Schmidt stated that she thought Paul would like to move forward with getting this to the next meeting, and she also wanted to point out what a difficult position this was to move forward with something on a fast time frame. Chair Bonar asked if these changes would go to the Board before public hearing. Ms. Schmidt said they could choose to adopt them, yes, and she is advocating for putting everything the Commission says in the submittal so there is public record of everything that has happened.

Chair Bonar stated then with that understanding that it’s up to the DLNR if they want to delay things with this or move forward... and wanted to call for the question. He continued and said a yes would mean they’re recommending to include these “shall” changes in place of the “mays”, and a ney would mean we are not recommending that we recommend this to the DLNR. Member Buchanan wanted to clarify that by recommending the changes they are moving to except the draft rule changes, Chair Bonar said yes, with these recommended changes. Discussion broke out over what the motion was again. Member Fletcher stated he thought he was voting on whether to change the “mays” to “shalls”, and then he wanted to see another vote on whether to move the rules forward. Member Buchanan thought it would be more appropriate to say they are moving forward with the draft changes, however we have these recommendations and if the Board would like to amend them at that time and take our advice.

Ms. Schmidt stated they already had recommended one thing to include a landowner definition, and thought they should continue recommendation by recommendation, or they could go back and undo the first one. Member Fletcher asked if all were in favor of that, and discussion continued on how to approach the motions. The Commission voted to approve this motion with five members in favor and four members opposed. Member Young motioned to recommend advancing the rules through the rulemaking process, together with previous recommendations. Member Fletcher seconded the

motion. The Commission voted to approve this motion with eight members in favor, one member (Chair Bonar) abstaining.

Chair Bonar called for a 10 minute break.

ITEM 5. Informal update from the Trust for Public Land regarding the Fiscal Year 2011 Legacy Land Conservation Program grant to Livable Hawaii Kai Hui for the acquisition of five acres at Hawea Heiau in Honolulu, Island of Oahu; and possible advisory action by the Legacy Land Conservation Commission regarding this item.

Ms. Ka'akua introduced herself and greeted the Commission. She wanted to bring to the attention of the Commission two aspects of the Hāwea Heiau project that they had not had a chance to discuss yet. Before she went in to details about these two things she wanted to refresh everyone on the site and she referred to a map projected on the wall. She proceeded to point out the significant cultural sites, wetland areas, and development areas that surround it. Ms. Ka'akua then continued and explained that the two items she was bringing to the attention of the Commission they were not aware of at the time of their application, and just wanted them to see what the project would be like in total. The first item was the nature of the driveway, and she proceeded to reference the projected map and explain its planned location to go through the Hāwea property to get to the adjacent condominium development. What the Hui did not know at the time was that it was going to be a raised structure, and it will have more a presence than they originally expected. She explained that they are currently trying to negotiate with the developers to reduce the "footprint" of the driveway by making it smaller in height or size. Member Berg asked if it would affect the water flow of the wetland. Ms. Ka'akua stated it would not be running through the wetland area, and she continued to elaborate using the map. She said the Hui's greatest concern is that the driveway will have a greater presence. Chair Bonar asked if the driveway had to go in that location because they had an access easement. Ms. Ka'akua said they had a pre-existing recorded access easement and they even verified with DTP that there is no where else on the property that they can have another access easement. The driveway is nothing new; it is just the raised nature of it that she wanted to bring to their attention.

Member Berg confirmed that the approximate height of the structure would be 13 ft., and asked what would happens if it rains, where the runoff from the mauka property would go, and whether it would cause flooding in the cultural and archeological sites. Ms. Ka'akua said that the answers may have something to do with the second thing she wanted to bring to their attention which is a underground retention basin that is slated in the corner of the property (she referenced the map) and stated it wasn't near the cultural sites; discussion ensued in reference to the map and the affects of rain/flooding, elevation, and how the wetlands function. Chair Bonar asked if there were drains under the driveway that led to the retention basin, and Ms. Ka'akua brought up another map specific to the basin and continued to explain how it worked and where storm run-off would travel too. Member Buchanan asked if this was approved by the county's Department of Planning and Permitting (DPP). Ms. Ka'akua stated she thought it was in the process. Member Buchanan said aren't they required to keep all run-off on their property or their budget. Ms. Ka'akua stated that there was a joint development agreement and they were waiting to hear back from DPP on where they were at with this, and also that this was a major concern for the Hui and TPL when they first learned about this and she continued to explain how that area was originally planned to be a gathering/park area for people to go before they actually enter the property and it could still

function as that. The main concern the TPL and the Hui had was the two outflow points and their proximity to the wetland and its affect on water quality. The Hui had requested that Hale Kalai hire a local water consultant (Andy Wood) to review the system and recommend better practices and remove a rift raft so that there would be better access for the public in to the site, and that is underway and a report with recommendations will be coming out and she will share it with the Commission. Member Buchanan stated regardless of the riprap they are still liable now, and if the project came to her through the County or DPP she would not approve this because you cannot create an action now that will have possible liability for the adjoining property regardless of the water quality...and where is the street collection at, its now your liability in the event of a fifty or hundred year storm event. Ms. Ka'akua agreed with this and said the liability factor was a huge concern and it is something they have addressed in the option agreement between Hale Kalai and TPL and also the Hui which will apply to all their past, present and future affiliates...basically any situation you can possibly think of the Hui will not shelter any of that liability.

Chair Bonar asked if they knew about the road before. Ms. Ka'akua stated yes, and it was included in the application and was previously recorded, however, they had no idea about the retention basin and only found out about it a month after they had been approved. He asked if there was a price that was named. She said yes, \$600,050 for the acquisition, and the auction is scheduled to be signed this Friday which will incorporate all of those liabilities issues. More discussion ensued regarding the water flow issues from the basin to the wetlands in reference to a map. Ms. Ka'akua stated there were still a lot of questions that they still had, and that the Hui still had that needed to be answered and will hopefully be addressed when they receive the water consultants report. She continued by explain what some of the hopes of the Hui are in regards to the retention basin by using the map; in which the developed property can use its excess water instead of just letting it go to the basin (smaller footprint). Another thing they asked the water consultant was to see if the outflow point can be moved further away from the wetland, and at the time of their meeting he stated there were other options for Hale Kalai that they were originally unaware, so that is hopeful. Member Kaiwi asked what was the raised driveway going to be built on. Ms. Ka'akua stated there would be underground parking. Chair Bonar asked what the size of the property was. She stated it was three acres. Member Buchanan asked how large and tall this development would be. Ms. Ka'akua stated that it will be a little massive in scope, even though it would be just a straight up concrete wall, it will be terraced and the Hui's suggestion of using native plants has been agreed upon...and before TPL or the Hui got involved with the project they got a height variance so the building will be nine stories high from the ground. Discussion ensued about the height and how it pertained to Hawai'i Kai. Ms. Ka'akua further stated that regardless the Hui had been offered the opportunity to purchase this property, but there is going to be a huge condo development and there is going to be a driveway running through the property.

Member Young asked that if the retention basin was on the property that was to be acquired with Legacy Lands. Ms. Ka'akua said yes it is. Member Berg asked if the property would not have the value as a gathering place because it is separated by the big huge driveway now. Ms. Ka'akua stated it would have the same value when they came to the Commission for funding because they had the driveway easement and location known included in the application, and the open native interpretive area can still function because it is above the basin. Member Young wanted to clarify if the property had actually been purchased. Ms. Schmidt quickly reviewed where it was at, and stated that funds had not yet actually been dispersed yet and they haven't gone through the due diligence review that they normally do for dispersing grant funds. She also wanted to clarify that if

this is a substitute change they ask for the Commission to review it, and then send letters of notification and request for comments to the Senate President and House Speaker like they did for Nu'u.

Chair Bonar asked if the wetlands were getting enough water before hand to keep it healthy. Ms. Ka'akua stated that the Hāwea side wetlands are overgrown, so there is a lot of water in that wetland but the invasive plants needs to be removed with the partnership with NRCS, so it is a potentially healthy wetland once you remove those invasive species. Chair Bonar discussed how some of the sand retention basins have proven to be beneficial with filtering the water and he hoped the water consultant is doing the estimates on how this can contribute, and how they can monitor the quality of the water. Ms. Ka'akua stated that may be something they have to sign a legal agreement between the Hui and Hale Kalai for them to be required to do over and above...Chair Bonar then said that the fact is if there is a large underground parking garage there will be more runoff, and discussion ensued about if the Hui would be responsible for the park/gathering place. Ms. Ka'akua stated that the Hui wanted control of that area and they have it worked out so that a certain amount of funding (annually) from the Association will go in to a fund controlled by the Hui for the landscaping and maintenance of that area. Member Canfield asked if there would be any other driveway or parking area for the Hui. Ms. Ka'akua stated no, its all walking and there are no other structures on the property, just the drive way and retention basin. Discussion then ensued regarding the fire road approval and driveway. Then the discussion shifted to the proximity of the driveway to the heiau complex. Member Kaiwi asked if there had been an EIS done, Ms. Ka'akua stated that there was an archeological survey done of the property. Member Kaiwi stated he thought it would be hard for DPP to go for something like that, and the proximity of the development to the cultural sites is alarming and he is interested in seeing the environmental assessments and permits. Ms. Ka'akua stated there is the preservation plan, and the monitoring plan. Discussion then took place regarding the buffer that will be around the heiau complex (there will be one, but may seem small because the development is nine stories tall).

Ms. Ka'akua stated they may hear back from DPP. Chair Bonar asked if they had talked about re-negotiating price with them. Ms. Ka'akua stated that was something she was concerned about, and they had the appraiser supplement to the appraisal, and when the originally did it and it came in at \$660,000 he put no value in that area because the driveway. Then discussion took place about the private parks and how it pertained to the property, and how it they were negotiating agreements regarding public use of these parks. Member Kaiwi than stated that the size of the driveway was probably larger than what they had originally been approved for, and Ms. Ka'akua stated she did not have the original map with dimensions with her, but the configuration was the same. Member Fletcher wanted to clarify that there was no value for the retention basin and the driveway area. Ms. Ka'akua stated that was correct and when they had a supplemental appraisal done the conclusion was that there was no change in value from the original appraisal of \$660,000. Member Fletcher asked does that mean that the public money that was spent here was not spent on land under the driveway or the retention basin. Ms. Ka'akua said yes. Discussion ensued on access to the park due to the driveway and the value of parks for the community even though there is no value on paper. Then discussion was raised regarding is there anything else the development can do to not have a gigantic second story driveway run across the adjacent property. Ms. Ka'akua stated they had tried to see if they would considerer a bunch of these different creative ideas.

Chair Bonar asked Ms. Schmidt if there was anything they need to be considering or review for this. She stated since they were still waiting to hear from the water consultant, she didn't know if they wanted to act now or wait until they had all the information. Ms. Ka'akua stated she wasn't really requesting official action at this time; she just wanted to bring it to the attention of the Commission because it is something they filed with DTP. Member Fletcher asked if they could make an advisory statement to the Board. Ms. Schmidt stated yes. He continued and said he thought they shouldn't put up with this monstrosity of a driveway, he had thought there would be a nice paved road in which people could walk back and forth across it, and the visual impact is enormous not to mention the sort of ethical impact on the cultural use of the land. Chair Bonar then asked whether the developers would say "so what" and just proceed with the development and deny sale to the Hui...then asked Members Kaiwi and Young their opinion since they had visited the site before. Member Young stated she thought it was hard to believe the appraiser didn't give any value to that piece of property and she elaborated on this. Mr. Hirokawa stated why he thought this was because of the "highest and best use," and it wasn't a very highly developable property. Chair Bonar asked Member Kaiwi's opinion because he knew there was going to be a development in close proximity and he stated his impressions were the same as the community members in that the developer was going to try and work with them by incorporating the cultural sites, but this is different from that in his opinion. Ms. Schmidt stated she thought the first step was to look back the application, the meeting minutes and see what was approved...Chair Bonar stated he thought what they approved could probably "fit" with what they are looking at now, and asked Member Fletcher if he thought it was worth it to put a recommendation that the Commission feels the developers should take a more aggressive look at... Member Fletcher asked at what point the driveway is set in stone. Ms. Ka'akua stated the pathway was already recorded and they are in the process of getting the permits, and that there has been ten revisions of the driveway they have worked through with them and this was the smallest. She stated she was wondering if this is something the Commission would like to see move forward, and how the message would get across to the developer...Member Fletcher suggested they say the present design of the driveway is not consistent with the expected use of the land, its not consistent with the decision making we did. Discussion ensued again about the development and how they were aware of it at the time of the application, and that everywhere around that area is already highly developed and it is just becoming harder to accept the building being there as things move forward. Member Berg stated that wasn't it sort of the intent of approving this project was to preserve the cultural and archeological sites in the middle of a huge development, and rather than blowing it off we can help the Hui and preserve whatever little was there and didn't feel it was a game changer or something that should cause the withdrawing of funds, but perhaps they could say something about how they are distressed over the visual impacts. Discussion ensued again about how when you hear there is going to be a driveway you assume it is going to be ground level, how and that was the Hui's impression too. Then discussion took place regarding the views in and around the areas of the property utilizing the projected map.

Chair Bonar asked the Commission if there should be a resolution at this time or wait until they get more information. Member Buchanan shared her concerns again on the liability issue regarding the possible flooding of the retention basin; this is a red flag because someone will have to take responsibility if that event occurs. Mr. Hirokawa stated he thought it may be best for the Commission to wait and see what the water study says because you want to be satisfied that they can still perform what they promised to do and if the basin affects the wetland management that could play in to the grant award at that point. Discussion took place regarding the water surveyor and if he would be non-biased. Ms. Ka'akua stated she thought he had been chosen by the Hui

because he's done a lot of community work of this nature. Chair Bonar then asked if anyone wanted to present a resolution at this time. Member Fletcher stated that the Commission feels that the design of the drive-way and the storm water management aspects of the land have raised concern with the Commission in that they are not consistent with their anticipated use of the land. Ms. Schmidt just wanted to state again she thought it was important that all the information be in front of you before you make any decisions. Chair Bonar stated he agreed but felt this needed to be addressed now and perhaps this will give more footing to the Hui to go to the developer, and who else would get that land if the Hui doesn't because there really isn't any development you can do on it...and asked if there was any other comments from the Commission. The issue was again called in to question informally. The Commission agreed upon the following statement: "the Commission feels that the design of the drive-way and the storm water management aspects of the land have raised concern with the Commission in that they are not consistent with their anticipated use of the land." Discussion ensued on how to present this to the Hui.

ITEM 6. Discussion and possible recommendations regarding Geographic Information System (GIS) mapping and other informational needs for the Legacy Land Conservation Program.

Ms. Schmidt stated that Member Buchanan had requested some maps of where the current FY 12 applicants are in relation to projects that had already been funded and discussion took place regarding the maps. The Commission was very happy with them. Ms. Schmidt pointed out that the tax map key (TMK) maps from the counties may be a couple of years behind, so some aren't the exact TMK, but they are pretty good.

Chair Bonar asked there were any other announcements. There were no announcements; he called the meeting to be adjourned.