

Minutes of the November 6, 2007, Legacy Land Conservation Commission Meeting

COMMISSION MEMBERS PRESENT:

Dr. Dale B. Bonar, Chair
Dr. Carl J. Berg
Dr. Joan E. Canfield
Dr. Charles (“Chip”) Fletcher
Dr. Robert J. Shallenberger
Mr. Wesley Kaiwi Nui Yoon
Ms. Karen G.S. Young
Mr. Herbert (“Monty”) Richards

STAFF PRESENT:

Linda Chow, Deputy Attorney General
Ian Hirokawa, Project Development Specialist, DLNR, Land Division
Molly Schmidt, Legacy Land Conservation Program Coordinator, DLNR, DOFAW

VISITORS:

Abel Simeona Lui, Konohiki, Kawaa
Dr. A.H. Lui, Kawaa
Kathlyn Richardson, Cave Conservancy of Hawaii
Harry Yada, Property Manager, Dept. of Finance, County of Hawaii

AGENDA

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

Chair Bonar called the meeting to order at 10:11 a.m. Members of the Commission and staff introduced themselves. Chair Bonar mentioned that an item for approval of minutes was missing from the agenda. Since formal approval of Commission minutes is not required, Chair Bonar suggested distributing his amendments for approval at a later date.

Item 2. Policies, procedures, and visions/goals considered by the Commission in advising the Department and Board of Land and Natural Resources or making recommendations regarding the acquisition of any interests or rights in land or the award of grants from the land conservation fund .

Chair Bonar pointed out that topics under Item 2 are being fleshed out by the Commission for the purposes of discussion and that the Commission may want to form sub-criteria or form subgroups to take closer look at any given item.

Item 2.a. Evaluation of applications for grants from the land conservation fund.

Member Kaiwi announced that he now works for the Office of Hawaiian Affairs (OHA) and will have to recuse himself from all OHA-related items.

Member Young asked if she should say something regarding her discussion with the Ethics Commission regarding the Mao Organic Farms application. Member Young stated that staffer Nancy Neuffer said that she is not barred from participating, but that she would like to check with the Commission to see if they felt she should recuse herself. Chair Bonar suggested that the Commission think about it for discussion at the next meeting.

Member Shallenberger asked what the protocol would be for recusal, he had heard two different versions discussed thus far: leave the room when talking about the application, or recusing yourself from the vote.

Discussion of Chair Bonar's conflict due to the Maui Coastal Land Trust application, and Member Kaiwi's conflict. Member Kaiwi asked if whether he will be able to help with the preparation of OHA submissions if he recuses himself from the vote on that application.

Member Berg stated that the Ethics presentation had covered this and that members should not be helping with the application. Ms. Chow stated that generally, commission members should not be appearing in front of their commission to represent an applicant, and that helping with application effectively creates this problem.

Member Kaiwi clarified that he had not helped applicants at this point, and that his question had been in anticipation of potential future conflicts. Ms. Chow stated that the specific facts of each case should still be passed by the Ethics Commission staff.

Ms. Schmidt asked whether the suggested method of doing rankings would work, and if this issue should be clarified in time for the next meeting. Member Fletcher asked if this was a normalization procedure. Member Berg questioned whether the Commission should use the mean or median.

Member Fletcher asked for clarification on how the Commission had ranked applications last time. The Commission had ranked the ten applications, averaged the rankings, and selected the top five.

Chair Bonar entertained a motion for the Commission to adopt a ranking system which will allow weighted rankings in situations where one or members must recuse themselves, with the review of Ethics Commission staff and a statistician. Member Young made the motion, Member Canfield seconded, all were in favor.

Member Richards suggested introductions not be assigned roles on the Commission. Ms. Chow mentioned that the Land Board operated in specific roles because the Board was set up this way. Member Shallenberger stated that this Commission may have been set up in this way to provide depth of expertise, rather than to provide specific roles for each member.

Chair Bonar moved the Commission on to discuss the next meeting date because it affects process... the Commission confirmed Friday, December 14, 2007, as the next meeting date. Chair Bonar mentioned that this date left five weeks for the Commission to do reviews. Ms. Schmidt mentioned that site visits must be performed before this date.

Ms. Schmidt suggested two Commission members visit each site, with members visiting the sites on their own islands, where possible. Chair Bonar mentioned that this would be discussed under Item 4.

Chair Bonar moved the discussion to due diligence and title issues. Chair Bonar stated that LD staff had mentioned that it was not feasible to use its resources to do a title review of each applicant. Chair Bonar stated that condemnation can clear clouded title with a quiet title action, and discussed kuleana rights, and how quiet title actions should be a last resort in most situations. Chair Bonar stated that, should a potential claimant come up, land trusts should work with them to resolve the issue rightly. He mentioned that it might be appropriate for title issues to affect the vote on a project, and encouraged discussion on this issue.

Member Young stated that the Kawaa grant from last year may have title issues, and that the Lui family had been incensed about the State's involvement with the purchase. Member Berg asked the status of that grant. Ms. Schmidt stated that the County of Hawaii had not yet submitted any of the due diligence requirements of the program (title and appraisal reports) and was waiting on the contract from the State to be finalized. Ms. Schmidt stated that the due diligence review requirement was a safeguard for the program, and that issues substantially affecting title would have to be cleared up before the grant would be disbursed. Ms. Schmidt stated that the presence of the Commission would be another safeguard, but that it hadn't had enough time last year to assess the political landscape of each project.

Member Kaiwi stated that it is rare that the Native Hawaiian community does not know where the bones of their ancestors are, and that the often the phrase "inadvertent discovery" is often tossed around incorrectly, however, if the Commission gives the green light on a project with its best intentions, and iwi are found, there will be an unofficial "cloud" on the title. Thus, to try to solve title issues in advance may be an unproductive exercise for the Commission.

Ms. Chow stated that some preview of whether title is clouded may be helpful, otherwise the Commission could end up tying up funds in an unsuccessful acquisition that could have been used for another project.

Member Fletcher questioned whether four weeks would be enough time to do anything but evaluate the materials in presently in front of the Commission, and asked whether it would be fair to give an in-depth look to some properties and not others, specifically, whether it would be fair to perform some site visits and not others.

Member Shallenberger stated that, ideally, each applicant should have title, appraisal, and landowner interest.

Upon a question from Chair Bonar, Ms. Chow stated that the State will not generally acquire title that is not clear, and that in the Commission's case, it is more of a policy decision regarding whether it could help devote funding towards more promising projects.

Ms. Schmidt stated that the current appraisal and title reports had not been a program requirement for applicants due to the cost burden; and that it may not be fair to judge applicants on these items when some will have them and some will not. Member Shallenberger stated that, in every case, the range of information available from an applicant will be a little bit different.

Member Richards asked what happened to funds from failed projects. Ms. Schmidt stated that it would go back to the Land Conservation Fund, unless there was time before the end of the year to figure out how to re-apportion and encumber it. Chair Bonar stated that the Commission had pushed its part of the process ahead so that there might be time left at the end of the fiscal year for re-apportionment. This would allow for the use of all of the funds under the ceiling of a current fiscal year to be used.

Member Young inquired about accepting applications on a rolling basis. Ms. Schmidt stated that there would be no basis for competitive comparison of the applications if the applications were not accepted on a deadline, but that, eventually, a biannual cycle might be possible if the program gains efficiency and more funding.

Member Kaiwi stated that as long as the Commission made its considerations based on the materials provided with good/pono intention, if the award is meant to happen, it will happen.

Member Berg stated that applicants were told clear title was important and may have selected their projects based on this, and the Commission should continue to emphasize this to applicants.

Chair Bonar suggested that the Commission recognize title is an important issue, but not require that title must be clear... but count it as a criterion to take into account in discussion the application.

Mr. Hirokawa stated that DLNR's Land Division has the ability to look up some title information on a database and provide this information to the Commission.

Mr. Lui, Konohiki of Kawaa, introduced himself and stated that the Commission was exercising control on lands belonging to his ancestors. Mr. Lui stated that the lands were federal lands and the Commission is committing crimes against the people that live in the ahupuaa. Ms. Schmidt asked what the Commission might do to help. Mr. Lui stated that the Commission ought to make sure that the people of the ahupuaa are part of all of the

decisionmaking, and the Commission should call the families and talk to the kupuna in the district. Mr. Lui said that only konohiki have the right to designate the lands and take care of the people with the resources.

Mr. Lui expressed concern that the Commission would allow for projects where developers would be allowed to benefit to the detriment of the people. Member Kaiwi introduced himself to Mr. Lui (in Hawaiian language) and stated that the purposes of this Commission did not include allowing for development.

Mr. Lui stated that the Commission should be certain that its course of action is right, or pilikia will result. He said that right now there is a lot of pilikia over the lands, which were meant for the Hawaiian people. Konohiki malama everything in the land, including the people. He stated that [conservationists?] preserve the land without the people.

Mr. Lui stated how, in the past, lands had been taken. He said that these decisions are big and will affect children and grandchildren, and that the creation of one program will not fix the problem, because kupuna have been left out. Going along with this program was, in effect, continuing a fraud.

Mr. Lui talked about his family and other residents losing their rights to the land, and how the current way of doing things was causing suffering to everyone, not just his family.

Dr. A.H. Lui introduced herself as Mr. Lui's sister. She thanked the Commission for their concern about clear title to land. She talked about the Kawaa purchase for which Legacy Land grant funds had been encumbered and issues with title to the parcel. She stated that the current owner did not have proper documentation. She stated that the rights of the native tenants must be respected and that her brother's rights had not been respected. She stated that her family was the native ohana of the land and suggested the Commission investigate native rights to land in Hawaii. She asked the Commission to consider the premises on which they were making decisions regarding land. She suggested that, if trust is to be built, the government should give the money, in trust, to the people to malama the land. She said that, if given a choice between development and conservation, she would not choose either, because the people on the land had not been involved.

Member Kaiwi explained that the Commission did not have anything to do with native Hawaiian kingdom rights, and welcomed the Luis to come to OHA to discuss this topic. He stated that part of the responsibility of the Commission was the preservation of watersheds, parks, natural areas, cultural sites, and more, on behalf of the State.

Member Kaiwi stated that the Commission/Program is growing right now and that it would listen and talk to the families.

Dr. Lui stated that it will be put on her family's record that she advised the Commission because it is her responsibility... she is in charge of the family, her brother is in charge of the family's land and natural resources.

Chair Bonar added that the Commission is attempted to do all it can within its legal framework to do the right thing for the land and the people on it.

Dr. Lui reiterated that there had not been a transfer of rights to land from her ancestors to the current owner. She asked what the Commission would do to get in touch with native tenants of lands, given that some of them may be not be present on the land for economic reasons.

Member Fletcher stated that there needed to be a mechanism within the Commission's decision-making process that acknowledges the need for communication with families.

Dr. Lui stated that, due the use of forceful tactics in the past, her family did not have a trust relationship with the government. She stated that her brother had been a protector of the land.

Member Young stated that the Commission had intent to consider native rights to land and resources, citing the Commission's treatment of the grant to the Cave Conservancy of Hawaii as an example.

Member Kaiwi stated that the Commission had not consulted with the family, and that outer-island ohanas should not have to come to Oahu for this reason.

Dr. Lui stated that, because of history, she now felt threatened for her family when her family's rights were discussed at a public meeting. She stated that a number of officials and politicians had discussed her family or visited her family, but that none of them were truly considering their rights. Mr. Lui stated that he had kept peace on the land for years without compensation. His children had been born on the land and had to leave while he protected the land. He said that he is just one of many in this situation.

Member Kaiwi explained Mr. Lui's mana and cultural position to the Commission. He stated that the Luis had come to share their story in order to put the obligation on the Commission to act correctly.

Chair Bonar called a short lunch break at 12:15 and called the meeting back into session at 12:35.

Chair Bonar asked how the Commission should go about seeking feedback from native tenants of land. Member Kaiwi suggested that the Commission members themselves speak with the families. Chair Bonar suggested requiring applicants to identify and consult with native tenants. Member Kaiwi stated that leaving the issue up to the State

might result in the assignment of a task force, however, the Commission needed to talk to the people itself so that a direct trust relationship could be built.

Chair Bonar asked who could determine the konohiki of lands. Member Kaiwi said that OHA might have this data, and reiterated that it is culturally appropriate for a Commission member to talk to people directly. Chair Bonar stated that the Commission needs to discuss the topic further in terms of ethics and legal considerations.

Member Shallenberger stated that there was a dilemma illustrated by Kawaa: one of the reasons the County was interested in preserving the land was that it had been preserved up until this point. He stated that perpetual protection should be the goal, and that, while native tenants may feel threatened by conservation, conservationists may feel threatened by the fact that a potential for development exists.

Item 2.b. Distribution of grant funding

Chair Bonar introduced the topic of balance between islands in applicant consideration. Member Shallenberger suggested that completion of projects and securing an area should be a consideration.

Member Fletcher stated that he did not prefer eliminating good projects because they are in the wrong place. He suggested that the Commission allow applicant pressure (in terms of strong projects) to drive the projects that are picked.

Member Young stated that DLNR should make an effort to reach out to others beyond DLNR and maybe even look at it from a cultural standpoint. Member Fletcher suggested applicant workshops be given. Ms. Schmidt stated that her focus at DLNR had been on developing the program and the guidelines for applicants and that she hoped to conduct public info sessions once rules/guidelines are in place. She stated that rulemaking had been put on the agenda to gather the Commission's comments on how it wanted to participate.

Chair Bonar stated that he agreed with Member Fletcher that the best projects should receive funding. Member Canfield suggested holding DLNR's applications to a slightly higher standard, give its access to the program. Chair Bonar stated that he would prefer to add a criterion for the applicants' ability to steward the lands they seek to acquire.

Member Berg stated that people he had talked to on Kauai felt there should be equitable distribution by island or they weren't going to get a fair share. Member Berg stated that he felt Kauai had the ability to put in the best proposals, such that this policy would not harm Kauai.

Chair Bonar asked the Commission to what extent it could or should support eminent domain. The Commission discussed friendly condemnation and the distinction between willing and unwilling sellers.

Member Fletcher asked whether there could be a situation where the use of eminent domain could be used to achieve a right/good result. Chair Bonar stated that legislature may be willing to dedicate CIP funds for State and county projects where condemnation is necessary. Ms. Schmidt asked whether the Commission was looking into creating a guideline for the program or a policy for the Commission. Ms. Chow stated that it was a discussion of the Commission's treatment of projects. Member Berg stated that it should be left to decision-making on a case-by-case basis. Ms. Chow illustrated that there were very different situations where condemnation could be used, and that the purpose of this discussion was to get the Commission thinking about this issue.

Chair Bonar paraphrased the intent of the Commission to leave island distribution and condemnation decision-making to a case-by-case basis, based on the excellence of the project. Member Young added that education efforts should be pursued.

Chair Bonar introduced the topic of balancing among resource values. Per the request of Chair Bonar, Ms. Schmidt read the resource values that land may be acquired for under Hawaii Revised Statutes, Chapter 173A. Member Richards stated that the best project should be awarded funds. Member Berg stated the difficulty in distinguishing when most projects check all resource values except for agriculture (whereas agriculture projects just check the ag box).

Member Fletcher asked whether situations like the Lui's were covered under the HRS 173A resource values and if not, how to address this. Ms. Chow stated that it may fall under cultural or historical. Member Kaiwi stated that the categorization of resources was counterintuitive to him and his culture, and that the State needed to initiate some cultural education on native resource management. He requested that the Commission consider that some questions assume a certain viewpoint and thus are hard to answer from a native Hawaiian perspective. He stated a preference for disregarding the balance of resource values and letting the best projects proceed.

Chair Bonar stated that the Commission's role is to prioritize, even though it is difficult to compare apples and oranges. Ms. Chow stated that the reason for the inclusion of the item on the agenda is to get the Commission to discuss whether it wants to make a comparison of resource values. Member Kaiwi stated that they should not because the land and resources themselves are not to be viewed as more important than others when they are part of a larger system.

Chair Bonar stated that the Commission must perform its legal duties and asked how a cultural component could fit into this Commission, given its duties and limitations. Ms. Schmidt stated that the resource values were only a list of what the Land Conservation Fund could be used for, and did not dictate the priorities of the Commission, and that the statutory priorities of the Commission were fairly broad.

Mr. Lui stated that he would speak for his descendants... and stated that the Commission was on the right track in its efforts to perform its duties in a pono way. He urged the Commission to work with the laws that it was given and continue to do its best to stay

pono, and that change takes time. He stated that only the land was in righteousness, and not the people.

Dr. Lui stated that the Commission is exercising control over land implicitly, and still not consulting the native people. Chair Bonar stated that he appreciated the Dr. Lui's perspective, however, the Commission had to function within its duties and powers granted by law.

Ms. Richardson asked what the Commission's rationale for recommending Kawaa had been. Chair Bonar asked Ms. Schmidt to get this information for Ms. Richardson.

Member Fletcher suggested that the Commission adopt Member Kaiwi's view and choose not to discriminate based on resource values. Member Shallenberger suggested that the Commission take a look in a few years to make sure none of the resource values have been overlooked. Member Young expressed concern that agricultural values would be overlooked. Member Kaiwi asked the Commission members to look past the barriers of their individual areas of expertise to see the interconnectedness of all of the resource values and decide that the most pono project that will help the people and help the aina is the best way to go.

Chair Bonar asked if old applications were public record. Ms. Schmidt stated that almost all information on the applications except private contact info, etc., was public record.

Ms. Schmidt asked if the current applications were public record. Ms. Chow stated that they may be withheld if a government purpose was frustrated by their release. Chair Bonar asked Ms. Schmidt to consult with counsel after the meeting.

Item 2.c. Statutory priorities and the formation of criteria

Chair Bonar introduced the item for discussion, asking how the Commission could value resources, as is suggested by the statutory priorities of the Commission. Member Kaiwi made a comparison of parcels of land to children, stating that one that is not as healthy or strong is not necessarily worth less than the other. He stated that they would be equal, not valued differently.

Member Fletcher stated that he did not like the method of discussion, and would not be forced to judge projects by slicing them thinly. Ms. Schmidt stated that the issue to consider would be the legal strength and defensibility of the Commission's recommendations.

Member Shallenberger stated that his experience in the conservation field has told him to focus on the areas needing immediate help.

Member Canfield asked how these discussion items fit into the larger scheme and whether it is related to rulemaking. Ms. Schmidt replied that this agenda item was meant to facilitate a discussion of statutory priorities.

Ms. Chow stated that the way to keep the Commission's decision-making process transparent was through the promulgation of rules. Ms. Schmidt added that the Commission could choose its values and criteria, but should also be willing to thin-slice it for the public. Member Kaiwi stated that his role on the Commission was not to defend his decisions or position, but to protect lands. Ms. Chow stated that the Commission could apply the concept of pono, but ought to be able to articulate what makes one project more pono than another for the public and for future applicants.

Chair Bonar spoke about the Commission's decision regarding a project in the previous year that the Commission disliked. Ms. Chow explained that the discussion of types of agricultural lands was meant to elucidate what types of agricultural lands might be considered pono by the Commission, not to force a particular system of valuation on them.

Member Fletcher asked whether rules could simply identify criteria without prescribing "X" as better than "Y." Ms. Chow stated that she was not certain, but it may be a possibility. She asked whether all ag lands were considered equal. Member Kaiwi said yes, the lands were equal, it was the kanaka that had damaged the lands. Ms. Chow then stated that this could be included in the concept of "types of lands."

Member Canfield stated that she felt the current criteria form was the best the Commission could do in time for this round. Ms. Chow stated that this was for future consideration. Ms. Schmidt stated that there was a tension in the discussion between the Commission's duty of consistency and public access and the desire of the Commission to conduct pono decision-making, and that they were both important values. Member Shallenberger stated that he valued having a given set of criteria that the Commission took into account.

Chair Bonar introduced the topic of culture and how it fits into the Commission's duties. Member Kaiwi stated that the question was how everything else fits into culture, as one body.

Item 2.d. Land acquisition process requirements

Chair Bonar asked Ms. Schmidt what the item concerning process requirements was for. Ms. Schmidt stated that it had already been covered under a previous item.

Item 4. Site visit planning, logistics, and meeting dates/times for the 2007 (Fiscal Year 2008) grant application cycle.

Chair Bonar gained consensus that the next meeting will be called as necessary. He suggested discussions with OHA and other entities to cover cultural concerns.

Chair Bonar introduced the topic of site visits. Member Berg stated that last year's grant cycle had demonstrated a need for site visits. Member Shallenberger stated that a report back to the Commission was essential. Ms. Chow stated that it may be a better policy, from a legal standpoint, to visit all sites rather than just some.

Ms. Schmidt stated that she had hoped two members per site would visit the land and talk to the people and report back to the Commission. Member Fletcher stated that his ideal would be to have every member visit every project at Sunshined meetings.

Ms. Schmidt listed the projects and island locations. Members of the Commission expressed their preferences for site visits and discussed the method of contacting applicants and landowners.

Item 6. Briefing of current status of 2006 grant awards by LLCP Coordinator.

Ms. Schmidt briefed the Commission on the current status of 2006 grant awards, stating that none of the acquisitions had closed at that point. Mr. Hirokawa briefed the Commission on the status of the two State acquisitions.

Chair Bonar stated that ten-minute presentations on each site should be sufficient. He stated that testimony time should also be limited. Member Berg suggested scheduling presentations and testimony in the morning and have deliberations in afternoon. Member Richards stated that he would have to leave at 3 p.m. Ms. Chow stated that it may be possible for Member Richards turn in rankings as a vote. Chair Bonar suggested a 5-minute limitation for testimony. The Commission decided informally to start the meeting at 8 a.m. and do a one-day meeting.

Item 7. Discussion of alternatives to the Legacy Land Conservation Program's current method of conserving and protecting land and possible changes in law or policy regarding land ownership and protection.

Chair Bonar stated that this item stemmed from a comment made by Senator Hanabusa about State ownership of lands. He stated that the State could be a co-holder of easements under the program to add an extra level of protection. Member Shallenberger stated that he had seen some organizations turn over their lands, and suggested a State or county-approved landholding organization, not just some coalition that just got together, to provide taxpayers some insurance.

Ms. Chow pointed out that giving State ownership of lands assumes that they have the money for management; however, there is no additional funding for management that would come along with this change. Mr. Hirokawa added that LD holds State acquisitions to higher due diligence standards than grants to nonprofits and counties for acquisition.

Member Richards mentioned the challenges to protecting ag lands long-term. Chair Bonar suggested pushing for more financial support.

Member Berg stated that the Commission should be discussing these matters with the county open space commissions. Chair Bonar asked Ms. Schmidt to contact the counties for their information.

Item 5. Presentation by Commission member Chip Fletcher: “Potential impacts of sea level rise in Hawaii.”

Member Fletcher gave a presentation on sea level rise in Hawaii. The Commission discussed the potential impacts and responses, and briefly discussed the relationship of this issue to the Commission’s duties.

Chair Bonar adjourned the meeting.