

**2019 Legacy Land Conservation Commission Minutes, Meeting 65
State of Hawai'i Department of Land & Natural Resources, Division of Forestry & Wildlife**

DATE: June 25, 2019

TIME: 8:45 AM

PLACE: Kalanimoku Building
Conference Room 322B
1151 Punchbowl St.
Honolulu, Hawaii 96813

COMMISSIONERS PRESENT:

Mr. Thorne Abbott (Chairperson)
Mr. William "Butch" Haase (Vice Chairperson)
Mr. Frederick Warshauer
Ms. Wendy Wiltse
Ms. Kanoe Wilson

STAFF:

Department of Land and Natural Resources, Division of Forestry and Wildlife
David Penn (Program Specialist, Legacy Land Conservation Program)
Casey Ching (RCUH)
Lissette Yamase (KUPU)
Julie China (Deputy Attorney General)

PUBLIC:

Hamana Ventura (County of Hawai'i)
Keoni Fox (Ala Kahakai Trail Association)
Rayna Hayashi (Trust for Public Land)
Lea Hong (Trust for Public Land)
John Stinton (Soon to become Legacy Land Commissioner)

MINUTES:

ITEM 1. Call to Order

Mr. Penn stated that proper Public Notice (Subsections 92-7(a), (b), and (e), Hawai'i Revised Statutes) procedures were followed and that quorum (Subsection 173A-2.4(b), Hawai'i Revised Statutes) was present. Commissioners, staff, and attending public introduced themselves.

ITEM 2. Discussion and Possible Recommendations

- Encumbrance in conflict with the purposes of the grant?
- Substantive changes to the Project Application?

LLCP 17-01, Waikapuna, Hawai'i, Tax Map Key Number (3) 9-5-007:016 (Contract No. 66886), post-application encumbrance by exclusive, perpetual communications easement. (Section 173A-11, Hawai'i Revised Statutes and Sections 13-140-23, -25, and -57, Hawai'i Administrative Rules)

Mr. Penn introduced Ms. Hayashi as a new representative for Trust for Public Land. Mr. Penn gave background on the project with its 1st ranking in 2016 and large award of \$2 million to the Ala Kahakai Trail Association, who has been granted money for other projects in the past. He introduced the new development where the appraisal revealed the current landowner carved out an area including a county tower or microwave tower and gave an exclusive perpetual easement of the area to its operating company to manage and control. The intent of gathering the commission was to determine if the change to the application is substantive and calls for an amendment to the contract and reevaluation by BLNR. Mr. Penn noted that it is a good scenario to explore what might be done in the future to determine if adjustments need to be made or changes are not substantial.

Chair Abbott opened the discussion by clarifying the purpose of the discussion and brought attention to its similarity to the prior solar farm situation. He then yielded the floor to Ms. Leah Hong to provide more background on the situation.

Ms. Hong oriented the commissioners to the area by showing a map of Waikapuna, part of the Ka‘u coastline, that the Ala Kahakai Trail Association, Trust for Public Land, Ka‘u community, and National Park Service are working to preserve. She gave an overview of the projects and their corresponding funding that cover almost 5000 acres involved in the entire effort. Waikapuna is highlighted for its broader effort to conserve the coastline, cultural sites, and history of the landscape.

Ms. Hong showed the commission pictures of the county tower and maps of the 7,150 square feet easement area. She went over the Trust for Public Land chronology document which demonstrated how the leases were established by predecessors and pre-existed the application. The tower and corresponding easement area were mentioned in the original application in #4 and #9. The tower was not producing any revenue at the time and was not addressed. After the ranking meeting, the landowner, Ka‘umahi, discovered things on the tower unrelated to the County and in violation of the lease to the County, so the lease was terminated. The landowner then renegotiated use of the area with HELCO and Hawaii Public TV, established an easement to themselves as a subsidiary, and the tower began generating revenue with use by HELCO, HPTV, and the County. The landowner offered to include the easement in the acquisition for \$280,000 but the Trust for Public Land could not afford it and Ala Kahakai Trail Association decided against incurring risks and costs associated with the tower.

Ms. Hong noted that if the easement is ever abandoned, they are required to clean up and restore the area to its original condition. Vice Chair Haase questioned if performance bonds are available to support restoration of the site upon decommissioning. Ms. Hong clarified that there is property liability insurance and coverage for obligations of the easement, but no explicit performance bond is established.

Mr. Keoni Fox shared that Ala Kahakai Trail Association and Trust for Public Land were given the opportunity by Ka‘umahi to make sure the value in the project was preserved and protected. Vice Chair Haase asked about the presence of environmental hazards stemming from fuel storage or back up power supplies. Ms. Hong answered that the phase 1 environmental survey was fine.

Mr. Fox shared that the free lease was given to the State and County for civil defense and emergency services but upon finding out that other entities were getting rent-free use of the tower, Ka‘umahi wanted to gain control of the situation. Mr. Hamana Ventura communicated that the County plans to use the tower, but it is owned by the Ka‘umahi subsidiary who holds the obligation to maintain it. While the lease was in operation, HELCO and HPTV were responsible for the clean-up and

restoration of the site after use but when the lease was terminated, Ka‘umahi took over those responsibilities. This concerned Ala Kahakai because they did not have the funds to take on the responsibility of cleaning up the site should HELCO or HPTV no longer wish to use it. Ms. Hong reiterated how the existence of the tower was disclosed when they applied and that HELCO, HPTV, the State and the County are using it in the same way as before. She added the size of the easement area relative to the entire property was minimal and therefore, an insignificant change regardless.

Mr. Penn spoke about the difference now being that the new landowner would not have a say in the lease. Commissioners clarified with Mr. Fox and Ms. Hong that the parcel is not removed from the property in any way, there is just a long-term easement over it and the State and/or County may have removed antennas.

Commissioners, Ms. Hong, and Mr. Fox discussed how the price of the transaction was reduced to \$6 million from the \$7.3 million appraised value. Mr. Fox addressed how the landowner was not willing to include the easement for no additional cost due to the time and energy invested into creating the revenue source from the tower and the generous gesture of allowing the State and County use for free. The current rental income is \$1,800 from HELCO and HPTV. Due to the presence of other cell phone towers in the area, Ala Kahakai Trail Association does not foresee other companies using it. Mr. Fox shared that early termination rights eliminate long term value because there is always the chance they could be left with a vacant tower without potential for use by other companies.

Chair Abbott asked if the tower will influence the county’s grant contribution to the acquisition. Mr. Ventura informed that the landowner and County are in discussion about the rent of the tower and that the open space fund and lease tower agreements are addressed by the same council, making these decisions well-connected. Chair Abbott probed about the potential for others to benefit from the tower and Mr. Fox reiterated his stance that the maintenance and upkeep would be a liability if owned by Ala Kahakai Trail Association and vacated by the tenants.

Chair Abbott and Vice Chair Haase summarized the issue as a third party now having a perpetual foothold within the conservation transaction and it being up to the Commission to determine whether it is a significant change requiring reconsideration by BLNR. Mr. Penn emphasized that the State’s concern was a change in how the application originally gave the landowner the right to terminate the lease each year at their discretion but no longer have that option with the perpetual easement. Given the circumstances, it was not appropriate for DOFAW staff to make the final decision.

Vice Chair Haase clarified that the acquisition would include the easement area, but Trust for Public Land would not receive proceeds from the lease excluding them from revenue sharing grant requirements. He shared his opinion of no significant change to the application. Chair Abbott noted that the owner does get an additional \$1800/month and inquired about the pasture leases. Ms. Hong shared that they are potential revenue sources for the community to maintain management and stewardship of the property under the Ala Kahakai Trail Association ownership as stated in the application. Ms. Hong also reminded the commission that the revenue from the pasture licenses and other cell phone towers were considered positive things during their deliberation because it provided Ala Kahakai Trail Association with management funds. Chair Abbott clarified that no income-sharing is possible for the future regardless of new lessee. Commissioner Warshauer asked for a further explanation of the ownership to which Ms. Hong informed it is a subsidiary of the current landowner, Ka‘umahi Operating LLC.

Vice Chair Haase asked about the circumstances requiring the impromptu meeting. Ms. Hong explained that the urgency is due to the extension option agreement which expires at the end of August. Mr. Ventura elaborated on the long process required by the County to release \$4 million and how they are being proactive so funds are sitting in escrow when the state funds are ready. Vice Chair asked Mr. Ventura if the County is satisfied that resources to be protected are safe from future activities associated with the easement and Mr. Ventura replied yes. Chair Abbott asked Ms. Julie China for additional comments and Ms. China replied that the commission seems to have fully flushed out the issue. Mr. Stinton, prior commissioner and soon to resume a place on the commission, shared that if the perpetual easement had been on the application during his time on the commission when they originally made the decision, he would not have voted differently. Thereby, he believed it was not a substantive change.

Chair Abbott proposed a motion consisting of three points:

1. The commission finds the change in the encumbrance is not in conflict with the original purpose of the grant.
2. Although there is variation in land tenure relative to county used microwave tower, it does not substantially change the project application.
3. Due to no substantial change, the Commission would like to advise the Department that the matter should not go to BLNR.

Vice Chair Haase seconded. All were in favor.

Mr. Penn opened the floor for a general discussion to how these issues could be addressed in the future. Ms. China informed that for State land deals, they ask the landowner to no longer encumber the land once funding sources are secured or decisions start being made. She suggested a rule or addition to the application packet that no further encumbrances be made once the commission makes their decision and recommendation to BLNR. Commissioners and Ms. China discussed how a rule could be incorporated to fix encumbrances on the land deals due to conditions of the grant funding. Vice Chair Haase recommended requiring landowners to disclose current negotiations when applications are submitted. Ms. Hong added that most landowners are hesitant to sign binding agreements until funding is secured but they do try to disclose what happens in the interim.

ITEM 3. Program Updates

Chair Abbott inquired about the DLNR staff's most recent travels. Ms. China shared about her and Mr. Penn's experience at the Land Trust Alliance's Symposium on Conservation Easements. This included a case illustrating problems with "floating" conservation easements where an undetermined area is carved out of the easement for future building but prevents the property from being valued properly in the case that the future building is in a high value area. The case is Pine Mountain Preserve vs. IRS, citation 151 TC #14. Vice Chair Haase asked if it can be integrated into the State rules regarding conservation easements that carve outs must be delineated. Ms. China answered no due to the landowner possibly wanted a tax write-off and the IRS being more scrutinizing of conservation easements. Commissioner Warshauer asked if this applies to other easements with floating nature and Ms. China clarified that it would depend on how the conservation values of the property are affected. Mr. Penn shared that the Legacy Land program is working to get materials from the symposium and Land Trust Alliance organized into a format to be easily shared.

Mr. Penn brought up the issue of applicants that have other organizations hold the conservation easements over the land deal and how it can be brought before the board to avoid confusion and

concern. He suggested adding to the scope of the Commission’s advisory capacity to recommend “Property be acquired by X with conservation easement held by Y with the conservation easement including specific protections.”

Mr. Penn presented other program updates including the close of an acquisition with Trust for Public Land and Hi‘ipaka LLC for property in Waimea Valley totaling two closing for the fiscal year. Form 5 agency review requests for the next two application cycles reveal who the applicants will be. The next meeting is scheduled for July 30th at the airport where the permitted interaction groups will be established following the Turtle Bay site visit on July 29th. Vice Chair Haase asked if a project comes up between the ranking meeting and the next fiscal year whether they can apply for any FY 21 funds. Mr. Penn informed that the FY 20 budget is currently fixed by the legislature, but there may be the opportunity during the next legislative session to put in a supplemental budget request for FY 2021 due to the new timeline of the decision-making process. If so, a second round of applications for FY 2021 may be possible. Ms. Hong agreed with this change in timeline and shared that having the ranking of projects come out before the congress passes their budget will provide incentive for various representatives and senators to increase the spending ceiling.

Commissioners questioned how many applications are anticipated for this year. Based on the agency consultation, Mr. Penn shared that they can expect over 10 applications for each fiscal year, but most have submitted the same application for FY 20 and FY 21 with exception of a few. Mr. Penn reiterated that the two application cycles is one time only to readjust the timeline for recommendations. In the future, the application cycle beginning in January will start in FY 2022.

ITEM 4. Adjournment

Chair Abbott adjourned the meeting.