

HAWAI'I COUNTY PUBLIC ACCESS, OPEN SPACE AND NATURAL RESOURCES
PRESERVATION COMMISSION

MINUTES-REGULAR SESSION

July 13, 2009

Department of Liquor Control Conference Room
75-5722 Hanama Place, Suite 1107
Kailua-Kona, Hawai'i 96740

Present: Chair Kim Garcia
Vice-Chair Hannah Springer (left at 3:31 p.m.)
Commissioner E. Kalani Flores
Commissioner Larry Komata
Commissioner Terri Markovich
Commissioner Sarah Moon

Absent: Commissioner Steven Hiramaki
Commissioner Bill Gilmartin

Others Present: Amy Self, Deputy Corporation Counsel
Alexandra Kelepolo, Clerk III, Finance
Iwaloa Chilson, Clerk III, Finance

CALL TO ORDER

The meeting was called to order by Chair Kim Garcia at 10:01 a.m.

APPROVAL OF MINUTES

Ms. Springer made a correction to the last sentence of Page 5 to change Flore's to Flores.'

Ms. Markovich made a correction to the first and third paragraph of Page 2 to change 250,000 to \$250,000.

Commissioner Komata moved for approval of the minutes of June 8, 2009, regular session, as amended, seconded by Commissioner Markovich and carried unanimously by voice vote.

WRITTEN COMMUNICATION

Communication No. 09-017: Transmittal from Councilman Pete Hoffman to Council Chair J Yoshimoto dated June 30, 2009 and Proposed Amendment to Chapter 2, Article 42, Sections 2-217 and 2-218 of the Hawai'i County Code (HCC).

Ms. Self noted that she met with Council Member Pete Hoffman to discuss his proposed changes to amend the HCC for the Commission. She summarized the various changes which will be presented at the next Finance Committee meeting in July.

(the commissioners went into discussion)

Motion: Commissioner Moon moved to change the wording to “acquisition of lands in order of priority on the prioritized list as developed by the Commission and/or submitted by the Mayor.” Seconded by Vice-Chair Springer.

(the commissioners continued their discussion)

Motion: Commissioner Moon moved to re-state the motion to read “request the director of finance to enter into negotiations for the acquisition of lands in the order of priority on the prioritized list as developed by the Commission or as submitted by the Mayor.” Seconded by Vice-Chair Springer; all members voted aye, motion carried.

Motion: Commissioner Flores moved to amend the sentence in Section 2-217 (2); seconded by Commissioner Komata.

(the commissioners continued their discussion)

Commissioner Flores withdrew his previous motion; Commissioner Komata withdrew the second.

Motion: Commissioner Flores moved to strike out any recommended changes to section 2-217 (2). Seconded by Vice-Chair Springer; all members voted aye, motion carried.

Motion: Commissioner Flores moved to amend Section 2-218 (a); seconded by Vice-Chair Springer.

(the commissioners continued their discussion)

Commissioner Flores withdrew his previous motion. Vice-Chair Springer withdrew the second.

Motion: Commissioner Flores moved to revise Section 2-218 (a) to read “the Countys’ share of the purchase price paid for a property shall not exceed the appraised value as prepared by an independent appraiser engaged by the County.” Seconded by Vice-Chair Springer; all members voted aye, motion carried.

Ms. Self told the Commission to put together a cover letter to Council Member Hoffman noting their recommended changes to the HCC.

(the commissioners continued their discussion)

Motion: Vice-Chair Springer moved to forward the recommended amendments to Section 2-217 and 2-218 of the HCC with the cover letter to Council. Seconded by Commissioner Markovich; all members voted aye, motion carried.

DEPARTMENT OF FINANCE REPORT

- **Discussion on the Commission's budget or any other financial matters**

Ms. Chilson noted that the County accounting report for the 2% fund is attached to the minutes.

- **Discussion on how much of the 8 million dollars currently in the 2% fund will be going towards the purchase of Kāwā and Pa'ō'ō**

Ms. Chilson reported that the estimated acquisition amount for Kāwā is between 4 and 5 million. The state grant funds in the amount of 1.5 million are still being processed along with the federal Recovery Land Acquisition (RLA) grant funds in the amount of 1 million. Therefore, depending on the appraised value of the properties, approximately 1.5 to 2 million could come from grant monies which would lower the overall acquisition price.

Mr. Komata asked Ms. Chilson when was Tax Map Key: 9-5-17:05 added into the purchase since it was not included in the 2008 Annual Report.

Ms. Self told Mr. Komata that he needs to go by the first Annual Report in 2006 since Kāwā was the very first property listed as #1 on the prioritized list and at that time parcels 7, 5, 25 & 06 was included.

Mr. Komata added that both appraisal reports done did include parcel 5. Ms. Self asked Ms. Chilson to have Mr. Inaba do some research on why Parcel 5 was not included on the map.

Recess: 11:29 a.m.

Reconvened: 11:35 a.m.

Ms. Chilson reported that the estimated acquisition cost for Pa'ō'ō is 2.5 million with approximately 1.250 million in federal grant monies from the Coastal Estuarine Land Conservation Program (CELCP).

- **Discussion on the status of the purchase of the acquisition of the Honoli'i Gulch property listed on Resolution 296-07, which amended the Commission's Prioritized List**

Ms. Chilson noted that Honoli'i was ranked #6 on the "draft" prioritized list for 2008, however at the meeting of November 24, 2008, it was determined by the Commission that only the "top five" properties were to be listed.

Mr. Flores re-called a prior discussion with the Finance Department and thought that someone from Parks & Recreation (P&R) looked at the properties but realized it was not adjacent to the existing County park, and therefore not viable since it wouldn't enhance their existing property.

Ms. Chilson referenced Appendix 3 of the 2008 Annual Report which notes that this property was included in the 2008 Comprehensive List; however it was not originated by the Commission but by Bill No. 06-150 which was passed by Council.

Ms. Self asked that Mr. Inaba check on whether the County will be purchasing this property through other funds since a bill was passed for this acquisition.

Ms. Chilson then mentioned that the PONC funds are held in different types of CD's of which the interest rate varies. The highest interest rate for CD's is 0.80% and the interest rate for the money market account is 0.20% with approximately 2.7 million in that account.

Ms. Springer asked why the interest payments deposited into the 2% fund are staggered. Ms. Chilson replied that she would need to clarify with the Accounts division on that.

Ms. Chilson then spoke in regards to Civil Case No. 4590 which provided access to the residents to reach Kāwā bay and the adjacent shoreline area. She noted that TMK:9-5-17:07, which the County already owns is subject to easements that run along the old government road which lays parallel to the ocean. The only mauka/makai easements, pedestrian and vehicular, are located on Mr. Olson's property identified as TMK:9-5-16:06.

Mr. Komata then asked if there is already access to the shoreline, then why does the Commission need to purchase the property. Mr. Flores added that other purposes for acquisition was also to protect natural and cultural resources along with the turtle nesting sites.

(Ms. Chilson circulated a map to the Commission which outlines the parcels along with the easements).

OFFICE OF THE CORPORATION COUNSEL'S REPORT

Ms. Self had nothing to report.

CHAIRPERSON'S REPORT

Ms. Garcia had nothing to report.

UNFINISHED BUSINESS

- **Commission to discuss creating new form for assessing public access suggestion forms**

(the commissioners went into discussion)

Recess: 11:56 a.m.

Reconvened: 11:57 a.m.

(the commissioners continued their discussion)

Ms. Springer asked Ms. Self what is the difference between an access and an easement.

Ms. Self replied that the best way to explain it in general property law terms is "when you own a piece of property you have a stick of rights, bundle of sticks which represent different rights that you have. So when a landowner grants an easement he's not giving up his entire bundle of sticks, he still owns the property underneath the easement, so he's not giving up his fee simple ownership;

he's only giving a right to use a certain portion of his property to someone else. So he cannot block that, he cannot, depending on what the easement document says when he's granting the easement, usually it's for egress/ingress, ingress/egress, meaning in and out access through the property. It can be for like for instance, the water department gets easements so that they can run a waterline; HELCO gets easements so they can have utility poles. So whatever use you're giving that person when you give them grant them an easement you cannot interfere with that use. Otherwise, the owner of the easement is responsible for making sure that the easement is maintained unless it states otherwise in the granting document, okay. So like for instance, in some instances we've been able to get the owner of the property to grant public access, a public access easement and they're responsible for maintaining it and all of that, they're covered under, as long as it's for recreational use and they're not charging admittance or anything like that they're covered, they're not liable under HRS 5-20 which is called the recreational use statute, okay. So anyway, so whatever rights or whatever use that the landowner, meaning the grantor, is granting in that easement to the grantee he cannot interfere with that use, okay, but if it's not otherwise stated in the granting language that the owner will still be maintaining that easement it's automatic that the grantee who is getting the easement is responsible for the easement for making sure it's maintained.

And that's why were in a kind of a crossroads right now with our trail system because if any of you ever heard of the State trail system, Na Ala Hele trail system, well there's a statute, HRS statute, I think it's 198-D, that in fact protects the State from liability on their trail systems but it didn't include County trail systems so the Counties are still hanging out there in fact we're thinking that we're gonna see if the other Counties will join us at this next legislative session to try and get the Counties included in that.

When you ask me about access, here's where there's a difference because when they're requiring the owner to provide access to the public to the shoreline let's say for as a condition of the SMA permit, Special Management Area permit. Unless it's a Land Court property, if it's land that's registered in Land Court, I just found this out because I just did a lot of research on this. Unless it's a Land Court property, if its Land Court property the only way your going to guarantee that the County continuously and always has the public access is if you have a survey, it has to be an easement surveyed so that you have a metes and bounds description of where it's exactly located on the land and it has to you have to register with Land Court and it has to appear on the TCT, the Transfer Certificate of Title, it has to actually appear as an encumbrance on that, there's case law on this or else it doesn't exist as far as the landowners concerned and if you go to court and it's not on that, it's not listed as an encumbrance on the title your out of luck, you don't have a real easement. So, cause we had a landowner that wanted, he does not want to pay for the survey and he's required as part of his SMA permit to provide a public access along down to the shoreline. So we're trying to get around that just by providing a general description in an agreement, have an agreement with the landowner that you will provide a perpetual public access easement within along the shoreline lateral shoreline access along the shoreline within 40 feet from the edge of the cliff and also include language so that if there's any sort of erosion that they have to move it mauka. So that's fine you have this agreement you sign but that's not good enough for Land Court because there's no metes and bounds, we though we could save him the money of having to go to survey but if it's Land Court property it has to be surveyed, so there's no getting out of that. So we are in other instances where it's just been recorded at the Bureau of Conveyances versus the Land Court. We can have just an agreement for public access and not have to actually get a grant of easement, or not have to have a metes and bounds description of the property. You could actually draw it, cause they're more lenient at the Bureau then they are at Land Court."

Ms. Springer asked Ms. Self for the purposes of their work would it be proper to use the word easement or access. Ms. Self replied that it depends on what they want.

Mr. Flores added that you can have access without an easement, for example if it's under the Highways Act of 1892, it can be a traditional easement. Ms. Self noted that only if the trail or road was there before 1892, if not you have to prove that it wasn't a government road prior to 1892 or else there's no public access.

Ms. Self noted that at the end of July, Gilbert of the Planning Department will be doing an additional GIS (Geographic Information System) layer that will have all public access and easements included and she can do a presentation to the Commission once she gets that information.

Ms. Self added that another situation for this particular Commission is *“the way that the Planning Department gets the accesses is either that they're required pursuant to under State law, there is a requirement that when somebody comes in to apply for subdivision, that the County must require them, if it's shoreline property, that they must require them to provide mauka/makai access to the shoreline. The other way they get it is through SMA permits, because SMA, you cannot, the reason they're able to get it as a condition of the SMA permit, is because if you look at what the requirements are to get an SMA permit, you cannot block access to the shoreline, you have to make it in other words you have to mitigate in order to not negatively interfere with access to the shoreline, or the ecology of the shoreline, all of that is taken into consideration and Hannah can she might be able to enlighten you even more because she used to be on the Planning Commission and they're the ones that grant SMA permits. So it's made a condition of the SMA. So we have State law that backs that up, we also have State law that backs up the access that I was telling you about for as a condition of subdivisions, okay. Now, if you guys were to do it, that's different because we don't have anything that allows you or the Council pursuant to your list to just do that. It would be considered a takings. You cannot require somebody to give up a portion of their land without paying for it even an easement. So, in this instance we would have to purchase an easement rather than having requiring the owner to provide it. So that's why it's different in this situation, we don't have any State law that, unless they're coming in for an entitlement from the County, and this they're not coming in for an entitlement, you guys are putting them on a list and saying Council this is what we want. So in that instance we'd have to purchase an easement. The only other way would be if for instance the landowner came in and said oh I want to agree to give you access to the shoreline through my property and we can sign an agreement and then he's protected under the recreational use statute for doing so.”*

(At the request of Ms. Garcia, italicized excerpts from Ms. Self's discussion above is verbatim)

Ms. Springer asked Ms. Self is she has any examples of purchased easements. Ms. Self replied that the Water Department has documents for utilities that she's aware of.

Ms. Springer asked if there's an abstractor attached to the public accesses for the County. Ms. Self replied that she's not sure, if there is one it would be in the Real Property office.

(the commissioners continued their discussion)

12:32 p.m. – lunch

1:15 p.m. - reconvened

(the commissioners continued their discussion)

Ms. Garcia asked that everyone bring back comments and suggestions at the next meeting to create a new assessment form.

Mr. Flores re-collected that from his notes they were going to create a form letter to respond to suggestion forms and also an action form for public access with referrals to different agencies, if not under their jurisdiction.

Ms. Garcia noted that discussion on this item will be continued at the next meeting.

- **Commission to discuss previously submitted suggestion forms regarding public access in the various districts**

Ms. Garcia noted that discussion on this item will be continued at the next meeting.

- **Commission to discuss creating form letter to respond to suggestion forms**

(Ms. Moon circulated two draft form letters to the commissioners to review)

(the commissioners went into discussion)

Mr. Flores suggested that they take the draft form letters and bring back their comments at the next meeting.

Ms. Garcia noted that this item will be continued at the next meeting.

- **Commission to discuss “Questions & Answers” for Chair Kim Garcia’s radio interview on LAVA 105**

Ms. Garcia reported that it would be a 15 minute interview with Sherry Bracken and she would discuss what the Commission is all about and other related matters.

(the commissioners went into discussion)

Ms. Garcia will submit her list with the questions and answers to Ms. Kelepolo who will have copies for the commissioners at the next meeting.

Ms. Moon suggested that Ms. Garcia also mention the open vacancies for the Commission in District 3 (South Hilo), and the upcoming vacancies in Districts 2 (South Hilo) and 7 (South Kona) which terms will be ending on December 31, 2009.

Ms. Self added that Ms. Garcia should also mention that the County is looking for matching funding for leveraging to make the money go farther.

NEW BUSINESS

- **Commission to discuss drafting of the 2009 Annual Report to the Mayor including assessment of the 2009 suggestion forms**

Ms. Springer summarized the Commissions' tentative schedule as follows:

July – assess suggestion forms;
August – site visits;
September – compile lists;
October – draft annual report;
November – finalize report;
December – submit report.

(the commissioners went into discussion and began assessment of the 2009 suggestion forms)

Mr. Flores suggested that they assess the remaining suggestion forms at home and submit their scores to Ms. Kelepolo who will compile the information and provide at the next meeting.

Ms. Garcia then noted that this item will be continued at the next meeting.

- **Commissioner Sarah Moon and Commissioner Steven Hiramami to report on their site visit to Wai'eale and Honolulu Landing**

Ms. Moon requested that this item be deferred to the next meeting.

Recess: 3:38 p.m.

Reconvened: 3:40 p.m.

ANNOUNCEMENTS

The next meeting is scheduled for Monday, August 10, 2009, 10:00 a.m., at the Department of Liquor Control Conference Room, 101 Aupuni Street, Suite 230, Hilo, Hawai'i.

ADJOURNMENT

Chair Garcia adjourned the meeting at 3:40 p.m.

Respectfully submitted,



Alexandra Kelepolo, Clerk III