

**MOLOKAI PLANNING COMMISSION
REGULAR MEETING
JUNE 8, 2011**

*** All documents, including written testimony, that was submitted for or at this meeting are filed in the minutes' file and are available for public viewing at the Maui County Department of Planning, 250 S. High St., Wailuku, Maui, and at the Planning Commission Office at the Mitchell Pauole Center, Kaunakakai, Molokai. ***

A. CALL TO ORDER

The regular meeting of the Molokai Planning Commission was called to order by Chair Mikiala Pescaia at 12:08 p.m., Wednesday, June 8, 2011, at the Mitchell Pauole Center Conference Room, Kaunakakai, Molokai.

A quorum of the Commission was present. (See Record of Attendance.)

Chairperson Mikiala Pescaia introduced the Commission and the Planning Department staff.

Chair Pescaia: Before we begin, does anyone have any proposed changes to today's agenda?

Mr. Nathaniel Bacon: Yeah, I've gotta leave about 3:30, so as long as it gets fit in there somehow, but you can move this right along so it should be, you know, another 25 minutes and we're done, right?

Chair Pescaia: Right.

Mr. Bacon: Okay.

Chair Pescaia: And we'll have – if no one else is leaving, then we have a little bit more time because we'll still have quorum, right? Okay. I think we're gonna try and get through this as much as possible. Item F, the workshop no. 3 on case law on water issues, if we don't get to it, she's okay being pushed back to another meeting. So maybe at about two o'clock, we'll kinda gauge where we are and see if we need to move that item to – postpone it.

Ms. Lori Buchanan: Chair?

Chair Pescaia: Yes.

Ms. Buchanan: Also, Kauila Hanchett of Ka Honua Momona was also asked that if they had a chance – if they had to be moved to a later time, she said that would be okay too.

Chair Pescaia: Would they prefer to be moved or it's okay they be moved?

Ms. Buchanan: No, I think if we running out of time for regular business.

Chair Pescaia: Okay. Okee dokey. Just so our community knows that we may agenda items not being presented today.

B. PUBLIC TESTIMONY ON ANY PLANNING OR LAND USE ISSUE

Chair Pescaia: Alright. So at this time, I'd like to open up the floor for public testimony on any planning or land use issue. This time is allotted for members of the community who may be here on their lunch hour and would like to offer testimony on an agenda item, or on another planning issue that they would like us to take a look at on a future agenda, you may do so now. If you can stay and give your testimony when your agenda item comes up, we prefer that. Seeing none, we will close that portion. I now would like our Commission to take a look at the minutes of the March 9th meeting.

C. APPROVAL OF MINUTES OF THE MARCH 9, 2011 MEETING

Chair Pescaia: You should have received a copy in your packet, and I will entertain a motion.

Mr. John Sprinzel: A motion to adopt the minutes.

Mr. Bacon: I second.

Chair Pescaia: Motion by Commissioner Sprinzel, a second by Commissioner Bacon. Any discussion?

There being no further discussion, the motion was put to a vote.

It was moved by Mr. Sprinzel, seconded by Mr. Bacon, then unanimously

VOTED: To adopt the minutes of the March 9, 2011 meeting.

Chair Pescaia: Okay, motion carried. Alright. First item of business, Communications, Mr. William Spence, the Planning Director, requesting concurrence from the Molokai Planning Commission in regards to an SMA exemption on Mr. Kirk Greenman.

D. COMMUNICATIONS

1. **MR. WILLIAM SPENCE, Planning Director, requesting concurrence from the Molokai Planning Commission pursuant to their Special Management Area Rules, as amended, that a Special Management Area (SMA) exemption can be issued for the following:**
 - a. **MR. KIRK GREENMAN, owner, submitting a Special Management Area Assessment for a two-story, two-bedroom, one-bath dwelling, building footprint of 901 square feet, 1540 sq. ft. of living area, 240 sq. ft. carport, and 636 sq. ft. unfinished basement, Individual Wastewater Treatment System, and After-the-Fact grubbing, fill and removal of a section wall, for a 4,216 sq. ft. lot in the Interim District at 7712 Kamehameha V Highway, TMK: 5-7-010: 038, Kaluaaha, Island of Molokai. (SMX 2010/0406) (Valuation: \$86,000) (N. McPherson)**

Ms. Nancy McPherson: Good afternoon, Commissioners. Thank you, Chair Pescaia. Nancy McPherson, staff planner. I'd just like to tell you that the owner, Kirk Greenman, is here today, so he can answer any of your questions that you may have about this project.

I received an SMA assessment application that had been handed off a couple of times when I came back. And I went down and did a site visit. There had been after-the-fact grubbing, and some fill, and a section of the rock wall along the highway had been removed. So at that point, I said, well, there's some after-the-fact activities here. So we went ahead and dealt with that. And the owner's been very cooperative. And he paid the after-the-fact fee. And this project is for a – it's on a small lot. These are lots in the Moana Beach Lots Subdivision which was planted in 1933. And I did call Lesli Otani of our Subdivision, Public Works Department, and she said they don't even have a file on it. It was just – I guess when it became a State, they just, you know, made them into TMKs or whatever. So it's a little bit of a problematic situation from a planning standpoint because these are existing nonconforming lots.

But what – in this case, the lot is right on the highway. He's received a water meter, so that's already been installed. He can get utilities. He can get access from the highway. And so the – and the house meets the set backs. So basically, it's for after-the-fact site improvements and for the proposed two-story, 1,540 square foot single family dwelling with a 636 square foot carport, an individual wastewater treatment system, driveway, and then the after-the-fact actions as I have outlined to you already.

The State Historic Preservation Division was contacted about this project. There was a site visit made on April 5th 2011. The letter that came back was a little bit confusing for me and I did get clarification. This is your Exhibit 17. She had confused the Spalding Lots that are

to the west, and there's about ten lots that have been cleared over there, and a road bulldozed into the forest toward the stream, and all of that. And that's gonna be coming to you, eventually. There is an SMA assessment application for that, but she did go and visit the Greenman site. We did talk about it. She said that there was no effect. So we've had e-mails and phone conversations about this. She was gonna try to get me a revised letter by today, but that didn't happen. So basically this does have the correct TMK number. And we are clear that this is the lot that she is making a determination of no effect because it's already been cleared.

And we had a long discussion about the Moana Beach Lots Subdivision in general and that whole situation. And this is gonna come up again when the Spalding request for utility pedestal and power pole comes to you because again, lots were cleared, there was no SHPD review, and her opinion is that the entire area should be surveyed. So – but I don't have anything in writing to that effect. I mean, I think it actually is in this letter, I think, possibly.

Ms. Buchanan: Chair, I have a question at this point for staff. Planner McPherson, so under Cultural and Historical Resources, in that second paragraph, am I to assume, then, the statement, "However, we request the opportunity to comment on future permitting activities for this parcel and note that in general this subdivision appears likely to contain historic properties, and we would have recommended an archaeological inventory survey be conducted if the grading had not already occurred," is that a true statement?

Ms. McPherson: Yes. I mean, this is a long-standing situation here on Molokai, as many of you already know. And it's unfortunate that people go ahead and– Mr. Greenman has been very cooperative. He was actually completely unaware that going ahead and clearing the lot, and moving sections of the rock wall was not acceptable. And he's very clear on it now. I think a series of newspaper articles needs to be published in the *Dispatch* so that the rest of the island is very clear on this because unfortunately, a lot of people think it's totally okay to bulldoze your lot, move rocks around, do whatever, and clear your land in the SMA without any review by any agency whatsoever. And that's been a dilemma since I've been working on this island and I'm sure for 20-plus years prior to that. So we're working on it. I'm working on it. And we're gonna continue to work on it. But he got some bad advice and he trusted the person that gave him that advice. And he's willing to – you know, he's been totally willing to take responsibility for that to the extent that he can, which is to pay the after-the-fact fee.

And unfortunately, yeah, there is no – SHPD does not have any fining system. They do – they would require mitigation prior to the– There actually is another application that is gonna be coming to you where they are waiting, and they've been waiting for two years, because they're waiting for an SHPD letter that tells them what they're supposed to do, because they wanna remove a 20-foot section of a historic rock wall so that they can get

access to their property. So, you know, this is gonna keep happening. In this case, I think SHPD is going to require some kind of mitigation. But it's a tough situation, and I think it's just difficult. But Mr. Greenman was unaware, and he's gotten quite an education out of this whole process. And if he had it to all over again, I'm sure he would've done things very differently. And do you have any questions for me or the owner?

Mr. Sprinzel: In view of what you've just said, could you not put something in the newspaper? I mean, could you not make that a task seeing as you say you've been worrying about it for years?

Ms. McPherson: Yeah, we've been talking about it in the Department. And it's just a matter of finding the time to actually do that. And I would probably do a series of three or four articles to try to cover all of the topics in the space allowed.

Mr. Sprinzel: You could save so much time after, wouldn't it?

Ms. McPherson: And impacts to cultural and natural resources as well, if we can prevent those. I think that's one of the goals of the Chapter 205A, Coastal Zone Management Program, is to avoid or mitigate impacts to cultural and natural resources in the SMA.

Chair Pescaia: I think another key point would be to work with our Realtors who are directly interacting with these people who are buying these properties and understanding what they can and cannot do. I mean, that's the point of – opportune for new owners to understand what they can and cannot do, and the process, because we have a lot of people that come in, and when they don't what they can and cannot do, and they get to us, they're frustrated by that point, and we're trying to – sometimes we have to compromise things because we feel for them and we want them to move ahead on their projects. But I don't know. I would look at – there's only a handful of Realtors. We can definitely reach out to them and see if there's something we can do at that point.

Ms. McPherson: Yeah, I have made a presentation to the annual meeting of the West Molokai Association. And they sent a letter of appreciation saying they really appreciated me doing that. And I think kinda the purpose of having a community plan is so that the planner can go out and do those sorts of things. So I can make a presentation to a meeting of Realtors here on Molokai. I could make it to the Chamber of Commerce. I mean, we don't even wanna talk about all of the renovations going on in Kaunakakai businesses, you know. But I mean, it's a pretty hot topic. So if the Commission wills it, I will have – Clayton will be able to put that on my priority list of tasks.

Chair Pescaia: Yeah, we will it. Alright, back to our application. Anybody have questions for the planner? Commissioner Bacon?

Mr. Bacon: Okay, I guess one question is, where did the rocks go, finally? I mean, if somebody excavated or moved them, where did they go? And is there gonna have to be any further modification to allow for an apron?

Ms. McPherson: The rocks were conveniently accepted by the Realtor who had given the advice to the applicant to remove them. And so they went east in Pukoo. And as far as the— I'm sorry. What was the second question, Nat?

Chair Pescaia: The apron.

Ms. McPherson: No, the apron is in the right-of-way for the highway. The driveway at the apron, that's the width that needs to be for the driveway to go through there. That's my understanding. Now, Luigi Manera's here and he has talked to the applicant a little bit about this situation. I believe he is going to need a permit from the State Department of Highways also because if you want to connect – put a driveway up to the highway, you have to get one of those. That's correct, right? So if you have kind of technical questions like that, you might need to ask the applicant, or possibly Mr. Manera since he here's conveniently for another item.

Mr. Bacon: So is the owner here that can answer that question?

Ms. McPherson: Yes, sure. Come on up, Kirk, and speak into the microphone.

Mr. Kirk Greenman: Good morning. Good afternoon. You had a question about the apron? Kirk Greenman, sorry.

Mr. Bacon: Does any more of the wall have to be removed or modified to accept an apron appropriated for your driveway?

Mr. Greenman: I don't believe so.

Mr. Bacon: Do we have a drawing of how big that apron has to be, and where the . . . (inaudible) . . . is existing now?

Mr. Greenman: I have one here. I don't know about how the wide the apron is, what the specs are of how wide the apron needs to be, though. I can—

Ms. McPherson: I believe there are some exhibits that the architect did put a lot of driveway specifications on the plans, also, sight lines, and that sort of thing. So if you give me a second, I'll look at which exhibits those are on. Kirk had Luigi make an adjustment to the plans to reflect the actual location of where the rock wall was removed. And so he's just gonna walk around and show that to you right now for a minute.

Ms. Buchanan: In the meantime, Chair, can I ask staff a question because you move too fast. I had questions for staff.

Chair Pescaia: Sure.

Ms. Buchanan: Sorry, Nancy.

Ms. McPherson: Sure.

Ms. Buchanan: The individual wastewater, the capacity for that, I noticed that this is over – a 1,500 square foot home, but yet it only has one bathroom and only two bedrooms. So that's a fairly large living space for just one bathroom. And I was just wondering if that had anything to do with the fact that maybe the individual wastewater treatment system capacity was only able to facilitate the one bath, two-bedroom.

Ms. McPherson: Well, actually, you'd probably have to ask the owner that question. The bottom story is actually kind of like a storage area, I believe, and carport. So the only part that's gonna be inhabited is the 910 square feet on the top floor. And he also has had a design that where the infiltrator chambers are traffic rated so they can go under the driveway. So if I can pass your question on to the owner, then maybe he can respond. Yeah, actually, it's a small lot. So it kinda has to be a small house to meet the setbacks. And he said that the wastewater treatment system is actually oversized for the house. I don't think that was intentional, but it's better to be safe and go over, then have an under-engineered system that overflows or whatever. Did that answer your question, Commissioner?

Ms. Buchanan: . . . (inaudible) . . .

Ms. McPherson: Okay, I'm sorry. We do also have on Exhibit 11, a grading plan. We have a driveway without road curb detail. We have on Exhibit 6B, we have the traffic control plan. And then I included actually, Exhibit 6 is all of the specs. I copied them off of the plans and made you an exhibit that has all of the specs itemized. 6A has the site plan, but again, they had to adjust the location of the driveway. And the applicant is very clear that no more rocks are to be moved or this will have to be – go through State Historic Preservation again.

Ms. Buchanan: Question for staff: so the determination of the \$990 in fees is specifically for the after-the-fact grading and grubbing and removal of rocks.

Ms. McPherson: And fill.

Ms. Buchanan: And fill.

Ms. McPherson: A little bit of fill.

Ms. Buchanan: So that's the total of fees? There are no other occurring fees for anything else?

Ms. McPherson: No. Yes, it is. And what we do is we take – the minimum fee by law is a thousand dollars. Then we take up to 50% of the valuation of the after-the-fact work that's been done. And we base that on various criteria. In this case, the owner was very cooperative and tried to make up for things quickly. And so we basically, levied the 5% of the valuation which was a few thousand dollars, I think, for the after-the-fact work. And then we'd also deduct the SMA application fee from that also. That's just the way the Department does it?

Ms. Kelly: Why?

Ms. McPherson: Mr. Yoshida would have to answer that question.

Mr. Yoshida: Why do we charge them an after-the-fact fee?

Ms. Kelly: Why is the application fee taken out of a fine charge?

Mr. Yoshida: Okay, it is not a fine. It is a fee. And it is based on the additional time that staff needs to take to process the application because it is after-the-fact. That is what the after-the-fact fee is based on. They pay a fee. They pay an initial fee, okay, that everybody would pay whether they came in before or after-the-fact. Then we discover that it is an after-the-fact action. So that subjects them to the after-the-fact fee which in this fiscal year is a thousand dollars plus up to 50% of the valuation of the project. Before, it was a thousand dollars plus 10 to 50% of the valuation of the project. Ten years ago, it was double the fee.

Ms. Buchanan: Question for staff. Clayton, please clear – I need something cleared up. You said you took the minimum thousand of the thousand-dollar fee. Up to 50% of the valuation of the project or the valuation of the action?

Mr. Yoshida: Well, the valuation of the proposed action that's being–

Ms. Buchanan: By the intended action.

Mr. Yoshida: Yes, correct.

Ms. Buchanan: So in this case, someone would have to make the determination of the action of an irretrievable and irreversible action. You would have to put a valuation on that.

And so I don't know how you came to that valuation, but then you took 5% of that valuation with you attached to an irreversible action. And then you took away that fee that everybody pay and that's how you arrived at the \$990 as an after-the-fact fee. Is that correct?

Mr. Yoshida: Well, the maximum fee that they would have to pay for any SMA assessment whether it be \$165 – you know, if it's less than ten thousand, they would pay \$55, currently. If it's between \$125,000 – oh, between ten thousand and \$125,000, it'll be \$110. And if it was more than \$125,000, they would pay \$165. So if they did a million dollars worth of interior improvements, they would only be \$165.

Ms. Buchanan: And that would be okay if you're taking the valuation of the project, but if you taking the valuation of the action, if it's a part of the action– The determination of the valuation of the action is what I'm trying to figure out–how the Department has arrived at the valuation attached to the action. It's easy to take the valuation of the project. I can say the valuation of the project, the house is \$125,000, but the action of grading, and grubbing, and removing a possible historical site is how I'm trying to figure out how you attach one value to that action. So that's how come I asked you to define whether that was – the action or valuation of the project.

Ms. McPherson: What I did, I requested from Mr. Greenman some kind of documentation of – you know. And basically, I got a bill, copy of a bill that he was charged for the person who came in to do – to clear the lot, and do all of that stuff, bring in the fill, and that's what I based it on was what he was charged. And if that's not proper, then we'll definitely take your feedback on how you think it should be done, and we'll pass it on to the Planning Director.

Mr. Bacon: I guess I got a question. I'm not sure who this is directed to, but probably you. I would think of all the people on the island that would know what can and can't be done with parcels of land would be Realtors. And I know certain people who do excavation work, and other kinds of work, and they say they won't even do it until the owner shows them a permit that says that they can do that be it an SMA permit to be have, or a building permit, or some sort of a permit that says it's okay to do what you're doing. And some of them don't, you know, because it's a matter of like, I need money, so I'm gonna do the work. But there's a principle involved here, and I really find it hard to believe that a Realtor does not know that you cannot take out historic walls. I mean, everybody knows that.

Ms. McPherson: I've seen a lot of things happen on this island since I took this job: some of them, pretty manini; some of them incredibly destructive. In my professional opinion, Molokai is an archaeological treasure trove. Certain areas like Kaluaaha, Pukoo, Honomuni, those lo'i are still sitting in there under the overgrowth. And if I could wave a magic wand, I'd have the entire coastline surveyed, and we would have it all documented. And we would figure out a way to protect all of these things while still allowing folks to have

reasonable economic use of their property, which they are assured by the U. S. Constitution.

That being said, we have a human system of trying to do enforcement and trying to regulate, and it's not perfect. I have been working very hard to improve it. It's very, very difficult to improve it. And we all need to work together: the community, the Planning Commission, the Department, Public Works. Everybody needs to work together to try to fix this situation. And I know you have a very full agenda, and I don't really wanna go on for a long time about this, but if you have specific comments that you would really like us to direct to the Planning Director, I suggest that you try to figure out a way whether it's drafting a letter, or what, expressing your displeasure and your desire to see the enforcement strengthened, fees and fines increase, that there is something stronger happening to either penalize people when they do these things, or prevent it from happening in the first place. And I will be overjoyed to work with you on doing that and achieving that. But you need to send a strong message to the Department, and I'll just leave it there.

Chair Pescaia: Okay, any more questions?

Ms. Buchanan: Let me refresh my memory, Planning McPherson. In one other case, the County of Maui is not giving out any water meters in East Molokai, new water meters or second water meters to properties. What is the current—?

Ms. McPherson: That is another whole subject and journey. And my understanding right now, although we do have another item coming on your agenda that you'll get more information when we get to that item, my understanding is they're not issuing permits for new lots like subdividing. If it's an existing lot, they may or may not issue a water meter, but they will not be able to assure a long term reliable source of water to a newly created lot. And that is the message that I am getting. It is still evaluated on a case-by-case basis, however. But the – evidently, the County 's been over-drafting the aquifers for the various systems by 10% for too long, and the State has told them they can no longer do that. And so things are kind of getting restricted. I would love to get a clearer answer from them, but it's not really forthcoming. But again, when we get to the Bacon item, we can talk about that some more.

Ms. Buchanan: Last question: does the owner have clear title to – for utilities and water entrance from the highway to his lot? Remember, we had trouble right down the road because most of the subdivided lots in the Kaluaaha area are landlocked. I know he's right next to the road, but does he have a title for a right of entry to his property from the highway?

Ms. McPherson: I'm not really sure what that is. All I know is that he has to get – go through a process with the Department of Transportation to get that driveway to connect to the highway. And my understanding is that if it's deemed safe to do so, they will allow him to do that. But, yeah, for any of the lots that are makai of there, they're in deep trouble because no improvements have ever done for that subdivision. There's no infrastructure. There's no roads. There's no drainage. There's a stream flowing through the middle of it, Kaluaaha Stream.

Ms. Buchanan: Okay. And that's why it's an existing non-conforming lot. Is that correct?

Ms. McPherson: Yes. It was created in Territorial days. And it was a big subdivision, and I don't think anybody's really looked at it since it was created, but it's on my radar. That's for sure.

Mr. Sprinzel: Does he have water?

Ms. McPherson: Yes, he has a water meter. It's already been installed. And the overhead line can come over from the power line across, because there's a subdivision right across the highway, right mauka of there. And so he doesn't need to put in another power pole or anything like that. He might have to trim the trees a little bit more, but he's actually trimmed it quite a ways back, but he's also kept a lot of the mature trees, the large trees there.

Chair Pescaia: Any more questions, Commissioners? Okay, at this time, I'd like to open up public testimony on this item. If there's anyone would like to provide comments or questions? Seeing none, I will close the testimony on this agenda item.

Ms. Buchanan: Chair, I have a question for the applicant. Mr. Greenman, were you aware when you purchased the lot that it had some issues associated before you got put a home there?

Mr. Greenman: No, I did not.

Ms. Buchanan: Because it seems like – you know, it's troublesome, and that's probably why it's unimproved right now because there's a lot of issues.

Mr. Greenman: There are two houses next door. Not the next lot but on the same side of the road, there's a lot next to mine, and then there's a house, and a house right next to it.

Ms. Buchanan: That is also part of that subdivision?

Mr. Greenman: Yes.

Ms. Buchanan: Lucky them, yeah? Okay. Okay, thank you. One more question for staff. Pointing out what I mentioned earlier under cultural and historic resources, and you validating that it was a true statement from the State Historic Preservation, in your recommendation for concurrence, I don't see, except for item no. 5, and this is on that recommendation from staff that the project will not impact historical sites. Proposed project includes grubbing, fill. And you say it does not involve any additional ground-altering activities. But wouldn't an installation of utilities, the water meter, and associated house-building footings be contrary to that statement?

Ms. McPherson: Yes, thank you for pointing that out to me. And what I'd like to do is strike that sentence. The archaeologist went there, and I told her that they would be doing an individual wastewater treatment system, but the thing is, is the fill was brought in and placed where the individual wastewater system is going to be going. Now, whether it's exactly enough and there will be no excavating going beneath the previous grade, I don't know that for a fact. But my understanding was because there was fill brought in and because that's going to be the location of the septic system that the impacts will be minimal. So that was my understanding, but I can strike that sentence, if you would like.

Mr. Sprinzel: Nancy, you have to dig a huge hole to put a – this stuff in. I mean, I've seen it on my own property. There's no way you're not gonna go below the – I mean, it must be what–eight to ten feet? So what I'm saying is I think somebody's got to expect it and be there while they do this work.

Ms. McPherson: Thank you for that clarification.

Ms. Buchanan: Chair, so either – after a motion is made and discussion ensues, if we could make an amendment to that no. 5, but I think it would help for the record if the applicant would for the record state so. Maybe we can bring the applicant, because you can explain to him in most of the special management areas on Molokai that have had a high density of historical and cultural use, we've asked that any grading, grubbing, or digging more than two feet that an archaeological monitor be present at the time of that action. And that would be a cost that you would have to incur, if there is any cost. And so I guess what we would wanna know is if you would be agreeable to that. And this is directed to the applicant: Mr. Greenman.

Mr. Greenman: Yes . . . (inaudible) . . .

Ms. Buchanan: Let the record reflect that Mr. Greenman has acknowledged that he would do that.

Chair Pescaia: Any more questions? I will entertain a motion.

Ms. Buchanan: Chair, if I might? I think the silence from myself is a simple reflection of my contemplation on being stuck between a rock and a hard place. And my own internal struggle with being – serving in this capacity for now eight years, and having seen this type of action over and over again is very frustrating. But we know we cannot take it out on the applicant because of ignorance. But, you know, they say ignorance of the law is not an excuse. And so while we want people to build homes on Molokai, and we welcome them, it's the silence from this Commission now in just pure not knowing, you know – being ecstatic enough to jump up and approve something.

So for myself, right now, to be honest, I think I just need time to reflect. I cannot make a motion at this time for myself, but if somebody else wants to do that – I don't know what I wanna do, honestly.

Mr. Bacon: I can make a motion to concur with the Department's recommendation with the idea that we do have somebody onsite which the owner's already agreed to. So whenever any excavation is being done under the two-foot of original grade that somebody will be there. And if that's agreed to, I don't have a real problem with it. And that if they have to do any more rock removal in terms of that driveway because it says it's a 15-foot section here, and he has a driveway that's 16 feet, then any of that work should be – anything that's been like that should have somebody there to see what's going on so that there's no hidden treasures in the rock wall and that sort of thing that could be destroyed.

Ms. Buchanan: I second that motion for discussion.

Chair Pescaia: Okay, motion made by Commissioner Bacon, second by Commissioner Buchanan.

Ms. Buchanan: Discussion, Chair, that following this meeting today that this Commission will either by e-mail or letter sent to the Planning Director Spence that our Planner, Nancy McPherson, be delegated to work with the Realtors to make them knowledgeable of the current rules and regulations within the special management area, and also to do that on an annual basis, and to also work in other problem areas, and to work with our Building Inspector, Anthony Fukuoka, to come out with an informational piece in the *Molokai Dispatch*.

And then this is a directive for the Department, the Planning Department, and that would be to either review or validate to this Commission, the process for which they use to determine the value of an action as opposed to a project valuation.

Chair Pescaia: Okay. Any further discussion?

Mr. Bacon: Chair, I agree with that in terms of, you know, what you were saying earlier to Mr. Alueta, you know, we're about the first stop anybody gets as far as like, wait, you can't do that. And we should be the last stop. We should be able to say, yes, you've done all the things that you should've done, and we approve what you're doing, or you've made a mistake and you haven't done this one thing out of a hundred. But for us to have to be the first rung on the ladder is not appropriate at all. And the Department needs to do a much better job of educating the public, and educating, certainly, the Realtors. I mean, I have a really hard time believing that a Realtor doesn't know that. And simply saying, I don't know that doesn't mean that they don't. And it's a situation that's really not good particularly, for Molokai. So I think the education part of it's very important. And I think the Department really has to get on board with that.

Mr. Sprinzel: I think we would ask you, Nancy, to make that – and, Clayton, to make that a priority, really, the newspaper and all these people. It's much more important than keep bringing these exemptions which we then say, no, you can't do that, otherwise, I agree with everything that's been said.

There being no further discussion, the motion was called for a vote.

It was moved by Mr. Bacon, seconded by Ms. Buchanan, then unanimously

VOTED: To concur with the Department's recommendation as discussed.

Chair Pescaia: Motion carried. Thank you, Mr. Greenman.

Ms. McPherson: Thank you, Commissioners.

Chair Pescaia: Our next order of business, we have Mr. Luigi Manera of Architectural Drafting Service, a consultant on behalf of the Sisters of the Sacred Hearts submitting an SMA assessment for their addition/renovation in the interim district consisting of a 600 square foot addition to a living area, and 90 square foot deck addition to an existing three-bedroom, one and a half bath, 960 square foot single family dwelling, and 360 square foot carport on a seven thousand-acre lot in Ranch Camp.

- b. MR. LUIGI MANERA of ARCHITECTURAL DRAFTING SERVICE, consultant, on behalf of the SISTERS OF THE SACRED HEARTS, submitting an SMA Assessment for the Sisters of the Sacred Heart addition/ renovation in the Interim District, consisting of a 600 sq. ft. addition to living area and 90 square foot deck addition to an existing 3 bedroom, 1.5 bath, 960 sq. ft. single family dwelling and 360 sq. ft. carport on a 7,094 sq. ft. lot in Ranch**

Camp Subdivision. Adding 3 bedrooms, 2 bathrooms, 1 den, 2 studies, new kitchen, new living room, storage, and new lanai. Minor excavation (max 18"-24") for 25 footings. TMK: 5-3-011: 050, Kaunakakai, Island of Molokai. (Valuation: \$85,000) (N. McPherson)

Ms. McPherson: Thank you, Chair Pescaia. Nancy McPherson, staff planner. Well, this one is a lot easier because it's in Ranch Camp, and that subdivision was created many years ago. We do know that right up above Ranch Camp, there are a lot of archaeological sites, and that there are recommendations that it be turned into an archaeological preserve, at least parts of it. And it's also single family residential in the Molokai Community Plan up above, even.

So this is for an existing dwelling. What is happening is that the Sisters of the Sacred Hearts are needing to renovate this house so that they can be more comfortable, and do their study, and their contemplation, and all of that sort of thing. And the desire is to add a study, and a den, and bathrooms, and bedrooms; expand the lanai area; and there will be 25 footings, minor excavations, a maximum of 18 to 24 inches for these footings.

Therefore we are recommending— Oh, I'm sorry. Yes, and the archaeologist from the State Historic Preservation has done site visits in Ranch Camp. And she – although I did not get a letter from her on this one, she did make a site visit. We did have a verbal conversation. And she said that the dwellings in Ranch Camp for additions/renovations would have no effect on historic properties. So that's the assurance that I'm going on here. We've had a lot of difficulty transmitting information to them, getting a response. It's been very challenging. I've spent numerous e-mails and done a lot of begging. I told her she could do four projects in one letter, if she wanted to, but she's doing the best she can. So we just are kinda gonna limp along here because it's Ranch Camp. If it was pretty much anywhere else on the island, I would insist on waiting, but because it's up there, I think we're gonna be okay with this one. So if you have any questions? Also, Mr. Manera is here to answer questions on the project.

Mr. Bacon: My only question was we're doubling the occupancy of this property, and I was wondering if that's something that the Sewer Department is aware of and approves of since it's gonna be more of a load for them.

Ms. McPherson: That would be a question for Mr. Manera. Is he still here?

Mr. Luigi Manera: Sorry. Luigi Manera. I'm sorry.

Mr. Bacon: No, the question was has the Sewer Department been made aware of the fact that this is going to double the residency at that residence. And is there a problem for them or they can accept that extra—?

Mr. Manera: Yeah, no, no. It's been reviewed by – it was reviewed already by the Wastewater Department on Maui. And there is no – they say no – there is no – based on three bedrooms, there is enough capacity for the existing sewer.

Mr. Bacon: But we have—

Mr. Manera: This is County.

Mr. Bacon: We're doubling—

Mr. Manera: Yeah, three to six.

Mr. Bacon: Okay, so this Sewer Department down here doesn't have a problem with that extra load?

Mr. Manera: No, no.

Mr. Bacon: I just wanted to make sure they were contacted because if later on somebody says, ay, nobody told us, then—

Mr. Manera: Oh no, no, no. It's been— Thank you.

Mr. Sprinzel: Just a question, Luigi, please. Isn't there a 15-foot setback from the property line?

Mr. Manera: From the front. Probably from the front.

Mr. Sprinzel: Six-foot on the sides is okay?

Mr. Manera: That's correct.

Mr. Sprinzel: Okay, thank you.

Mr. Manera: And ten feet if it was two-story. One story, six feet. Two-story, ten feet.

Chair Pescaia: Any other questions, Commissioners?

Ms. Buchanan: Just some comments on the recommendations by staff on item no. 5 again. Just pointing out on the record that the proposed project includes minor excavations, maximum 18 to 24 inches for 25 footings. And I just wanted to commend Mr. Manera because he's very much aware of our issue with digging for waste individual, wastewater, and also for footings and telephone poles, and all of that, too, that's in excess of 24 feet. And I'm glad that I can see that and not have to ask for that. So thank you very much.

Chair Pescaia: Okay. At this time, I'd like to open up public testimony on this agenda item. Alright, seeing none, testimony now closed. Is there any more questions? Ask them now, if not, I'll entertain a motion.

Mr. Sprinzel: Motion to accept the exemption.

Chair Pescaia: I have a motion by Commissioner Sprinzel to concur with the exemption and a second by Commissioner Davis. Discussion?

There being no further discussion, the motion was called for a vote.

It was moved by Mr. Sprinzel, seconded by Mr. Davis, then unanimously

VOTED: To concur with the exemption.

Chair Pescaia: Unanimously carried. Thank you. Motion passes. Congratulations, Sisters of the Sacred Heart on your new addition and renovation . . . (inaudible) . . . Alright. Item no. 2 under Communications, we have Mr. Joshua Stone, Chair of the Maui County Charter Commission. He submitted a memo asking for comments – asking for comments from the boards and commissions by the end of this month.

2. MR. JOSHUA STONE, Chair of the MAUI COUNTY CHARTER COMMISSION submitting a May 10, 2011-memo asking for comments from the boards and commissions by June 30, 2011. (Copy of memo was distributed with the May 25, 2011-agenda packet.)

Chair Pescaia: Does anyone have any comments they would like to—?

Ms. Buchanan: Refresh my memory, please, Chair. Was this the one that Joe Alueta did not finish? Did we defer?

Chair Pescaia: No, they're doing – they were revamping, yeah, the charter on all boards and commissions.

Ms. Buchanan: Yeah, no change our boundaries.

Mr. Yoshida: Yeah, this is the letter from Josh Stone, the Chair of the Maui County Charter Commission. They're reviewing this charter. The Commission reviews the charter once every ten years. They are asking the departments if they have any recommendations. They're asking all the County boards and commissions if they have any proposals. And they also will be going out to the community this summer to the various communities to see if they have any proposals for amendments to the charter. So this is an opportunity for the Molokai Planning Commission as a Body to propose any amendments to the charter. We did provide copies of the charter to you in your binder which we give to you at the beginning of your term. And it's also located online on the County website.

Mr. Sprinzel: Is this the charter which gives the Mayor the right to boot someone off the Commission if they don't turn up? No?

Mr. Hopper: Yeah, it's in here. The Mayor has to— Members of boards and commissions appointed by the Mayor with the approval of the Council may be removed for cause upon recommendation for such removal by the Mayor and approval of two-thirds of the entire membership of the Council.

Unidentified Speaker: . . . (inaudible) . . .

Mr. Hopper: Clayton would know, but I don't know if that's ever happened. It's almost always by resignation of the member.

Ms. Buchanan: Chair, for discussion, now, it rings a bell, I think for the charter, at the point where this Commission had trouble getting new Members on board and getting old Members that don't show up off. With the resignation – I mean, with the term expiration of Chair Chaikin and Commissioner Kalipi, I think I asked if they could serve in an interim capacity until such time the vacancies were filled. And the charter does not allow for that. So my recommendation to the charter would be to make an allowance in that type of situations to have existing Members serve in an interim capacity until that vacancy is filled. That's my recommendation.

Mr. Sprinzel: I would certainly second that.

Chair Pescaia: Not just serve in their own vacancy, but in any vacancy, right? I mean, because what happened – they actually – Commissioner Davis and Commissioner Dudoit actually filled Kalipi and Chaikin's seats to get the five-year term, right? But we already had Commissioner Leong's vacancy that was existing when they were still on, and we haven't filled that vacancy. So not just staying on until their replacements come on, but – and also serving to take another Commissioner's—

Ms. Buchanan: Commissioner Williams' vacancy.

Mr. Sprinzel: If it's the same as the Urban Design Review Board, if somebody fills in, they only do the unexpired portion of the five-year term.

Chair Pescaia: Right. So that's the existing vacancy now, right, is the remainder of Commissioner Leong's seat, right?

Mr. Yoshida: Yes, that's correct.

Chair Pescaia: Okay. Any other comments? Are there any objections to us formally recommending that? We have a . . . (inaudible) . . . but we can do it again. Yeah? Any other ideas, anybody? Any other suggestions? If not, I'd like to open up public testimony. If anyone out there has a shiny idea you think we should consider in regards to this agenda item? No? Okay. Seeing none, we'll close the public testimony on that. Okay, who drafts the letter?

Mr. Yoshida: We can draft the letter for the Chair's signature.

Chair Pescaia: Thank you. Right on. Anything else? No? Alright. We'll move on to item no. 3. Is she here? Okay. We have Ms. Kauila Hanchett of Ka Honua Momona who will be making an informal presentation on their project. We're gonna take a five-minute break so they can set up for their presentation.

(A recess was then taken at 1:12 p.m., and the meeting reconvened at 1:22 p.m.)

Chair Pescaia: I would like to call this meeting back to order and welcome Ms. Kauila Hanchett of Ka Honua Momona, who will be giving an informal presentation, and receive comments from the Commission, as well as this community, on her proposed Hale Mana Hooko, Hale Lillii, Hale Naauao project out at Alii Pond. Kauila?

- 3. MS. KAUILA HANCHETT of KA HONUA MOMONA, a DHHL lessee, requesting to make an informal presentation and receive comments from the Commission on the proposed Hale Mana Hooko (office), Hale Lillii (restrooms), Hale Naauao (traditional open-walled classroom), and misc. site improvements at Alii Pond, TMK: 5-4-00: 019, Island of Molokai.**

Ms. Kauila Hanchett: Welina me ke aloha, Commissioners. My name is Kauila Hanchett. For those of you I don't know, I was born and raised here. My parents are Mike and Carla Hanchett of Hoolehua. And I'm also a part of Ka Honua Momona's executive team. And

I'm here on behalf of Ka Honua Momona to present our Kauhale building project to the Commission.

Just a little background on who we are, we were founded in 2003, became a 501C3 nonprofit in 2004. We currently secured a 35-year lease. Prior, it was a five-year lease on Alii and Kalokoeli fish ponds from the Department of Hawaiian Home Lands. And our mission is to be a model of sustainability mauka a makai.

To put this project in a global context, what we're trying to do here is build our project as green as possible. And green building looks at several different areas: one is site selection; harmonizing your building with the landscape instead of dominating; energy efficiency; water usage and waste reduction; and selecting environmentally-preferable building materials. And when you look at the preferable building materials, there's a lot of different things to look at. Is it a renewable or nonrenewable resource? What does it take to get the product to some – where it's targeted to the build site? Embodied energy is how much energy it takes to take the raw material and create a finished product. So it can have a higher or lower embodied energy, indoor air quality and durability.

Why should we go green? I'll just say that the building and construction industry is one of the most wasteful and polluting industries in the United States and globally. And what that does is create an opportunity for us to make a big impact on sustainability by changing the way that we build our buildings.

A brief overview of our project, there are three different structures: our Hale Mana Hooko, our office and ohana area; our Hale Lillii, our restrooms; and our Hale Naauao, traditional classrooms without walls. And I'll go a little more in-depth on each of those components of the project.

For our Hale Mana Hooko, we kinda looked at the whole spectrum of what we could do to build our office, one end being doing a very quick container office, and the other end starting from scratch and getting all local materials. And because of time constraints and project, we kinda landed in the middle. And we found that we were able to meet our green goals, our budget, and our time goals by going with a green building company called Deltec. Deltec is located in North Carolina, and they're most well known for their round homes. We have several of them on-island. And they have amazing green properties for their structures.

We were – so part of the Deltec home is they use sustainably harvested lumber. Of course, the best lumber we could get would be coming right from Molokai. Unfortunately, I found that code does not allow you to use local building materials without putting a steel beam support down the center, which makes it more ornamental, and highly economically unfeasible. And I hope that is one area we can change.

A low or no VOCs, all products have VOCs or no VOCs. And that's just its toxicity level. It sets off gasses, these chemicals, during – especially when it's new, and then when the products start to deteriorate. And so the materials and resources used were low or no VOC. And we have a 95% recycled metal roof. And honu board is a new product I just found which is kinda exciting. It's a new green product just starting in the Hawaii market. It's been on the American market about three years, primarily, used in Asia. And you can submerge it in water for months with no impact on the board, and it's also completely nontoxic and harmless to the environment and human house.

Our energy efficiency, for passive cooling, we've incorporated vertical ventilation. And part of that was already built into our Deltec structure. They have a cupola at the top of their structure which is about six feet in diameter, and it helps to vent the attic. What we've done is connected it to the bottom of the structure to vent the whole building. And this technique was developed by Virginia MacDonald. She's a Hawaii architect. And it basically uses vents that are low, either on the floor or low on the wall, and then vents that are on the ceiling to suck air up from the bottom and out to the top creating a continuous vertical flow of air through the structure using only the sun's heat.

We also incorporated a radiant barrier which is a material you underlay the roof that reflects heat. And the metal roof also has reflective properties. And all of these things help to keep the structure cool. My goal was to avoid A.C. Myself and a couple of the ladies I work with can't stand being in an A.C. office. However, we do have a couple other people that need to be cool. And so I was trying to find a middle ground of being able to keep the structure cool, but needing to recognize those cooling systems. We also have a four-inch overhang which helps to shade wall, and again, helping to keep the structure cool.

Natural lighting, we have operable sky lights that will provide, along with our windows, all of the daytime lighting that we'll need for our structure.

And a round design, again, part of the Deltec is very energy-efficient. You're able to get an equal floor space with a lot less wall. I think about 15% less wall, so you have less transfer of heat into the building. So that's our first phase, our Deltec.

Second phase is our restroom, Hale Liilii. Again, we're gonna be using all local building materials as much as is allowable by code. We have natural lighting and ventilation, green materials and design, low flow shower and sink fixtures, and our grey water system. So all of the water that's coming out of our showers and sinks, we have two showers and two sinks in our restroom and a sink in our office, will go into this grey water system which will feed our subsurface irrigation and water our native plants. And so we'll be recycling our water.

The biggest choice that we made for our restroom is going with composting toilets. And for those of you that know Alii and Kalokoeli, this is located at Alii Pond, you know what a sensitive area we're in, culturally and environmentally. If you look at our water, it's about 45 inches below the surface. And this area that we're in is rich with moololelo and the water is a very special water. And we didn't want to mess with it. So the idea of putting a septic system on our site was simply unfeasible with the mission that we have. And we found that going with composting toilets allowed us to get away from that.

And what we hope to do is start changing the waste mentality. The term I like to use is "humanure." And it reclaims the fact that this is a natural cycle, and there are important nutrients in humanure that can be safely composted and returned to the earth as nature intended. We are going to be saving up to 36,000 gallons of water annually, eliminate sewage, and all of the environmental hazards that is connected with septic systems. Also, today's composting toilet is very user-friendly. We're gonna get one that has the foam flush. It uses three ounces of water per flush, but people can be comfortable. And it's odorless, easy to maintain, and gives you a valuable end product.

Our Hale Naauao is the actual hale which many of you are familiar with. And what I love about Hale is that the indigenous architecture of our kupuna incorporates a lot of the buzz words, but in the green movement. In fact, the ventilation, your vertical ventilation I spoke about earlier, was developed when the architect was standing in a hale and observing the mechanisms of the indigenous architecture. So it's natural ventilation, lighting, and cooling, and is ideal for our climate and conditions.

So in every aspect of this project, we've tried to really examine the choices we've made and do it pono. We have a beautiful partnership with another nonprofit, Ma Ka Hana Ka Ike, and their youth, which is a Hana Building Program, will be coming to Molokai to work with our youth in constructing our Deltec. And what I love about that is that it puts our youth at the cutting edge of the green building movement. And that's very inspiring.

They're bringing their solar truck. They have a truck with six solar panels mounted on the roof that will power our construction site. So our construction will be 100% solar. We're also using recycled and salvaged materials whenever possible working with stores like Reuse Hawaii and Restore, and getting things there, if it's available, and otherwise purchasing sustainable green materials new. We're putting in a solar system as funds become available, green water catchment, and also using native plants for all of our landscaping needs.

This is an insight or inspiration I had in working with this project, and it's what I call a formula for our future. And it's a formula I've used when making the decisions I've made on this project. And it's simply taking a personal choice, any choice that faces you, and you multiply it by every single person on this planet, and then you multiply that by a hundred

years and a thousand years. And if you can see the result of that one action, you begin to get an idea and a feeling for the kind of power that we have in the choices we make every day. And you begin to understand the kuleana that we have to future generations to change the way that we are doing things, and to do things in a greener and a more sustainable manner.

In closing, I wanted to share an olelo noeau by my kupuna which guides my life, and has guided this project. (Ms. Hanchett spoke in a Hawaiian translation of the following: "Care for the land as if you would your family, and in turn, the land shall care for us.") Mahalo.

Are there any questions from the Commissioners? Or I'm really hoping you guys would be willing to comment on the project, if not now, in writing. And all of these comments will be submitted to the Department of Hawaiian Home Lands.

Mr. Sprinzel: Brilliant. Could you take over all construction on Molokai?

Ms. Buchanan: Comment, Chair. I think anybody who knows me knows that I really short on comments. I just wanna commend you and your executive team for putting together a really nice . . . (inaudible). . . . It obviously took a lot of research. And it's really refreshing and awesome to see that the lessees of Hawaiian Home Lands actually being proactive and going the extra step to not only meet, but exceed expectations of the current building industry, planning, and the special management area. So I so proud of you guys for doing all this homework and kuleana. It just is outstanding. So it's really nice to see that this generation is taking over that kuleana because, you know, us old guys, we was worried. But fantastic job, Kauila. Please tell the rest of your team that we said so. And makakau.

Chair Pescaia: Nobody get questions for her? Anybody get questions for her?

Ms. Buchanan: No, but I asked her already if their team would be willing to help in other areas on Molokai to help the County and the State develop similar areas in one green way that they did. So they setting precedence. And they setting the bar really high for everybody else to follow. And if they can do it, everybody can do it.

Chair Pescaia: Absolutely. Can be done. Can be done. Oh, yeah, we support Ka Honua Momona, your mission, wonderful project, clearly well thought out, well researched, and we trust that you going turn around and help the next person do the same thing when the time comes. For the community, because it's a DHHL project, it's not under our purview, so we're not approving a permit, or they don't have to come before us. This was simply for our information, our participation. They're soliciting comments from us on a – what is that? On an informal basis. And I'm sure they'll welcome the community's comments as well, if you have anything. And if you're available, and you're driving by, and you see them in progress, don't hesitate to stop by and support them, help them out. They have a lot of

opportunities for the community to engage in the work because it's all of our fish ponds, and all of our ocean, and all of our aina that they are looking after. So mahalo, Ms. Hanchett, for your presentation and your time. If anything comes up following, we will forward any comments to you.

Ms. Buchanan: Chair, I think it would be nice for the Commissioners to write a short letter of support to the department that they should be encouraging more of these types of programs being proactive.

Chair Pescaia: Absolutely. To DHHL, you're saying, yeah? We can do that. Would that help?

Ms. Hanchett: Yes.

Chair Pescaia: Okay.

Ms. Hanchett: Thank you very much, Commissioners, for your time. Aloha.

Chair Pescaia: Aloha.

Unidentified Speaker: . . . (inaudible) . . .

Chair Pescaia: Can you come up to the mike, please? And following this testifier, yeah, if there's anyone else in the community who would like to offer a testimony on this item, please feel free.

Ms. Colette Machado: When we did the renovations for Kalaniani'ole Hall, it is DHHL, but we had to apply for an SMA permit. So this is on the coastal area. It abuts the shoreline. I believe that they would have to apply for some waiver if it is— So I don't know about that. So I just wanna let you know when we did the renovation, the building's been there a while, we had to apply for an SMA. We had assumed that we didn't need an SMA. We also had to get other permits that would require some of the changes we were providing for in the hall such as the upgrade on the bathroom, the waste management system, which they may not need. But I just wanted to lay that out that we not really sure if these things actually are exempt from the shoreline with the SMA. So I would just raise that as a concern. Maybe Nancy knows. The DHHL, you know, the first thing we did was call them up and find out if they could issue us a letter to waive the SMA, but that didn't work.

Chair Pescaia: Sorry. Can you just state your name for the record?

Ms. Machado: Colette Machado.

Ms. McPherson: Nancy McPherson, staff planner. Kauila came to me early on in the process, and we worked with DHHL with Todd Grey. And at first, they were telling them that they needed to apply for an SMA assessment and possibly a permit. And I had a lot of discussions with Todd and with Kauila. And in my reading of the act that created DHHL, in my reading of 205A, as well as a reading of the Hawaii Revised Statutes that handle Department of Hawaiian Home Lands, my interpretation was that we do not have – the County does not have jurisdiction over Hawaiian homestead land. Given that, Hawaiian Homesteads is actually responsible to be administering Chapter 205A on Hawaiian homestead land. Evidently, they don't have enough planners, and enough budget, and that sort of thing to do that. So it sounds like they've been starting to delegate to the County for building permits, requiring lessees to meet the County Building Code. And this was actually the first time that I have seen a DHHL lessee actually being told that they had to apply for a permit. I'm not sure. Clayton would know who handled the SMA permit for the Kalaniani'ole Hall Restoration.

Ms. Machado: . . . (inaudible) . . . I don't wanna be an obstacle here, but I just saying if you can get a letter that exempts them, right on, because you're gonna end up with . . . (inaudible) . . .

Ms. McPherson: Yeah, I mean, my understanding is that – I mean, my goal is to respect Chapter 205A, and also respect Hawaiian sovereignty. And so I advise them that they do not–

Chair Pescaia: This got nothing to do with it. But I do have a comment on this topic and that is, so you saying that the State of Hawaii, Department of Hawaiian Home Lands is understaffed and under budget to handle their kuleana that falls under their jurisdiction as far as building permits and so forth, and so they're pushing it on to the County, which is understaffed and under budget, and we have a whole other population of people whose permits are going slow because they're also handling DHHL load?

Ms. McPherson: Well, the bottom line is we don't have jurisdiction. So if we required them to get an SMA permit, and they had to come to this Commission, and conditions were put on that project, I really don't know how– and this is a question for Corp. Counsel also–I really don't know how we would enforce those conditions. But let me–

Ms. Machado: I just wanted to emphasize that Ka Honua Momona should be working with the Commissioners and the staff to get a letter of exemption. Until you receive that, it's only walaau and waha. Whether it's a 205A versus blah, blah, blah, blah, blah, you need to get that exemption letter to move forward so that you're free from all of the kinda conditions, shoreline setback, environmental, EIS. You folks all know what the rules are and all of that. But you need to get that from the Commission and from the Department of Hawaiian Homes. And I don't wanna confuse this as the issue with sovereignty. And that's

where I wanna correct Nancy. This is about issues relating to appropriate structural development along a shoreline, and especially, if it's abutting the fish pond. It needs to be environmental compliant, if it is required. And I do know that they are very sensitive about how they do the planning. You already know they gonna do all the sensitive issues, but they are still governed within the guidelines of the Department of Hawaiian Homes. That's all I'm simply saying. And I wanted to correct Nancy because I don't want people to get the misconception, the role of the Department of Hawaiian Homes. There are still rules and standards of practice that they abide by. And we are still upholding to environmental requirements. That is our kuleana as people, or residents, or citizens of this island whether we work through a planner like Nancy or anybody else like Todd Grey. If you can receive that based on what they reviewed, hey, more to you. But that's not going to be a standard rule. We have to work towards achieving those approvals. That's all I'm saying.

Ms. Hanchett: Aloha. Just to clarify— Mahalo nui for that manao. And you are absolutely correct in that normally Hawaiian Homes does require DHHL lessees to go through the normal County processes. They also do have the right to exempt themselves as they choose on a case-by-case basis. And that's what is happening here. We're not asking for any handouts. We have designed our project to be completely in compliance with the SMA regulation. I'm a hundred percent confident that if we end up going through the SMA process, there will be nothing that would hold us back from that. However, we are working with time lines with our grants and also with availability of the use from Hana that are coming over to construct our facility. And because of some of those considerations, and also wanting to set a good precedent for Hawaiians on Hawaiian homestead lands, we felt that this was the better route. But we are completely in compliant with whatever is the requirements to setbacks and whatnot for the area that we're in. But mahalo nui for that manao.

Chair Pescaia: Maikai. Anyone else? Okay. Mahalo again, Kauila, for your presentation. The Commission will now move on to agenda item E-1. This is an unfinished item: Nat and Anne Bacon requesting an SMA minor permit for a two-lot subdivision and installation of a septic system for an existing dwelling and enhancement of an existing water source. We have previously visited this agenda item back in March. Commissioner Bacon has recused himself as he is the applicant, and we still maintain quorum with five Commissioners here.

E. UNFINISHED BUSINESS

- 1. NAT and ANNE BACON requesting a Special Management Area Minor Permit for a 2-lot subdivision, installation of a septic system for existing dwelling and enhancement of an existing water source (Loiloa Spring) which includes installation of a 2.5 gallon per minute (GPM) solar powered water pump, a water storage tank, and water lines for**

property situated in the RU-0.5 Rural District at 8665 Kamehameha V Highway, TMK: 5-7-007: 028, Pukoo, Island of Molokai. (SMX 2010/0417) (Valuation: \$8,000) (N. McPherson) (Deferred from the March 23, 2011 meeting.)

Ms. McPherson: Aloha, Commissioners. Nancy McPherson, staff planner. We're bringing this item back because the Commission requested that there be some verification from the Department of Water Supply of the County of Maui that they had taken another look at this and had, based on current information, either affirmed or changed their position as far as being able to get a water meter and connect another lot to the Ualapue system. And that was submitted to you with your packets. That— In addition, I have had e-mail conversations with Charlie Ice of the Commission on Water Resources Management. And we had quite a long discussion about these issues. And the situation is that the aquifer was being over-drafted by ten percent for quite a while. And the State— Did you guys get the copy of the letter? Okay. I know I didn't get one either, so maybe what we should do then is make copies. Did everybody not get it in their packet? It would take us just a couple of minutes to make copies of the letter.

Unidentified Speaker: . . . (inaudible) . . .

Ms. McPherson: Okay. Basically what they said was they reaffirmed their original position that— I could read the letter. It's not very long.

Unidentified Speaker: . . . (inaudible) . . .

Ms. McPherson: Okay. And said they cannot assure a long term reliable source of water because of the situation with the Ualapue system. So that was what the Commission requested. I also again had a discussion with Charlie Ice. And the Department of Water Supply gets direction from the State Commission on Water Resources Management about the over-drafting of the aquifer, the pumping, etc., and whether or not that's sustainable. And they've been informed that the level that they've been pumping is not sustainable; therefore, they need to, you know, not offer new connections for new lots, evidently. So that was the information I got from the State that, yes, there is a serious situation. I think we all kinda know that already, but that the County's water systems, you know, they have been over-pumping their wells, and they need to stop doing that. And this is one of the repercussions of that. So that's the new information that we have, which really isn't new. But you did request that there be a verification from the County, and we did get that for you.

Ms. Buchanan: So the letter is from Charlie?

Ms. McPherson: No, Paul Meyer.

Ms. Buchanan: Okay. It's from the Deputy Director, then, County of Maui Water Supply. Okay. So – but we just approved a new building. It doesn't say – he's already stating in this letter that we're exceeding our pumping allocation, but yet we continuing to give out water meters to existing sites. Is – who's the new Director? This is the Deputy Director. Who's the Director from Water Supply? Jeff Eng?

Ms. McPherson: Dave Taylor.

Ms. Buchanan: Dave Taylor. Okay, so what is the County gonna do about this, an existing permit for building homes, if they're already over-pumping? Are they gonna put a moratorium on this like they did Upcountry, Maui, until we find another water source?

Ms. McPherson: That would be a question for the Department of Water Supply. I can't answer your question. I believe Nat's had some discussions with them, so if he wants to volunteer any of that information.

Ms. Buchanan: Can this Commission send a letter to the Director asking him what they plan to do?

Chair Pescaia: Well, in this letter it says they're reviewing alternatives, but they don't have any–

Ms. Buchanan: But they've been reviewing alternatives for the past ten years, and I've been a part of those meetings.

Chair Pescaia: Right, so, do you expect any different answer from them?

Ms. Buchanan: Well, yeah. Maybe we need one moratorium on buildings until we do have another water source.

Chair Pescaia: Okay. Is that the will of this Commission that we draft a letter and send it to the Director of the Department of Water Supply inquiring to the Ualapue area status, and their water source, and a future management plan?

Ms. Buchanan: Can we extend that to not only the Ualapue aquifer, but to all the systems that the County now operates because–?

Chair Pescaia: On the entire island?

Ms. Buchanan: Yeah, 'cause my understanding is that that applies to the other current conditions in Kualapuu as well.

Chair Pescaia: So noted. Any other Commissioners have thoughts on this or do you all agree? Yes? No? Gonna be helpful? Yes? No?

Ms. Buchanan: I'd like to know what the Public Utilities Commission thinks about this.

Mr. Sprinzel: It's a little bit vague because they say, "We are under a pumping allocation for this well." Now is it this well that exceeded by 10 percent? In which case, it's only there. If the others aren't exceeded, then what do you propose would really be affected? Well, it would be affected, but it wouldn't be necessary.

Ms. McPherson: This letter is only addressing the Ualapue system, but in my conversations with Charlie Ice and with the information that was coming out of the USGS when we were doing the water working group, it's all the County's systems. And we were having salinity spikes. So that's kinda what triggered all of this.

Mr. Sprinzel: And meanwhile, all the water runs down into the ocean.

Ms. Buchanan: Okay, so, Chair, what are we doing? Is this just for informational purposes? Or under Unfinished Business, are you actually acting on something?

Ms. McPherson: Well, we still have an SMA minor permit that needs to be either approved, approved with conditions, or denied. And Nat's here and he has a statement. And if we wanna let him say his peace, then I think we should let him do that. And then you'll have to either defer or make a decision.

Mr. Bacon: Okay. I'm Nat Bacon, and I just wanna read this because I'm not a good public speaker, anyway. Okay.

As stated before, we'd like to create a two-lot subdivision so we can build an ADA compliant home in the lower portion of our property. The subdivision is necessary for us to be able to afford to build this other house down below. We plan to sell the existing home with a new septic system and use the proceeds to build an off-the-grid ADA home that would be self-sufficient. It will be all solar-powered, and we'll utilize the fresh water from the spring just as the Duvauchelles had done long before the County water lines were ever put in. We hope to demonstrate that we can live off the land, much as we just had the previous discussion, and using the natural resources that are available to us. And they're currently not being used as a productive source, so we'd like to be able to do that.

Since the domestic water source is required for a second lot, we tried to get the water meter, but the County was not able to give us one since they're

already drawing down their pumping allocation by 10 percent. It was the County's direction that we submitted a request to the State Commission on Water Resource Management, which is the authority over all fresh water usage in Hawaii—ground water, as well as surface water for a stream divergent works permit. This Commission subsequently issued a permit to withdraw up to a thousand gallons per day from the spring basin located on our property, which is known as the Loiloa Spring.

Now, this permit allows us to withdraw up to a thousand gallons a day for household, and garden, and orchard irrigation. Our actual household needs, which . . . (inaudible) . . . were two hundred gallons a day. The greater amount of up to the thousand gallons is what we anticipate the overall use might be during the summer dry spells when we would need to irrigate a lot more.

The pumped water would be held in a three thousand-gallon storage tank until it's used. So if there was a problem with the flow in the water in the spring, or a pump failure, or some other extenuating circumstance, we would have at least two weeks to sort things out, and bring water in by truck, or however else we can get it as necessary as a temporary measure.

The two-lot subdivision meets all the State, County, and community plan regulation requirements and guidelines. We plan to redevelop the spring-fed pond and farm prawns, watercress, and taro. Previously, up until the '50s, it was farmed for watercress and mullet. And the windmill, which was actually earlier, the windmill stopped working in about 1920 or thereabouts. I'm not sure exactly when, but earlier on. And the windmill pumped water, a portion of the water, from the spring up the hill to a cistern, and it fed the domestic and garden use for the Duvauchelles next door.

The septic system is designed for the existing house. It will be constructed in the area that we pointed out earlier on the plot plan. The new septic system is a condition of the final approval of the two-lot subdivision by the Department of Public Works. And because the County is not issuing water meters which is from a groundwater source, we wanted to do the surface water route, which is available on the property. And so we went to the State and went through that whole process and got the permits from there.

Any questions?

Ms. Buchanan: No, but just to clarify, so we're being asked to act on the Unfinished Business of the SMA minor permit for Nat and Anne Bacon. Is that correct?

Ms. McPherson: That's correct. Yes, and I would like to add that also in my discussions with Charlie Ice, I went over the site inspection report from 1999. That was kindly given to us the last time this was heard at the Molokai Planning Commission. And I looked at the recommendations that were in that report and I talked – I told Charlie, well, you know, wouldn't that be a really good thing to do to be actually locating, identifying, evaluating the springs on the east end, and getting some data, and figuring out how to take better care of them? And we all realize a lot of them are on private land. But he said that he would try to look for some money to do something like that. But again, it could take several years, and there's no guarantee that he'll be able to find the money. But I did at least get him to say that much that he thinks it's worthy of study. They're very significant cultural and natural resources, and that if he can, and if we all keep pestering him, maybe he'll be able to get something funded.

Ms. Buchanan: Chair, question for staff. So other than this letter from Deputy Director Meyer, the information on this application is still the same? Is that correct?

Ms. McPherson: Yes.

Ms. Buchanan: Okay. Chair, maybe you can take public testimony.

Chair Pescaia: We shall entertain public testimony on this agenda item.

Ms. Machado: I'm the– I'm Colette Machado. I'm the neighbor on the makai side of this project. You know, I think during that Green application at Kaluaaha, I think I saw a different perspective from government regulating the issuance of water permits. I believe that Commissioner Buchanan began to look at that. Mr. Green was issued– He built a house there, and he hasn't gotten the SMA application, but he was issued a water permit to get water for his new house. And what was getting clearer was that those that have an application as a new application for a water permit, they may be – well, it's obvious that they will be able to receive that request from the Water Department.

So I think that a moratorium is really critical. It's either you not gonna be able to issue any permits, or you gonna make exceptions to those that are new applicants for water permits. In this case, Mr. Bacon is actually subdividing his lot, and attempting to sell, and consolidate, and move to the bottom. He made that very clear. But at this level with the Planning Commission, the Water Commission has – he's applied to – for a permit to – I don't know if the word is to "utilize" that spring. And I think that's the one that actually had raised a lot of issues because it's an amendment to the particular use of the spring for home use and what they call domestic use. There are some major concerns about the long term impact of that three thousand gallons in a storage or being able to withdraw what is – appears to be minimal. But still, there is inadequate data that perhaps was not provided for by the Water Commission. When we gathered in the month of March, I believe that the

Commissioners raised the bar again on what would be appropriate information that could satisfy whether or not it is appropriate to amend the spring use and go through another process with another agency at – in Honolulu.

So long story, short, you made a decision in March that appeared to be non-favorable for this application, but yet it became a deferred for additional information to research. So today, you're back to the same question whether or not the SMA could be provided to the applicant, and whether or not your questions that you raised, if there was adequate information.

I think that if Nancy had a long discussion with Charlie Ice, and this is not part of the County's responsibility, it's part of the CWRM, the Commission on Water Resource Management, we should've been able to receive a little bit more verification on just exactly— I'm not sure if Mr. Bacon's permit has been terminated because there was a specific timetable that he had to respond to before he would've lost it, and whether or not there are others on this island that actually had received permission from the Water Commission to do this kind of work outside of watering for agriculture, but to use for domestic and home consumption. I think we're leading into a whole new arena of a permitted use by asking for an exemption for the purpose of using a well for this purpose. Although this might seem to be reasonably okay on behalf of the Commission on Water Resource Management, but it's a dual system which I feel is unfair that new applicants that are building new homes are actually being approved with their water permit.

I have information that says that the water from the Ualapue aquifer actually has a sustainable yield of eight million gallons per day. Shouldn't you have gotten information that actually gave you readings on what is being utilized on a monthly basis, quarterly basis, which is monitored by our Water Department? Eight million gallons seem to be substantial, and whether or not two to three hundred homes on the east end actually utilize all of this. Like whether or not we are over the 10 percent. So some of that information should've been provided so as not to put the real burden on Mr. Bacon to provide.

And I also felt that very strongly that if the planner spent a lot of time on the telephone with Charlie Ice, another planner, there should've been some sense of laying out a timetable if and when the permit would be approved for Mr. Bacon to move forward with his application. It may appear that he has received the permit. That's what I recall. But what's holding it up is the SMA. So it's like whoo. It's like juggling.

You know when I came to the Commission, I was vehemently against the process because we weren't informed and the fact that we care for the ditch along the roadway. So I was concerned about proper notification or working with him as a neighbor. And then now when I'm looking at how unfair things are at the County level, and with the lack of information, eight million gallons per day is what the Ualapue aquifer provides. Eight million gallons.

Does that go to how many users? And whether or not he – that side should be limited to a 10 percent that they said we're already over at 10 percent.

So this is kind of stuff that the Planning Commission never gets all of this current information. That's why you fight all the time to raise the bar to go on the record. But now we're getting into a really crunch and critical time with water. The Department of Water should be able to provide you folks at least information that could make appropriate decisions.

So I would have to say that I'm concerned that Mr. Nate Bacon has already received his approval from the Commission on Water Resource to utilize the spring. And what's holding it up is here at the SMA level. We have not received new data so that's inconsistent. But alarming is that at the municipal level that the Department of Water Supply is not working with the State to provide you with the kind of decision you need on whether or not he would be eligible to receive a second water permit application for the lower half of his property. And that should've been something that could've been negotiated and if that was possible. Now, I'm just rambling.

So my husband tells me don't speak against it. He's concerned that– But I have to say from inside my naau, I am opposed to the use of the spring for the purpose of – for domestic use and the retaining of a three thousand-gallon tank for the home use of the next dwelling that they want to build. You know, a lot of times people buy homes not knowing they subdivide on the east end because that's what they call a desirable area to live. I was happy when Nat and his wife, Anne, purchased that property because it had gone through many hands, and it was originally held by Zelly Duvauchelle. And to hear that they now are looking at subdividing so that they can sell the upper portion and live on the bottom, I really regret that I have to say that that's not a good enough reason. That's speculative at the economic level. But that's just my naau telling me that. So I just would like to say and apologize to the Bacon Family, but when you move to the east end, and he got a beautiful lot with a magnificent view, and then because of certain reasons, you want to subdivide and utilize the spring to allow you to build another home on the bottom, I just have a hard time with that. And I'm speaking purely as a neighbor and as someone that has a big heart. I cannot hide behind being a good neighbor when I truly feel this is not pono. So I would like to speak against his application for – to use the spring. It's just not pono to take spring water and to be utilized and stored to use as a household commodity in your home, and to be regulated in that way. But I would be pissed off with the Planning Department and the lack of information that you did not receive from the Commission on Water Resource as to the status of his permit. And also – because he's gonna be beholding to them on the regulating part, which is minimal. And then also with the Water Department for not providing you folks with reports that actually can demonstrate overuse by 10 percent. Eight million gallons of water from the Ualapue aquifer, that's something that I think you folks deserve to receive as information to make your decisions.

So, eh, Nate, you know, last time I was wish-wash. Today, I speak opposed to this application. Thank you.

Chair Pescaia: Commissioners, you have questions for the testifier? Seeing none, mahalo. Anyone else? Okay, Mr. Bacon.

Mr. Bacon: I kind of resent being called a speculator, because that's not my intention at all. I don't want to leave my neighborhood. We love Pukoo. And the only way we see we can do that because we've just gone through this process with my in-laws, who can't even come up to the house, is we've got to build down below where we can have complete access, ADA access is what we're looking at, so we can live out our lives there. I mean, we bought this place fully understanding that they were taking us out in a pine box, and that was gonna be it. Yeah, we were naive, but we weren't speculative. This is our home. And I bought this property from Zelly. And I talked to her. And she came way down on the price because she knew us. And their intention from the very beginning was to utilize the spring water for a residence and a school. They were gonna do some schooling work and stuff like that, and aquaculture, and renewing the farm, which is something that we wanted to do. It's not a new process at all. You go out anything Wailua and beyond that's in the valley, all we're looking – we're not looking for groundwater, we're looking for surface water. And that's what we're doing. We've applied for a surface water diversion and lots of people are already doing that. Lots of people already have wells, which is ground water, but lots of people have permits and are using – you know, Huliwai, and up in Wailua, those people are all on surface water. So it's not a new process. It's sometimes that was done historically before. The Duvauchelles at the windmill, they pumped it up to the cistern, which was a ten thousand – no, a seven thousand-gallon cistern, and they used that for watering their gardens and supplying their home.

So the best use for this water rather than just running out in the ocean and it's not going anywhere that's being used usefully is supporting the wildlife and everything. And we're only taking out a little bit. I mean, it's not like we're taking all the water out. I mean, that almost what it sounds like, but we're taking out a very small amount, like less than 1 percent. And that's all we want. And that's what we need to maintain a house because I can't get a water meter. And earlier on, when I did ask about a water meter, they said, "Well, if you're building a second home, you know, it's on the – you can get two water meters for a lot, if you're building a second home, but you can't use that to subdivide." And if I was rich, I could do that, but I'm not rich. I have to be able to sell that house up there so I can afford to build down below. And that hurts because we're gonna miss a great view. I mean, we have a wonderful view up there. And it's very peaceful. It's very nice, and everything. We like our neighbors. We get along with our neighbors. We want to stay there, and this is the only way financially, we can afford to do that.

And I went through the process. I went to the authority on fresh water systems which is the State Water Use Commission, and pleaded my case, and they said okay. They went through the history of it, and they said that's fine, you know, you can do that. And the permit is still good. So, anyway, that's my case. Take it or leave it.

Chair Pescaia: Okay. Anyone else in the community, in the public, wants to offer testimony on this agenda item?

Mr. Myron Akutagawa: Myron Akutagawa. I've been to Colette. Gee, I just found out she went oppose me. That's okay. Everybody, you know, it's not like the old days where you oppose the husband and the husband lock up the wife and that was legal.

But we working over there, constantly, doing the field. About 20 years ago, they was all grown up. You know what I mean? So we had clear 'em up. The house wasn't there, you know. So there was a pine tree blocking the view. So I said, eh, I going cut 'em down because it was a pest. All of a sudden, one of the tenants was there. I forgot her name. After a while, she end up Kauai. Maybe you remember her name. Okay? She told me, "Thank you for cutting that tree. Now, I have a view." So all that went play into place. And with that, I think the value of that property went double again. You know what I mean? I don't know. Maybe if I was a nasty guy, I just plant the same tree again because the pine trees grow up like – within 20 years, it gets – nobody get view. The value go back down.

But anyway just saying that for me, as a neighbor, we have to kinda agree to certain things. And when us, as local born, see somebody comes into the property—I understand my wife right now—and then subdivide it, and then it was like, gee, I mean, you came over here, you bought a beautiful place, and then all of a sudden, you wanna make money off of that place. But we not the only guys that has to be educated. Where I'm from, Kamilo, one time this guy had kuleana land, and I live in one lane where . . . (inaudible) . . . stay, he came down there, brought the map, and he said, "Oh," and this is one local guy, said, "My family went own land behind here some place. You think you can show us?" I pinpoint where my land stay. Went down about 20 yards. I say, "Your land is right about here, up there, you know, mauka side." Took my picture. And then within six months, I saw one paper on top there guaranteeing title, I guess, you know, for all the descendants. And then it was up for sale. I mean, so we get our own Hawaiian people selling their land, and telling us they love the land, you know, at the same time. So – and now we get one house over there. Hopefully, always going get one good neighbor. We always pray for good neighbors.

Long story, short, maybe this – this the problem with guys coming off-island and within our own people that they come over here, they say we love to live over here, let's subdivide, and then, of course, everybody going look at him. Gee, now they like money off the land whether trying to make families over here and being part of the population.

All of us guys grew up on Molokai. Some people grew up on plantations. You know, they came over here from the time – but they love this place, and then acquired the land up Kualapuu, especially. And then we understand that concept. We no like say as Hawaiians, oh, that was our land, get out. No, you welcome over there. You come over here, you love our island, you part of the community. That's what we like tell them. That is in our heart. And then right now, my wife just – you know. But that's how we look at people who just subdivide their land. That's just the way of life. I wish we can put laws and saying, you come over here, you say you love this place, why you guys trying to subdivide the land? Not unless the tax go up so great that–

My mother, across Kilohana, she went subdivide the land for her sons, and that's they way it supposed to be. And right now, the sons, she putting one stipulation–this goes to her family. If you cannot find somebody within our family, we gotta go to her sister's family, and sell it to them, and that – try make that stipulation also. And that is from one kupuna who like make sure that the land stays within the family because far too long, far too much, we see our cousins lose their land, and they get nothing. So with that, I don't know if I went help you guys make the decision, but I like go on record saying us, as local people, see that, and we become I think righteously, judgmental against these people. So I telling this Commission, that's what we see all the time–people coming in, stay little while, and make one house.

Another thing I see a lot of is they come. They buy raw land. They make one house, then they sell 'em. Keep the land raw. If you not going live over there, keep it green. No let it go for one house where you block one fish pond, obstruct one fish pond, obstruct everything. Make it so you buy the house, you live inside, and you create one legacy as a good person, or whatever you going build on whatever on Molokai, you know. So we can live with each other if you live like that. Okay? So with that, thank you. Thank you, everybody.

Chair Pescaia: Any questions for the testifier? Seeing none. Is there anyone–? Thank you. Is there anyone else wanting to offer testimony on this agenda item? Seeing none, public testimony is closed. Commissioners, any further questions, comments? Any clarification?

Ms. Buchanan: I'm assuming if you going call for one motion that Commissioner Bacon is recusing himself. Okay. So only get five of us.

Chair Pescaia: Yes.

Ms. Buchanan: And I don't know if this is helpful or not, but in view of the new information, this Commissioner does not have a change of mind based on my memory now because – but kind of – I didn't know we was going actually – I thought was just information we was

getting. But I think it's fresh in my mind that I still remember the reasons I gave for not voting in favor of a positive motion on Commissioner Bacon's behalf. I don't have a change of heart. I think all my reasonings, it will still be the same. So I think you can still call for one motion, but I will be voting in the negative based on earlier testimony I gave which my issue is with the Commission on Water Working Resources, and data that is 13 years old, and data that was questionable to begin with. I don't think the Commission— So I'm in direct disagreement with the Commission's findings. And I don't think they should be issuing said permits based on questionable data. That's where my big problem lies.

And I said earlier in the day that I think serving this County in this kind of capacity for about eight years, and I've never – this is precedent-setting. So in the sense that this is precedent-setting, I think we should be very careful to think about the fact that if we grant this SMA minor permit, we basically giving them the okay to draw this water. I no really care what the Commission on Water Working Resources says, but I do care what this Commission says. And I cannot do that in all good heart knowing that my action going set a precedence where the next person who might have the same available water resource on his property can do the same thing, and it would be real easy for him, because it's based on what I believe is erroneous information.

Mr. Sprinzel: Can I ask, Lori, is your only objection to this the fact that we don't have the information on the – current information on the well, on the spring?

Ms. Buchanan: Like I stated, the problem is the Commission giving out water use permits that is not based on real scientific data to ensure me that there will not be a cumulative adverse impact in the future from this water withdrawal. And I think it's dangerous that you can set a precedent by simply coming to this Commission and being able to set up a pump that you can just throw in the ground and start drawing water. I mean, what's to stop everybody from doing that? There is a cumulative impact and this is precedent-setting. So I cannot do that.

Mr. Sprinzel: So why don't we postpone it, defer it, whatever, until we get current information from the Resources' people?

Chair Pescaia: Because we've asked for it and that letter is what we got.

Mr. Sprinzel: No, that letter is sent to Nat. They didn't reply to us.

Unidentified Speaker: . . . (inaudible) . . .

Mr. Sprinzel: I would make the motion to defer it, and that we ask for the information on this particular spring.

Mr. Ron Davis: I'll second that motion.

Chair Pescaia: Okay, so we have a motion by Commissioner Bacon, second by Commissioner Davis. Discussion, what exactly are we asking for? I mean, what is your motion tied to?

Mr. Sprinzel: Exactly what Lori wanted to know—some up-to-date information on this particular spring and what effect it will have.

Mr. Davis: Madam Chairman, not only the spring, but also based on the comments that I heard Colette Machado make on the eight million gallons a day. Maybe if we get correct information, there may be a possibility that he can get another meter, which would make this spring issue go away.

Mr. Sprinzel: Absolutely. Yes, both things. I mean, they haven't responded to us. And after all, we're the ones making the decision. I think we should get that information.

Chair Pescaia: Nancy, have you on behalf of the Department or the Commission requested this information from either of these entities?

Ms. McPherson: The way we were handling it was that Nat was – Nat's understanding was that he was to try to get confirmation from the Department of Water Supply for the County. And then I made inquiries based on a review of the information that was connected with CWRM, water stream – service water diversion permit. And this was not done in a formal way. So if you'd like it done formally, and you want the Department to write a letter on behalf of the Commission requesting both from the Department of Water Supply specific information about the sustainable yield of the Ualapue system, the actual usage, current usage numbers for gallons per day, how many users of that that are connected to that system. And then, you know, basically, you want the data, the specific data for the Ualapue system, and then as well from the Commission on Water Resource Management. I'm assuming something in writing defending their granting of the permit based on testing data from 1999? Would that be adequate?

Chair Pescaia: Yes. I think two more things. And also adding to – what is the projected build-out, because it seems like they will give a meter if there is already an existing lot for a new construction. If you have an existing lot, they will give – they will award a meter which is what Greenman had. But if you're gonna create a second – create a new lot, those, they are not approving. So how many undeveloped lots are there in that area on that system that they also have to account for or guarantee, because it looks like they would give them a meter. So they need to, you know, account for that in their calculations.

And then the second thing is the data from 1999 is from the lower part of the ditch and not from the spring itself? We don't have any data of the spring itself except for Mr. Bacon's self attempts to kind of gather that. So I think we're looking for a clarification. How can they propose an adequate yield, a sustainable yield, and put in these figures if they don't have any data from the spring itself?

And I guess further on is any other case related to the environmental impacts of changing even a little – well, he's considering a little bit of that water. Is there any other examples of a similar action and what that has resulted in even on the east end or other islands in a similar situation? Because really, we're talking about something that could potentially ruin an ecosystem. And yes, people did think 50 years ago, but things were different back then, drastically different. And so there's a lot of things that have changed. We gotta not really look at – we gotta look at what's existing now and what our proposed actions can have on the existing current situation. So I think we need current information: what's going on in there, what's in that ditch, what is this water – how it may change. You're looking at the aquifer which also feeds the – I'm not sure where the spring water comes from, but if we're having salinity spikes in the area, I gotta believe that we're all drinking from the same bowl. The water coming out is from the same place somehow. So we just gotta be really careful of everything we do. And I don't want to set precedence. I want this to be, if we do go forward on this, it's something that we all can feel good about, stand by, and we can use it for future situations.

Ms. McPherson: Okay, I think I have information to draft two letters on your behalf asking for more information from the Department of Water Supply, as well as the Commission on Water Resources Management. And there's an old saying in the West, "Whiskey is for drinking and water is for fighting." And one of the things is that it gets very political. I think that's why it's so difficult to get these agencies to put something in writing along these lines because they know they can get attacked for it either way. So I will make another attempt to get that specific information, to get better and more current data.

Ms. Buchanan: Madam Chair, well, the last time, I thought they worked for us. But during the Water Use Development Plan meetings which just fell out of – I don't know what happened to those Water Use Development meetings, but they were collecting really great data at that time. This was what? Two years ago, yeah? I mean, you know, Nancy. We sat through all those meetings. But I think they have the data. I think they just have to release it to us. Because the best scenario for Mr. Bacon is to get a meter. And so besides just saying they cannot guarantee a new meter, what we asking them is the data they use to come to this conclusion. That's what we asking them for.

Ms. McPherson: Yeah, I was gonna mention that the Water Use and Development Plan was chugging along until Ellen Kraftsow left. And the last I heard, they had bumped the Molokai section to the end of the line, and that they were going to do all of the Maui ones

first. And so if you'd like in your letter to say we would also really like the Department of Water Supply to prioritize the Molokai section of the Water Use and Development Plan, I can throw that in there, if you'd like.

Mr. Hopper: Could I make a comment? At this point, we're looking at data that would be used in determining the SMA permit, and whether or not it would meet or not meet the standards and criteria under HRS 205A. There's a list of criteria. It does include coastal ecosystems. It does include dealing with stream diversions. So there are some information but— And you can certainly ask for information from the Department, but sending a letter asking, you know, for something to be prioritized over others as part of an application, I'm not sure if that's ever been done or is appropriate. And I would just say that all the information coming in should be used to determine under HRS 205 if this meets the criteria or does not, required for an SMA permit in this case. And if it does, then you could — you may approve it, if you find it meets the criteria. If it does not meet the criteria, then you say that — then you can deny the permit or you can condition the permit. But I just wanted to make that clear again that all the information needs to be tied to the goals, objectives, and policies of HRS 205A. And there's a long list of what they are, and they can be reviewed. And I would recommend if this is deferred, before the next time it comes up that we take another look at those, and whenever there's a vote taken, be sure that it's based on those standards and criteria at that point. So that's just my thoughts on the discussion and the permit.

Mr. Sprinzel: Nancy, if you — in my experience over many, many years of dealing with government departments, if you write a letter and widen the inquiry, they're gonna dodge whatever it is they wanna dodge. Ask a very simple question, which refers to what we need, and don't go wandering off about prioritizing and that. That's my personal recommendation.

Ms. McPherson: Well, Commissioner Sprinzel, I think the challenge is that they don't wanna release that information until they've updated the Water Use and Development Plan. That's my incite into the situation. And if that's gonna be—

Mr. Sprinzel: You and I know that that information is on a computer in their office, and they can get it in 30 seconds, if they had a mind to. I guess it's how we ask the question.

Chair Pescaia: Okay, we have a motion on the floor. Is there any further discussion? Or are we doing a—? So everybody is in agreement to submit this letter, right?

Mr. Sprinzel: And not to defer it to the next meeting, but to defer it till we get some answers.

Chair Pescaia: Defer it till we get a response.

Ms. Buchanan: Discussion. I can be agreeable to that because I've already stated for the record that I do find that it does not meet the criteria of 205A in its current application. So that is my stance. So I am willing to vote in the affirmative of a deferment in lieu of obviously, yeah, denying the application.

Chair Pescaia: Any further discussion? So the motion as it stands is to defer until comments are received or a response is received by both Departments on these two separate issues that we will address in a letter that staff planner or staff will draft, and we will send out. Okay. Right? Clear? Everybody's clear? Alright.

There being no further discussion, the motion was put to a vote.

It was moved by Mr. Sprinzel, seconded by Mr. Davis, then unanimously

VOTED: To defer until comments or a response is received by both Departments on the two separate issues that will be addressed in a letter drafted by staff and sent out.

Chair Pescaia: Motion is carried unanimously. This item is deferred until we receive comments and the pertinent information that we can make a better decision. Thank you, Planner McPherson, and Mr. Bacon. The Commission will now take a five-minute break as our next presenter makes her way here, unless you folks want to move on to Chairperson's Report and the Director's Report. She coming. Never mind, we'll continue with the Chairperson's Report.

First, I'd like to have clarification on the letter for the water supply status on Molokai because at first we're talking – this particular letter is specific to the last case. Do we want to ask for information for the whole—? That came up earlier, but I wasn't sure what we decided, really.

Unidentified Speaker: . . . (inaudible) . . .

Chair Pescaia: Okay, we go wait till later. We'll wait on that one. The discussion was receiving information on the entire island status. Sending a letter out not just for Ualapue, but—

Ms. Buchanan: Okay, no, let's not bite off more than we can chew right now. Let's just take care of Nat's application.

Ms. McPherson: Yeah, I would take Commissioner Sprinzel's advice, and maybe think about it a little bit more, and maybe draft a third letter eventually saying we want more

information on the overall water situation, and we also want to know about the scheduling of the Molokai portion of the Water Use and Development Plan.

Chair Pescaia: Okay, sounds good.

(Mr. Bacon then rejoined the meeting in his capacity as a Commission Member.)

G. CHAIRPERSON'S REPORT

1. Status of the Commission's Subcommittee on Rule Changes Report

- a. Rules of Practice and Procedure**
- b. Special Management Rules**
- c. Rules Regarding Special Uses in the State Agricultural and Rural Districts**
- d. Shoreline Area Rules**

Chair Pescaia: Okay, next, status of the Commission's subcommittee on rule changes report, how do you all feel about that? We are on the Chairperson's Report, technically, item no. 1.

Ms. McPherson: I can give you a little bit of information about what we've been doing within the Department. We have an environmental planners group that mainly focus on coastal zone management, shoreline, and environmental review. And I'm a part of that group, and we have been going over the Molokai SMA and shoreline rules. And we're going to – actually, there was a meeting yesterday, but I missed it because I don't have call-waiting on my phone, and people kept calling me, and so the people who wanted to call me from the Department couldn't get through. But anyway, I think I'm gonna meet with them and talk story a little bit tomorrow afternoon. And so what the Department's gonna be doing is reviewing recommended changes also, and then correct me if I'm wrong, Clayton or Mike, but my understanding is then those – are those gonna be brought back to the Commission or not? I'm not sure.

Mr. Yoshida: I think the comments will be run past the Planning Director and Deputy Director. And then we'll be transmitting the Department's comments to the – on the proposed draft rules to the Molokai Planning Commission for their consideration. But we are reviewing all four sets of rules. So we had a lengthy discussion the past previous two Fridays about all of these rules.

Chair Pescaia: Commissioners, any comments?

Ms. Buchanan: My only recollection was the very quick departing comments by outgoing Chair Chaikin, along with our Corp. Counsel. And I know I needed maybe another meeting time when Chair Chaikin and Kalipi could come back along with the assistance from Corp. Counsel to go over the four – the draft rules that was done right before they left. I don't think – I know for myself, I never absorb those changes in my head because was really quickly. We went through them very quickly, yeah? And in the meantime, concurrently, they're working on it and sending it out for comments and stuff. I don't think we had a chance to comment on our rule changes from our own Subcommittee. I think I asked that Chair Chaikin come back and we dedicate a chunk of time during Planning Commission meeting to go over those again. That's my recollection.

Mr. Hopper: Just my advice. I know Planning's gonna have its comments, and you should definitely see what its comments on those changes are, but it's gonna be almost impossible for anybody to look at the rules during a meeting, and have a presentation, and be able to get everything at that meeting. So I'd recommend – you know, we have the draft available, if you'd want them. I could e-mail it to you, and you could look over the rules before the meeting and read each section, because if it was like one or two changes maybe in a meeting, we could actually go over it, but you'd be getting highlights. But you're right, it's very difficult to get the substance of everything in a meeting when you're talking about rewriting rules, adding amendments, in some cases, putting in entire new sections. So really to get a flow for it, you would need to read it separately from the meeting, I would think. And I mean, I can certainly answer questions. If we need to go to other – Steve Chaikin. But when the Department comes in and has its own set of comments, it would be another set, we can go with that, and maybe incorporate them all into one document, and go from there. But I would advise, especially, new Commissioners, if you need copies, we can get you copies of draft amendments to go through them prior to the meeting, because it would be very hard to get all of the information in a meeting.

Chair Pescaia: Everyone in agreement? Alright. Director's Report.

H. DIRECTOR'S REPORT

- 1. Pending Molokai Applications**
- 2. Closed Molokai Applications**

Chair Pescaia: You should've all received a list of the pending and closed Molokai applications.

Mr. Yoshida: Yeah, if there are any questions from the Members regarding the reports? Seeing none at this time, moving to discussions with Maui Electric Company on liability for power pole installations on private property.

3. Discussions with Maui Electric Company on liability for power pole installations on private property. (N. McPherson)

Ms. McPherson: I can read you a short e-mail that I got from Ray Okazaki of Maui Electric:

Regarding a request for MECO rep. to attend Molokai Planning Commission meeting.

Hi, Nancy. I'm trying to discuss this issue and work with our construction department to address and assist with this ongoing concern. We are currently trying to fill the supervisor's position on Molokai. This person would be in a better and direct position to answer the concerns mentioned previously. I know we had discussed our procedures previously upon any inadvertent discovery; however, it appears that this is not adequate at this time. I'll contact you when I have more information.

And I haven't had time to draft a letter on your behalf to MECO, but I will to get that done. Time is compressing for me right now, but I am leaving for a vacation on Friday for three weeks. So – but it's on the top of my list. So I will be still getting a letter off to MECO. And if they can answer your questions in writing, then they don't have to come here, right? Okay.

Ms. Buchanan: It's okay. We just not going let them put any poles up until they answer. That's simple.

Ms. McPherson: I'll let Ray know that.

4. June 29 Public Hearing on Council Resolution No. 11-24 regarding Short-Term Rental Homes

Mr. Yoshida: Our next meeting is scheduled for June 29, and we scheduled the public hearing. With the Commission's concurrence, we've scheduled the public hearing on Council Resolution No. 11-24 regarding short-term rental homes. The Council resolution is posted on the County website, Planning Department, proposed legislation. Based on the previous two times whenever we talked about transient rentals, we've had a spirited discussion, and we had a lot of testimony. We'll see what happens on June 29.

5. Status of Molokai Planning Commission vacancy

Mr. Yoshida: The status of the Molokai Planning Commission vacancy, as we reported at the last meeting, DeGray Vanderbilt withdrew his nomination to the Planning Commission

to fill the seat that was vacated by Napua Leong. The Mayor's Office is actively looking for a person that will serve out the rest of Commissioner Leong's term. Hopefully, now that the Council is finished with the budget, as they passed it on second and final reading yesterday, their Committees will be back in action next week. So hopefully, the Mayor will submit a name shortly, and it'll be considered by the Policy Committee again, and we can get another Member on board say within a month or so.

Mr. Bacon: So if the Mayor has a number of names to choose from, do we send in recommendations if we think--?

Mr. Yoshida: Yes.

Mr. Bacon: And we just -- can we e-mail him, or we send a letter, or how do we do that?

Mr. Yoshida: Yeah, I think he's kind of developed the short list, and we'll be submitting a name very shortly as he realizes some of the problems that we have right now in achieving quorum and taking action on various applications.

And I guess as far as Commissioner Williams' position, I guess they're also looking for a person to fill out the rest of that term.

Chair Pescaia: Has the Mayor -- I don't know what the word is, but has the process been initiated to remove him from the Board?

Mr. Yoshida: Yeah, I believe to fill in Commissioner Williams -- yeah, they are looking very vigorously.

Chair Pescaia: But has he resigned?

Mr. Yoshida: I think they did give him a time deadline to respond, because they tried calling, and they weren't able to get in touch with Commissioner Williams.

Chair Pescaia: So we were just reading the charter, and doesn't it outline a process for that where we would have to vote? Oh, we don't. Oh, the Council votes.

Mr. Hopper: . . . (inaudible) . . .

Chair Pescaia: Okay, so the Mayor takes it to the Council. The Council votes two-thirds to -- has that happened? No?

Mr. Yoshida: I don't -- well, you know, the Council has -- the Committees have been inactive because they've been focused -- except for Budget and Finance, because they've been focused on the budget, which got passed on second and final reading yesterday.

Chair Pescaia: Okay, you let us know.

Ms. Buchanan: Chair, can I request on other – Director's Report, item no. 4, Council Resolution 11-24, instead of me looking all over for it, can Suzie or somebody either e-mail it. But if it's a large document, can I have a hard copy, or do we already have a copy of it, and I just don't know where it is? We had it two meetings ago? Can you verify that, Suzie, that we already had it? It's the Resolution 11-24. And I'll look in my packets, because I always bring three packets.

Mr. Yoshida: Yeah, again, it's also posted on the County website under the Planning Department.

Ms. Buchanan: I lazy look on the County website. That's what I saying. I want you to e-mail it to me. Thank you.

Mr. Yoshida: Okay, I'll have Nina print out a copy for Commissioner Buchanan.

Chair Pescaia: Okay, it'll be sent out – a report will be sent out in the packets for that meeting in regards to it.

Mr. Yoshida: The last thing I'd like to say is regarding information on the Hawaii Congress of Planning Officials Conference this year, there is one. It's on Kauai hosted by the Kauai Planning Commission and Kauai Planning Department, September 21st to the 23rd, Poipu. Due to budgetary constraints, we're only able to send three representatives from each Planning Commission. So we will be transmitting the registration information to you, and the Chair can decide. You can express your interest directly to the Chair. And she can decide who will go, who the three will be. And we would want that by September 20th. That's the early registration – I mean, on June 20th as the early registration deadline is June 30th. Okay, that's all we have to report. And if not, we can move on to our workshop with Malia Akutagawa.

F. Workshop No. 3 on Case Law on Water Issues conducted by Malia Akutagawa, former Planning Commissioner and member of the Molokai Island Burial Council

Ms. Malia Akutagawa: Aloha, Chair Pescaia, and Members of the Molokai Planning Commission. Thank you for your patience. So basically, I'm just gonna do a workshop on Hawaii State water law. And I can make packets available through Nancy. I was kinda rushing, so I apologize for not making the outline for you folks.

So the purpose of this workshop is to inform you about statutory constitutional and common law protections regarding water, and to assist you in making your decisions with respect

to any kind of permit that may affect water uses. So Hawaii has a unique law around water, and a lot of it is based on Hawaiian traditional and customary practices and beliefs. So Hawaiian beliefs towards water are that it's sacred, and that the God Kane, when he struck his staff on the earth, springs would gush forth. So for this reason, water has spiritual mana and it has to be managed as a resource for all.

And just looking at Hawaiian words around water: wai is water, waiwai is wealth. The Kanawai, which is a law is – has the word “wai” rooted in it. And it shows you how much water was part of the Hawaiian life and any civilizations' life for that matter. So part of the laws in Hawaii also tie back to the traditional Hawaiian management system with the ahupuaa. So that diagram I pulled off the internet shows how water was managed from mauka to makai traveling through the auwai, the different springs, and the loi, the taro patches, and down through the fish pond.

So as I said earlier, traditional Hawaiian law or Kanawai developed around the management of water. So in ancient times, the konahiki or land steward was in charge of making the ahupuaa productive. And the ahupuaa was a self-sustaining unit from mountain to the sea where members of the aina, who were tenants of the ahupuaa, could get all their needs. The alii, the chiefs, the konahiki, they were – they held the lands and waters in trust for the people. And the makaainana, the common people were free to leave if they were unfairly treated. So again it was imperative for the alii to treat the makaainana, the aina properly so that the land could be productive.

So in post-Western contact, King Kamehameha formed a constitutional monarchy. And he brought in a lot of the traditional understandings. So during this period, you see a mixture of English common law and Western law principles melded with Hawaiian rights. So in the Declaration of Rights and the Constitution of 1839 to '40, the King declared that all the lands belonged to him, but not as his own private property. They belonged to the chiefs and the people, and are subject to the King's management. Thus, this motion of trusteeship was maintained over the land.

With respect to water, there was a law in 1839, the King's intent to assert his sovereign power to regulate water for the common good. And it quotes:

In all places which are watered by irrigation, those farms which have not formerly received a division of water, shall be supplied in accordance with this law, the design of which is to correct in full all those abuses which men have introduced. All those farms which were formerly denied a division of water shall receive their equal proportion.

So during this time, there were some conflicts over the water, so the King had to definitively state that the water was protected for the people.

So the Mahele of 1848 was the major land division where a system of private property was introduced to Hawaii, but it wasn't exactly like Western property law. There were certain reservations on the land, and that was the kuleana reservation reserving the rights of native tenants.

The Board of Land Commissioners was established in 1845 to handle the land claims. And arising out of that was the Kuleana Act, which set aside fee simple title to native ahupuaa tenants for their kuleana land, which was typically, a small plot where they could put their house, and they had gardens and taro growing. So this right was known appurtenant water right, any water that was attached to the taro. So the Kuleana Act guaranteed that the people shall also have a right to drinking water and running water. And this has been codified in Hawaii Revised Statutes, Section 7-1.

So what were the impacts of Westerners on traditional water use and management? So Hawaii has the benefit of having a year-round growing season and sunny climate. So this was a boon for the plantation, agriculture, and pineapple, and sugar. So what happened was these massive engineering feats were done where they tunneled through mountains and created dikes to transport the water from the windward and wet lush side of the island to the drier, leeward areas where sugar and pineapple grew best.

Ground water wells were developed to supplement the surface water system. So if you see the top picture, it's the stream running, and then these grates, and going down into a tunnel system, and then carried via a ditch down to the sugar lands.

So Western and Hawaiian practices were in direct conflict. Hawaiian families were dispossessed from the lands as the water diversions caused streams to dry up, and along with it, the Hawaiian way of life.

So during the time of the overthrow when Hawaii became a Kingdom, these wealthy sugar barons were the sons of the former missionaries. They conspired to overthrow the government, and then marshal law was instituted. So during this period, all the judges were – came from the Mainland. There were no rights for voting or anything like that. So a lot of the territorial cases overturned the King's intent to provide water for all. So here – so some of the court cases affected the following results: appurtenant water rights that were reserved for taro cultivation and attached to native lands has fallen into ownership by sugar companies who now applied these rights to sugar. Prescriptive rights were basically like adverse possession of water. So if you could show that your use was actual, open, notorious, and hostile to the holders of water for a certain statutory period, then you could steal and prescribe those rights to yourself. And then there was a doctrine called, "Surplus Water Rights." And it was basically contrived as any – like extra water during heavy storm periods. So during the Territorial period, they would do all this mathematical formulas to figure out how much of the water was surplus.

So statehood occurred in 1959. And what resulted was there was a shift whereby the U. S. Territorial judges were no longer sitting on the bench. Now, we had local judges appointed. So around this time, the Richardson Court came on and Chief Justice William S. Richardson, he was Chinese/Hawaiian. I had the privilege of meeting him when I was in law school, and a lot of the Hawaiian rights' cases came under his watch. So the Hawaii Supreme Court had more local judges, and then you began to see a shift back to some of the traditional principles.

(Mr. Bacon left the meeting at approximately 3:30 p.m.)

So the landmark case happened in 1973. And that was the McBride Case, a conflict with two sugar companies over the use of the Hanapepe River on Kauai. So the court ruled that there's no such thing as private ownership of water. They went back and they looked at Kingdom law, which became now the law of the State. And they found that the King never gave up his sovereign prerogative. So when land was transferred during the Mahele, what remained attached to the land was the King's sovereign prerogative to encourage and even to enforce the use of . . . (inaudible) . . . lands for the common good. So the right to use water was seen as one of those important use . . . (inaudible) . . . So then the State of Hawaii, as a successor to the Hawaiian Kingdom now became the trustee of all waters for the public and common good. There were massive court battles after McBride, but in the end, this case was upheld. Another part of the McBride Case was they looked at riparian water rights. And riparian is basically any use along the river bank, any landowner that lives along the stream or river banks has a right, an equal right to the stream. So the court surmised that the Kuleana Act of 1850, which was now adopted as Section 7-1 of the Hawaii Revised Statutes references the right of people to running water. And this basically made riparian water rights not just a common law protection but a statutory protection.

And then with respect to surplus water rights, if you recall, the excess storm water allocation, the court rejected that and said that because of these riparian principles, and because the State is the trustee of waters for the public good, there is no such thing as surplus waters. And then they went – they proceeded to uphold appurtenant water rights, which is attached to taro land, but they ruled that these waters cannot be taken from the watershed and applied to other lands. They are appurtenant, or they appertain, or attach specifically to the kuleana land parcel with kalo.

In 1978, we had a constitutional convention. And in that convention, they created the Commission for Water Resources Management or what's commonly known as the Water Commission. And they also established criteria for water use priorities.

So some of the provisions include Article 11, Section 1, states that all public natural resources are held in trust by the State for the benefit of the people. So it pretty much affirmed what the McBride case did. Article 11, Section 7 makes specific reference to

water, including the directive to protect, control, and regulate the use of Hawaii's water resources for the benefit of the people.

Now, the Waiahole Case in 2000, which was a decision that came down from the Hawaii Supreme Court further affirmed this public trust doctrine in water. And it stated:

The State's water resources trust applies to all water resources without exception or distinction. The public trust establishes a dual mandate of 1) Protection; and 2) Maximum, reasonable, and beneficial use. An affirmative duty is imposed to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.

So some of the public trust purposes identified by the court included environmental protection, traditional and customary native Hawaiian rights, appurtenant water rights, domestic water uses, and reservations for the Department of Hawaiian Home Lands. And this case was also affirmed not just by Waiahole, but the Waiola O Molokai Case in 2004.

So in these cases, they said the public trust purposes have greatest priority and protection well over any private or commercial use of water. And basically, in looking at balancing public and private purposes, it must begin with a presumption in favor of public use, access, and enjoyment, and establishes use consistent with trust purposes as the norm or default condition. So default public trust always trumps private use.

The Hawaii State Constitution, Article 11, Section 7, established the Water Commission. The Water Commission is under the Department of Land and Natural Resources. And the primary authority of the Water Commission is to have authority over water use and management. This is different from water quality. The Department of Health handles water quality issues. So the Water Commission has to develop water conservation policies, water use priority, criteria, and regulations while at the same time maintaining existing appurtenant correlative and riparian rights. The Commission determines reasonable and beneficial uses, is responsible for protecting ground and surface water, watersheds, and streams.

So the statute that covers the water code that the Water Commission follows is HRS, Chapter 174C. So the following slide will basically cover some of the provisions of the water code. So the water code establishes a Hawaii Water Plan with four components: a Water Resource and Protection Plan prepared by the Water Commission; Water Use and Development Plans, and Water Quality Plans prepared by each County; State Water or Project Plan prepared by State agencies; and Water Quality Plan prepared by Department of Health. The code regulates water use by means of a permitting system, which applies only to lands designated by the Commission as water management areas, or as

recommended by the Commission, or initiated by written petition. So Molokai is a ground water management area, and has been designated also as a sole source aquifer. So once designated, the Commission assumes administrative control over both ground and surface waters in the designated area. Permits for withdrawals, diversions, impoundments or consumptive uses are required in all designated areas. Permits are not needed for individual use or for water catchment.

So the permitting criteria, each applicant has to establish for the proposed use that – they can be accommodated with the available water source that it is a reasonable beneficial use, that it will not interfere with any existing legal use, it's consistent with the public interest, consistent with the State and County general plans and land use designations. So that part is important to the Planning Commission since you guys do look at the County general plans as part of your permitting authority. And it's consistent with County land use plans and policies. That also includes the Molokai Community Plan. Appurtenant rights are preserved by the code. The water code requires the registration of existing wells, and permits are required for well construction, installation of pumps, pumping management area, and stream diversion work.

Section 174C-101 specifically protects Hawaiian water rights. So the code also acknowledges the Hawaiian Homes Commission Act, HRS, Chapter 175 relating specifically to our Molokai irrigation system. The code does not diminish or extinguish trust revenues derived from existing water licenses unless compensation is made. Traditional and customary rights of ahupuaa tenants are also protected under this law. Some of these rights include, but are not limited to taro cultivation on one's own kuleana land, gathering of hihiwai, oopu, opae, limu, thatched ti leaf, ahu cord, and medicinal plants for subsistence, cultural, and religious purposes. And it states that appurtenant water rights are protected and cannot be diminished even if a kuleana landholder fails to apply or receive a permit for their rights.

The Hawaiian homesteader rights specifically conferred by the Hawaiian Homes Commission Act also relating to Molokai irrigation system, the water code directs the Commission to incorporate and protect adequate reserves of water for current and foreseeable development, and use of Hawaiian Home Lands as set forth in Section 221 under the Hawaiian Homes Commission Act.

So specifically for the Water Commission, I would look at the Hawaiian Homes Strategic Plan for Molokai. And I would look at what current and potential projects are coming down. And I would see if any water – any kind of land use permits that you're reviewing does not conflict with the Hawaiian Homes Strategic Plan. And like appurtenant rights, both traditional and customary native Hawaiian rights and reservations for the Department of Hawaiian Home Lands are public trust purposes.

So one of the challenges with the water code is that surface and ground water are treated separately. But the diagram to your right shows the interconnectedness between ground water and surface water. That's the hydrologic cycle. So everything is connected. So looking at a practical implication, if too much surface water or stream water is being diverted, you probably will lack recharge to your ground water. So this is where – you see that interconnection? But the challenge with the water code is they treat it differently and there's different rules pertaining to both.

Correlative water rights is just like riparian water rights except it deals with ground water. So correlative water rights protect the interest of individuals who own land overlying the ground water source or aquifer. This land has rights that correlate to the water below it. This means that correlative rights are protected in non-designated areas. But only existing correlative uses receive priority in designated ground water management areas. So if you don't claim a correlative right, then – but you not using it, you cannot justify that. Correlative rights are subject to the reasonable use doctrine, which means that in times of a water shortage, each use with correlative rights has a share to a reasonable amount of water. And these amounts cannot injurious to the rights of others.

For designated ground water management areas, the Commission looks at sustainable yield. So sustainable yield is the maximum rate at which water may be withdrawn from a water source without impairing the utility or quality of the water source as determined by the Commission. Basically, there's this lens, this fresh water and salt water. Basically, the salt water is more dense than the fresh water. So – but there's a protective lens between the salt water and fresh water. And in that interface is brackish water. So when too much water is being taken out from an aquifer, and there's a piercing of that lens, that's when your sustainable yield has been threatened. So the trick is to maintain your sustainable yield and don't go beyond it.

Riparian rights under the water code, so as I said earlier, riparian rights protects those who live along the river bank or the stream bank. These rights are subject to other rights of equal or greater value, such as appurtenant water rights which deal with taro, traditional and customary native Hawaiian and other riparian rights are reservations for the Department of Hawaiian Home Lands. The Hawaii Constitution protects riparian uses under Article 11, Section 7, as well as statutorily, which is Hawaii Revised Statute 7-1. Due to the water code's establishment of water management areas, Hawaii has a bifurcated system of rights. In non-designated areas, the common law controls. And anyone with riparian land retains riparian rights. Once an area has been designated, only existing riparian uses as opposed to un-exercised riparian rights continue to retain preferential status.

The Rapoon Case, which was on the windward side of Oahu, they look specifically at riparian rights, and they found that they cannot be severed from riparian lands. Efforts to

sever or transfer such rights, which usually occur as part of a deed of sale are ineffective. This means that even if you have riparian land and the deed conveying the property reserves or transfers riparian rights are water rights in general, your land will still retain those rights. It's different in terms of appurtenant water rights. If there's a transfer of deed, then the appurtenant water rights are severed. With correlative water rights, they protect our interest of individuals who own lands overlying the ground water source. Oh, actually, I covered that already.

Now, in surface water designation areas, there has only been one, and it's a very controversial Na Wai Eha issue on Maui. And this is the controversy with Alexander and Baldwin Sugar Company. So these are multiple ahupuaa on the East Maui Watershed. There has been some instructive language from the Waiahole Case. And in that case, the designated ground management – ground water management areas were given the direct and inevitable interrelationship with the surface water. So in issuing water use permits for surface water, we can look at the Waiahole Case as instructive.

So just briefly going over some of the regulatory stuff with the Water Commission, so they have to do a Hawaii Water Plan, which has four different parts: the Hawaii Resource Protection Plan, Water Use and Development Plan, State Water Project Plan, and Water Quality Plan. The intent by the legislature was to develop a comprehensive long range plan for the protection, conservation, and management of Hawaii's water resources in advance of any decision to allow the use of water covered by these plans. So what the Commission should specifically look at is the County requirements for a Water Use and Development Plan. So the Commission can reference the Water Use and Development Plan especially, in terms of Molokai. And the County basically, in these WUDPs, or I just call the WUDPs, the WUDPs must detail current and future water needs by the County so that the Water Commission can adequately plan for allocated water for future requirements while first accommodating the current and foreseeable needs of the Department of Hawaiian Home Lands. Counties are required to identify the status of County water and related land development, future land uses and water needs, and regional plans for water development.

So what I recommend is review your WUDPs for Maui County especially, for Molokai, as well as consider some of the statutory and constitutional provisions that protect the public trust, native Hawaiian rights, and the existing and foreseeable uses of native Hawaiian homesteaders.

So just a brief thing on the public trust, so like the Waiahole Case covered a lot of the public trust issues. So what I heard when I was attending some of the contested case issues with the Na Wai Eha issue on Maui was A&B folks were saying to allow the water in the streams to enter the ocean is a waste. That is not a waste. The Waiahole Case basically said to have the oopu, to have the hihiwai, to have the fish thriving in the streams, that's a public trust purpose to allow for recreational uses in the stream, swimming, you

know, hiking along the streams, all those things, that's the public trust. So public trust really is what provides for the environment and the ecosystem, keeping the ecosystem healthy, and what provides for the people. So again, in looking at some of the things that you reviewing, land use permit applications, SMAs, look also at some of the ecological aspects, as well as looking at what kind of gathering, or fishing, or practices may occur along areas where fresh water enters the sea. Look at all those things. And these are not things just to consider. There's an affirmative duty by any State or County agency to protect these rights.

So thank you for having me here, and I'll be happy to entertain any questions you might have.

Chair Pescaia: Commissioners, do you have any questions for Malia? Seeing none. Mahalo nui for taking a huge, huge topic, and just getting straight to the point, and making it very easy to follow, and making the big words not sound so intimidating. We did have two cases today that raised some concerns in this area, so this definitely has been enlightening, and might help us to look at different directions for the answers that we need to make our decisions. So on behalf of the Commission, we want to thank you for taking the time yet again to come and educate us, and help make our job a little easier, and shed some light on these issues.

I. NEXT MEETING DATE: JUNE 29, 2011

Chair Pescaia To the rest of our community, thank you for joining us today. To our staff, thank you for your support, and we will reconvene on June 29th, an irregular meeting date. And with that, pipi holo kaau. Meeting adjourned.

J. ADJOURNMENT

There being no further business to come before the Commission, the meeting adjourned at 3:38 p.m.

Respectfully submitted by,

SUZETTE L. ESMERALDA
Secretary to Boards and Commissions

RECORD OF ATTENDANCE

Present

Mikiala Pescaia, Chairperson
John Sprinzel, Vice-Chairperson
Debra Kelly
Lori Buchanan
Nathaniel Bacon (12:08 p.m. - 3:30 p.m.)
Ron Davis

Excused

Zhantell Dudoit

Absent

Don Williams

Others

Clayton Yoshida, Planning Program Administrator
Nancy McPherson, Staff Planner
Michael Hopper, Deputy Corporation Counsel