

MOLOKAI PLANNING COMMISSION  
REGULAR MINUTES  
MAY 8, 2019

A. CALL TO ORDER

The regular meeting of the Molokai Planning Commission was called to order by Vice-Chairperson Laakea Poepoe, 11:08 a.m., Wednesday, May 8, 2019, at the Mitchell Pauole Center, 90 Ainoa Street, Kaunakakai, Molokai.

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

Vice-Chair Poepoe: Good morning everybody in the room. I, Vice-Chairperson Laa Poepoe, I will call the meeting to order, and the meeting of -- Molokai Planning Commission meeting of May 8, 2019, at Mitchell Pauole Center. I going open up agenda item B, Public Testimony, if there's anybody in the public that would like to testify.

**B. PUBLIC TESTIMONY** - At the discretion of the Chair, public testimony may also be taken when each agenda item is discussed, except for contested cases under Chapter 91, HRS. Individuals who cannot be present when the agenda item is discussed may testify at the beginning of the meeting instead and will not be allowed to testify again when the agenda item is discussed unless new or additional information will be offered. **Testimony will be limited to a maximum of three (3) minutes, with 30 seconds to conclude.**

Ms. Poepoe: Mahina Poepoe. I wanted to testify on an item under Director's Report, I believe, Pamela Hamamoto's short-term rental, oh no, special use permit application, so the Commission denied the special use permit, but the Department was -- took too long to issue the decision and order, so she appealed it, and I don't know if it's in court right now, but I just wanted to know, and I don't know if anybody can answer this but I just want to put it out there, I wanted to know what the Planning Commission can do legally if the judge grants them their permit because of the negligence of the Department, like can the Commission or community take legal action of some sort if that happens. So that -- that's all, for your consideration. Thank you.

Vice-Chair Poepoe: Any Members have questions for the testifier? And if none, is there any other person in the audience who would like submit testimony, spoken testimony, verbal? Whatever you call it. Seeing that there's none, we'll close public testimony, and move to item C, orientation training.

**C. ORIENTATION TRAINING NO. 2**

**1. Enforcement/Request for Service (RFS)**

Ms. Osurman: Aloha, Commissioners. Hello. Can you hear? This good? Hello. Hi. I'm Tammy Osurman, Zoning Inspector, here to give you a little enforcement workshop, okay.

Okay, thank you. Alright, the -- the purpose of Maui County Code, Title 19, the Comprehensive Zoning Article, is to regulate the utilization of land, so, basically, I'm a use inspector. Alright, the standards include location, height, density, mass, size, parking, yard area, open space, density of population, and use of building, structures, and land.

Okay, in addition to Maui County Code, Hawaii Revised Statute 205A, which is the special management area, we regulate the use, activity, or operation that qualifies as a development. Okay, this assessment of the SMA is to preserve, protect, and, where possible, restore the natural resources of the coastal zone by Hawaii -- of Hawaii, sorry.

I am a zoning inspector. I am one of five. Alright, the zoning inspectors in the Planning Department, we investigate for discrepancies with -- for the use of the land, which is, as I explained, Title 19, the use of the -- the use and the number of structures, not the building itself, that's building department, okay, site coverage, setbacks, building heights, and permits whether they're after-the-fact or not. We also investigate for special management areas, shoreline management, which is up to 150 feet above the high water mark, Board of Variances and Appeals, flood zones, outdoor signs, and after-the-fact violations.

So this here, in County of Maui, consist of four islands: Maui, Molokai, Lanai, and Kahoolawe. We have five zoning inspectors and one supervisor to regulate all four islands. Yes. Okay, as you can see, Maui County has 167,000 people in 2010; Molokai has 7,345. I am in charge of everything that is to the left of Maui County, okay, so I'm one inspector so please be patient to me. Okay, Kihei has 250 people per square mile. Molokai is wonderful, it has 15. Alright. Alright.

Alright, so we'll talk about enforcement. Our enforcement is complaint-driven, so without a complaint, I don't just walk over to somebody's house and says you're wrong, alright. It's complaint-driven. Now the complaints are converted to request for services, an RFS, and I will be going over RFS, RFS, RFS - those are three most important letters for you to remember. Alright, so they are converted into request for services, we do not take anonymous complaints, and the names of the complainant will be -- will be disclosed upon request, not our phone numbers, not our address, not anything else, just the names, and pretty please provide accurate addresses and information. The better your information, the easier it is to enforce, and for faster service, once again, please remember your RFS number.

There's several ways to file an RFS. One is written. You can either mail us, email us, or fax us. You can call us on the phone, but you must know the address or the TMK. Sometimes we don't get the information right. Right? It's all hearsay, what we hear, and what we're typing. The best way is to do it online - [www.mauicounty.gov](http://www.mauicounty.gov) - especially if you have multiple jurisdictions, such as building without a permit, sewer, multiple family. If there's a couple jurisdictions, the best way to do it is online. Alright, so be specific.

Okay, so here I said this is the Maui County Website, [www.mauicounty.gov](http://www.mauicounty.gov). Alright, on the bottom it says "Online Services," press that, it will take you to a different site, which is on the right, the Request Entry; the top half, you put in your name, your information, and then in the middle is the event location. You cannot just say the guy down the street, okay? Because we might pick the wrong address, and if you got the wrong address, it might be closed and you're like wait a minute. I put in this complaint. If you -- you have to have the right, correct address for that. The description. We ask for three types of evidence. The more information you give us, the easier it will be to enforce. So, here, RFS numbers. You'll get a request for service number and this is how you track your complaint. So this year is 2019, so the number will be 19-000, all the numbers. As you can see, 18-01999, that was the year 2018, we had 1,999 complaints. The year '17, 2017, 1,667, okay. So please be patient with us. Alright.

So this is on the back of your handouts, the very last page, this is -- this is a Department of Planning RFS form, so it says the same thing, your name goes on the top after the black bar, the address of concern, and on the side is what the Department of Planning is concerned with - setbacks, building heights, multiple families, signs, parking, landscapes, built without permits, non-permitted use, and we need your justification, and your actual signature. Alright.

Okay, so this is how we view our complaints. One complaint, this is '16, 2016, the first four lines is the four different departments that it went to, so that was one complaint and, as it says there, it may trigger several departments, okay. It all depends how you word your complaint. So you do not have to put in 20 complaints for the same place, one saying building, one saying this, let's put it all under one place.

Alright, so, basically, this is a certificate of occupancy, and this is the way I refer to people, I give them all the numbers to the different departments. I give them one of these. This is my big business card. Alright. But it, basically, tells you all the different inspectors, we have building inspectors, electrical inspectors, fire, health, highways, plumbing, water - as you can see, water could involve DLNR, the State - we could do the Federal, Army Corps of Engineers, and Planning Department, or ZAED.

Alright. Processing the request for service. So this is when we get a request for service. This is what we do. We investigate. We gotta get our facts on the parcel. We find out who the ownership is. Ownership; who owns it. We find out what type of permits they have. Their histories. We get photos. We get websites. We find out what zone they are in, and that will allow them to do certain things. Alright.

If we find a violation, we give them a notice of warning. We call those "NOWs" for short. Alright. We give them a time to correct. The shortest is 7 days; the average is 30. Alright. We are looking for compliance. So we're giving them a chance.

Alright, if they do not correct their violation, we can send out a notice of violation. This is when fines are involved. We have to be 100% sure there is a violation. We need evidence. Alright, so, without going to trial, all of these violations are civil, they're not criminal, alright, civil. It also allows the owners to appeal the decision. They have 30 days to do that. We're fair to everybody. Everybody gets 30 days. So, hopefully, we have some kind of resolution for them. How do resolve their violations? The fines? There's initial and daily, and if there's a settlement, that's where you guys come into play. Alright.

The next one. So this is what a notice of warning looks like. It looks like a form letter. An official letter. This is asking them to comply. The ticket is our violation. If anybody ends up with a ticket, this is when they have to pay money. They must pay money. There's a initial violation charge, and there's dailies. The average is \$1000 initial, and a \$1000 daily. Okay. That's our average. Please remember offenses are civil and not criminal. We are looking for compliance with the law within our jurisdiction so sometimes the RFS has five different inspectors going, we might close our section. The RFS still might be open because another department is still looking at it. Okay?

So let's give you some examples. So one of my favorite chapters is Maui County Code, Title 19.04.040, Definitions. This is where we have to explain to people, okay. There's a difference between accessory building, which is not for human habitation, that's a garage, a barn, a potting shed, alright, a carport, versus accessory dwelling, that's, basically, your ohana. Alright, there's a family, there's a single-family dwelling, and there's a multi-family dwelling, which is another name for apartment. All of these definitions are in 19.04. It also tells you about kitchens. It's an area to prepare food. There's a wet bar; this is where we come into a lot of trouble. Wet bars are very tiny. Very, very tiny. There's only a 1.5 cubic-foot sink, can't even wash your cat in there. It's that tiny. And a small refrigerator, an under the counter refrigerator, 7.5 cubic feet. Anything larger than that, we call that a kitchen; then we can tag you for a second dwelling. Alright, it also tells you about home occupation versus home business. One you can have customers come over. One you can have a sign. The other one, nobody knows you're there, okay. Then we -- we also tag between short-term rental, which is less than 180 days, versus a bed and breakfast, a person living there, but they are also short-term renting a room, so all the definitions come together and we have to make sure what we're talking about, is it a short-term rental house? The entire house? Or is it just a few rooms and the owner does live there? If it's a tenant who's doing it, it's a short-term rental house, okay, because the owner is not living there.

Alright. So dwelling unit. A dwelling unit is another word for house, alright. It means a room or group of rooms connected together consisting of an independent housekeeping unit for a family and containing one single kitchen. One kitchen. No bar sinks that have a huge refrigerator, a hotplate, and all that, that's two kitchens.

Alright. A multi-family dwelling is an apartment. It means three or more units, alright, and they're independent of each other. So this house in the middle, we don't know if it's one unit, one single-family house, or if it's an apartment with three, or is it one house and one ohana, so from the outside, we cannot tell.

So the first thing we look at is, for a residential lot, is the maximum building envelope. So in a residential lot, the highest you can go is 30 feet. Your front yard must be 15 feet clear. Your side must be six, side and rear must be six feet for one-story, ten feet for two stories. So this magic box, we place that onto the site, and we can see whether it fits or not. If it fits, we don't have any setback issues, we don't have any height issues, alright, so now we check this setbacks, we check the building heights, okay, okay, okay. Multiple families. We don't know that by looking at the picture. We don't know if they have signs in their yard. We don't know if they have a bed and breakfast. Alright. We check parking. We check landscaping. Whether they're built without a permit or they have a non-permitted use.

Alright, this one is called an "accessory building" because no one can live there, right. It's not for human habitation. By the way, on an agricultural zoned land, today, you must have 51% of your land used as agriculture prior to applying for a dwelling. Alright. So this, okay, this was also called an "accessory building." It was called a "potting shed," not for human habitation. This is what I found in my inspection. So the question is: Did they violate the agriculture use? Was it built without a permit? If as a building -- as a potting shed, they may not have needed a permit, alright, but now is it part of SMA? Is it another dwelling unit? Did they meet the setbacks? Is it health and safety? Do they have building permits? Is there a fire hazard, electrical, plumbing, taxes, police? There's lots of possible violations. Alright. That's where your RFS comes in.

Okay, so our enforcement policies and procedures. So Maui County Code 19.530.010, it says: Approval or permits must be issued; .020 is criminal prosecution. Well, we must go to trial for that, but if we just do it administratively by sending them letters, warning letters, violations, it's a civil, okay. It's a civil fine not to exceed \$1000 a day. The violators have a right to appeal this. They have 30 days to appeal this. The order becomes final after 30 days of mailing or delivery. Thereafter, up to \$1000 per day for each day which the violation persists. Alright. You can't say let's do \$500,000 because our limit is 1000. Alright, remember, offenses are civil, not criminal - well not for the Planning Department, okay. Just a side note money stays in Maui County if it's civil; where if it's criminal, the State of Hawaii gets it.

Alright, so another one. Let's do information gathering. So let's pick a site. We find out through our KIVA, our research that this is the address, this a Google Earth of the property, so before I fly over to Molokai, I kinda know what I'm dealing with, so we find out the parcel attributes. I found out this is agriculture. I find out there were grading permits on this site. Alright.

So Title 19 concerns. The first deal we find out is it agricultural use? The yellow line is our setbacks. There's a 25-foot front, 15 side from the neighboring properties, okay, so so far they meet that. If they wanna build, 51% of it must be agriculture, and the most they can cover the land is 10% is your building envelope, your buildable area, okay.

So on our next step, we find out all the different zones. So the blue line against the water is our shoreline. Shoreline setbacks, which Jeff will go over, is anywhere between 25 feet to 150 feet, so it all depends on the lot itself. So the other blue line, the purple line I guesstimated 150 feet from the shoreline, okay, so, to me, that's the maximum shoreline setback. And the red is our SMA.

Alright. This is our jurisdiction. So within the property itself, it's County jurisdiction. This is what I can deal with for the Planning Department. The State DLNR is charge of the water, minimum of 25 feet from the water's edge, minimum, up to 150 feet to the water's edge. So as I wrote, shared jurisdiction. It could be zoning; it could be DLNR. This land itself is conservation. It's State jurisdiction.

Okay, so compliance is our goal. So it's our best effort to prevent and detect any violations and let's correct them. We want compliance. Okay, so upon discovering a violation, we send a written notice to the person, the owner, the owner of the property and indicate what the nature of the violation is and the actions necessary to correct it. So we can order them to stop, stop the use, stop the building, structures, additions, and any work being done. And then, C, to cause to be taken with any action authorized within the law, okay. We need compliance of this Title, so just like the slide before, the question is: If you don't pass the SMA permit, what -- I mean we need a remediation plan and the question is who is going to come up with that? Is it DLNR? Is it our shoreline specialist? Is it our owners? Our planners? Our inspectors? Alright. Or the commissioners? Who is going to solve the problem and what is going to be required, okay.

Just a note. You guys might have to pass a SMA permit for them to restore the dune. Alright. Just a note.

The next one is HRS 205A, Coastal Zone Management. The most money that we can push for a violation is \$100,000.00, but usually it has to affect the water. It -- there's

100,000, there's 10,000, and there's 1000, and there's 500, so usually those are the tiers. So \$100,000.00, the State will allow that if it affects the water.

Okay, almost done. One thing I wanna make clear is grandfathering. Alright. Grandfathering means it's permitted prior to the amendment of the law. They have to have a permit. It's not like, ooh, I was grandfathered. Well, just 'cause your grandfather built it, did he build it with a permit? If he didn't build it with a permit, it's not called "grandfathering." Alright. Nonconforming lot, structures, uses, parking, they may be continued provided the redesign, the construction, the enlargement, if they extend the building, or if it's moved, it must meet today's standards. So you can't have something that was on the property line and that was grandfathered in, if you pick up to move that building, you have to be at least six feet away from the property line. If you pick up and move it, even though that building was built in the '50s, it must meet today's requirements. Okay. Yeah, the 51%, if it's destroyed, I'm sorry, you lose your building unless it's a historical structure, which doesn't mean -- by the way, it's historical, it's they need something that states it's a historical structure, okay. Grandfathered repairs with a permit. Any nonconforming structure may be repaired, expanded, or altered in any manner which does not increase its nonconformity. A nonconforming use may not extend to the new parts of the building. Okay. The square foot must remain the same. This is especially for vacation rentals. If they had a one-story house, and it was 1000 square feet, and they said they're grandfathered for vacation rentals, only the 1000 square feet is grandfathered, not the four-bedroom addition that they added. That part is not -- is not grandfathered, alright. They can rent that out to someone else but I mean long-term, but they cannot just say, oh, I was grandfathered. They can't expand and build bigger and call it "grandfathering." Okay. So the floor area of the structure as it existed at the time of the nonconforming use shall not be increased. Alright. And no nonconforming use shall be changed to another nonconforming use. Does that make sense? If you had a theater and now you wanna do -- put Longs Drugs there, you're not able to go from a nonconforming theater to a retail store, okay, so you can't change the use, you can leave the building as it is, but you can't change the use.

Alright, last slide. No. No. Last slide. Okay, we have no laws against chickens. Alright. Sorry. Yeah. The rest is just my authority to enforce so that's just things for you to know, and the next one is, you know, what must be finished, and the other one is conservation district that we have no authority for that. Okay. Alright. Any questions? I knew it. Alright, go ahead.

Mr. Moore: You said over here that the height limit was -- you said that the height limit was 30 feet.

Ms. Osurman: For residential.

Mr. Moore: Is that the height for Molokai also?

Ms. Osurman: I believe so.

Mr. Moore: 'Cause we built out house, they said it was 25.

Mr. Osurman: I don't -- I don't know. It might have been 25 feet and it's to the bottom of -- did you have a -- did you fill five feet? See, we count to the bottom of the point underneath, so whether if it was original grade, new grade, whatever is lowest or if it's building, so we count all of that and if it's 30 feet from where the original grade was, you put in five feet of fill, and then you build 25 feet above that, that might be the deal, it might be building department will say you can't do this kind of construction and go higher than 30. I don't know. I do not know what the situation is without an address.

Mr. Moore: Okay.

Ms. Mowat: This -- this might be a real easy one for you so I can -- what -- what qualifies a development?

Ms. Osurman: Okay, so I think it's third slide, any, yeah, well no, it just says: Any use, activity, or operation that qualifies as a development. On the back of an SMA permit, it says what the -- SMA permit it says what qualifies as a development. Yeah, there's a criteria for SMA.

Ms. Espaniola: So the historical structure, meaning you can't move the building, you can't alter the building. Can you be more specific on the historical structure?

Ms. Osurman: Okay, so your historical structure, the square footage must remain the same, the footprint must remain the same, okay, so if it's a house that had two bedrooms, okay, so if it was a house that had two bedrooms built in the 1950s that we can prove was doing short-term rentals since the '50s, they can be grandfathered in, but if they tried to change it, and make it a four-bedroom house, that is not allowed. They're not grandfathered. They're only grandfathered for two bedrooms. If they built bigger than the footprint on the land, that area is not grandfathered too. It's the exact footprint and the exact square footage. You can renovate 50 -- less than 50%, so 49% per year.

Ms. Espaniola: Another question. So my son-in-law, I guess he's a civil engineer, so he said that when you do a historical structure, you have to use the same materials, is that - - how does that apply? Well, I mean that's as far as what he knows and --

Ms. Osurman: If you're saving the building as a historical building, yes. So if you are a historical building with wood siding, you must replace the wood siding, you cannot do metal siding, you cannot change the --

Ms. Espaniola: Outside.

Ms. Osurman: Windows, you cannot change -- the materials must remain the same.

Ms. Espaniola: What about the inside?

Ms. Osurman: The square footage must remain the same.

Ms. Espaniola: But the materials is not, you know, like --

Ms. Osurman: It depends what kind of historical structure you have and -- and what point it is historical.

Ms. Espaniola: Okay.

Ms. Osurman: Yeah. There's -- there's all these prerequisites to become, and great tax breaks, to become a historical structure. You see Front Street. Front Street, they gutted all the inside and they just said the façade, the front of the building is required to stay the same. Okay, so as long as the building envelope remains the same --

Ms. Espaniola: Okay.

Ms. Osurman: For their historical --

Ms. Espaniola: Yes. Building.

Ms. Osurman: Prerequisite.

Ms. Espaniola: Okay.

Ms. Osurman: Okay. Does that make sense?

Ms. Espaniola: Yes.

Ms. Osurman: So it all depends.

Ms. Espaniola: Yes.

Ms. Osurman: But most of the time it's same for same.

Ms. Espaniola: Okay. Another question. How does this apply to DHHL, Hawaiian Home Lands?

Ms. Osurman: Zero. Zero. We do not have any authority for Hawaiian Homes. Zero.

Ms. Espaniola: Okay. Great. Thank you.

Ms. Osurman: Not -- that's only the Planning Department. That's only zoning enforcement. So if Hawaiian Homes, you complain that somebody has a vacation rental in Hawaiian Homes and you're asking me to do something, I cannot go, not on to Hawaiian Homes, but I cannot enforce them having a vacation rental. I can't say it doesn't follow Maui County standards 'cause we do not --

Ms. Espaniola: Have jurisdiction.

Ms. Osurman: Have jurisdiction over Hawaiian Homes.

Ms. Espaniola: Great. Okay. Thank you.

Ms. Osurman: Okay?

Vice-Chair Poepoe: Aunty Bridget, you wanted your question to be answered still? Sybil ... (inaudible)...

Ms. Desjardins: So I can answer the question about development. Is that what you -- okay. So if you look at Hawaii Revised Statutes 205A-22, that provides the definitions and it does provide the definition of "development" as that's used in the context of the SMA rules.

Ms. Mowat: ... (inaudible - not speaking into the microphone)...

Ms. Desjardins: Hawaii Revised Statute 205A-22, Definitions, and so a "development" means any of the uses, activities, or operations on land or in or under water within a special management area that are included below, and there are five, and then it says: "Development" does not include the following, and there's a whole long list of 1 through 17 that are not development, so the best way to educate yourself about that is to just get a copy of it and kinda try to absorb it because that's the primary number one questions is: Are we dealing with something that is defined as a development or not? 'Cause if it's not a development, it's not going to come here except for a waiver because under the Molokai rules, if the Director makes the determination that it's not a development and

waives the SMA requirements, this Commission has the authority to look at that and ask questions about it. Hope that helps.

Ms. Mowat: Thank you.

Vice-Chair Poepoe: Any --

Ms. Desjardins: I'm sorry. If it's not in the big book and you folks need it, we can make sure you have copies of it 'cause it's important.

Vice-Chair Poepoe: Anymore questions for the presenter? No? Seeing none, we'll move on to the next topic.

Ms. Lopez: So the next one would be Mr. Jeffrey Dack, but before -- well, he's going to go over the Coastal Zone Management and SMA more in your question, Commissioner Mowat, and it's on all SMA applications, and you guys do see all SMA whether they're development or not.

## **2. Shoreline and Special Management Area (SMA)**

Mr. Dack: Yes, good morning. Jeff Dack again, as mentioned. I came to your meeting a couple meetings ago. I'm a Current Planning Supervisor in the Planning Department. I'm Sybil's supervisor. I don't -- haven't made it here too often 'cause Clayton Yoshida usually come to these meetings but he's been out ill for a good while. I've been the supervisor for the various Molokai planners you've had going back a good number of years.

Ms. Lopez: I'll be your slider.

Mr. Dack: Oh okay. Okay. Great. So -- and I supervise the section that actually deals with the SMA law and shoreline rules, and so I'm going to be working off a presentation that was prepared about a year ago by -- by another planner and, pardon me, it's kinda - - it's kinda long and technical and involved, and if you have questions, certainly we'll deal with those at the end or questions during -- during your work. You know, Sybil gets, you know, pretty well up to speed on the laws and if she has some questions, she always will consult with me or one of the other planners 'cause a lot of what will actually come before you are actually the SMA things, they come before you more than -- more than things that are related to -- to zoning.

So today we'll be covering the Coastal Zone Management statute, which, again, I think I heard it was referenced, Chapter 205A, you also have Special Management Area Rules,

you have Shoreline Rules, and we'll talk about the Papohaku Dunes area, and then we'll briefly look at some recent sea level rise information.

In 1972, the U.S. Congress adopted the Federal Coastal Zone Management Act. It requires coastal states to adopt their own regulations for their own coastal zones. The Hawaii Coastal Zone Management Act, Chapter 205A, was approved in 1978 as the State's environmental policy and resource management umbrella, it authorize and mandates a local special management area permit system, and is applicable to all of the Hawaiian Islands. SMA permits, special management area permits, exemptions, and shoreline setback variances are authorized under parts 2 and 3 of the Chapter 205A, and those are administered by the counties. But section 8.84, of the County Charter, actually designates the authority for the Coastal Zone Management administration to the three Planning Commissions of the various islands, not to the County Council, so you are the final authority for administration again of our local County's administration of the Coastal Zone Management Act that's adopted by the State.

The special management area, or the SMA, as on Molokai, is a subset of the coastal zone, which, in Molokai's case, covers the entire island and that, the coastal zone for Molokai, is depicted in pink. It was mentioned by Tammy that there's other - next slide if you can - there's other rules and laws, of course, and you had a speaker last time, Ann Cua, I believe, spoke more about some of the -- the columns on the -- you know, the -- yeah, the columns on the left-hand side, more the broader State law, talked about the Land Use Commission, talked about zoning, etcetera, but administration of the Coastal Zone Management is parallel but its own little separate category, it's on the right-hand side, and again, as shown there, you have two sets of rules that -- that your Commission uses to manage this for your island. But as a whole, all of these work together to create a, you know, and the intent is to create a more ordered and sustainable community.

Since your Commission is the authority for implementation of the Coastal Zone Management Act for Molokai, you have responsibilities for various things. If you could move on. Yeah. Under the Act, local authorities are required to minimize where reasonable dredging, filling, otherwise altering any natural water feature, reducing the size of any beach or the public resource area, reducing or restrict -- or restrictions upon public access to the shoreline, you're supposed to minimize interfering with or distracting from views to and along the shoreline, and minimize activities that might adversely affect water quality, existing habitats, or agricultural uses of land. Next.

Then under your rules -- pardon me. Under your rules, you adopted -- you adopted various of the SMA guidelines in the State law, and these are critical because they apply Statewide to all jurisdictions, so all development in the special management area has to be subject to reasonable terms and conditions to ensure that there's adequate access to public and shoreline facilities in recreational areas, adequate and properly located public

recreation areas and wildlife preserves, provision for waste treatment and management, and that projects cause minimum adverse effect to water resources and scenic and recreational amenities as well as result in minimum danger from potential natural hazards. The purpose of your rules, 12-302-2, as found in that section of the rules is the -- it's designed to implement this HRS 205A, the State law relating to Coastal Zone Management, it says: Establishes procedures for SMA clearance and permitting, including public noticing and hearing requirements, for the State policy to preserve, protect, and where possible restore the natural resources of the coastal zone, to establish special controls on development along the shoreline to avoid permanent loss of valuable resources, and to provide adequate access to beaches, recreational areas, and natural reserves. The rules assist in giving full consideration of the State's policy of establishing special controls on development within the area as along the shoreline to avoid permanent loss of valuable resources and provide access to beaches, recreational areas, and natural resources. As a special management -- as a management tool, the rules are designed to assure that allowable developments are designed and carried out consistent with those CZM objectives that I just mentioned, and the policies -- and policies in the law, the guidelines in the law, and then all the provisions of your rules. In doing that, all projects that are reviewed by the Department and then as they come to the Commission, we look at whether they could have potentially significant effects in the coastal area, and those types of significant effects we always look at as filters. We try to see if a project could have a -- could involve a significant impact to natural or cultural resources, if a project could conflict with environmental policies or goals, it could detrimentally affect economic or social welfare, public facilities, affect, threaten, or endangered species or habitat, would it be contrary to State or County plans or zoning or subdivision ordinances, could it detrimentally affect air quality, environmentally sensitive areas, natural land forms, substantial ...(inaudible)... for public views to and along the shoreline or is contrary to any of those objectives and policies, again, I mentioned a little bit ago. Proposed projects are reviewed against the guidelines as -- as I mentioned, and projects may have adverse impacts but if they do, they have to be minimized to the maximum extent feasible with conditions of approval that your Commission would apply.

An SMA permit and shoreline variance is decided upon by the Planning Commission. In situations where there's multiple permits required for specific development, the SMA permit must be obtained prior to issuance of other permits but after any zoning approvals, however, you know, concurrent processing can be done, you can get a combination of a SMA use permit and along -- along with, for example, a conditional permit from the County that can be processed at the same time.

There's three types of permits that are -- that can be issued under your rules. The first is -- we'll mention here is minor permits. These are for projects that are determined to be a development, as a Commissioner asked about, determined to be a development under Chapter 205A -- I mean, yes, Chapter 205A, Section 22 that was, you know, referred to

by Corp Counsel, and if it has a valuation of less than \$500,000.00 it can be approved by your Commission as a minor permit. After the Department has consulted with relevant agencies and analyze the application, I'm sorry. I'm talking first -- I was getting out of order. The first -- the first set up here is, pardon me, is the major permit. Those are for over 500,000, and that needs to be presented, in valuation, that needs to be presented to you in a public hearing after property owners within 500 feet of the parcel been notified, and you can approve that kind of project with conditions or deny it in accordance with provisions of State law. Now we'll get to the minor permits that I incorrectly mentioned first. SMA minor permits are, again, a project that is considered to be development under State law but the valuation is less than \$500,000.00. They are processed by the Department and they still need to come to the Commission for approval but it's not a public hearing, it's not formal noticing, but they still do need to come to the Commission and receive your approval. The third type of permit is an SMA emergency permit, and those are for situations that pose an imminent and substantial harm to public health, safety, or welfare, persons or property. The Planning Director has the responsibility to not only review and analyze the application but to actually issue the permit. You don't do that in this case. Your rules have given that authority to the Planning Director because, again, it's an emergency, something that needs to be acted upon quickly that can't necessarily take the time to be agendized and to be brought to you. Under some circumstances, if it's a bad enough emergency and the situations are calling for it, the Director can give verbal approval of an SMA emergency permit, however, they -- an applicant still has to come in for written approval. But you're not left out of the loop, whenever the Director issues a emergency permit, notification of that will be on your agenda. I think your last agenda had a notification of an SMA emergency permit on it, as an example.

The first part of the process to determine where a project needs to go is when we receive an application, usually when an application for we call it an "assessment," and SMA assessment, and that is -- we look at that, we look at how it fits with the rules, how it fits with the actual plans of the Molokai Community Plan, how it fits with the County General Plan, how it fits with zoning, all that, and we also look at very closely at the type of activity that is going to be there to try to figure out whether this, what's being proposed, actually does meet the terms of a development and -- or it actually is considered to be not a development, this is a critical decision 'cause it takes it the route either of an exemption or a development, and I'll just read you, since the question was asked, development includes five examples from HRS 205A, Section 22, so it says:

"Development" means any of the uses, activities, operations on land, in or underwater within a special management area that are included below," these five: Placement or erection of any solid materials or any gaseous liquid, solid thermal waste, grading, removing, dredging, mining or extraction of any materials, change in the density or intensity of use of land including, but not limited to, the division or subdivision of land,

change in the intensity of use of water, ecology or related thereto or access thereto, and construction, reconstruction, demolition, or alteration of the size of any structure.

But then, as again was mentioned by Corp Counsel, there's a whole set of exemptions, and I won't necessarily go through all of those 'cause, again, it's long, but the principle one we -- that we commonly see, well there's a few of them actually, but one of the ones that we commonly see, for example, a single-family residence. A single-family residence that is under 7,500 square feet, not part of a larger development but can include an ohana, accessory unit, can be considered not a development and can be considered exempt. And there's other things, such as repairs to those kinds of developments, repairs to existing commercial facilities, all repairs or alterations to existing structures, repairs to underground utilities, the use of land for agriculture, those are probably the most -- the most commonly seen. So if we -- when we look at a project, one of the first things -- an SMA assessment application, we try to determine, well we do determine whether it fits as an exemption or -- or it needs to be brought to you as a -- as a development. If it's not a development, the Director has the -- the Planning Director actually has the authority to issue an exemption, however, it must first come to your Commission, on your agenda, and you can make a decision whether you wish to waive any further review and just let the Director go ahead and issue that -- that SMA exemption for somebody who wants to build a new single-family house. Do you want -- or if you -- if you don't want to waive it, you can make a decision to actually have it brought back to you at a subsequent meeting for you to actually issue the exemption yourself. The -- if it's exempt, you know, and this is talking a little about -- more about what happens if it can be -- it can be denied again, but, again, if it's not exempt, it's brought to you as a minor permit so things can take either route. So you can, again, you can either waive or you can ask it to come back to you. If there's any permit that's denied by the Director or your Commission, that can be done because it's inconsistent with State or County planning documents, County or zoning, or has adverse impacts. Those are all grounds for -- for denial.

Now I'll talk a little bit about Shoreline Rules. You have two sets of rules. Remember, you have the Special Management Area Rules and you have Shoreline Rules. The shoreline area - next slide if you can - is a small -- that's actually again still the SMA rules, but the shoreline area is a smaller, is a subset of the -- the SMA area, and every island in the -- in the County of Maui has a shoreline area, and it shares goals and objectives with the SMA and Chapter 205A to, you know, strive to provide accessible coastal recreational resources, preserve and restore historic resources, protect, preserve, restore scenic and open space resources, minimize adverse impacts on ecosystems, it would direct us to locate facilities while minimizing negative impacts, reduce hazard to life, streamline permitting processes, stimulate public awareness, education, and participation, these are all objectives and policies of the State law and then within your rules itself, your shoreline rules itself, the purpose of the rules can be summarized as -- as follows: to ensure public enjoyment of the shoreline area to the fullest extent possible, preserve the natural

shoreline environment and beach processes, limit manmade structures to those that are compatible to the shoreline area, protect, preserve and restore the quality of scenic and open space resources, provide adequate access to and along the shoreline, ensure public use and enjoyment of shoreline resources for future generations.

Now, to figure out whether something's actually in the shoreline or not, your rules establish or actually if it was in the setback, the rules have calculations, and Sybil can put those up on the screen, but it largely depends upon the size of the lot, whether the lot was created before June of 1989, but in most cases these days, particularly for any parcel that was created after 1989, the setback is 40 feet if the lot depth is 150 -- 100 feet or less, and if for other lots above that, it's what we call the -- there's one-quarter of what we call the "average lot depth" or 150 feet, whichever is greater, so say for example you have -- you have a lot that's 400 feet, then your setback would be 100 feet. If your lot is 600 deep or greater, then you are in the maximum setback of 150 feet in any lot of greater than 600 feet still has that same 150 -- 150-foot setback.

There's -- there's a set of permissible structures that can be built in the shoreline without having to have a variance, and they're fairly limited, but those are pretty much those were completed before 1970 or duly permitted before 1989, that's kind of the grandfathering concept that Tammy was talking about. Again, structures that were outside the setback area when they were constructed. Again, that's a grandfathering brought forward into the shoreline rules. Structures related to agriculture, aquaculture prior to 1989. Those are determined to be minor and can be approved without a variance, just be approved actually administratively by the Planning Staff, Planning Department. And there's maintenance, repair, reconstruction, and minor editions to publicly owned legal ocean-based recreational facilities, such as a beach park, pavilions, things like that.

So, again, the Planning Director's authorized to issue those approvals as well as to make determinations of where the setback is, but that has to be based upon a shoreline survey that is prepared by an engineer, it gets submitted to the Department of Land and Natural Resources; ultimately, that shoreline survey gets approved by the Board of Land and Natural Resources, gets signed by the chairperson, and that's good for a year. That actually provides the basis for us to measure the setback from. The setback goes whatever the -- you know, whatever -- if it's a 100-foot setback, your setback's 150 feet running mauka from that certified shoreline. The rules also provide requirements for submitting variance applications; that requires -- that's very much like the SMA major permit I was mentioning, requires a full public hearing, 500-foot notice, and can be -- we'll discuss that in a few more minutes.

But I wanna go, you know, your shoreline planner had ask that there be a brief discussion of the Papohaku Dunes area, and that -- this was on your agenda for I think a property by -- owner is Mr. Wehner, a few meetings ago, and here's an opportunity to talk a little -

- I'm sure there was some -- there was some discussion, certainly, of that area at that time but just kind of a little broader discussion of the Papohaku Dunes area. It's a area of -- it's unique with abundant natural and cultural resources, and some of the features in that area are native species, historic properties, and the largest, it's the largest sand dune system in the entire Hawaiian Islands. It's located on the West End, and there are limitations on the development in the area. Limitations are ...(inaudible)... by County regulations, State land use regulations, as well as land development covenants that conditions when the land was subdivided. This is an example of where we have, again, the multi-jurisdictional question that Tammy was referring to. Shown here, the State land use classifications in the Papohaku Dunes. Then on the -- the next slide we'll see the SMA covers the land makai of the individual parcels and the makai portions of those same parcels. And all of this -- this information on the Papohaku Dunes can be found in the Papohaku Dunes Cultural and Natural Resource Preservation Plan, which was published in 2005, and is -- it was used as a resource document. Again, we used it in the -- in the valuation and consideration of the most recently the -- Mr. Wehner's grading in the dunes. We do -- we consult it regularly when we're assessing projects along the coastline.

In the preservation plan, the dune area has been segmented into nine sections. It's for purposes of description, recommendations, and then there's recommendations in the plan regarding treatment of grading, vegetation, education, drainage, natural features, development standards, manmade features, and all the recommendations are designed to preserve the unique qualities of the area.

Next, we'll talk a little about shoreline setback variances that's found -- Section 13-304-13 of your rules. If it's -- if someone gets a shoreline setback variance, and they're very -- very rare, but if they're approved, it provides the ability for the applicant to do a project that otherwise would be illegal, it's not a permit, and your rules specify that you must grant a variance under only certain unique circumstances, and then they only be granted for projects that are necessarily ancillary for crops, agricultural landscaping, drainage improvements, publicly owned boating or water sports facilities, facilities or improvements by public agencies for utilities, certain private facilities, or they can be sand pushing makai of the shoreline. For granting a variance for private facilities, a finding of hardship has to be made, and the hardship can't be economic caused by actions of the property owner or caused by subdivisions or permits approved after June of 1989. There are mandatory variance conditions. If a variance is granted, under your rules, there's conditions that have to be -- you can apply a variety of conditions but there are a few in this case that are mandatory that the project must maintain safe lateral access for the public to and along the shoreline or compensate for its loss, minimize risk of adverse impacts to beach processes, minimize risk of structures falling, failing and becoming rubble on the public property, minimize adverse impacts on public views to, from along the shoreline, and they also must comply with flood hazard rules. They require very close scrutiny before it could be issued.

The final topic, we'll talk about sea level rise a bit 'cause that definitely has some significant implications for -- for Molokai. It's become a major topic of public discussion over the last -- last few years. In 2014, the Hawaii Legislature adopted Act 83, and then in 2017, they adopted Act 32, and those created the State's climate change mitigation and adaptation initiative. The second of those created the climate adaptation mitigation adaptation commission and that was formed to support sustainability goals, to reduce greenhouse gas emissions, improve resiliency to climate change, and prioritize our State's resiliency agenda. The commission's initial goal was to develop a sea level rise vulnerability and adaptation report, and I happen to be the commissioner who's been designated by the Planning Director that has legal authority but, basically, she's designated me, I've been attending these meetings, so I pretty much am the County's representative on this climate commission. There was -- well, the first things we did as a commission was to adopt the Hawaii Sea Level Rise Vulnerability and Adaptation Report at the end of 2017. It's a technical report, it's not a plan, it assess vulnerabilities to coastal hazards due to sea level rise, it provides recommendations for improving resilience from coastal hazards and provides a framework for assessing other climate change impacts. It was created by a team, including the Hawaii Department of Land and Natural Resources, Office of Conservation of Coastal Lands within there, U.H. Sea Grant Program, the University of Hawaii, School of Ocean Science and Technology, and DetriTech, a private consultant. Last year, Mayor Arakawa issued a Proclamation, and the County Council adopted a Resolution, each acknowledging sea level rise and directing that the County work towards implementing the measures in the report. There's a companion to the report, it's called "Sea Level Rise Viewer," and that can be found at a website noted at the bottom of the screen, this is a screen grab from the website. The viewer covers the six main Hawaiian Islands and provides vulnerability information for certain areas based upon passive flooding, highway flooding, and coastal erosion at different possible footage of sea level rise. The largest one being 3.2 feet, and 3.2 feet is anticipated as early as 2060, so best practices to be planning to be addressing possible impacts of sea level rise within -- within that blue area. This is a slide from the viewer of Kaunakakai with 3.2 feet of sea level rise, again, which might occur as early as 2060. It's -- the document refers to this, the blue area, as the sea level rise exposure area, or SLRXA, pardon us, as you can see, a significant portion of the town is expected to be affected by the combination of passive and high wave flooding and coastal erosion, so it needs to be into account in any future development as well as any redevelopment, and should be used to determine what facilities need to retreat from the exposure area. I'll note that your -- your member of the Council from Molokai, who in her capacity as budget chair, has proposed recently \$500,000.00 for this commission fiscal year's budget for phase one of County-wide shoreline, which in this case would be County-wide shoreline retreat studies under Planning, and it would start with Molokai, so that -- if that's granted there, we have a significant opportunity to be addressing the very substantial impact sea level rise will -- will be -- it's anticipated to have on Kaunakakai Town. If you'd like a more

comprehensive presentation on sea level rise, we could do that later, but this is -- I'm going on and on, so I'm going to be wrapping up here.

So, in conclusion, I'd like you to -- I'd like to leave you with these thoughts, you know, we know that our shoreline area provides for tourism, economy, recreation, food and fishing, cultural practices, and our quality -- a large part of our quality of life, however, it is threatened with accelerating coastal erosion, flooding hazards, and sea level rise. Shoreline and coastal erosion processes together are a system that needs to be studied and fully understood to make sound scientifically-based planning decisions, such as could be made in the shoreline retreat study I just mentioned. The -- so, with that, I'll conclude. Thank you very much for your attention. I know that was a lot of -- a lot of information. I'd be happy to answer any questions. Again, you know, Sybil has been answering questions pretty much every meeting that something comes to you relative to that whole set of topics and documentation regulations I mentioned and I or other members of the shoreline team, Sea Grant representative could return to a future meeting if you'd like at some point. Any questions right now? Again, sorry for the length of that, but it's a lot of material.

Chair Buchanan: Mr. Chair, I have a question. And, first of all, I apologize that I'm really, really late. I think I needed the Vice-Chair this morning to fight a brush fire, but I ended up having to do it so I was late.

Vice-Chair Poepoe: Madam Chair, would you like to --

Chair Buchanan: No.

Vice-Chair Poepoe: Assume the --

Chair Buchanan: No. This is good practice for you.

Vice-Chair Poepoe: Okay. Okay.

Chair Buchanan: Mr. Acting Chair. Average lot depth. So as -- as the commissioner on the sea level rise, is that something this Commission should be looking at in its rules? Is it adequate? Is it inadequate, the setback for the lot depth?

Mr. Dack: No. The -- your current setback is just a very small ribbon immediately adjoining the shoreline compared to that sea level rise exposure area and that's -- the sea level rise exposure area definitely needs -- warrants a lot of serious consideration towards, you know, protection in -- 'cause that's a much broader area than your setback area will be. The Maui Island Planning Commission is working on amendments to our shoreline -- to the Maui Planning Commission Shoreline Rules that would be addressing

that, but that's only one aspect of areas of concern, those would be related to coastal erosion, but there's certainly other consideration should be given to even areas that would, again, subject to flood -- flooding, so it's certainly an area that would be very appropriate for -- for attention. Again, I think if it turns out that this proposed shoreline retreat study proposed by your Council person from Molokai ends up being put in the budget, that would be a really good venue to be addressing, basically, the issues associated with sea level rise in that blue area.

Chair Buchanan: Okay, thank you. I also wanted you to go back to the side right before that one, the other actions under SMA rules 12-302, Molokai Planning Commission, yeah, right there. So the exempt, the category exempt, SM5, and the criteria, and the authority, when this Commission can waive or not waive the review of the Director's recommendation, my understanding is that authority is unique to the Molokai Planning Commission and does not exist in the Maui Planning Commission. Is that true?

Mr. Dack: That is correct. I can -- I often can't get it quite straight but actually I believe that the Lanai Planning Commission has a very similar kind of authority but -- but that's not the case on Maui. There's such an incredible volume of exemptions that go through Maui that the Maui Planning Commission would probably have to be meeting, you know, couple days every week of the month to be able to take on the same kind of review opportunities that you have under your rules.

Chair Buchanan: So I think I just wanted to -- the Commissioners to understand that is a unique oversight that this Commission cannot lose because often we ask how projects got built or done on the shoreline and sometimes what we get back is that they were exempted projects or administratively permitted or, yeah, permitted, so I'm always weary of the administrative permits, even the emergency permits, we hardly see those emergency permits -- well, actually, we never see them because they don't come to us, but what happens when you have one single-family home that has multiple request for emergency permits? Does the County look at those multiple permits and make recommendations to the homeowner?

Mr. Dack: I would expect that if there's an emergency permit that was requested for a house, one of the things that will absolutely be done is there'll be a visit to the house, or any emergency permit that's proposed, there'll be a visit to the site and if we are -- we feel that there might be other kinds of issues that might be arising in the near future, I'm sure we would be noting those and possibly making recommendations for -- for activities maybe beyond that which originally brought it to our attention, and, under rules, the emergency permit is only good for 180 days, and they, within that timeframe, the applicant's supposed to make an application for a regular SMA assessment that then would actually bring that project before you either as an SMA exemption or a minor permit,

so you would see the project, it just would be later on down the road after their initial emergency's been abated.

Chair Buchanan: Okay, thank you very much. I've never seen them. Mr. Chair? Mr. Acting Chair, I sorry to be late. Again, I apologize. But did the presentation go over -- I saw him touch on Papohaku Sand Dunes, I was kinda wondering if within what I might have missed, they explained how notice of violation would be issued. You guys covered that already? Pau?

Mr. Dack: The first -- the first presentation was all enforcement. Yeah.

Vice-Chair Poepoe: Yeah, that's correct.

Chair Buchanan: Did they shine -- shed light on what we can expect from the project that we just heard at Papohaku? They did?

Vice-Chair Poepoe: I think Tammy only had one -- I forget what she said, but she made mention of something when that slide was up.

Chair Buchanan: Okay, sorry. I no like reiterate. I just -- because from that meeting till now, people are asking me what happened, and it's not on the agenda so I don't wanna bring up the specifics of it, but just for the overall how notice of violations are issued and what is the sliding scale and what are the considerations that go into Public Works determining, or Planning, the notice of violation, enforcement.

Mr. Dack: Well, the general -- I apologize. I'm sorry. The generality of our response is, yes, the presentation did address that, it didn't address Public Works because that's not in the Planning Department's kuleana, it did -- the presentation did mention that there can be an RFS, request for service, submitted and goes to a variety of responsables, and that includes Public Works, but Tammy Osurman, your code enforcement officer for Molokai, didn't get into Public -- the Public Works portion of it nor do I think she'd probably would consider herself qualified to do so. But the -- you have -- there was a hard copy of the presentation materials, a summary, that was, you know, pretty, in my opinion, I thought it was a very good presentation, frankly, and I hope your Commission thought it was helpful.

Chair Buchanan: Okay, thank you. I think we going request for Public Works come and give us training on how they work maybe. Thank you.

Vice-Chair Poepoe: Members with any more questions? Seeing none, we can move on to the next topic or, yeah, that's one good suggestion, five-minute recess.

*(A recess was called at approximately 12:30 p.m., and the meeting reconvened at approximately 12:40 p.m.)*

Vice-Chair Poepoe: Come back to order so we can complete our training. Take it away, Planning Department.

### **3. County Policy Against Discrimination**

Mr. Dack: So we have a podium shift so, hopefully, you can hear me a little bit better this time. I'm sorry but it sounds like I was fading in and out last time. So this is a set of slides on the County of Maui Policy Against Discrimination. It applies to all County officers and that includes commission members. The policy's very simple. Officers and employees of the County must not discriminate against or engage or the harassment or retaliation of another employee, the public, or individual under consideration for County employment. It applies to all employees, board and commission members. Employment decisions are made -- that are -- definition of discrimination is employment decisions made solely because of individual's race, sex, pregnancy, sexual orientation, age, religion, color, ancestry, national origin, disability, marital status, etcetera, are considered discriminatory. There's a series of protected classes in employment. I'll just read a few. The act started many, many years ago, probably a good 30 or 40 years ago, and with just limited classifications, such as, you know, race, I think sex, sexual orientation, well, they were added over time, basically. This is quite an extensive list of protected classes of employment. You can move on. Forms of discrimination can include unequal terms and conditions, can include harassment or retaliation. Example of unequal treatment. Back in 1990, Hawaii Sugar Plantation monthly wages were different on different ethnic groups; certainly, that is certainly something we couldn't do today. Another -- another example here was from a help wanted ad, 1921, where there was employment being specifying race in the people who were being requested to be considered for employment. Other examples of unequal terms, for example, only males are allowed to use flextime, person with disabilities aren't given training opportunities, or older employers are not provided computers. Those would be examples.

Harassment is a form of discrimination and is prohibited. Verbal harassment may be created by the use of epithets, derogatory comments, negative stereotyping, unwelcome invitations, personal notes, jokes, or slurs. Physical harassment may be created by inappropriate touching, crowding, or impeding movement. Visual forms of harassment: circulating written or graphic materials or displaying derogatory posters, cartoons, or drawings.

A little closer look in discrimination. Protected basis of sex include gender, unwelcome sexual behavior of a sexual nature, pregnancy, and breastfeeding. Sexual harassment can include, here's a list, sexual advances, requests for favors, etcetera. It can be by an

officer, employee, or to another officer, employee, or private individual. Board and commissioners members, again, are considered to be officers of the County. It has to be particularly if advances are unwelcome. Move on.

Sex discrimination can also be created by subjecting an employee to comments or other visual, verbal, or physical contact of a sexual nature or because of his or her sex. The conduct, again, is unwelcome and the conduct is so severe or pervasive that it creates a hostile work environment. Evaluation of the severity or pervasiveness of harassment is made from the victim's perspective and not the intent of the alleged harasser.

Pregnancy discrimination. Because only women can get pregnant, pregnancy discrimination is considered a category of sex discrimination. Discrimination because an employee is breast feeding expressing milk at the workplace is illegal.

It's illegal to discriminate against an employee or applicant who has a disability but can perform the essential functions of the job with or without a reasonable accommodation. Not all conditions meet the definition of disability. The mental or physical condition must substantially limit a major life activity. Generally, the condition must be a permanent nature, not just temporary. On the other hand, the person must still be able to perform essential functions of the job with or without accommodation. Don't assume that a person with a disability can't do a job or needs accommodation, and don't assume a person who looks perfectly healthy is not disabled.

Discrimination based on religion. There must be no unequal terms or conditions related to that, no harassment, and the employer must provide reasonable accommodations for religious practices. Question: Is there illegal discrimination? Here's a little check list. Is the person a member of a protected class? Did that person suffer from an adverse act? Did the adverse act happen because of the person's protected class? And are there any legally valid defenses to what happened?

If you feel you've been subject to illegal discrimination, report it immediately, within 120 days, to either your Commission chairperson or here's the names of -- of four people beyond your chairperson.

The U.S. Equal Employment Opportunity Commission and the Hawaii Civil Rights Commission enforce laws or regulations which prohibit discrimination in employment.

All information gathered related to a complaint is to be kept confidential to the extent possible. Of course, certain information must be disclosed to complete the investigation.

It's illegal to subject an employee to adverse treatment because the employee complained to the County about what he or she reasonably and in good faith believe it to be a

discriminatory employment practice or because they participated in a complaint process as a complainant or a witness.

County's employees and members of boards and commissions must not discriminate any persons who use County services and facilities.

Are there any questions on that?

Vice-Chair Poepoe: Members, any questions? Seeing none.

Mr. Dack: Thank you.

Vice-Chair Poepoe: Moving on to our next topic.

- 4. Sunshine Law**
- 5. Ethics**
- 6. Contested Cases**
- 7. Property Rights**
- 8. Rational Nexus and Rough Proportionality**

Ms. Desjardins: Okay, bring it on, Sybil. Okay, so now we're going to talk about all the other things on the agenda. We have about a little bit less than an hour to get through this. If you folks have questions, let me know. But let's start by talking about the Sunshine Law. I know we have a couple new members I don't know.

Okay, so let's go ahead and get started. You have -- all of you have the handout in front of you. First thing we're going to talk about is open meetings. As most of you already know, the Sunshine Law requires that meetings be public, and the general policy and intent of the Sunshine Law is that we want government to be as open as possible, we want the process to be open to the public so that the public can have confidence in the proceedings. Interestingly, the Sunshine Law -- well, scratch that. I'll get to that later. Exceptions to the Sunshine Law that we're going to go over today, those are strictly construed against closed meetings, so we really don't have closed meetings unless we absolutely have to, and if you don't have a specific statutory exception, board business cannot be discussed in secret. So what is required - open meetings? So every meeting of a board is open to the public, and the public is always permitted to attend. People who have an interest in something that's taking place at a public meeting need to have an opportunity to submit data, views, arguments, in writing or orally, on any item that has been agendaized, and the board or commission can take -- make reasonable time allotments for public testimony. So what to remember about that is that the general rule is that you give -- this Commission gives the members of the public three minutes to testify; if, however, there's a reason to go over the three minutes, it needs to be discussed.

The board needs to determine that that's what the board's going to do, and then you have to give that same opportunity to everybody who testifies, you can't just limit it to certain people.

Okay, so the first thing that we wanna talk about is what is a meeting? Since all of this really only has to do with meetings, what is a meeting? So a meeting is the convening of a board or commission for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the board has supervision or jurisdiction. So those are the sort of buzzwords that we look at when we try to determine whether something is a meeting or not. So the Molokai Planning Commission has nine members; that means that five of you folks make a quorum. All actions of the commission must be taken by a motion approved by five of nine members, generally, there are some exceptions, for example, going into executive session, but, for the most part, all decisions need to be made by a majority.

Okay, so what can you not do under the Sunshine Law? First of all, no more than two members of a board can gather to discuss board business, so, in other words, if you two of you get together and you wanna talk about something that's pending or could be considered in the future to be board business, you can talk about it, however, you can't make an agreement to vote a certain way between the two of you, and you can't then talk about it between two of you and then go to a third board member and talk about what the two of you talked about because that's called a "serial communication" and that really sort of circumvents the whole purpose behind the Sunshine Law, which is that you folks are going to do everything that you do in public meetings and are open to the public and agendized. You can't discuss board business by phone, fax, email, social media, Facebook. You can go to social gatherings together, you cannot talk about board business, but, hopefully, 'cause it's a social gathering, you'll be talking about something more fun than that. And you can have a meeting that's held by telephone or video conference. Sometimes we have boards that may have a member who's temporarily or permanently disabled, there are rules about how you can have board meetings with one person not present, we don't need to get into a big long discussion about that because, right now, that's not an issue for this Commission.

So then the next big question becomes, well, what's board business? I mean we can't talk about board business, so what does that really mean, and the definition of "board business" is matters over which the board has supervision, control, jurisdiction, or advisory power and that are before, aha, or reasonably expected to come before the board or commission. So that's really kind of the tricky part. So one of the examples that has been an issue and a problem for us in the past is the Native Hawaiian Law Training, and the reason why the entire board cannot attend that training is because there are issues that come up within that training that very well could become board business later, so we'll talk about -- well, I'll talk about it right now. There is a Native Hawaiian Law

Training that's coming up, I believe, next month, two of you folks I believe will be attending that training. There are two new members, so I'm hoping that you are the two that are going to be actually attending that training.

Another exception to the no more than two members of a board is what's called a "temporary investigative group." You can form a TIG in order to have less than a quorum -- or less than a majority of you, so that would be three of you, more than two but no more than three of you together -- or, I'm sorry, or four. Sorry. My math is off today. So you can have two or more but less than a quorum of you could form like a subcommittee to talk about a particular issue that's relevant or important to the commission, for example, we currently have a TIG in place to review recommendations for changes to your rules and regulations, and then that TIG is going to report back to you folks later in the year to talk about what was discussed. So that's one of the exceptions to the rule that I just talked about, and the reason why we have that exception is because we don't wanna cripple a commission from being able to move forward, we want a commission to be able to do things like review its rules but not take up every single one of your meetings to do that, okay? The thing about a TIG though is that the deliberation and decision making on what the TIG comes up with have to be done at two separate meetings. So for example, when your TIG reports back to you about recommendations about changes to the rules and regulations, there's going to be a general report given to you about what the TIG has come up with, and then on a next agenda meeting, you will take public testimony and have an actual discussion about it, but that first meeting will just be to report back to you, okay, to give the public an opportunity to catch up with what's going on.

Okay, alright, that's the same thing. No, no, no, I'm sorry, go back. So this is -- has to do, for example, with the Hawaiian Law Training. So the board can assign two of you to go, then the only thing that's going to happen afterwards is that you're going to report back to the board at the next regularly scheduled meeting and so the public can hear that you went to this training, I can help you with that if those folks that are going, one of the two of you will go ahead and report back and I can assist you on how to do that, but then you're just going to come back and let the public know what happened, and what you learned, and just give like sort of a brief overall view of what occurred, again, to link it back up to the public so the public is aware of what you did and what the presentation was.

Okay, so if, for example, a meeting is canceled due to lack of quorum, there are still a few things that you, as Commissioners, can do, one of which is that you can go ahead get trained, like today. I think the last time we did this training we didn't actually have a quorum of members present. You can go ahead and you can be trained. The other thing that you could do is you can take public testimony, you can ask questions of the testifiers, but what you're limited from doing is any deliberation amongst yourselves when you have a lack of quorum, okay?

You can also attend other types of meetings, such as a County Council meeting or a community association meeting, again, it has to be less than a quorum of you and you have to come back and report that we attended the such and such community association meeting and this is what occurred, we received a presentation by A or B, the general topic that was discussed was C and D, so you're going to report back.

One huge exception to all of this is what's called an "executive meeting," those are meetings that are parts of meetings or entire meetings that are closed to the public. If you anticipate ahead of time that you may need to go into executive session, then what you're going to do is you're going to actually put that on the agenda so the public is aware that there's a high likelihood that an executive session might be required. In order to go into executive session, you have to -- somebody has to make a motion to go into executive session, that vote has to pass by two-thirds of the members present so long as they constitute a majority of members to which the board is entitled so, in other words, if you have a bare quorum of five members present, and you wanna go into executive session, all five of you have to agree to go into executive session or it's not going to happen. If you do go into executive session, we generally go into that room back there, there are minutes of that session that are kept, so our record keeper comes with us, we have a discussion only about the very, very narrow thing that caused the executive session, there's not going to be any voting that's going to take place in private, there isn't going to be any deliberating, but, for example, we might have an executive session because I may say, okay, I'm going to request an executive session as the attorney for this Commission, I think that you need to hear something about your legal rights or responsibilities that I want to cue you into, or one of you might have an issue about a legal responsibility in which case you're going to be concerned enough about it to say I think we wanna go into executive session. I'll help keep your executive session narrowly focused so that you don't go off and start talking about things that could just be talked about for the general public to hear. Okay?

Alright. So what happens if you violate the Sunshine Law? Well, generally, if somebody from the public believes there's been a violation of the Sunshine Law, or a commission member believes there's a violation of the Sunshine or protest something that occurred, then what happens is is that the Office of Information Practices will receive a complaint saying that I believe a violation occurred. The most common one that I've seen is members of the public believing that there has been some sort of predetermined discussion and a vote on something without there being a meeting, okay, and so this has come up recently during the department -- the approval of the Mayor's request for department heads. There was some concern about whether or not there may have been a violation of the Sunshine Law. So what'll happen is the Office of Information Practices will ask for the commission's attorney, mostly, to write a response as to how you feel about whether there was a Sunshine Law violation or not. Sometimes there is a Sunshine

Law violation in which case the commission may say, yeah, you know what, it turns out we actually did inadvertently violate the Sunshine Law. We're sorry. We won't let it happen again. In which case the Office of Information Practices will, generally, just say there's been a violation, it's been admitted, or there's been a violation that wasn't admitted but after reviewing all the evidence, we believe there was one, they don't have the authority to do anything other than say don't do it again or how about some training in more depth -- in-depth training of Sunshine Law for you folks to understand, and that usually occurs when there's like a series of violations and of a certain board or commission isn't getting it. But from there, the person who feels aggrieved can also take it to the Circuit Court if they don't agree with the OIP's decision, and the Circuit Court can actually enforce it by either voiding out whatever happened at the meeting where the Sunshine Law violation occurred, issuing an injunction against the Commission. If it is found to be a willful violation, in other words, it was made very clear that something would be a Sunshine Law violation, you do it anyways, that actually has a potential of being a misdemeanor, and there's also the potential of being removed from the board. Any quick questions about Sunshine Law violations? The good news about it is that if I see it, if I feel like it might be happening, I'm going to let you folks know that I feel like we have an issue and I'll let you know, but go ahead.

Ms. Espaniola: Regarding the executive meeting. So I know we had -- we had met, had a executive meeting regarding for the board to cease, and that group came in and read, so what follow up has been made on that? I'm just -- I'm just saying this for the record that we any follow up on the executive meeting ...(inaudible)...

Ms. Desjardins: So, generally, there is no follow up with executive sessions, so what happens is is that you -- in the example that you gave we -- you folks made a motion, which was approved to go into executive, we had a private discussion, which we're not going to talk about now, and then we basically resolved it and then we get back on the record, but let's -- let me give you an example. If something comes up and I feel, for example, that there may be some liability on the part of the Commission, what I may do is say I would ask somebody to make a motion to go into executive session; from that point, then I would say, listen, here's what I think legally could be a problem for you folks and I would lay it out, and then we walk away and we conduct our business, but we -- remember, there's never really going to be much of a follow up because we're not making any decisions in executive session. But a really good point, since we'll be talking about ethics coming up and I don't remember if I put it in the slide, is one of the important things is is that we never disclose what occurred in executive session, and, in fact, the minutes of the executive meeting are not disclosed to the public. Now if there is a challenge to that, we keep minutes in case there's a challenge, but we would never disclose that unless ordered by a court or even by OIP or something to disclose that. I hope that helped.

Okay, so we're going to talk a little bit about Robert's Rules of Order. For the most part, the way that these meetings are to flow is that the chairperson can ask for recommendations on motions, the chairperson is able to speak and debate, and also vote, but, generally, the chair doesn't make motions but may say something along the lines of I'm ready to entertain a motion to approve or to deny something, or sometimes the chairperson may not want to even give that much of a -- of a cue as to whether he or she wants a certain motion to come forward and may just say I'll entertain a motion at this time, and then leave it up to the members, and then it's up to you folks for one of you to say I make a motion to, you know, deny the SMA permit, and then you have to -- every motion has to have a second. Now once a motion is seconded, the motion no longer belongs to the person who made the motion, so they don't have any control to amend it or change it, now it belongs to the body and the reason why that's important is because when we get to the issue about friendly amendments, for example, Leonora, you might make a motion to deny an SMA permit or let's say grant a permit with three -- three provisions, recommended provisions, there might be a friendly amendment by somebody else to add a fourth provision, for example, that's kind of a borderline friendly amendment 'cause it actually changes it a little bit, but you can make sort of little changes to it, then you'd have to vote on the friendly amendment first, and then you get back to your main motion depending on whether the friendly amendment passed or didn't pass. Again, as these things come up, we can work on them, you know, individually, but I just wanna kinda trigger for you some of the things that might happen. Can you go back?

Okay, so the chairperson's job is to control the flow and order of the meeting. The general protocol is is that commission members are supposed to -- so the chair, and our chair does this very well, will say does anybody have any questions, okay, so each of you then would say to the chair I'd like to ask a question. Some chairs like to go down the line and will ask, you know, Commissioner Poepoe, do you have any questions, Commissioner Moore, do you have questions; it's really up to the chair how to do that. But, generally, most commission members are good about asking the chair's permission to ask a question rather than just taking over and asking questions. It's just a matter of procedure.

So we talked a little bit about a motion and the flow of a motion. If you are silent on a vote, then it is considered an affirmative vote, okay, so if -- some people will say I'm going to recuse myself from voting, then you're going to be voted as a yes unless you have a conflict of interest, and if you have a conflict that's been disclosed, and that conflict is recognized, then vote -- not voting is not considered a yes or a no, but if you just simply have listened to the discussion and you don't vote, it's going to be a yes.

Okay, so we talked a little bit about a friendly amendment. You can keep going. Things to remember about being a commissioner. Most important, and these are the hardest things to do sometimes, and one is that you have to remain impartial and not openly make conclusory remarks until all of the evidence has been presented, and the reason why

that's important is because if a decision that you make is challenged, okay, the first thing they're going to strike out at you is that you closed your mind or you made up your mind before all the evidence was presented, so you're like judges 'cause this -- you have a quasi-judicial role in a lot of way, so you gotta try imagine yourself from the point of view of the person who's presenting, you may have very strong opinions about something, but you wanna really refrain from making a lot of conclusory remarks as if you've made up your mind until after you've had an opportunity to hear from everybody, and the best time to start making your conclusory remarks is after the motion is made and then the chair says I'm opening this up for discussion, that's the time for you then to be trying to convince your members to vote the way you wanna vote, and that's all done in public, so if you have a strong feeling about something, for example, Commissioner Bicoy might say, you know, I've heard all the evidence, and I feel very strongly, I'm going to be voting against this and this is why, you're doing that 'cause you're trying to convince the other members to go your way, okay, and you're also advising the public how you feel and that's important for the public to know. Sometimes I see council member or commissioners just not say anything and it's really hard 'cause you don't really know, and then you also don't have anything on the record to really say why you felt a certain way about something, okay, and remember your decisions gotta be based on the evidence and the record. If you go outside of the record and make decisions you're going to get overturned, so if you want what you're doing to stick, then you really do have to base it on the evidence and the record, and so it's part of your job to develop the record, okay, 'cause the record is what, for example, if you listen to an SMA permit application and you feel like there's not enough evidence to grant the permit, but in the back of your mind you're interested to know why, for example, it might be important to do, you wanna tease that out of the -- the people that come before you, ask them questions, engage them in answering questions, or the other way around, if you are feeling like a project doesn't sound very good, remember you're keeping your mind open but what you're doing is you're asking them questions because you wanna get to the bottom of it, and the only way you're going to get to the bottom of it is you have enough evidence to do that.

Yeah, and then just avoid statements that could be mistaken as an attack, and remember that people are going to be judging you, they're going to be looking at your decision because you have a substantial role in this community, there are certain things that community members can't do unless they come before you, so it's a huge responsibility, but you have to be careful and sensitive to what people could misconstrue 'cause you will certainly not intend it, but if you put it out there the wrong way, somebody can certainly twist it, so just be careful.

Okay, so let's talk a little bit about contested cases. A contested case happens when a proceeding involves the legal rights, duties, or privileges of specific parties and there is a law that requires you, as commissioners, to determine those specific rights and duties after an opportunity for agency hearing. Any contested case then can be appealed to the

Circuit Court, so after you folks, it's not the BVA, the Board of Variances and Appeals, that hears your appeals, it goes directly to the Circuit Court. So what you're trying to do is that if you want your decisions to stick, you have to remember that it's going to be looked at as a matter of law by a Circuit Court, so you wanna make sure you do your job right. Some contested cases require a public hearing by law and some do not, so, for example, an SMA minor permit does not require a public hearing; what that means is not that you don't receive public testimony, but there's no notice requirements like an SMA major permit, you have to tell your neighbors, you have to put it in the newspaper 30 days in advance, that's more of public hearing requirements, okay. Yeah. So contested case requirements are found in Hawaii Revised Statutes 91-9 and 91-10. If you have a formal contested case, you have to give notice to the public, you have to allow the people who are coming before you whose rights and privileges you're examining an opportunity to submit evidence to you, there has to be an opportunity for cross-examination and rebuttal and the way that you folks do that is you ask questions of the testifiers, you can ask questions of the public testifiers who come forward, you have to give the folks who are coming before you with an application an opportunity to present what's called "rebuttal evidence" and that means that they get to come up and have the last word and the reason why is because they have the burden of proof. They have the burden to come to you by a preponderance of the evidence and prove to you that you should agree with the action that they're requesting you to take. You don't have the burden of proof. You're just listening and then they're the ones who have to convince you that -- that you should go their way, and it has to be done by a preponderance of the evidence, and the best way to think of that is not beyond a reasonable doubt, like in a criminal case, but are preponderance of the evidences, is it more likely than not that they have enough evidence to convince you to grant the relief that they're asking for. You're going to consider the whole record, not just portions of it, but you wanna look at the whole picture of what's gone down, and every decision and order adverse to a party has to be in writing, it has to be accompanied by findings of facts, and there are time deadlines for that to occur, so, for example, we had one recently, an SMA after-the-fact, which you folks denied, and that matter will be on the agenda for the next hearing, I'm working on the proposed findings of facts and decision, and if you agree with it, then what you will do is you'll go ahead and you will sign off on that. That will all be done within the timeframe that's required under the law and if you don't do within the timeframe, then, more likely than not, the Circuit Court's going to reverse it, that's the problem, so we gotta make sure these things get done in time.

Okay, so what is the record? You know, we use this term "agency record," well, what is it? It's defined by Hawaii Revised Statute 91-9E, and it involves any pleadings, motions, any rulings that you may have made, intermediate rulings, which, generally, doesn't happen in front of you folks, oral testimony, any exhibits that were prepared, usually those are attached to the -- the Planning Department's staff report, but if the folks who are asking you for relief want, they can give you things that want submitted into evidence, offers of

proof, proposed findings, all of that is the record, so it's the big picture. What you can't do, for example, is let's take the SMA denial that I was talking about earlier, once you close public testimony, say, for example, next time this comes up on the agenda, if we took more public testimony, that would be an error, and the reason why is 'cause you're already done. It's closed. It's a sealed thing by that point. So you wouldn't take any more public testimony. You just have to determine whether you're going to sign off on the decision and order, you can make amendments to it if there are portions of it you don't like, and then you can -- people can make motions to amend certain parts of it. We'll bring that up more later, next time, but you definitely can't go outside of the record to make decisions, and that could be a grounds for appeal, and this is true whether it's a commission ruling or whether or not it's a case in court; we don't go outside of the -- of the record. So there is case law where the folks, for example, who lose, what they do is they raise that as an issue on appeal and say, hey, the commission went outside the record and made a decision, and so I've cited an example of where the board -- a board did improperly consult outside sources; another example was receiving a letter from a party taking a view of the premises after the meeting, not -- you can go look at the premises but to then bring that, what you saw after the meeting in and say, hey, I went after that meeting, after our deliberation was done, and here's what I saw, that would be overturned on appeal because now you're doing something that happened after all of the evidence was presented, okay.

Okay, so what does a court do? Once a court reviews or is asked to review one of your decisions, the court has several things that it could do, it can affirm your decision, that's what we like, that means that they agree with everything you did; the court could remand the case with instructions, specific instructions for the commission to do certain things, for example, the circuit court could -- this happened recently on Maui, the Maui Planning Commission did not submit something in a timely manner and the so the circuit court reversed it and said, Maui Planning Commission, I'm reversing because you blew the time limit and I want you to issue the permit, okay, so that was something that where the Circuit Court said specifically what it wanted the -- the agency to do. The Circuit Court could reverse or modify the decision and order if it feels that the substantial rights of the petitioners have been prejudiced because of something that you did. No, no, no. Go. And some of those things that the court might say happened in the process of deliberation is you violated a constitution or statutory provision, that you acted in excess of the authority that you are given by statute, that you did not follow the law, that you had some other area of error of law, and I want to give an example. There is a very famous Hawaii -- actually, it's an Intermediate Court of Appeals case, not a Supreme Court Case, but it is our binding law, and it has to do with what happens when a SMA permit is denied, and the name of the case is "Topliss" - T O P L I S S - and this came out in 1993, and what I like about this case is it lays out very specifically what is the appellate court going to look at when reviewing your decisions, and here's what it says. It says that appellate review of an administrative agency's decision that is within its sphere of expertise is given a

presumption of validity, okay, so the court's going to look at it and presume that it's valid. Somebody who seeks to overturn the agency's decision bears a heavy burden of making a convincing showing that that agency's decision is invalid because of unjust -- because it is unjust and unreasonable in its consequences. So that's pretty heavy burden on the part of the person who is going to be taking, for example, your decision to deny an SMA permit to the Supreme Court. Another -- another quotation from that case that I think is important for you folks to remember is that it also says that as far as the appellate court's concerned, the administrative agency's findings of facts will not be set aside on appeal unless they are shown to be clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, or if the appellate court, after examining the whole record, is left with a definite and firm conviction that you folks made a mistake. Okay, so if you can -- if the appellate court feels that a mistake has been made, the it's going to overturn, and that's exactly what they did in this Topliss case, it had to with a Kailua-Kona development, and what happened was the planning commission, the appellate court decided that the planning commission had made a definite and firm mistake but remanded it to give the commission an opportunity to embellish the record or to give further evidence to support its finding in that particular case, it's a good case, but it definitely is the leading case, even though it was from 1993, there hasn't been anything since then that's come out to take its place. So I hope that wasn't too much information, but us, lawyers, we get excited by this kinda stuff so -- okay, so keep going.

Okay, so let's talk very quickly about ethics. Does anybody have any questions about what I just said? Sorry. Okay, let's talk about ethics very quickly. You folks, I don't know what you get in your packets when you become a commissioner, but one of the things that you should have is provisions from the County Charter that talk about the ethics for boards and commission members. Here's all the things that you can't do. I'm going to talk about them very briefly, but the first one, accepting gifts. You can't do that unless it's a gift of nominal value, or what we like to call a "gift of aloha." If it's something though that has slightly more than a nominal value and seems to be designed towards affecting your decision making, you wanna avoid taking it and the best way to do that, 'cause people really do like to give in Hawaii, and that's great, but as a commissioner, you don't wanna take something like that, you just wanna say you know what, I really appreciate it, but I can't take this from you. Thank you very much. You can't disclose information that should not be made public, so that would be like what you found out in executive session, you don't wanna go tell other people. You don't wanna use confidential information for your own personal gain or anyone's benefit. You don't want to engage in a business transaction or activity, or have a financial interest in anything that would tend to impair your independence of judgment, so one of the examples that I like to give is that if you have a business interest or you work for a company and that company were to come before this Commission for a permit or something like that, you would definitely wanna disclose that. Your rules allow you to have a conflict of interest and engage in the discussion, but your rules don't allow you to do anything further than engage in the

discussion, you can't vote, alright. You can't use County property or personnel for anything other than a public activity or purpose, so this would include using not only County property, like computers or things, but it also means also County personnel because their time is considered County property. You can't fail to disclose a financial interest in a matter that comes before the board. You also have to be careful about disclosing things on your financial disclosure statements because although your disclosure statements are not public, what you wanna make sure you do is you wanna make sure you disclose, for example, any business interest within the realm of that disclosure statement, for example, that your spouse might have because you don't want the public to feel like you hid something when there may have been somebody else in your family that had an interest, but just read the form very carefully and follow the rules on the form. You can't receive compensation for any services rendered in connection with a matter that came before the board that was impacted by any action that you may have taken.

Penalties for that. You could get fined. You can be removed from the board. Those are the basic penalties.

So what is a conflict of interest? If you look at your rules, Molokai Planning rule 12-301-21, it talks about a conflict of interest. Whenever you have one, my best advice to you is to just go ahead and disclose it, okay, and then we can deal with and make a decision whether it's something that's significant enough for you not to vote on it or whether you wanna just engage in discussion, okay. When in doubt, ask. You can also ask for an advisory opinion from the Board of Ethics. The nice thing about advisory opinions is that if you get one, and you follow to a T whatever they told you, then you can't be held liable later. What happens sometimes is somebody needs to get a BOE decision and then what they do is they don't follow it and then that can get you into trouble, so if you do get a Board of Ethics advisory opinion, just follow the ramifications of it, and if you have any questions about how to do that, ask me, and I can let you -- I can help you with that.

Okay, so case law review. This is really heady stuff. This is going to come up as you make decisions and my job, part of my job is to make sure you guys stay on track, but I wanna, again, make you aware of some of the buzzwords. So you have your own legal standards, I read you a couple of them from the Topliss case, the law determines how you make your decisions, what you can make decisions on. The staff reports outline the law for you. You do not have to agree with the staff report, but the nice thing about the staff report is that they lay out for you exactly what the law is, and if it's not complete, I'll let you know, but, so far, I haven't seen a staff report that didn't lay the law out for you, that doesn't mean you -- you have to agree with the interpretation of the law, but they do give you a good roadmap, if you look at those ahead of time, as to what the law is. If you have a question about what the law is, for example, like what is a development, you can ask during a meeting and I can help you with that. If you stray outside of the legal

framework of what you are allowed to look at as far as the law goes, that's how your decisions get overturned.

Okay, so the takings clause of the United States Constitution, the Fifth Amendment, says that one of the principle purposes of the takings clause is that the government cannot force people to bear the burden of public -- a public burden which in all fairness and justice should be borne by the public as a whole. So like takings, for you folks, can happen like in the realm of say issuing a permit, allowing a permit and putting conditions on it. We're going to talk about that now.

There are some famous United States Supreme Court cases that outline what your duties and responsibilities are when you are issuing recommendations or provisions, like we're going to give a permit but we're going to make you give public access to the beach as part of that permit. There has to be an essential nexus or a connection between the anticipated effect of land use by the issuing of a permit and the real property exaction, excuse me, so, in other words, you have to identify the project's anticipated effects and you have to show how your condition that you're putting on it is related to that effect. The most famous case came out of California and it had to do with a building permit that was provided and the condition that was put on that building permit was that the public had to be given access to the beach through the person's property, and the United States Supreme Court said wait a minute, those two things don't compute. The fact that you're giving this person a building permit has nothing to do with public access to the beach. However, if you could find a way to justify why public access to the beach should be part of a permit, okay, and -- and the best way to do that is to look at like, for example, the Coastal Zone Management Act 205A, and you look at its policies and objectives, that will tell you how to make your requirements consistent with the permit, and so I'm here to help you do that, you'll also get that from public testimony, okay. So the essential nexus, again, you have to show that the regulation substantially further the government purpose that would justify either granting or denying the permit.

Okay, so the government's power to forbid particular land uses in order to advance a legitimate police power purpose includes the power to condition such use upon a concession by the owner. Even if a concession of a property right exist, so long as the condition furthers the same governmental purpose advanced as justification per hearing the use, I know that's a lot, that's why I have you the handout because what I want you to do is I want you to go back and I want you to read these slides and absorb it, okay, because I can't possibly go through it right now.

So again, rough proportionality, Dolan versus the City of Tigard is a United States Supreme Court decision that talks about rough proportionality. I want you to go back and I want you to read this because this explanation will explain to you what I mean by it, but let me be clear that if I feel, as you're going through this discussion and you start

implementing possible regulations on a permit, I might give you some suggestions or I might tell you what I think about it, I may tell you that I would like to go into executive session 'cause I might say to you, hey, you know what, I think if you put these three proposals on here, I think you're going to get reversed. I'm not going to say that in an open meeting 'cause I'm giving you legal advice, okay.

Okay, so then I also did a little outline of the Nolan Dolan test for you. In sum, it looks like this. Permit conditions must further a legitimate State interest. So you ask yourself: What is the County or State's interest being protected, okay? Shoreline access by the public, for example. And what is the law that we are applying to that? Number two: How is the condition related to law or the State's interest? Three: The conditions must be roughly proportional to the project's impact. You cannot make them excessive because, remember, the whole idea is that one person cannot be asked to take on the burden that really applies the public in general.

Okay, so sometimes a court may find that the commission has imposed unconstitutional conditions. So you can't require a person to give up a constitutional right, such as the right to receive just compensation when property is being taken for public use in exchange for a discretionary benefit conferred by the government or the benefit has little or no relationship to the property. And again, I always go back to that original case where a guy came in for the building permit and the next thing he knew, he had the public walking across his property to get to the beach, and there was no justification by that particular board as to why public access should be provided in exchange for a building permit, okay, but that doesn't mean it's always going to be that way. You might find reasons why that might be an issue. So I talked a little bit about what happens, for example, in the realm of SMA laws. If you look at the objectives and policies of the Coastal Zone Management Act, which is the HRS 205A, and you keep in mind the objectives and policies of that statute, then you're probably going to be okay. Okay, go ahead. And so what I did is I put those policies out here just as a general reminder for you. The policies are that we want to provide public access. We wanna protect and preserve historic resources. We want to keep open space resources. That's what, in the Topliss case, that was the -- the issue and that was not allowing a building permit in an SMA area, okay, because the commission was concerned about the public view of the ocean from where it was and the fact that there had already been so many other building that had been put up in that area that they felt that one more building would really block access, and the court said, well, you know, you may have a point but the problem is you don't have enough in your record to really justify that so go back and work on that a little bit. Another one is minimizing adverse effects on coastal ecosystems. Economic uses of property. Coastal hazards. Reducing the risk of them. Or managing development. So these are some of the things that you might say, for example, somebody wants to put up a building near a historic resource, but in order to do that, they're going to block access, the public's access to that historic resource, so you might say, hey, well, in exchange for doing that, we wanna make

sure that you keep a corridor, a view corridor open as part of your building. We wanna make sure the public has the right to go across your property to get to this historic site.

Next. What? Okay. Okay, so we can go through this. I already talked about Topliss. Keep going. Keep going. Okay, so, again, you can put conditions on the granting of special management area use permits. Again, you have to make sure that they're related to the -- to the reason for the permit. Go ahead. So here are some good SMA permit conditions that you might wanna think about imposing depending on what kind of development it is. Again, provision and maintenance of beach access, preservation of archaeological sites, protection of life and property from coastal hazards, boundary setbacks, building height restrictions to preserve your coastal views, drainage improvements, mitigation of artificial lighting on shoreline and ocean water, there are lots of laws about what kind of lighting you can use, but these are the -- some of kinds of things you wanna look at. And then you have to make a determination that a development is consistent with the Coastal Zone Management Act if you are going to grant a permit in an SMA area, so you have to take all those things into consideration and say we think that this permit is okay because the project addresses all of these things that we're here to try to protect. You also have an affirmative duty to protect cultural resources. Another really important case is Alaloa. You're also obligated to protect reasonable exercise of customarily and traditional exercised rights of Native Hawaiians to the extent feasible, that's the PASH decision. When you attend the Native Hawaiian Law Training, those folks spend a lot of really good quality time explaining these decisions to you, but these are things that are going to come up and if, for example, there is a archaeological assessment or a cultural assessment that points out customary things that are taking place within a particular area, part of your permit may have to include the ability to access those areas for native practitioners. Again, I put a quote in here you can read later from Alaloa. And again, more language about the protection of traditionally exercised rights of Native Hawaiians. And this is another very good case, Ka Paakai O Ka Aina versus the Land Use Commission, this came out in the year 2000, and I've -- I hope you go back and read these, but these are the three general pieces of information that I wanna give to you regarding these cases.

Go ahead. Okay, that's a lot of stuff I know, but, again, I'm hoping that the outline helps. Does anybody have any questions though about anything that I just said? Yeah, go ahead.

Ms. Mowat: ...(inaudible)...

Vice-Chair Poepoe: Aunty Bridget, can you use the microphone please?

Ms. Mowat: I just wondering, you know, with the -- I'm just wondering how does the climate change and the ocean rise and how does that apply to your SMAs, is that something we consider also cause I don't see anything?

Ms. Desjardins: So my presentation isn't specific about climate change, but I will give you an example, if, for example, you are asked to review permit, and in the information that you were provided, in the evidence and the record, there were concerns about sea rise, okay. One of the things that you would need to consider in the issuing of the permit is whether or not the permit is consistent with whatever evidence is provided about what's going to happen specifically in that area, about the sea rise change. For example, if you were asked to consider a permit very close to the -- to the ocean, and there was evidence on the record that said that within the next 20 years, this area is going to be underwater, one of the questions you're going to ask yourself in issuing that is how do I take that information into consideration in issuing this permit? Is there a recommendation by an expert that that building be placed as -- say on poles as opposed to being, you know, build on the ground? Is there a recommendation from an expert saying don't allow building in this area because we already know that it's going to have detrimental impact on the environment if you do that? What you're going to do as a Commissioner, you're going to listen carefully to what's being presented, studies that are put in front of you, it's not for you to guess, and if you feel in the back of your mind that there's not enough information provided, remember, the person who comes before you has the burden to convince you to grant the permit, so you may say among yourself, well, I'm not really convinced that I have enough information here about what might happen, don't guess and say I've heard about global warming and climate change, maybe we're going to have a problem, but you gotta look at it and say either somebody said there might be a problem with this or I've heard enough about it to know that it isn't a problem so I can be satisfied that I have enough information to grant the permit without provisions. Does that -- is that helpful? So you're analyzing it as a matter of law that way, okay. Any other questions?

Ms. Espaniola: Can you give couple examples of disclosure, making full disclosure, you know when we have to make -- the commissioners have to -- if they conflict -- the conflict of interest?

Ms. Desjardins: Okay.

Ms. Espaniola: And we --

Ms. Desjardins: Sure.

Ms. Espaniola: We wanna make a disclosure. Can you give me couple examples of that? I mean I --

Ms. Desjardins: Sure. I'll give you an example. Somebody comes before you asking for a permit and you're related to that person, that may or may not mean anything in terms of your ability to be fair and impartial, which is your role, but you wanna put it on the record because you're going to say, you know, this is my niece, and then you're going to have a discussion with the Commission whether or not -- well, first you're going to say whether or not you think that makes you unable to be fair and impartial 'cause you're always going to do whatever your niece tell you to, or you may say, you know, I worked -- I work for this company, I received a grant do some work for this company, I want you folks to know that I may have a financial interest in this project and, therefore, you're definitely, at that point, going to say I'm not going to, you know, vote; under your own rules, you can partake in the discussion. Another example happened when our Chair was one of the folks who had written in an RFS or called in an RFS on the project out at Papohaku Dunes and so she participated in the discussion 'cause your rules allow you to do that, but she abstained from voting. Her vote wasn't a yes. Her vote was not counted because it was a vote with a conflict attached. Does that help? So always err on the side of disclosure because, think of it this way, you don't want somebody to find out later that there might have been a problem and you didn't say something.

Ms. Esmeralda: The difference between abstain and recuse?

Ms. Desjardins: You wanna know what the difference is? So recusing oneself from a vote means that you have a reason to recuse yourself, but if you abstain from voting, that's when it is counted as a yes unless there's a reason. So I don't think recusal or abstention -- abstaining in of themselves are the correct terms. I think it has to do with the action itself so, in other words, if you -- if there's no reason attached, and I've seen you folks do this before, you'll go through a whole discussion and then when it comes to voting, one of you might say, well, I'm going to abstain from voting. You're -- you're -- that's a yes vote, okay. If you're recusing yourself, you are definitely saying that you -- but you have to -- there has to be a reason. If you just said I'm recusing myself when it came to voting time, that would be considered, I think, an -- you're abstaining from voting. Recusing means you have a reason. Any other question? Okay, thank you. Thank you for letting me off lightly.

Ms. Espaniola: Can I -- can I ask one more. I'm sorry. One more question.

Ms. Desjardins: Oh, wait a minutes.

Vice-Chair Poepoe: Go ahead.

Ms. Espaniola: So when -- when do you make that disclosure, before discussion, after discussion? I mean when is that done?

Ms. Desjardins: When it first comes to your attention so that might be before the discussion 'cause you see on the agenda something's there and you're saying, okay, I'm gonna say it, but maybe during the process itself you realize, oh, you know what, there's a connection here I didn't really realize. As soon as you feel that you know that you should say something, you should say something.

Ms. Espaniola: Okay. Thanks.

Vice-Chair Poepoe: One more question.

Ms. Desjardins: Go ahead.

Vice-Chair Poepoe: I -- I not sure if it was mentioned or not if it still stands that when it comes to voting items, you -- the members are not allowed to produce their own evidence. Is that true?

Ms. Desjardins: So as a fact finder, you are not bringing evidence before this body. You're the finder of fact. That's correct. However, if you are in a discussion about something and you see that there is something going on, for example, you might ask one of the testifiers are you aware of this study from, you know, 2012, it talks about blah, blah, blah, blah, blah. If you know it's out there, go ahead and -- you have the right to question the testifier. You can get it out that way, okay, but, yeah, you can't come in with stuff and say I'd you folks to, you know, 'cause then you're reversing your role, you're not being fair and impartial, you've now made a statement about how you feel about something. Does that make sense? But the best way that I can tell you to get stuff out is ask the -- those who are coming before you questions about what you know 'cause you folks live here so you all drive around and you see stuff going on, so it's okay to say something like, you know, I've been by that project many times and I noticed you don't have a, you know, a gate or you don't have a fencing, it's okay to say and say can you comment on that; now you've put it out there for others to hear. Does that make sense? Okay.

Vice-Chair Poepoe: Anymore questions from the Members? Okay, no questions, we will move on to item D, Director's Report.

#### **D. DIRECTOR'S REPORT**

- 1. Pending Molokai Applications Report generated by the Planning Department with the May 8, 2019 Agenda Packet (Appendix-A)**
- 2. Closed Molokai Applications Report generated by the Planning Department with the May 8, 2019 Agenda Packet (Appendix-B)**

### **3. Agenda Items for the May 22, 2019 meeting**

#### **E. NEXT SCHEDULED REGULAR MEETING DATE: MAY 22, 2019**

Ms. Lopez: So Director's Report. So pending Molokai applications report generated by the Planning Department with the May 8 agenda packet, which is your Appendix-A. If you guys have any questions regarding no. 1. No. 2 is the closed Molokai applications report generated by the Planning Department with the May 8, 2019 agenda packet, which is Appendix-B if anyone has questions regarding any of those. And if not, agenda items for the May 22, 2019 meeting, like what Corp Counsel noted before, you will see the findings of facts, conclusions of law, and decisions and order for the Mr. Scott Wehner report, the SMA6 2019/0001, will come before you on the May 22<sup>nd</sup>, and we also have a minor, SMA minor permit that will come before you on that agenda meeting regarding installation of new antennas on the Sprint facility tower located on Paddlers Inn roof. So those two are on your agenda for May 22<sup>nd</sup>, and is your next scheduled meeting date. And I turn the time over to -- back to Vice-Chair for adjournment.

Vice-Chair Poepoe: Okay, before we get to agenda item F, does anybody have any questions or anything else they wanna add? Chair?

Chair Buchanan: Sound funny, yeah? By the way, I heard you guys made me chair when I wasn't here at the last meeting. Thank you. I accept and I humbled by your support and confidence. I wanted to get back to the disclosure part since Commissioner Nora brought it up, and I was going to do this I think today if we had anything on the agenda but -- and then maybe it's more appropriate for the next one 'cause I really wanted the public to know, and it might be minor, but it's also goes to transparency. I think the more transparent you area, the more validity your Commission gets, and so I didn't realize it until I went to church, and I was sitting in church and I realized that two other Commissioners on this Commission are members of my church, and although we don't get into discussions at church, maybe 'cause I hardly go, sorry God, but I think just disclosing that to the public is worthwhile, you know, because this is a small island and we always say like either we related or we go to the same parties and we go to the same church, and, you know, so I just wanted to make that disclosure and that would be Commissioner Mowat, who's the new Commissioner, and - he waving his hand down there - so that's it. That's my disclosure. Thank you very much.

Vice-Chair Poepoe: Thank you, Chair.

Chair Buchanan: Oh, let me also state for the record that I feel that that will have no bearing on any future decision-making that will come before this board and myself as the Chair. Thank you.

Vice-Chair Poepoe: Okay, I get -- the -- the issue of revisiting the TIG, the formation of the TIG, so if you can get that kinda situated for this Commission session, I guess so if we can kinda start headed that way again or --

Ms. Desjardins: So you're asking that it be placed on one of the future agendas 'cause I think we already -- did we already schedule a date that the TIG is going to report back in September I think it was? No?

Chair Buchanan: I not sure because we never even meet.

Ms. Desjardins: Okay.

Chair Buchanan: So --

Ms. Desjardins: So if that's something that you wanna put on the future agenda, then you would let -- let Sybil know and she'll --

Ms. Lopez: Schedule.

Ms. Desjardins: Schedule it. Okay. Is that what you're asking?

Chair Buchanan: Or you asking if the TIG can meet?

Vice-Chair Poepoe: Yeah.

Chair Buchanan: The TIG can meet. I notice our third member is not present and I don't know if he was present at the last meeting, and I think they were only present at one or two meetings total. Isn't Commissioner Pele our third TIG person? No? Who is out --

Vice-Chair Poepoe: Yeah, Vice of the TIG.

Chair Buchanan: Okay, so we need to call him and we need to get ahold of him. Okay. I can do that. Thank you, Vice-Chair.

Ms. Lopez: So, Vice-Chair, just to clarify, you are not -- you are not requesting to have the TIG on the agenda 'cause you will work it out amongst your -- okay -- your group.

Vice-Chair Poepoe: I just took this as a opportunity to have that mentioned.

Ms. Lopez: Okay. Thank you.

## **F. ADJOURNMENT**

Vice-Chair Poepoe: Okay, so if there is no other questions or matters to have discussed, we will move on to item F, on the agenda, Adjournment. Meeting adjourned.

**The meeting was adjourned at approximately 1:51 p.m.**

Submitted by,

SUZETTE ESMERALDA  
Secretary to Boards & Commissions II

**RECORD OF ATTENDANCE:**

**Present:**

Lori Buchanan, Chairperson (Arrived at 11:52 a.m.)  
Laakea Poepoe, Vice-Chairperson  
Julie-Ann Bicoy  
Leonora Espaniola  
William Moore  
Bridget Mowat

**Excused:**

John Pele  
John Perez, III  
John Sprinzel

**Others:**

Jeffrey Dack, Current Planning Supervisor, Current Division, Dept. of Planning  
Sybil Lopez, Staff Planner, Molokai, Current Division, Dept. of Planning  
Tammy Osuman, Zoning Inspector, Zoning Administration and Enforcement Division, Dept. of Planning  
Mimi Desjardins, Deputy Corporation Council, Dept. of the Corporation Counsel  
Suzette Esmeralda, Secretary to Boards & Commissions II, Current Division, Dept. of Planning