

MOLOKAI PLANNING COMMISSION  
REGULAR MINUTES  
JUNE 10, 2020

**A. CALL TO ORDER**

The regular meeting of the Molokai Planning Commission was called to order by Chairperson Lori Buchanan at approximately 11:03 a.m., Wednesday, June 10, 2020, via BlueJeans Meeting No. 155030307.

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

Chair Buchanan: Good morning everyone. Commissioners and members of the public, if any, and Staff, welcome to the June 10, 2020 meeting of the Molokai Planning Commission. We have only one item I see on the agenda, and I don't think we need to read everything but if there -- Suzie, is there any members of the public other than Commission Members and ...(inaudible)...

Ms. Esmeralda: This is Suzie. I don't see anyone, and I haven't heard from anyone.

Chair Buchanan: Okay, just in case, public testimony will be taken on each agenda item as discussed and testimony will be limited to a maximum of three minutes with 30 seconds to conclude, of course, unless you petition your Chair, your Chair has powers and authority given to him if his members don't object, and the meeting links and numbers were in the June 10 meeting agenda, and you can get that on the Maui County website. So, again, Commissioners shall not be contacted by the Chat function. Testifiers will be called by the Chair, in this case, the Vice-Chair to offer their testimony, and again ask to mute their audio and video when you're not testifying or in discussion, that'll really help with the feedback, and then testifiers via video are asked to sign up using the Chat function. So if we cannot see you, and we cannot hear you, please use the Chat function because I believe Suzie and someone else is monitoring that Chat function. And I wanted to thank my Commissioners for hanging in there through one really difficult time, learning curve for use BlueJeans, I'm the worse, and then I just wanted to thank you guys because you guys give of your time freely without payment, you take off from your jobs, and it's all for the love of your community, and I appreciate that. So thank you again especially when really difficult issues that confront you folks.

So we on agenda item A, the Call to Order, and then item B, which is going to be Unfinished Business, and this matter was deferred by the Commission at the May 27, 2020 meeting. This is a non-public hearing. I think that's confusing for members of the public, myself, and Commissioners, but this is a non-public hearing contested case covered by Chapter 91, of the Hawaii Revised Statutes. As such, no public testimony will be taken on this agenda item. And I was contacted by the public asking me that

question. So it's clear that we're instructed that no public testimony will be taken on this item, and we're going to go into the item 1, and if Vice-Chair doesn't mind, I will read it:

*Chair Buchanan read the following agenda item description into the record:*

**B. UNFINISHED BUSINESS (Matter deferred by the Commission at its May 27, 2020 meeting.) This is a non-public hearing contested case governed by Chapter 91, Hawaii Revised Statutes. As such, no public testimony will be taken on this agenda item.**

- 1. Findings of Fact, Conclusions of Law, and Order Granting Appellant Scott Wehner, member of Wehner Molokai, LLC's Appeal from the Circuit Court of the Second Circuit, State of Hawaii, ordering the remanding of the Special Management Area Minor Permit request to the Molokai Planning Commission of the following:**

**MR. SCOTT WEHNER seeking a Special Management Area Minor Permit for the after-the-fact grubbing of 8,000 square feet and grading of 4,000 square feet comprising 45 cubic yards on a 5.65 acre parcel located at 0 Kaula Ili Way, Kaluakoi, Molokai TMK (2) 5-1-007:030 (Valuation: \$190,000) (S. Lopez)**

**The Commission previously dealt with the matter at its March 27, 2019 meeting.**

**The Circuit Court of the Second Circuit, State of Hawaii, heard the subject appeal on January 8, 2020 and ordered the matter remanded to the Commission to conduct a contested case hearing regarding the Appellant's Application for a Special Management Area Minor Permit.**

**AN EXECUTIVE SESSION MAY BE CALLED IN ORDER FOR THE COMMISSION TO CONSULT WITH ITS ATTORNEY ON QUESTIONS AND ISSUES PERTAINING TO THE COMMISSION'S POWERS, DUTIES, PRIVILEGES, IMMUNITIES AND LIABILITIES, PURSUANT TO SECTION 92-5(a)(4), HAWAII REVISED STATUTES.**

**The Commission may take action on the subject application.**

Chair Buchanan: And that, in itself, is confusing and so I hope, Commissioners, you will not be confused and if anybody is confused, speak up and say so. Please speak up and say so because that's your right as an advocate, and I see Bridget waiving, but hang on, Bridget, because I'm going duck out of here real shortly and I am going to ask the Vice-Chair, Laa Poepoe, to come in and take over at this time because I am not going to be participating in this agenda item, but thank you, Commissioners. Love you guys. Okay.

Vice-Chair Poepoe: Thank you, Chair.

Ms. Mowat: Laa, I'm -- I'm confused. Can I ask a question or -- and make a statement too?

Vice-Chair Poepoe: Is that allowed?

Ms. Mowat: Yeah.

Vice-Chair Poepoe: Please forgive me for not really knowing the -- the proper steps in doing -- conducting this.

Ms. Chen: Hi, everyone. Commissioner Bridget, do you want me to go over sort of the background here and then see if you still have a question or do you wanna go ahead and ask your question?

Ms. Mowat: Okay. Well, first of all, I just want to make this clear that I, in March 27, I - - that first contested, I didn't -- what is the difference between a contested case hearing? I mean what -- I noticed some -- just questions about the contested case hearing, okay, that -- I just wanna know is that a regular thing or it is a different way of providing testimony and such or conducting a meeting or a -- that's a question, and I just wanted to make clear that in the March 27, 2019, I was not on the Commission but I did read, I read everything and that was a lot, and I did testify, so I just wanna put that out and if there's any problems with that, I just wanna bring it out now. But I -- I'm in question about what is a difference between a contested case hearing and a regular hearing.

Ms. Chen: Right. Okay. Vice-Chair, is it okay if I go ahead and give some of the background? Some of it will be a repeat from last time, but that's a really good point, Commissioner Bridget, and I'll definitely be happy to answer that.

Ms. Mowat: Thank you.

Vice-Chair Poepoe: Yeah ...(inaudible)...

Ms. Lopez: Sorry, Corp Counsel, you have to speak up a little bit because -- yeah.

Ms. Chen: Sorry.

Ms. Lopez: ...(inaudible)...

Ms. Chen: Is that better? Let me shut my window. Maybe that's it. Okay, how's that?

Ms. Mowat: Better.

Ms. Chen: Better? Okay. So -- so this item was deferred from -- from the last meeting, as Chair Lori said, and prior to that, this -- this item was discussed and heard at the March 27, 2019 Molokai Planning Commission. The decision from the March 27, 2019 hearing on this item was appealed to the Circuit Court, as you all know, so Judge Kawano remanded the case to the Molokai Planning Commission with additional procedural guidance and that's why it's back in front of you. So the Commission, at this point today, has the opportunity to conduct the contested case hearing again and make a decision to approve, approve with conditions, or deny, so it's important to know the Judge did not give -- say anything about the Commission having to decide one way or another, that falls squarely in your court, the Judge did offer procedure guidance.

So to get to the contested case question, Commissioner Bridget, as you recall from -- from previous trainings, and there's no reason you shouldn't be confused by this, this is a very confusing topic, the whole contested case issue, what is a contested case? Why are there different ...(inaudible)... all of that. So to kind of condense it, there are different types of contested cases. Some require public hearings, and some do not. This contested case does not require a public hearing, and the Judge was very clear in his Order that that was part of the problem with the first hearing where this item was discussed, the public hearing should not have been conducted in the Judge's opinion, so his Order is, for this meeting, no public hearing, no public testimony on the Wehner item. Does that make sense? So the Commission is also not supposed to rely on the previous public testimony that was, you know, obviously included in the minutes that were transcribed, but, per the Judge's Order, the Commission is not to consider the previous public testimony, so I guess since you testified before, you're not supposed to consider your testimony, Bridget. So the item is closed the public. Sorry, what?

Ms. Mowat: I was -- how -- who decides when it's a -- a contested case hearing? How does --

Ms. Chen: So -- okay, a contested -- a contested case simply means something, a case or an item that is in front of the Commission where the Commission is going to make a final decision on the matter.

Ms. Mowat: Okay.

Ms. Chen: Final decision meaning that it's appealable to the Circuit Court after that.

Ms. Mowat: Okay.

Ms. Chen: So some things in front of the Commission are not contested case items, some are, and then beyond that, contested cases are divided up into public hearing and non-public hearing items. Does that make sense?

Ms. Mowat: Okay. Yep. That helps -- that helps a lot. Okay.

Ms. Chen: Yeah, so here, you know, you guys, you are the final decision-maker on this item just as you were at the March 27<sup>th</sup> meeting where you made a final decision that Mr. Wehner appealed to the Circuit Court. So --

Ms. Mowat: Okay, another ...(inaudible)...

Ms. Chen: ...(inaudible)... decision was back to the Commission, you have the opportunity to do it again. Does that make sense?

Ms. Mowat: Yup. Yup. I -- I have another question. So since we cannot use any public testimony --

Ms. Chen: Right.

Ms. Mowat: Can we refer to what is already been presented, like the minutes that we had on -- for March 27<sup>th</sup> and any kind of other, like the court documents, or we can refer to that and use that? Or what can we use?

Ms. Chen: Yes. So thank you for that question. You can refer to the minutes but the Commission should not refer to or rely on public testimony that was included in those minutes, and also, as Chair Lori pointed out, she -- she had to recuse herself from this meeting, so any comments that Chair Lori made in previous meetings should also not be regarded by the Commission or used in the Commission's decision-making process.

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

Ms. Chen: So -- so the Commission, let's see, okay, another thing that Judge Kawano ordered was that all parties be sworn in, so out of an abundance of caution, we're going to swear in -- I'll swear in the applicant, the applicant's representatives, and all the Department personnel, sorry, Department, sorry, applicant, but just out of an abundance of caution to do this as properly as possible, that's what I'm going to do. And going back to your comment, Commissioner Bridget, on the record where you said that you -- you've had a chance to read the lengthy extensive record, that was also part of the initial problem with the -- the first hearing in 2019, the Judge said that the Commission did not have the entire record in front of it and it should have had the entire record in front of it. So I understand that the complete application has been provided to the Commission, and all the documents that make up the record, that includes the application, exhibits, staff

reports, meeting minutes, the Molokai Planning Commission's Decision and Order from March 27, 2019, from that hearing, and the Judge's Order. So it's been over a year since the Commission considered this permit, we deferred, the Commission deferred this item from the last meeting based on the need for additional time to review the extensive record, which, as I understand, many Commissioners only received the day before the last meeting, so can I please go around and get a -- a verbal confirmation from each Commissioner that you've had a chance to fully review the record?

Ms. Mowat: Who you going first? Who you going ask first?

Ms. Chen: Let's see, how about, Vice-Chair?

Vice-Chair Poepoe: I have read and reviewed all the documents.

Ms. Chen: Thank you. Commissioner Bridget?

Mr. Mowat: Yes. I have. Extensive reading. Thank you.

Ms. Chen: Commissioner Sprinzel?

Mr. Sprinzel: Yes.

Ms. Chen: Thank you. Commissioner Pele?

Mr. Pele: Yes.

Ms. Chen: Okay, Commissioner Leonora?

Ms. Espaniola: Yes. Read and reviewed.

Ms. Chen: Thank you. Did I miss anybody? There's somebody signed up as JAS. I'm not sure. Did I get all of the Commissioners who are present today?

Mr. Moore: I read it all. This is William Moore.

Ms. Chen: Oh. Right. Commissioner Bill, how are you?

Mr. Moore: I'm doing great so far.

Ms. Chen: Okay. So you had a chance to read and review?

Mr. Moore: Yes.

Ms. Chen: Okay, great. And a question for the Department. Has the Department provided the applicant and the Commission with any new documents or submissions?

Ms. McLean: Stephanie, I confirmed with the applicant's counsel that they have all the materials that comprise the record and that were provided to the Commission. I believe the applicant's counsel wishes to make a statement before we go any further if that's -- if that's okay with the Vice-Chair.

Ms. Chen: Vice-Chair, if -- if I could interject, that would be fine and then if I -- I can go over sort of the order of operations for the rest of the item?

Vice-Chair Poepoe: Yeah.

Ms. Chen: Okay.

Vice-Chair Poepoe: Yes.

Mr. Chipchase: Thank you, Vice-Chair. I appreciate the opportunity to -- to address the Commission at this point, and I -- I respect and appreciate the Commissioners' time and attention to this matter and all the matters that come before you. As your counsel has explained and as the Chair did before she leave, this is a little bit of an unusual case because it comes back before you on remand from a Circuit Court, and the Circuit Court Judge concluded that the prior proceeding was improper. A contested case is, as you heard your counsel explain, is a little bit of a different process than -- than an ordinary public hearing, it's a quasi-judicial proceeding where you sit as effectively fact-finders and decision-makers in a quasi-judicial proceeding, which means that an applicant's rights or interest are involved, and when that happens, there's a high degree of procedural fairness that is required both actual impartiality and the appearance of impartiality, and -- and that impartiality is critical and we -- we see impartiality in the way that evidence is considered and the kinds of evidence that -- that is before the Commission, and so in a quasi-judicial proceeding like this, you only look at evidence that is actually been submitted to the body by a party to the proceeding, either the Department or a party. Minutes from a prior proceeding, in my view, are not appropriate and not evidence, and then the swearing in procedure, with respect, in my view, would be different than has been explained to you, but without detailing all those things, my -- my main point in addressing you at this -- this time is that Commissioner Mowat has -- has very correctly disclosed that she testified in the prior proceeding. We had an opportunity to review that testimony as the Commission was discussing the procedures with their counsel, and the testimony was unequivocally against the application. Under those circumstances, we object to Commissioner Mowat's participation as a commissioner in this matter because that impartiality that I talked about, the essential component of a quasi-judicial proceeding is now missing both in fact because Commissioner Mowat has expressed her opposition to the application, which was her right as an individual citizen, and in appearance in that a commissioner

has already voiced their view outside of -- of this particular proceeding on the appropriate outcome. We would call that, in legal terms, "a prejudgment" of the outcome and a prejudgment of the -- an application or even the appearance of prejudgment forecloses that commissioner from participating further in the proceeding, and so, with respect to Commissioner Mowat and the entire Commission, we do object to her continued participation in this contested case. Thank you.

Vice-Chair Poepoe: Thank you to the consultant. Can we have -- Director, you want to say something?

Ms. McLean: Thank you. Yeah, probably the same thing you were going to say, which is if Stephanie could guide the Commission based on that statement.

Ms. Chen: Thanks, guys. Let's see, Vice-Chair, can I just request a five-minute recess?

Vice-Chair Poepoe: Okay, we'll -- we'll take a five-minute recess.

Ms. Chen: Okay. Thank you.

*(A recess was called at approximately 11:24 a.m. The meeting was reconvened at approximately 11:33 a.m.)*

Vice-Chair Poepoe: Calling the meeting back to order and we'll have answers from Corp Counsel.

Ms. Chen: Thank you, Vice-Chair. I think Commissioner Bridget has something to say. Commissioner Bridget, if you have a question for me, then please go ahead and ask.

Ms. McLean: Commissioner, you're still muted. Commissioner Bridget, you need to unmute.

Ms. Mowat: So did you check on something, or do I need to recuse myself from this because of my past testimony and -- and just be counted as quorum? If that's what I have to do, then -- then so be it. I'll do that and just be counted as quorum if that's what I need to do. I wanted to know what you found out, Stephanie.

Ms. Chen: Sorry, what was that, Commissioner Bridget? You wanted to --

Ms. Mowat: Stephanie, you went on a five-minute break to speak with someone and what was the -- what did you find out?

Ms. Chen: My recommendation is in line with your voluntary recusal, so I recommend that you -- you, you know, you can stay present for -- for quorum but that you recuse

yourself from, like as you have, from participation in the matter based on your previous testimony that was in opposition to the application so --

Ms. Mowat: I just wanted to -- I just wanted to ask a question too and maybe make sure it's something to think about. If -- if the rest of the Commissioners all denied his, you know, permit, the application, and I testified, I mean don't -- we all stand in the same, how do all the Commissioners get to -- to vote again if they denied it in the first place? So just something questionable to me. I testified and -- and it was denied and now I have to recuse myself so just something I wanted to put down in -- in the record. That's a question for me. Okay? Thank you.

Ms. Chen: Thanks, Commissioner Bridget. For the -- the remaining Commissioners who are eligible to vote, do you feel that you can make an impartial decision based on the record?

Vice-Chair Poepoe: Yes.

Ms. Espaniola: Yes.

Vice-Chair Poepoe: This is Commissioner Poepoe saying yes for the record.

Ms. Espaniola: Commissioner Espaniola saying yes for the record.

Mr. Sprinzel: Yes.

Mr. Moore: Yes.

Ms. Chen: Commissioner Pele, sorry, I think you're still muted.

Mr. Pele: Unmuted. Yes.

Ms. Chen: Okay, so the remaining Commissioners who -- who are eligible to vote have all stated for the record that they feel that they can make an impartial decision based on the record in front of them, so going forward, the -- Mr. Chipchase, the attorneys don't need to be sworn in, the applicant will be sworn in, any applicant, any representatives of the applicant, such as if Mr. Manera is here, I'm not sure if he is, he'll need to be sworn in, and the Department, then the Department can present, and the applicant will be permitted to cross-examine or ask questions of -- of the Department, and the applicant will also be provided with the chance to rebut any evidence presented by the Department. After that, the Commission can move towards the decision-making process and so -- and if there, as always, if there are specific legal questions that we need to address, executive session is an option for the Commissioners.

Vice-Chair Poepoe: Thank you, Stephanie. What is next in procedures?

Ms. McLean: The Department can present the application if you're ready to go with that.

Mr. Sprinzel: Very ready. Thank you.

Ms. Chen: Okay, thanks. So is it going to be Sybil? Well, why don't we just do Michele and Sybil, I'll just swear you both in just to be extra cautious. Do you swear or affirm that the testimony you're about to provide is the truth, the whole truth, and nothing but the truth.

Ms. McLean: Yes.

Ms. Chen: Thank you, Director. And --

Ms. Lopez: This is Sybil Lopez, Staff Planner, and I -- yes.

Ms. Chen: Thank you.

Ms. McLean: Well, that was quite an introduction to this matter. As was described initially, what is in front of the Commission today is an application for an after-the-fact grading and grubbing on the subject property, and about 8,000 square feet of area was grubbed, and about 4,000 square feet was graded. After that, or when that activity took place, a couple of request for service were filed, one being by the Chair, which is why she has been told to recuse herself, which she has done. On August 15, 2018, the Department issued a notice of warning for that activity. Then, on March 27, 2019, the Commission had its hearing on the after-the-fact permit and voted to deny, and it was that action that the applicant appealed to Circuit Court in June of 2019. Then in January of this year, the Circuit Court Judge issued the ruling to reverse and remand the matter to the Commission for further proceedings. Then in April of this year, the Department issued a notice of violation, which is the next step after notice of warning, and levied an initial fine of \$14,450.00 for the unpermitted activity. The applicant has paid that fine. And so with the conclusion of that component of the enforcement action, the Department put forward the application for your consideration once again, and listed on page 3 of the staff memo are the criteria that we use in an SMA assessment, and then on pages 4 and 5 of the memo are the eight conditions that the Department recommends be imposed with our recommendation of approving the after-the-fact SMA minor permit. And I can go into detail on any of those aspects if you would like, but assuming that you read the memo, and you're obviously familiar with the activity that took place, but we can go through the assessment criteria and the recommended conditions or any other aspect that you wish to pursue in greater detail. Thank you, Vice-Chair and Commissioners. Sybil and I are both available for questions. I don't know if, at this time, the applicant wishes to make a

statement. If the applicant does wish to make a statement or his counsel, you can unmute yourselves and address the Commission.

Mr. Chipchase: Thank you, Director. Again, good morning. My name is Cal Chipchase. I represent the applicant, Wehner LLC. No questions for the Department. In terms of our presentation, with respect to the time the Commission's already invested this -- in this, and the Department as well, we kept our presentation of evidence short and did it mostly by writing, and so what we have submitted to you, as exhibits in this case, are the application, the Department's Report and Recommendation, a Declaration by Mr. Wehner, which was made under oath, a Declaration by the applicant's planner, Luigi Manera, which was also made under oath, and the copy of our powerpoint presentation, a very short presentation to the Commission. At this point, I would ask the Commission to receive those documents into evidence in the contested case.

Ms. Chen: Mr. Chipchase, is the applicant or Mr. Manera, are they present to answer questions pertaining to their Declarations?

Mr. Chipchase: They -- they can be available to answer questions. Yes.

Ms. Chen: So does the Commissioners, can you receive those documents into the record?

Ms. Espaniola: Yes.

Ms. Chen: Vice-Chair, you can just say if there are no objections, then we'll receive these into the record.

Vice-Chair Poepoe: Okay. If there's no object -- if there's no objections, we'll receive these into the record. Corp Counsel, what's our next step, please?

Ms. Chen: Okay, Mr. Chipchase, do you have anything else that you would like to add on behalf of the applicant?

Mr. Chipchase: I do, Commissioners. And thank you for receiving the documents. In this contested case then, that comprises your entire record. The documents that were received and anything provided by the Department, are your record in this contested case. The prior proceeding, the minutes, the testimony, none of that is evidence before you. And so based on the -- the evidence that is before you, I'll just take you through a couple of points on our slide; again, I won't take up much time. We'll see how this works.

Okay, hopefully, you see before you our powerpoint slide introducing this portion of the proceeding. As I said, I won't belabor any particular point. We've identified on the screen the TMK, when it was purchased, and what Mr. Wehner was trying to accomplish,

that included receiving a grubbing permit for three acres and allowed him to grub in the area of the permit. He did go beyond the permit area, which necessitated this after-the-fact permit, which we have requested from the Commission. That after-the-fact permit includes recommended mitigation measures. The standard is set forth on the screen, and it's in the Department's materials as well, and based on the evidence before you, the application meets the standard that you're to consider, and the way that works is that the law sets out what the Commission is to consider. The evidence shows whether that standard has been met or not. Things outside of the statutory considerations are not to be considered. The purpose of an after-the-fact permit is not to punish an applicant for having done something but instead to correct a violation. Included in those mitigation measures are a revegetation plan and maintaining the natural contours of the land, so conditions that if this has been an initial permit rather than an after-the-fact permit, probably wouldn't even have been included, so doing more than -- than would have been required recognizing that more is needed to mitigate this situation, that the mitigation also includes educational signs and -- and mapping out the dune boundaries.

And so, based on the evidence that is actually before you, the standards that the Commission is to apply and the testimony that is reflected in the declarations and from the Department and in the Department's recommendation, the -- the application meets the standard for an after-the-fact permit in this situation. The fine was assessed by the Department per the NOV, we paid the entire fine that was assessed, and we've agreed to the mitigation measures that the Department has put forward to you as part of its recommendation for approval. And so, as set forth in the record and for those reasons, we would ask the Commission to grant this after-the-fact permit. Thank you.

Ms. Chen: Do the Commissioners have any questions for the Department or Mr. Chipchase at this point?

Vice-Chair Poepoe: Seeing no questions --

Mr. Moore: This is William Moore. I have a question.

Vice-Chair Poepoe: Okay. Commissioner Moore, go ahead.

Mr. Moore: I have a question for -- I have a question for Michele. On this memorandum put out by you as Planning Director, on the second page, it says, "The applicant was cooperative during the investigation and application process; there is no mitigation or corrective action for the applicant to take related to the physical work." Is that relevant at this time?

Ms. McLean: Thank you for the question, Commissioner. That information was provided because those are the criteria that we evaluate when determining how much of

a fine to assess, and so that's why that information was included because it was a factor in the amount of the fine.

Mr. Moore: Okay, but I still don't see how it can say that no mitigation or corrective action is required.

Ms. McLean: The -- in terms of physical work to be done on the property or when we're looking at enforcement actions, it can often relate to construction and mitigation can be either removal of construction that was unpermitted, so that's the -- the degree of mitigation that we often have to handle when levying fines for unpermitted activity. The -- the recommendation from the Department on the after-the-fact permit does include what is often called "mitigation," but what we're referring to in that description is, for example, they don't have to go back to the site and -- and do any physical improvements. What's recommended as part of the permit is really responsible stewardship action to take from this point forward, it's not correct activity that occurred in the past.

Mr. Moore: Okay.

Ms. Chen: Vice-Chair?

Mr. Moore: I'll go with that but it sounds like -- it sounds like anybody can cut down the dune, and pay the fine, and it's all good.

Ms. McLean: Thank you for that follow-up. I'm glad you brought that up because that depending on the -- the location of the property and the features of the property, there could have been mitigation of that nature that would have been required. After the activity occurred, the UH Sea Grant Extension Agent went to the site and discussed in detail with the Department what steps should we take from that point forward, and it was her scientific recommendation that the dune didn't have to be -- physical work didn't have to be done, it's not a situation where a dune had to be restored, which could happen in some circumstances. If there was an extensive degree of grading down of a dune, then the recommendation may have been that that kind of corrective action be taken to replenish the dune and vegetate the dune, but that was not Tara's recommendation to us in this particular case.

Mr. Sprinzel: Michele, who -- who was it who did this inspection or what was their qualifications?

Ms. McLean: I'm sorry, that's Tara Owens, who is the University of Hawaii Sea Grant Extension Agent, she's a coastal hazards specialist and a coastal geologist and advises our shoreline team on a broad variety of sea level rise, coastal erosion, shoreline protection, dune management issues.

Mr. Sprinzel: And no connection whatsoever with Hawaiian culture?

Ms. McLean: I'm sorry?

Mr. Sprinzel: No connection -- whoops. No connection whatsoever with Hawaiian culture?

Ms. McLean: I wouldn't say that.

Mr. Sprinzel: I would.

Ms. McLean: A great deal of her work involves cultural resources and cultural practices but, as I said, she is a coastal geologist and, in that role, she is often involved with cultural resources issues.

Mr. Sprinzel: But the Molokai may I call them "experts" on remains and Hawaiian affairs were all unanimous in saying that this was almost a sacrilege, so we have her word from Oahu and the locals all thought the other way.

Ms. McLean: Well, she's -- she's actually based on Maui but --

Mr. Sprinzel: Same thing.

Ms. McLean: Her involvement was not, you're -- you are correct, that her involvement was not as a cultural expert or knowledge of all on Molokai cultural resources. I was saying, in a broader context, her work often involves cultural resources and cultural practices that require protection.

Mr. Sprinzel: 'Cause I have to tell you that all the -- the no decisions from this Commission were based on Hawaiian culture and the value of this site, they weren't because we didn't like the idea, although we don't like after-the-fact applications, this Commission has been very tough on anybody who comes here afterwards except in ignorance, and this wasn't in ignorance.

Ms. Chen: If I can interject. I don't believe, based on the record, that Ms. Owen was commenting or offering an opinion on any cultural aspects, she was rather looking at it from a scientific perspective as to what could be done, at that point in time, to mitigate the damage that had already been done, and I believe, I don't want to speak for her, but just based on the record, it appears that, in her opinion, there -- it had already -- the damage had already occurred and there wasn't anything, at that particular point in time, that could have been done to rectify the situation or remedy it. I also understand she, based on the record, that she wasn't able to be physically present at the site and her analysis was conducted via email and photographs, and through those means, so I don't believe she

was offering any commentary on the cultural aspects. It does look like SHPD commented on the record, and their opinion was that -- that any further analysis, from their point of view, was also moot because of the damage that had already occurred. Michele, is that an accurate assessment there?

Ms. McLean: Yes, thank you, Stephanie.

Vice-Chair Poepoe: How can we confirm that --

Mr. Sprinzel: Well, yeah, but if I may, Vice-Chair, 30 years ago or so, I applied to this Commission to build a small cottage on a lot in a very rocky subdivision in the heights, there were quite a few SMA this and that, including my flying an expert over from Oahu to ensure no Hawaiian relics were buried there, all was okay, and we have lived happily there ever after, but when our Commission was presented with an after-the-fact SMA for a lot on the West End, this was a sensitive area both culturally and environmentally, and it appears that there was very little interest or examination ordered by the authorities, that's why I just don't understand all this.

Ms. Chen: Vice-Chair, if I can say something else, I feel like I'm just talking this whole meeting, but perhaps it will be helpful for the Commission to look at this as though this application were presented to it without any action having already been taken, right, so Mr. Wehner is coming to you saying here is my proposed action, I want to grade and grub the sand dune, what would the Commission say to that, forget that it's already been done, what would the Commission say? The Commission would go through a series of questions likely, the Commission would have to look at are there any -- are there any conditions that we could impose in granting -- after granting this permit that would mitigate the damage. So if you can go through the whole analysis, then I think you can get to the decision that you're looking for. I think it's really confusing because it's already been done and you have all of this, okay, what do we do now, but look at this as though it were a new application.

Mr. Sprinzel: Well, we would certainly insist on there being the presence of a Hawaiian remains relic commission person, which is the case in almost every excavation on the island of Molokai. It's the first thing this Commission has always asked for, and if there had been somebody there, he wouldn't have gone past the top of the boundary, which Luigi had clearly laid down ...(inaudible)... for so there you go.

Vice-Chair Poepoe: Thank you, Commissioner Sprinzel. Thank you. Commissioner Pele.

Mr. Pele: This question is for staff, after Stephanie just gave that ...(inaudible)... I'm wondering if this type of permit, special management application, the checklist that are

required, what would be an area that hasn't been completed where the Department -- why am I getting double? Anyways, yeah, I don't know why I'm echoing.

Ms. Espaniola: We can't hear you 'cause you're echoing.

Vice-Chair Poepoe: Yeah, you get feedback but you get one other mike open?

Mr. Pele: No. Just on my computer. How's that?

Ms. Espaniola: Better. Thank you.

Mr. Pele: Okay, so is there any part of the application that would cue the Department to not authorize the permit or say that this act wasn't done or it has to be completed? I'm asking Staff this.

Ms. Lopez: This is Sybil Lopez. This Sybil Lopez, Staff Planner on this project. Commissioner Pele, thank you very much for the question. I too, myself, like Commissioner Leonora couldn't hear you because it was coming in double, so I will try my best to repeat the question I think you're asking, and then I'll answer it. And so what I thought I heard you say was if looking on the SMA checklist, you were somewhat asking if part of the checklist if -- how does the applicant or the Department reviews the checklist items and if it's unfinished, what do you do? So I just want to make sure that's what I heard.

Mr. Pele: Correct.

Ms. Lopez: Is that your question?

Mr. Pele: Yes, on any SMA minor permit for -- what would be a reason that it'd be not - not -- be denied or they had to paint a certain aspect?

Ms. Lopez: Okay, so, the -- thank you, Commissioner Pele. So the Department would review, so the Department would review the application according to the checklist items, so we look for if the applicant correctively addressed all of the checklist items and if it wasn't complete, then we would give the applicant back the application so that they could complete the application. So they have from 1 through about 18 checklist items that they would have to go through to make it a complete application. If it's not applicable to the proposed project, then, you know, then the answer would be no, but if it is applicable to the proposed project, like say are there any rare or threatened or endangered species or animal, plant, or habit, so if he says yes, the applicant needs to include a brief description. So I hope I answered your question. Thank you.

Mr. Pele: Okay, so would Historic Preservation Division be on that checklist, a review of that Department or --

Ms. Lopez: Okay, you're still ...(inaudible)... I cannot -- can you repeat because you're going in and out, I'm sorry, and you're coming in double so ...(inaudible)...

Ms. McLean: ...(inaudible)...

Mr. Pele: I don't know.

Vice-Chair Poepoe: Before we continue on, I can -- can I get in and ask if -- if we are going to proceed without having elected, with the hearing, without having elected a hearings officer?

Ms. Chen: Hi. Thanks, Vice-Chair. So the Commission can act as the hearings officer, as Director McLean pointed out at the last meeting, so I'd recommend taking that course.

Vice-Chair Poepoe: Okay, does it need to be voted before we continue on with the hearing?

Ms. Chen: No.

Vice-Chair Poepoe: Okay. thank you.

Ms. McLean: Chair, if I can answer Commissioner Pele's question, and it also ties back into Commissioner Sprinzel's comments, and the -- the approach that Stephanie outlined, which is if this application had come in before the fact, then we would have circulated it for agency review and, absolutely, the State Historic Preservation Division would have been one of those agencies, and, at that time, they very well could have recommended that archaeological work be done in advance if such work hadn't been conducted on the property in the past, and that archaeological monitoring be conducted during the activity, and that's, as Commissioner Sprinzel said, if you regularly impose a condition about archaeological monitoring, that would have come from an SHPD recommendation, that's something that the Department recommends absent of SHPD's recommendation or absence of a reason for doing that. That comes from the agency who has expertise in that area. In this particular case though, because the activity already took place, the application still did go to SHPD and they said, well, if there were resources there, it -- there's no -- there's no way to go back in time and determine what their recommendation would have been if the activity hadn't already taken place. So they said if there was -- if there were resources to document, that there's no point in doing that now because the activity had already been conducted. So they're the ones who would often recommend monitoring and, in this case, they didn't. They recommended denial because there isn't

the opportunity to do the monitoring or the inventory survey prior to the activity. So, Commissioner Pele, yes, SHPD was consulted in this matter and is regularly consulted on applications.

Ms. Espaniola: So, Michele, I have a question. So would that be -- so that's -- oh, the HPCD, is that conclusive or as ...(inaudible)... earlier with Commissioner Sprinzel that there was other commissioners or authorities that we could utilize to make better evaluation, cultural evaluation?

Mr. McLean: When it comes to archaeological or cultural resources, SHPD is the statutory, is the agency that's statutorily responsible for doing that assessment, that doesn't mean that other agencies couldn't be consulted, but we consulted with them, the application was also transmitted to the Office of Hawaiian Affairs but a response was not received from them.

Ms. Espaniola: Thank you.

Mr. Pele: Hey, Laa, can I follow up on my question?

Vice-Chair Poepoe: Yeah, go ahead, Commissioner Pele.

Mr. Pele: To Michele? Okay, so having said that, so for any SMA permits similar to this, if I did not complete, if I was the -- if I was the applicant and I've told the Department of Planning I'm not going to do the historical review but I still want my permit, what would the response -- would that be a reason, would the Department of Planning say, sorry, we cannot approve your permit unless you do this; this is part of your process; you have to do this; there's no -- there's no waiving this? And I'm just talking in generality on an SMA permit of this nature. I'm just trying to get -- get an idea. I know the work was done already, but if I was applying or if anybody else was applying in this context, would that be something that would not be a void of review just on a regular basis and I could -- and I could still get approval and -- and without having to do that work, that SHPD review?

Ms. McLean: There -- there are two kinds of requirements that SHPD typically requests, one is that archaeological studies be conducted before action is taken on a permit, so just in general, an applicant comes in to do work that involves a lot of ground excavation, SHPD will require that they do an inventory survey and that SHPD reviews and accepts that inventory survey before the application is either acted on administratively if it's within the Department's authority to do that, or before it's put forward to a commission for action. So that -- that research, that field work is conducted first. Then, if it's applicable, SHPD may recommend that, during construction, monitoring be conducted, and if they recommend monitoring, that has to be conducted in accordance with a monitoring plan that SHPD also approves. So when something is put before you that requires monitoring, SHPD has already looked at, most likely, has already looked at the results of

archaeological field work and believes that there's justification for monitoring to take place. Sometimes that archaeological field work results in nothing being found whatsoever and SHPD may say you don't need to monitor.

Mr. Pele: Can you give me an example if it was done administratively ...(inaudible)... planning, if --

Ms. McLean: Well --

Mr. Pele: They could deny a permit administratively, not in front of commission, which is -- but would the Department of Planning have an example where they would say your permit is -- we're not going to process this permit because the State Historical Preservation Division did not review your permit, did not have a review process within your permit? Would that, administratively, has that been common?

Ms. McLean: Well, that -- that wouldn't happen on Molokai when we're talking about SMA because you folks review exemptions and minor permits, but on Maui, if we send something to SHPD, we do not deviate from their -- we don't deviate from their recommendation. If they require field work, we pass that on as a Departmental requirement. There are occasions we don't hear back from them, but we, otherwise, we will follow their recommendation.

Mr. Pele: And what, administratively, would an after-the-fact permit that came through administratively would you guys consider that a deviation of procedure, as you just stated, you guys deviate but ...(inaudible)...

Ms. McLean: Right, in this case, they -- they weren't recommending that field work be conducted or monitoring occur. If this exact situation happened on Maui, we would approve the -- the permit, we would approve the after-the-fact permit administratively. Yes.

Mr. Pele: So you wouldn't consider the after-the-fact activity as a deviation in the process? 'Cause you said you don't deviate, administratively, you don't deviate from the rules but an after-the-fact you would deviate and allow this. It's typical, administratively, for you guys to allow this after-the-fact activity to happen.

Ms. McLean: When SHPD makes a request or recommendation for archaeological monitoring or inventory survey or field studies, we always go along with those. With after-the-fact permits, it's actually only recently that SHPD started commenting on them. They used to not comment at all on after-the-fact permits for the reason that you're grappling with right now is if the work already occurred, there's no real way to assess what happened, and so, previously, we would send it to SHPD, we stopped sending to SHPD for that reason, and then when they started reviewing after-the-fact permits again,

we started sending to them again. But in this particular case, I mean this is -- what's before you today is if we say no, then what? Then this activity occurred, and it's unpermitted, and it's just in limbo, and there's no mechanism to impose the conditions that are recommended which would help better protect the property in the future. So if the permit isn't approved, then the activity just go unpermitted, and we don't like to see that happen. We want to see activities permitted. So that's not to say that you can't vote no today, you have to give your justification for doing that, but if you vote no, then there's no permit, and there are no conditions, and it just stays like that, and we -- we would rather have it be permitted with appropriate conditions, and that would be the same case on Maui because I don't know what the alternative is. If there's a better alternative, please propose it.

Mr. Pele: No, and I have another question as far as when I was reading through it, so this -- the area that was graded and grubbed beyond the permit, the process is only to, like you said, they're seeking to have it permitted, but it won't be available for develop as part of the development, at least in his affidavit he stated that there is plans for the small -- a small structure up at -- having gone past his original grading and grubbing, does it give him carte blanche to utilize that area as part of the development or I'm just a little bit -- I'm just asking some questions about that. I mean are -- is he, since we're permitting it, we're just permitting the grading and grubbing aspect of this development, correct?

Ms. McLean: That's correct. You're only considering the activity that has already taken place. Any future activity would have to get permits starting from the beginning.

Mr. Sprinzel: Mr. Chair.

Vice-Chair Poepoe: Go ahead.

Mr. Sprinzel: May I ask a question?

Vice-Chair Poepoe: Yeah, go ahead, Commissioner Sprinzel.

Mr. Sprinzel: Michele, you said that you'd rather not have an open -- let them do what they like or let them not do what they like, but if they hadn't started any application for a building or a development, we can put all those conditions on when they do.

Ms. McLean: If the building or development is in that same area, yes, you could do it then, but if it's just a building permit or grading permit, that won't come to the Commission if it's not in -- if it's activity that's not in the SMA, then it wouldn't come to the Commission.

Mr. Sprinzel: Okay. Thank you.

Ms. Chen: Can I ask a point of clarification? Michele, is the property within -- is it considered part of a frontal dune?

Ms. Espaniola: Farm land. Farm land permit. I was just going to ask that question.

Ms. Chen: Oh. Well, I just wanted -- so it's not within shoreline setback area, correct?

Ms. McLean: There is a parcel between this parcel and the ocean, and I'm looking at a map now, and about maybe a third of the property, maybe a little under a third of the property is in the SMA, the remainder is not.

Ms. Chen: And is the dune that was graded and grubbed, is it -- would that be considered to be a frontal dune?

Ms. McLean: I don't believe so because there are different permitting requirements and restrictions for grading a frontal dune, and so the permit that they received wouldn't have been issued if it involved --

Ms. Chen: Okay, is it -- that was considered and determined by the Department not to apply.

Ms. McLean: There would likely be more extensive mitigative action if it were.

Mr. Pele: Can I ask a question on that?

Ms. Lopez: I -- I can also answer that. According to the Papohaku Dunes Cultural and Natural Resource Preservation Plan that the University of Hawaii at Manoa, Department of Urban and Regional Planning, in Spring 2005, collected this -- this plan book, and so they are, according in Section 2, of this Papohaku Dunes, as part of the fronting, as what you're asking of the dunes preservation plan, but I -- so we took a look at it, both Tara Owens and I, and we considered part of the mapping that was including in -- into the report of the SMA that is in front of you.

Mr. Pele: If I may ask a question that. But this would -- that wouldn't have been -- that wouldn't be applicable because the -- he wasn't permitted for that dune activity, right? So when we talk about the permit that he obtained, it wouldn't be applicable to the dune work at all 'cause that wasn't part of his original permit. Is that -- am I correct in assuming that? Anybody?

Ms. Lopez: So his -- his original permit was for the after-the-fact grading and grubbing and within the areas and the confined areas of the SMA, and within the SMA area, the property does front the shoreline setback, however, as Director McLean did state, that in the front of that, there's another property, and so that property is an easement owned by

56 of the owners that fronts the Papohaku area, and it is considered within the dunes preservation plan and that section is a part of that plan.

Mr. Pele: No, my -- my question was on the original permit, his original permit was only for three acres that were not in the SMA ...(inaudible)... correct?

Ms. Lopez: Okay, Commissioner Pele, so thank you, so the original permit that you are asking about is it the original permit for the grading and grubbing permit or the original --

Mr. Pele: Yes. Yes.

Ms. Lopez: For the SMA? So the original permit that was for the grading and grubbing permit was not -- nothing to do in the SMA area so, therefore, he did not need an SMA permit for the grading and grubbing permit that he obtained through the Public -- through the Department of Public Works.

Mr. Pele: Yes.

Ms. Lopez: And so that is why he got approved for the grading and grubbing permit because he was not to go enter into the SMA area on his property. Thank you.

Mr. Pele: Good. Thank you.

Ms. Espaniola: So, Commissioner -- Chair, can I ask a question?

Vice-Chair Poepoe: Go ahead, Commissioner.

Ms. Espaniola: So according -- according to the -- the findings of facts, Exhibit 6, that was prepared by the attorney, let me just roll this out so I can get a better idea on it, so on March 27, we supposedly held a contested hearing, and I think -- I don't know what a contested hearing mean, I just know that according to the minutes or our agenda, it was just applying for an after-the-fact permit, he was not -- it was not a contested hearing on that date, so is that correct or not?

Ms. Chen: Vice-Chair, if I could respond. Commissioner Leonora, that -- that was a contested case hearing on March 27 because the Commission was charged with making a final determination, so and that is part of that hearing, you know, certain procedural and there's a method that -- that has to be afforded to grant due process to the applicant, so it's the same -- the same process you're going through now. Does that answer your question?

Ms. Espaniola: Yes. So he applied for a permit in March of '17, 2017, permit was granted according to Director, Lopez, he violated or he proceeded without permit and

grubbed, according to his statement, accidentally or inadvertently, then we have another - he had to apply for another permit because RFS were given, and, of course, we cannot apply that, however, there were complaints that were made, he was required to apply for an after-the-fact permit, so denied on March '19, 2019, when we reviewed it and we denied it. So in his response, we have now a due process, we have to start all over again and try to give our reason, our recommendations based like we're starting all over again to approve or deny. Is that correct?

Ms. Chen: Yes. That is correct. That's exactly correct. So we're just going through the steps now where both parties and the applicant, you know, via his attorney had the chance to talk, the Department had the chance to talk, the Commission is now asking questions, and then, you know, if you need legal clarification on a specific point, we can go into executive session, and then the Commission can move towards deliberations and making a decision to approve, approve with conditions, or deny.

Ms. Espaniola: So, can I ask a question? So how -- can we compare versus his statement that -- that Mr. Wehner made, his Declaration, saying that he inadvertently graded and grubbed beyond the -- his permit, and if we compare that to our minutes on March 27 that the consultant said that he was well aware of it, how can that apply for us to moot his permit. Is that something that we can utilize just looking at the minutes according to -- I'm look at the -- for Mr. Manera, the question was asked by Commissioner Pele, so you don't go down there and determine where he's going to grub and grade, you don't mark it off, you don't talk to him about it, you don't do a site visit, you just -- I'm trying to find out why he did it and the reason he gave for doing it, if you were hired from the beginning, my assumption is you would go down there, so he's questioning -- asked the question to Mr. Manera. Mr. Manera responded by saying I showed him where the suppose -- where he supposed to grade, and so Commissioner Pele went and said and you just past his own. Mr. Manera responded, like I said, he got a little bit too excited. He went up took a look on the hill and had a look from the top. Mr. Manera also said that he called me the same day, he called me back to tell me oh man I like it up here. I said, well, what do you mean by that? I went up on the top, and I said, well, that's not right thing to do. I think you better stop work. So if I'm comparing both statements together, how does that will apply towards our recommendations in the fact that he was well aware and his Declaration of inadvertently doing it versus intentionally -- intentionally doing. How can that apply?

Ms. Chen: Well, so there are a couple of things there. First, the Declaration, Mr. Wehner's and Mr. Manera's Declarations are part of the record. Mr. Chipchase has said that they are available for questions. So if the Commission has questions based on those Declarations, the Commissioners are certainly free to ask those. Whether or not, you know, he -- what his intentions were, now that's another issue as to is that should factored into the Commission's decision, and I recommend, you know, you can ask

questions, and then discussions about those points I would hold off on until I think about that a little further, and we may go into executive session for that.

Ms. Espaniola: Thank you.

Vice-Chair Poepoe: Any other Members have --

Ms. Chen: If you have questions for the -- oh, sorry, Vice-Chair. But if you have questions for the applicant, then, based on the Declarations and the minutes, which are part of the record, then you can certainly ask them. So, Vice-Chair, I'll turn it to you.

Vice-Chair Poepoe: Okay, Corp Counsel, what is our next step we going take?

Ms. Chen: Does anybody -- Commissioner Leonora, did you wanna ask that question to Mr. Wehner or Mr. Manera?

Ms. Espaniola: It's conflicting so I mean I'm not going to have them have to answer that, it's in the record, in the minutes saying that it -- it conflicts each other, one saying that he knew about it, paraphrasing, and one saying that he inadvertently did it, so, you know, that you will help to make the decision. I'm looking at, according to the -- the Exhibit 2, the evaluation and when the fees were given, according to amount necessary to deter future violations, now I'm going to just go beyond this, future development in the vicinity is anticipated in near term and a deterrence is needed, so if we was to look at a deterrence, and he lists in his mitigation a list of things that he's going to do, work with the Department, so again, if I was to look at this, the -- his integrity is questionable in following through with the recommendations to deter -- for deterrence so that that -- I'm just wondering how it can be applied and I guess should formulate how to formulate the recommendations. Thank you.

Vice-Chair Poepoe: Thank you, Commissioner Espaniola. Any other Members have questions?

Ms. Chen: Yeah, I --

Vice-Chair Poepoe: Go ahead, Corp Counsel.

Ms. Chen: So, yeah, I mean this is a really tricky issue. I would -- I would steer the Commission away feeling, from the enforcement side of things, you know, that's the Department role to issue notices of warning, notices of violation. The Commission, right now, its job is to look at the evidence in front of it and if you can try to forget that it's after-the-fact, if Mr. Wehner came to you with this proposed activity, what would you say, and if the answer is yes with these conditions, or no, then we need to -- the Commission needs to point to specific findings of fact that its relying on to make those decisions. The, as I

understand it, and perhaps Director McLean can jump in here if I have it wrong, if the Commission -- the Commission does have oversight and monitoring capabilities if conditions are imposed, that if it's approval with conditions, and, as I understand it, the Commission would have continuing oversight over compliance with those conditions, whereas, if it's outright denied, which is completely within the Commission's purview as long as it's tied to actual facts, and conclusions of law, then if it's denied, then as I understand it, the property -- the project would just be sitting and then it would be an illegal or an unpermitted project just kind of sitting there as is, and -- and there would be no requirements on Mr. Wehner to follow any sort of remediation or conditions after this is over. Is that correct, Director McLean?

Ms. McLean: Essentially yes. It is the Department's responsibility to enforce compliance with conditions, but because of the Commission's broader authority over the SMA, the Commission does -- does have some role to play, but they're not the ones who issue enforcement actions or do investigations or anything like that. I just want to make sure that you're not suggesting they have that kind of responsibility for oversight of conditions.

Ms. Chen: Right. Under the -- the rules, what does the -- what -- what sort of oversight would the Commission have?

Ms. McLean: I would have to pull out my rules and look. I don't know off the top of my head. But, typically, once the Commission takes action, then it really falls on the Department to ensure compliance with conditions.

Ms. Chen: But either way, if -- if the approval is granted with conditions, then there -- there is something -- there are things that the applicant will have to comply with beyond the present hearing, right? If this hearing ends with a denial, does the applicant have to comply with anything beyond that?

Ms. McLean: Just in future -- in future action.

Ms. Chen: ...(inaudible)...

Ms. McLean: Yes.

Ms. Chen: ...(inaudible)... have to go through the whole process.

Ms. McLean: Nothing related -- nothing related to the activity that already took place.

Ms. Chen: Okay. Does the applicant or the applicant's attorney have anything to add?

Mr. Chipchase: I -- I don't know that I have anything to add in the sense of evidence before the Commission, I do reiterate that the minutes are not evidence before the Commission, part of an improper proceeding, so they're not in this record as evidence. What you have --

Ms. Chen: ...(inaudible)... be there but that's noted for the record, your opinion.

Mr. Chipchase: So -- so what the Commission is to consider are things that were actually admitted into evidence in this proceeding, and the things that were admitted into evidence in this proceeding support the -- the granting of the permit. You can't divorce the fact that it -- it is an after-the-fact permit, but that's why he paid a fine and that's why there are these additional conditions attached to it, and so with respect, I do believe that the appropriate course, based on the record, is to grant it, but, of course, that is -- that is, ultimately, your decision.

Vice-Chair Poepoe: Go ahead, Commissioner Pele.

Mr. Pele: I have a question. And I apologize, I am not an attorney, but --

Mr. Chipchase: You don't have to be sorry for that. It's nothing ...(inaudible)...

Mr. Pele: Is the idea that the minutes, if I'm hearing both of you correct, the minutes are not part of the record. Is that an opinion or a fact, Stephanie? Did you interject on that? I heard you use the word "opinion." You cutting out so I'm not -- I'm not understanding.

Ms. Chen: Thank you. It's my understanding that the minutes are certainly a part of the record that is before the Commission.

Mr. Pele: Okay.

Ms. Chen: And I understand Mr. Chipchase disagrees and so that is noted ...(inaudible)...

Mr. Pele: Alright. Okay. Thank you.

Ms. Chen: With the qualifying, you know, factors, of course, that I outlined in the beginning, which is that the public testimony was not to be considered by the Commission.

Mr. Pele: Correct. And can I also ask if, at the time that Mr. Manera was in front of the Commission on the original meeting, he was not a member of the public but he was considered the representative of the applicant. Is there a difference between those two? There is a difference?

Ms. Chen: Yes. Yup. There -- there is a difference. His -- his testimony on behalf of the applicant as the applicant's representative is thoroughly within the record that this Commission can review.

Mr. Pele: Thank you.

Ms. Espaniola: I have a question. So according to the -- one of the RFS, the memo says the complaint was bulldozing down sand dunes along the shoreline and putting up a fence line. Was that fence line put at all?

Ms. McLean: Commissioner, I do not believe a fence line was installed, but I would ask the applicant to verify that.

Mr. Chipchase: That's confirmed, Director. There's no fence line.

Ms. Espaniola: Okay, thank you.

Mr. Chipchase: You're welcome, Commissioner.

Vice-Chair Poepoe: Any other Members with questions?

Mr. Moore: Yes, this is Commissioner Moore. I'd like to ask Sybil a question. You said that the property beyond the Wehner is owned by 56 people. Is that correct?

Ms. Lopez: It is owned -- thank you, Commissioner Moore, for the question. It is owned in conjunction with all the owners that abuts the Papohaku area, all the way down to like I believe would be to Dixie, and so the accumulation of all the owners that own those property abuts -- abutting the shoreline, as far as I know, is -- they put it in an easement, it's a conservation easement to protect the dune areas in that -- in that west end side of that Papohaku. Thank you, Commissioner. Thank you for the question.

Mr. Moore: And it -- is Mr. Wehner one of those owners?

Ms. Lopez: Yes, he is one of those owners, and yes, he is one of the owners that own that property that abuts that -- the easement along that area.

Mr. Moore: So all the owners know that that's a conservation area. Is that correct?

Ms. Lopez: Correct. Yes. Oh, well, I don't know --

Mr. Moore: Okay. Thank you.

Ms. Lopez: If you're asking me that question. Sorry. I leave that up to the applicant to answer that last question. Thank you.

Ms. Espaniola: Was a farm -- was a farm plan necessary on this particular parcel, Director McLean?

Ms. McLean: Commissioner, a farm plan used to be required when someone was proposing to build a farm dwelling, and prior to this activity, I -- a farm dwelling hadn't been -- I believe that, initially, it was in conjunction with a building permit for a farm dwelling but that didn't get submitted along with the after-the-fact permit. At the time, I believe they were intended to build a farm dwelling and develop the property, and they went ahead with the grading activity, and as part of the SMA process, they were going to include a farm dwelling but they have not pursued the farm dwelling in the SMA, and the applicant can confirm that, but we no longer require farm plans for farm dwellings.

Ms. Espaniola: Okay, you answered my question. Thank you.

Vice-Chair Poepoe: Any Members with questions? In there's no other questions, we can move on to entertain a motion on the floor.

Ms. Chen: Vice-Chair, if anybody needs, you know, if you want to confer with your counsel, then we just need a motion for executive session and you would just state, you know, the reason. We could discuss or we can do it, you know, that's just -- that's there if there's something that you need to discuss in private.

Vice-Chair Poepoe: Is there any Member would like to make that motion?

Mr. Pele: Yes, I'd like to move to an executive session so I can confer with counsel.

Vice-Chair Poepoe: Second? Can I get a second? Motion to executive session.

Ms. Espaniola: I second.

Vice-Chair Poepoe: Okay, motion made and seconded. We can go into executive session.

Ms. Chen: Okay, actually, we need a -- a two-thirds vote.

Vice-Chair Poepoe: Okay. Let's go and do roll call.

Ms. Chen: Michele is shaking her head.

Ms. McLean: I believe a two-thirds vote is needed when it's not noted on the agenda that executive session may be called.

Ms. Chen: Right, and per Sunshine Law purposes and this isn't a Sunshine Law ... (inaudible)...

Ms. McLean: Otherwise, a simple majority.

Ms. Poepoe: Yeah.

Ms. Chen: Okay.

Ms. McLean: Yep. You would have to vote ---

Vice-Chair Poepoe: We can take the -- the vote.

Ms. Chen: Okay, a simple majority. Thank you.

Vice-Chair Poepoe: Sorry, we got out of line.

Mr. Sprinzel: Vote no.

Vice-Chair Poepoe: Okay, that's -- Commissioner Sprinzel, what is your vote?

Mr. Sprinzel: No.

Vice-Chair Poepoe: Okay, that's one. Commissioner Pele?

Mr. Pele: Yes.

Vice-Chair Poepoe: Commissioner Moore?

Mr. Moore: Yes.

Vice-Chair Poepoe: Commissioner Espaniola?

Ms. Espaniola: Yes.

Vice-Chair Poepoe: Okay, is that a majority? I'll vote -- I'll vote yes. Motion carries.

Ms. McLean: I don't believe the motion carried with Commissioner Sprinzel voting no. You only have four.

Mr. Pele: Okay.

Vice-Chair Poepoe: Does it require everybody to agree?

Ms. Chen: It would because we're at bare quorum right now.

Mr. Pele: Yes.

Vice-Chair Poepoe: Okay.

**It has been moved by Commissioner John Pele, seconded by Commissioner Leonora Espaniola, then**

**VOTED: to go into executive session to confer with counsel.**

(Assenting - L. Espaniola; W. Moore; J. Pele; L. Poepoe)  
(Dissenting - J. Sprinzel)  
(Recused - L. Buchanan, B. Mowat)  
(Absent - J. Perez, III)  
(Excused - J. Bicoy)

***MOTION FAILED***

Mr. Pele: Alright. Let's go.

Vice-Chair Poepoe: Okay, I'll entertain a motion on the floor on the agenda item.

Ms. McLean: Just for if I could remind the Commission that the Department is recommending approval subject to eight conditions as outlined in the memo.

Mr. Moore: This is Commissioner Moore. I move that we vote yes with conditions.

Mr. Pele: I'll second that. Commissioner Pele.

Vice-Chair Poepoe: Okay. Motion to approve with conditions made by Commissioner Moore, seconded by Commissioner Pele. We can or do we call for a vote now? Oh, we are in discussion.

Ms. Espaniola: So do we have our conditions spelled out yet? We wanna, Commissioner Moore, do you have specific statements of our conditions. Is that something I can ask?

Mr. Pele: The recommendations from the Planning Department.

Ms. Chen: I do have ...(inaudible)...

Ms. McLean: I think, if you'd like --

Ms. Chen: That -- that could be helpful, Director, and then I -- I do have a couple additional conditions that the Commission could look at if it wants to, I can try to share my screen ...(inaudible)...

Ms. Lopez: Corp Counsel, would you want me to read the Department's recommendation?

Ms. Chen: Sure.

Ms. Lopez: Okay. So in consideration of the foregoing determination, an SMA minor permit is required for the proposed action. Pursuant to the aforementioned, the Department recommends approval of the SMA minor permit subject to the following, actually I got nine conditions, so considering nine conditions. In consideration of the foregoing, the Department recommends that the Commission adopt the Department's memorandum to the Commission for its March 27, 2019 meeting -- for June 10, 2020 meeting as its findings facts, conclusions of law, and decisions and order, and authorize the Director to transmit said written decisions and order on behalf of the Commission. And there are the standard for the -- there are the following nine conditions. I don't know if you want me --

Ms. McLean: Sybil, you might -- Sybil, you might be --

Ms. Lopez: To read it.

Ms. McLean: Reading from the wrong report. There are eight.

Ms. Lopez: Okay. Sorry.

Ms. McLean: Eight conditions and it references the May 27, 2020 meeting.

Ms. Lopez: I'm sorry. I had the March 19<sup>th</sup> meeting up. I had the March 27<sup>th</sup> meeting up. I'm sorry. Now I have ...(inaudible)...

Ms. Espaniola: Besides the recommendations or the conditions were already made, I -- I'm -- was discussing with Commissioner Moore if he had, when he made the motion, if there was others besides the one that was already recommended by the -- the Department.

Mr. Moore: Find the recommendations by the Department on page 4, 4 and 5.

Ms. Chen: Does everyone have those recommendations in front of them?

Ms. Espaniola: Yeah.

Ms. Chen: There -- there are a couple additional ones that the Commission could consider, surveying and staking out the area that is identified in the study as dune, and no grading, grubbing, excavation and development in the dune area including any dune area located in the shoreline or frontal dune pursuant to Chapter 20.08, of the Maui County Code. And then as a third potential condition, adhering to the recommendations for dune management and best management practices, which is included in the Department's recommendation, but the -- the BMPs identified in the Papohaku Dunes Cultural and Natural Resources Preservation Plan, in Appendix J, which is the Geomorphical Study of Papohaku Dune. For your consideration.

Ms. Espaniola: So in discussion, I'd like to see what we can do for deterrence, the Department made the recommendation in that sense quoting "future development in the vicinity is anticipated in the near term and a deterrence is needed, so our conditions should reflect, you know, I believe a stricter deterrence in that sense what's allowed to us according to the law. So if we have the -- the ones that, for the record, that was already mentioned by our Corp Counsel should be added for the record, and if there's anything else in, as I stated earlier, the integrity, in that sense of the applicant, to follow through on the -- on the recommended recommendations based on the minutes of him accidentally or inadvertently versus intentionally, so I -- I would like to see how we can place a -- a little more stricter deterrence, and I don't know where to find that, I guess I should word that, if there's something cultural that can be necessary because it's after-the-fact, it doesn't - - the fact that the applicant -- it doesn't deny the fact there are others that are not in agreement with this, with this applicant although it was -- it just was procedural matters, in my opinion, that -- that caused for us -- for this case to be remanded. So considering the community, in that sense, in conscience, I would like to -- if any of the Commissioners -- and make a condition that there are -- that we have utilized in the past. No?

Vice-Chair Poepoe: Commissioner Espaniola --

Ms. Lopez: Commissioner Espaniola, was that a question to the staff or is it that you're coming up with a condition? I just want to make sure for clarity.

Ms. Espaniola: I'm sorry. Excuse me. That was a question to the Commissioners.

Vice-Chair Poepoe: Yeah, I'll go ahead and answer that. Vice-Chair Poepoe. As the cultural advisor to the Commission and as a cultural practitioner, so with regards to iwi and the unknown status of -- of the presence of human remains due to the after-the-fact

nature, there is no repair or remediation. The best -- the best possibility would be to not disturb anymore as a -- from the perspective of a -- of a practitioner. If that answers your question.

Ms. Espaniola: Yes, it does. Thank you, Chair. Vice-Chair.

Mr. Sprinzel: Chair?

Vice-Chair Poepoe: Go ahead, Commissioner Sprinzel.

Mr. Sprinzel: If I may just make a comment. We had a hearing, and we all listened to stuff, and we all said no. Since then a judge has ruled that everything we did was wrong. We shouldn't have listened to the people we listened to. We shouldn't have done anything that we did. Our Chairperson was totally wrong and, therefore, threw out, not only our judgment, but threw out our Chair as well. Having just one thing in this bulk of paper we looked through, bearing in mind we're all untrained volunteers, Luigi made it quite clear this guy did it wrong, did it in spite of being told it was wrong, and did it for fun, and here we are we're supposed to say, oh, that's okay. Fine. So I'm not going to vote for it. Thank you.

Vice-Chair Poepoe: Any other Members have points of discussion?

Ms. Espaniola: No. None, Vice-Chair.

Vice-Chair Poepoe: Okay.

Mr. Moore: This is Commissioner Moore. I made the motion, basically, because it was already established that if we vote no, then everything stands like it is. He doesn't have to do any corrections or remediation if we vote no. But if we vote yes, then we can impose conditions. If we vote no, we cannot impose any conditions. It's just done.

Vice-Chair Poepoe: Yeah, I believe that's true, Commissioner.

Mr. Sprinzel: And we -- we have a guarantee that he'll do all these things?

Ms. Espaniola: That's why we need to formulate our conditions in the means that there will be a guarantee of him carrying out based on his integrity, in my opinion, based on the minutes, you know, whether he's going to carry through with what he's supposed to or not. So if someone can make a recommendation or conditions guaranteeing that he'll follow through with what is recommended by the Commissioner or -- and by the Department. Can we get some help, Corp Counsel, on this? That's why I wanted to go to ...(inaudible)... so we could, you know, kinda get a better idea on where we can, you know ...(inaudible)... on these conditions.

Mr. Sprinzel: Mr. Chair, in the interest of getting through this, I made my point. I'll abstain so you can get it all done.

Ms. McLean: Commission, if I could note that the Department is responsible for enforcing compliance with conditions. There are a number of conditions where documents or plans have to be submitted to the Department, so there will be regular interaction between the applicant and the Department, and if you wish to entertain the additional conditions that Corp Counsel raised, so be it. One of those conditions is more or less already covered by a condition that's in the report. But perhaps the applicant can speak to his intentions of compliance from this point forward. But by having these permit conditions that is something that the Department can continue to enforce and given the process that this has gone through, and the attention that has been paid with it, the Department will be quite mindful of ensuring compliance with these conditions.

Mr. Chipchase: Director, I will take the opportunity to confirm the applicant intends to comply with the conditions as expressed in the Department's report, which is -- which are the conditions that are on or before the Commission on consideration of Commissioner Moore's motion. No other conditions are on the floor presently. As to the conditions that have been stated in the Department's report, the applicant is aware of them and intends to comply with them and that is why we are before the Commission on this after-the-fact permit and why the applicant has already paid the fine that was assessed by the Department. Thank you.

Ms. Chen: If I could respond to that. The -- the Commission is discussing those proposed conditions, but the Commission is also free to come up with additional conditions as long they're roughly proportional to the proposed or already occurred activity and reasonably related to further the objectives of the CZMA.

Mr. Chipchase: So with respect, Counsel, as a matter of basic Robert's Rules of Order, you can't consider additional conditions or additional points on an existing motion. It would take a different procedure. And with respect to the conditions that have been proposed by Corp Counsel, one, it's -- it's respectfully not Corp Counsel's role to propose conditions on a commission and, two, at least one of the conditions that was proposed, which I believe was no development period would -- would essentially be a taking of property, it'd be an improper condition, and so with respect, the conditions that have been proposed by the Department are both appropriate and consistent with the nature of an after-the-fact permit. Thank you.

Ms. Chen: So I will agree with you on the Robert's Rules of Order point, and if Commissioner Bill cares to rescind his original motion, and the seconder agrees, then a new motion could be put forth. The Commission certainly is able to consider additional conditions and the takings point, could you clarify that?

Mr. Chipchase: As I understood the condition that you had proposed, Counsel, it was to prospectively prohibit development in the area, which would not be an appropriate condition, A, on the after-the-fact permit or a condition is within the purview of the Commission to oppose or impose period, and so the, with respect, the conditions that were formulated by the Department are appropriate conditions given the nature of the after-the-fact permit and the responsibilities and roles of the Commission. The Commission can't prevent development on any portions of property particularly when that question is not before the Department or before the Commission. As the Department explained earlier, any development in the area, any development in the SMA would come back before this Commission for approval. You're not blessing future development. You would have to consider any proposed development within the SMA, that is your role, and that is your responsibility; that is not what is before you. All that is before you is the after-the-fact permit. Do you approve with the conditions that have been proposed, the work that was already done, not any future work and, as the Director pointed out, enforcement of those conditions that have been proposed and are attached to the Department's recommendation all fall within the -- the enforcement responsibilities of the Department so that if they're not done, the Department has the jurisdiction to take enforcement action, that's -- that's the Department's responsibility. Thank you.

Ms. Chen: Okay, thanks for that. For the record, it is my role, as the Commission's attorney, their counsel, to help them come up with permissible conditions and that can be done in open session. I, at this point, based on Mr. Chipchase's legal questions here and points of clarification, I'd recommend going into executive session so that we can further flush out the Commission's conditions.

Ms. Espaniola: Well, I make a motion to --

Vice-Chair Poepoe: Hold on, Leonora.

Ms. Espaniola: Oh, I'm sorry.

Vice-Chair Poepoe: There's a motion on the floor. We have to deal with that one first, okay?

Ms. Espaniola: Alrighty.

Vice-Chair Poepoe: So the next step is we're going to have take the -- take action on the current motion, that's --

Ms. McLean: If I could, Vice-Chair, the motion on the floor is to approve based on the Department's recommended eight conditions. If the Commission wishes to add further conditions or amend any of the conditions, a motion to amend the motion on the floor

could be made, and those additional conditions could be considered. Another option would be to withdraw the motion on the floor, and the second would have to be withdrawn, and then you'd have a clean slate and could start from scratch and make a new motion with additional conditions. I don't know that executive session is needed for that, but if the Commission feels that it needs to consult with its attorney in closed session, then you can either withdraw the motion and the second, and then move into executive session.

Ms. Lopez: Chair, can I, this is Sybil Lopez, can I read the eight conditions for the public, please?

Vice-Chair Poepoe: Yes, go ahead.

Ms. Lopez: Okay, so pursuant to the aforementioned, the Department recommends approval of the SMA minor permit subject to the following eight conditions: Number one, that the after-the-fact grading and grubbing is in accordance with the revised SMX application descriptions submitted on August 21, 2018 and representations made to the Department by Architectural Drafting Service.

Condition number two, that the applicant shall remove any kiawe debris that was caused by the grading that is not repurposed.

Condition number three, that within the area from which the kiawe debris is removed, the applicant shall restore and revegetate with native species appropriate to the site. The applicant shall submit a revegetation plan for the Department's approval.

Number four, that the applicant shall ensure best management practices to ensure dune preservation such as, but not limited, to a to e: a. Post one or more signs to educate visitors, subsistence practitioners, and lot owners about dune functions and importance of not disturbing the dunes; b. Allow the natural revegetation of the akiaki grass to continue; c. Maintain natural contours of the land and use natural landscaping design techniques; d. Channel foot traffic along one suitable path and use shared-access pats between coastal lots; e. Obtain proper permits for any future activity including ground-altering activity.

Number -- the fifth condition, that the applicant shall establish boundaries of the dune ecosystem defined by a dune engineer or other professional with similar knowledge approved by the Department; said boundaries shall be depicted on a map provided to and approved by the Department.

Number six, that there will be no ground-disturbing activities within the designated dune ecosystem boundaries as defined by a dune engineer or other professional with similar knowledge approved by the Department during wedge-tailed shearwater, uau kani,

breeding season (March through November) to avoid disturbance of seabirds and nest burrows.

Number seven, that the project shall be initiated by June 30<sup>th</sup> of 2020 and shall be completed within two years of the said initiation.

And, finally, number eight condition that full compliance with all other applicable governmental requirements shall be rendered. Thank you.

Vice-Chair Poepoe: Thank you, Sybil.

Mr. Moore: Chair, this is Commissioner Moore. Shall I withdraw my motion?

Vice-Chair Poepoe: If you would like to, Commissioner Moore.

Mr. Moore: Well, if we're going to go into executive session, then I will. I will withdraw my motion in lieu of the -- the session.

Vice-Chair Poepoe: Does that need a second, Corp Counsel?

Ms. Chen: Sorry, it cut out right when Commissioner Bill said that. What was your motion, Commissioner Bill?

Ms. McLean: Commissioner Moore withdrew his motion, and so Commissioner Pele would have to withdraw his second, and then the Commission could move forward from there.

Vice-Chair Poepoe: Commissioner Pele, would you like to withdraw your second?

Mr. Pele: Second withdrawn.

Vice-Chair Poepoe: Okay, no motion on the floor. Can I entertain another motion?

Ms. Espaniola: Motion to go into executive. Can I do that? With counsel.

Vice-Chair Poepoe: Okay, motion to go into executive session, made by Leonora. Is there any second?

Mr. Pele: I'll second.

Vice-Chair Poepoe: Okay. Seconded by John Pele, Commissioner Pele. Any discussion?

Mr. Pele: We lost Commissioner Sprinzel.

Mr. Sprinzel: No.

Vice-Chair Poepoe: Oh, he's still on the call.

Mr. Pele: I don't see him on.

Vice-Chair Poepoe: No discussion, I'll call for the vote. Commissioner Espaniola?

Ms. Espaniola: Aye. Yes.

Vice-Chair Poepoe: Commissioner Moore?

Mr. Moore: Yes.

Vice-Chair Poepoe: Commissioner Pele?

Mr. Pele: Yes.

Vice-Chair Poepoe: Commissioner Sprinzel?

Mr. Sprinzel: No.

Vice-Chair Poepoe: Commissioner Mowat? Oh, sorry.

Ms. Lopez: Yes. I'm sorry. She cannot vote.

Vice-Chair Poepoe: Yeah, sorry. Okay. So I'll vote yes and it won't -- motion fails.

**It has been moved by Commissioner Leonora Espaniola, seconded by Commissioner John Pele, then**

**VOTED: to go into executive session to confer with counsel.**

(Assenting - L. Espaniola; W. Moore; J. Pele; L. Poepoe)  
(Dissenting - J. Sprinzel)  
(Recused - L. Buchanan, B. Mowat)  
(Absent - J. Perez, III)  
(Excused - J. Bicoy)

***MOTION FAILED***

Vice-Chair Poepoe: So I'll continue to ask for motions. Does anybody want --

Mr. Billy: I'll renew -- I'll renew by motion to vote yes with the conditions, the eight conditions.

Vice-Chair Poepoe: Any second?

Mr. Sprinzel: I'll second.

Vice-Chair Poepoe: Okay. Motion to approve with conditions by Commissioner Moore, seconded by John Sprinzel. Any discussion on the matter? I have some points of discussion I want to make. I make that the project will be initiated during the -- I know it's going to have two years according to condition six but will not allowed, via condition seven, but what is the -- the time allowed to do remediation work and revegetation work if that is allowed, complete between those two times? The total time allowed to -- to have possibly remediate? Because the dunes were created and -- and vegetated over a period tens of thousands of years, so I don't know how less than one year it would be able to be given to the applicant to correct the destruction of the dune.

Ms. McLean: Vice-Chair Poepoe, you're referring to the requirement that the project be initiated by June 30<sup>th</sup> and completed within two years, but then, at the same time, there cannot be ground disturbance from March through November, so you're concerned that in the remaining time available that wouldn't be sufficient time for them to do the revegetation work? Is that the -- the gist of your comments?

Vice-Chair Poepoe: Yes. In comparison to the amount of time that was required for the dune to actually build up and be vegetated with native plants and be able to provide habitat for native animals, that wouldn't be enough time in one year to be able to remediate and to correct the destruction of the dune.

Ms. McLean: I believe the idea is to get plants planted within that two-year time frame but with the expectation that they would then -- they would then get rooted and proliferate in perpetuity, that there wouldn't be a limit to that. But we can perhaps tweak condition three, which is the one about restoring and re-vegetating to add that the -- the vegetation shall be maintained beyond the permit's expiration that it shall be maintained.

Vice-Chair Poepoe: Yeah, so when Tara Owens came here, did she give you a recommendation to even continue with the -- the revegetation of the dune when you did your site survey, your site study?

Ms. McLean: Yes, it was her opinion that there wasn't physical work that needed to be done, such as pushing sand to return an actual dune structure, that physical work like

that could likely cause more damage than benefit, and so her recommendation was the revegetation to keep the remaining system intact.

Vice-Chair Poepoe: I not sure how -- if that's how dune restoration works knowing -- being experienced in doing restoration is you don't touch it. You let nature happen. So I don't know if she gave the recommendation to actually try to out-plant on a sand dune but if I had my opinion, it would be to totally not touch anything, let it retain and restore on its own, let the animals return on their own to the sand dune, and I don't know how disturbing the bank would, the sea bank, would be an appropriate step for remediation. So I just trying to get to whatever my experience is with dune restoration in the same Keonelele Dune system.

Ms. Chen: Vice-Chair, would tweaking that condition to read, "After consultation with a professional knowledge of dune restoration," something to that effect, then the applicant shall submit -- shall restore and revegetate in according with a revegetation plan per the Department's approval?

Mr. Sprinzel: Wouldn't we have to withdraw our motion if you change anything unless Christopher agrees?

Ms. Chen: Yeah, as -- as Director McLean pointed out, we'd either have to amend this motion if you were to change anything, and second that amendment, and have that amendment passed, and then we'd be back to the amended motion, or you could withdraw as this -- this then would be Commissioner Bill's first motion.

Mr. Chipchase: Commissioner or Vice-Chair Poepoe, it is a little unusual to hear from an applicant when you're in discussion, I understand your question, and I think I can address it. If that's helpful, I will. If not, I understand.

Mr. Sprinzel: I'd certainly like hear.

Mr. Chipchase: Okay. Vice-Chair, if that's alright with you as well? Okay. The revegetation has proceeded, not -- not with active planting but naturally, and I don't know if you can see this picture of the site area, but the native grasses are coming back and they've been allowed to. There's not been any active planting. The -- the condition, as expressed, contemplates a plan that's approved by the Department. The plan that we expect to present is not to have active replanting, and so -- so that will be a portion of the plan that we submit to the Department. The Department, of course, has to approve that and agree, but -- but our understanding is the same as yours, Commissioner Poepoe, Vice-Chair Poepoe, that -- that active replanting would not be the best course, that allowing revegetation naturally would be the best course for that area, and that's what we intend to submit.

Ms. Lopez: Vice-Chair, if I could propose that if you're looking at changing that condition, would the Commission feel comfortable instead of it having the Department's approval, would it come to the Commission for the Commission's approval so that you know? I mean I just failed to propose that.

Vice-Chair Poepoe: Yeah, that's the exact point I was making is it's already destroyed. The -- the applicant already bulldozed the area and material was moved, but the plants will grow on its own. You cannot out-plant. You cannot water. You cannot fertilize. They need to grow on their own. The seeds need to sprout on their own. And, yeah, it's -- it's one of those things where the area would begin to fix itself if left alone, and one of the -- like on the side of culture, on the side of disturbed iwi, the possibility, the high possibility of having iwi on the -- on the site, that also too would require the area to be totally left alone and as well as all these other, in front of me, I have a list of -- of rules and regulations and policies and provisions in the general -- the Maui General Plan, our Community Plan. The -- the Molokai Island -- Island Plan, the West End Policy Statement, the CMZ -- CZM, and all these -- all these policies that are inconsistent with the conditions, so we kinda stuck here with I don't know how to put this in as a condition if it's already inconsistent with our plans. I can read -- I can read the policies if anybody wants me to.

Ms. Chen: Vice-Chair, do you have wording that you would propose?

Mr. Pele: Can I ask a question, Chairman?

Vice-Chair Poepoe: Go ahead, Commissioner Pele.

Mr. Pele: So the policies and procedures that you all have -- that you have in front of you, they're established policies and procedures, I'm assuming, and --

Vice-Chair Poepoe: Yeah, they come right out of the book.

Mr. Pele: So, and, Staff, if I'm asking this question, let me know if I'm correct, this in specificity to this approval, we're talking about the work that has been done already. It does -- there's nothing in these eight conditions that would supersede any of the policies that Vice-Chair Poepoe is referring to, which have already deemed to be on the record as I'm going to use that as a, lack of a better term, for determinations on development on our island, so -- so these eight conditions don't supersede those policies that -- that he's talking about with the West End, Molokai, the Maui dune management, or am I correct in saying that approving these eight conditions are alleviating any responsibility from other policies that I can develop for the island of Molokai concerning development? That was --

Ms. McLean: Your question, Commissioner Pele, this approval wouldn't supersede any other requirements or policies.

Mr. Pele: The problem I think Vice-Chair is having is there's some conflict you said, Vice-Chair Poepoe, between the -- some of the conditions and the policies that you have in front of you.

Vice-Chair Poepoe: Yeah, there's inconsistencies with the -- if it was framed as a hypothetical, we would have had the opportunity to hear it before the fact. There's a whole list of things that we can take from our existing plans and policies that we could have applied, but that's my argument is we have information here that would be -- be helpful for a decision that don't fit into the conditions.

Mr. Pele: Correct. I totally agree. I agree with you, which is why I wanted to go into executive session but, unfortunately, I'm trying to treat this as a new applicant 'cause they keep telling us to pretend like nothing happened but, yet, we have to still make a decision on an after-the-fact permit because the work has already been done, so I'm just trying to walk that line. It's a very confusing line for me to walk.

Ms. Lopez: And so, Vice-Chair, I got a comment, if it's okay to say, so going through the conditions with Ms. Tara Owens, we -- those certain conditions came straight from the Papohaku Dunes Cultural and Natural Reservation Preservation Plan and the Molokai Island Community Plan was considered within the conditions that are before you and as Director McLean said correctly to Commissioner Pele's question so -- but if you feel more assured to include those that you have as an added condition, you're also more than welcome to do that.

Vice-Chair Poepoe: I not confident that any recommendations will fulfill or offset the inconsistencies with our existing policies. The -- the existing conditions would be helpful in somewhere other than the sand dune, you know, the sand dune area, like somewhere in Kaunakakai or, you know, anywhere other than one culturally and environmentally sensitive area, so I having a hard time. I not into these -- these conditions. I just going go ahead and, if nobody minds, I'll read off the actual policies. I'll start with the Maui County General Plan 2030, so page -- Objective 1, improve the opportunity to experience the natural beauty and native biodiversity of the islands for present and future generations. Policy E, protect undeveloped beaches, dunes, and coastal ecosystems and restore natural shoreline processes; F, protect the natural state and integrity of unique terrain, valued natural environments, and geological features. So Objective 3, Police A, preserve and protect natural resources with significant scenic, economic, cultural, environmental, and recreational value. Police C, evaluate development to assess potential short-term and long-term impacts on land, air, aquatic, and marine environments; K, improve enforcement activities related -- relating to the natural environment; L, for each shoreline community, identify and prioritize beach -- prioritize

beach conservation objectives and develop action plans for the implementation. Implementing Actions A, document, record, and monitor existing conditions, populations, and locations of flora and fauna communities. Page 49, Objective 1, perpetuate the Hawaiian culture as a vital force in the lives of residents. Policy B, prohibit -- prohibit inappropriate development of cultural lands and sites that are important for traditional Hawaiian cultural practices and establish mandates for the special protection of these -- of these lands in perpetuity; F, recognize and preserve the unique natural and cultural characteristics of each ahupuaa or district; H, ensure protection of Native Hawaiian rights. Page 51, Objective 4, preserve and restore significant historic architecture, structures, cultural sites, cultural districts, and cultural landscapes. Policy D, protect and preserve lands that are culturally or historically significant; I, protect summit slopes and ridgelines from inappropriate development. Page 74, Objective 1, improve land use management and implement a direct growth strategy -- a directed growth strategy. Policy F, discourage new entitlements for residential, resort, or commercial development along the shoreline; H, direct new development in and around communities with existing infrastructures that serve its capacity and protect natural scenic shoreline and cultural resources; K, preserve the public's right to -- of access to and continuous lateral access along all shorelines; L, enable existing and future communities to be self-sufficient through sustainable land use planning and management practices; M, protect summit slopes and ridgelines from inappropriate development. Page 76, Objective 4, improve and increase efficiency in land use and planning management. Policy A, assess the cumulative impact of developments on natural ecosystems, natural resources, wildlife habitat, and surrounding uses; B, ensure that new development projects require discretionary permits -- requiring discretionary permits, demonstrate a community need, show consistency with the General Plan, and provide an analysis of impacts; E, coordinate with federal, state, and county officials in order to ensure that land use decisions are consistent with county plans and the vision local populations have for their communities. So that's the General Plan for Maui, 2030.

But I'll read off the policies in the Island Plan. So Heritage Resources, page 30, statement: Some Molokai residents feel there's a lack of awareness and respect for the importance of Molokai's cultural and archaeological sites by locals and visitors alike, which often leads to intentional or unintentional damage. There's also concern that some sites not formally identified are being damaged or destroyed by unregulated ground-altering activities, land development, and all-terrain vehicle use. In addition, platforms are often damaged by negative human activity, animals, or tree roots. Page 41, Goal, Molokai's cultural historic and archaeological sites and cultural practices will be protected and perpetuated for their cultural and historical value and for enjoyment of and sustainable use by future generations. Policy 1, encourage proper management of an appropriate interpretation of significant cultural resources and sites; 3, where appropriate, require identification and mitigation of potential impacts to subsistence activities and resources when reviewing development permits and discretionary land use proposals; 14, ensure that permits for any project that may affect historic property are provided to

SHPD for review and that SHPD's recommendations are issued as permit conditions. Page 94, community design, goal, the rural character of Molokai's small towns and the island's open spaces will be maintained and enhanced. Policy 3, encourage and preservation -- encourage the preservation of buildings, structures, and sites of historic and cultural significance; 6, maintain and enhance the rural character of the Kaluakoi area through low-impact site design and development practices. Page 176, Statement of the West End Policy Statement, the west coast has a very high concentration of cultural sites and its historical uses are well known. Koa were found in abundance along the entire coastline indicating the rich ocean resources found here. Papohaku Beach and the area surrounding it are historically significant. North of the beach is Kaiaka Rock. This major outcropping is home to a heiau facing Papohaku Beach which has been used as an observation tower for fishing and scouting purposes. Just below Kaiaka Rock is a canoe heiau, which is a rare type of shrine, its existence in the case of importance of this area for canoe launching and landing. In addition to fishing and canoe access, the beach maintains a spiritual use. The dunes along Papohaku serve as burial grounds as do sandy areas and dunes of Moomomi and Keonelele. Keonelele is the sandy inland area that connects the two coastal -- coastal dune systems. Lastly, the south of Papohaku is Puu Koai, the area where bodies were prepared for burial. Page 179, Statement of the West End Policy, one natural resource issue that intersects directly with the land use and housing section in the impact to the Papohaku Dunes by development owners and coastal lots along Papohaku Beach has state and county regulations to follow in determining the placement of their homes, however, those regulations are not completely congruent with the recent research that has been conducted along the dune system. The Papohaku Dune Cultural and Natural Resource Preservation Plan, compiled by the UH Manoa Department of Urban and Regional Planning Practicum in 2005, includes extensive information that demonstrates the need for tighter controls to protect the entire dune system. Policies and actions related to this issue are included in the land use and housing section. Page 182, Statement on the West Policy Statement, the entire area is dotted with burials especially those areas composed of sand since this was a common material in which burials were placed. The main burial sites include the dunes of Moomomi and Papohaku and Keonelele, the area where sand is believed to blow southwest from Moomomi towards Papohaku. Page 187, the Goal, West End's rich cultural sites and practices including subsistence hunting, gathering, and fishing will be protected and perpetuated for sustainable use by future generations. Policy 4, support the documentation of all cultural, religious, and archaeological sites to preserve the cultural integrity of such sites; 5, support the conservation and preservation of archaeological sites both large and small. Page 193, Goal, landowners will work with the community to protect the environment and culture of the West End including providing housing that is affordable to residents. Policy 5, encourage developers to provide access to protect the continuation of traditional gathering; 6, provide better notice and encourage the community to provide input on proposed developments and create opportunities for dialogue between the developer and the community; 7, educate landowners on proper protocol when gravesites are discovered during construction,

SHPD and the Burial Council should be contacted; 9, encourage the state to consider to consider extensive -- extending the state conservation district to include the entire Papohaku Dune System; 10, posted lots along Papohaku Beach should be built as far back from the ocean as possible to protect life and property as well beach and dune resources; 13, archaeological, cultural, and historical remains in the large scale development area or surround affected region shall be professionally and traditionally investigated before any construction begins; 14, support policies requiring setbacks farther from the coastline and primary dune systems. Chapter 13 is the HRS 205A, Coastal Zone Management Rules. There's a whole bunch of them.

But there is a lot of -- a lot of policies existing that is inconsistent with that -- the hypothetical of whether or not we started from what the outcome would be with this particular agenda item. But seeing as -- it's still an after-the-fact. There's no remediation to be done because it's just leave it as is.

Ms. McLean: Vice-Poepoe, if I could comment to your -- to the specific point that you were raising about revegetation. The condition about revegetation is related only to the area where kiawe debris is required to be removed. Later on, it requires that the applicant allow the natural revegetation of the akiaki grass to continue, but on that earlier condition where the revegetation was included in a condition, the Commission could revise that to say that the applicant shall allow the project area to revegetate and recover naturally, if you believe that's more appropriate. That doesn't go to a number of the other policies that you read, but that's -- it seems to be in line with your concern and with some of the policies that you shared with the Commission.

Ms. Espaniola: Can we, Vice-Chair, can I -- can I speak?

Vice-Chair Poepoe: Go ahead, Commissioner Espaniola.

Ms. Espaniola: So can we -- we denied the -- the after-the-fact permit on March -- on the last meeting that we had, I believe that's March 29th? I was wondering if we could just reiterate or restate some of the specifics, facts, and findings for the purpose of -- for the reason why we denied it, and, in addition, that would be, again, because we were just remanded, we were remanded because of procedural ...(inaudible)...

Ms. Chen: So if I could ...(inaudible)...

Ms. Espaniola: So I'm asking, Corp Counsel, can we just reiterate why we denied it, specific ones, based on that, and based on some of the policies Vice-Chair had mentioned or read out?

Ms. Chen: So I understand there's still a motion on the floor, right? It hasn't been voted on yet. So there's that issue. And then as far as discussion of a different motion and

reiterating reasons for denial, the reasons for, if the Commission is going to move in the direction of a denial or discuss that, the reasons for such denial should be -- should be based on the entire record, which the Commission did not have in front of it previously, and the Commission should formulate those findings today, not to say they may not overlap or be the same, but the Commission is not -- cannot just adopt its previous findings.

Ms. Espaniola: Okay, thank you, Corp Counsel.

Vice-Chair Poepoe: Any Members with discussion or questions? Seeing none, we can call for a vote.

Ms. Chen: And, Vice-Chair, perhaps if you could just repeat the motion that's on the floor to approve these eight conditions. Correct?

Vice-Chair Poepoe: Can somebody with the motion in front of them read it, please?

Ms. McLean: It was moved by Commissioner Moore, and seconded by Commissioner Sprinzel to approve the after-the-fact permit subject to the eight conditions in the staff recommendation.

Vice-Chair Poepoe: I'll do roll call for the vote. Commissioner Sprinzel?

Mr. Sprinzel: Abstain.

Vice-Chair Poepoe: Commissioner Espaniola?

Ms. Espaniola: No.

Vice-Chair Poepoe: Commissioner Pele?

Mr. Pele: Yes.

Vice-Chair Poepoe: Commissioner Moore?

Mr. Moore: Yes.

Vice-Chair Poepoe: So I'll vote no. Motion fails.

**It was moved by Commissioner William Moore, seconded by Commissioner John Sprinzel, then**

**VOTED: to approve the after-the-fact permit subject to the eight conditions in the staff recommendation.**

(Assenting - W. Moore; J. Pele; J. Sprinzel-Abstain)  
(Dissenting - L. Espaniola; L. Poepoe)  
(Recused - L. Buchanan; B. Mowat)  
(Absent - J. Perez, III)  
(Excused - J. Bicoy)

***MOTION FAILED***

Vice-Chair Poepoe: So is there any other motion? Does anybody like to submit a motion?

Ms. Espaniola: I'd like to make a motion approve with the eight conditions in addition to compliance to the Molokai Community Plan, some of the policies that were read, specifically, the cultural findings, some of the recommendations on the cultural findings. We have to word that out, but I -- I had it written it out but ...(inaudible)... my papers.

Vice-Chair Poepoe: Is that -- that be clarified or --

Ms. Espaniola: That would be my motion.

Ms. Chen: Commissioner, could -- could you be a little more specific with the additional conditions that you're referring to.

Ms. Espaniola: So the Molokai Planning Commission -- I'm sorry. Molokai Community Plan, there were specifics, some things that were read out that was not consistent with the eight conditions, so there were some that needed to be revised, number two, specifically, on the eight conditions regarding the leaving the -- not disturbing and the grading that's already done, so they said they were going to regrade if I'm -- I can't find my paper that wrote out over here. I'm sorry. So if you can read number two? Somebody can read, Corp Counsel, number two, of the eight conditions?

Ms. Chen: Commissioner Leonora, are you talking about number three that within the area from which the kiawe debris is removed, the applicant shall restore and revegetate with native species appropriate to the site. The applicant shall submit a revegetation plan for the Department's approval. Is that the condition you're talking about?

Ms. Espaniola: No. Number two. What was number two?

Ms. Chen: Number two is that the applicant shall remove any kiawe debris that was caused by the grading that is not repurposed.

Ms. Espaniola: Okay. So I think that's the one. Number two. The regrading. They're going to regrade, right? No? What does it say? Sorry, maybe I heard ...(inaudible)...

Ms. Chen: I don't have the ...(inaudible)... but the Department can comment on that.

Ms. Lopez: I -- I can clarify that for you, Commissioner Espaniola. The reason for the condition number two is that when the applicant graded and grubbed in that area to remove the kiawe debris when -- on the site, on the property, the applicant left all the debris in the southern part of where he graded, and so that is what the Department is requesting that the applicant remove that debris, so that's where -- that's what the condition number two is referring to.

Ms. Espaniola: Okay. Thank you. So the Community Plan or Vice-Chair suggested that we leave it to itself, can we add that and not disturb the ground again? That's -- that's what I mean. Adding that part to one of the conditions. Okay, I got it out. So, in that sense, for number two, instead of removing and moving it, just not to disturb it anymore, so that could be added as an additional condition or undo that condition that was specified in number two. Can that be done? I'm just wording it.

Ms. Chen: Yes, you're still -- you're still making a motion and you're just coming up with the wording, so do you want to make your motion to -- to move to approve with the eight conditions and strike condition number two, or do you want to reword condition number two to say that the applicant shall not remove any kiawe debris?

Ms. Espaniola: So, Vice-Chair, what do you suggest? I mean we strike it or we should revise or reword?

Vice-Chair Poepoe: I actually never like add 'em add as one condition.

Ms. McLean: Commissioners, may I make a suggestion based on what I'm hearing? That condition two gets replaced with the applicant shall comply with the objectives and policies of the Molokai Island Community Plan, and then condition three gets changed to the applicant shall allow the project area to revegetate and recover naturally. And then the other conditions remain as recommended. Does that address the concerns?

Ms. Espaniola: Or that can be added to -- to my motion, as stated by Director McLean, in addition, what she had just stated.

Vice-Chair Poepoe: Can that be repeated in its entirety, please?

Ms. McLean: The recommendation I believe that Commissioner Espaniola is putting forward is to approve the after-the-fact permit subject to the eight conditions in the Department's memo and with the changes that condition two that currently says, "That the applicant shall remove any kiawe debris that was caused by the grading that is repurposed," that gets removed and replaced with "That the applicant shall comply with the objectives and policies of the Molokai Island Community Plan." And then condition three that currently reads "That within the area from which the kiawe debris is removed, the applicant shall restore and revegetate with native species appropriate to the site. The applicant shall submit a revegetation plan for the Department's approval," instead of that, we say, "That the applicant shall allow the project area to revegetate and recover naturally." And then the remaining conditions stay as they are. Commissioner Espaniola, is that what you wanted the motion to be?

Ms. Espaniola: Yes.

Vice-Chair Poepoe: Any Commissioner Second?

Mr. Moore: I will second. This is Commissioner Moore.

Vice-Chair Poepoe: Motion by Commissioner Espaniola, seconded by Commissioner Moore, for discussion. Any discussion? So I cannot see any of the stuff I read being consistent with any of the conditions or, you know, it can be done by stretching, sort of reaching for it, but this whole application is inconsistent with the existing policies in the General Plan, the County plan, and the Molokai Island Plan, and the West End Policy Statement, but it's I guess that's all you can do as a matter of after-the-fact, but I don't see no improvement with -- with the conditions.

Mr. Espaniola: So Commissioner -- Vice-Chair, so Commissioner Moore already stated that he made the approval based on the fact that if we don't, or if I may say in my own terms, then we'd be darned if we do, we'd be darned if we don't do something about this. I think we should make an informed decision and based on the policies that you read regarding the Molokai Island Community Plan, there's more that needs -- well, we need to word it so where that it will justify the denial and, at this point, we, in my opinion, we have everything that we need except the community policies to word what we need to word to either deny or approve so adding the conditions, the additional conditions, how will it not -- how -- how can we word it so where it can apply stricter or reason, justifiable reason for denial or approval?

Mr. Pele: Vice-Chair, motion on the floor, are you going to call for the vote?

Vice-Chair Poepoe: I'll add some more discussion. The reason why I read all that out on the -- the, you know, the policies and all that is to prove that, within each other, the Coastal Zone Management, the Molokai Community -- the Molokai Island Plan, and the

Maui County General Plan, they all eventually intersect and continue to repeat the same theme and it's not complying with this application, so it's -- it's a circle of noncompliance or inconsistencies, so it's -- you can add all the conditions you want, it just won't be consistent with the Community Plan, the Maui County General Plan, or the CZM, and you find reasons why it can be, but it would be -- it would be omission, it would be disregarding our Island Plan, which is what we're supposed to be -- one of the documents we're supposed to be taking very seriously, and the County General Plan. So conditions is unsatisfactory to me. So I'll call for the vote. Commissioner Sprinzel? Or can we have this, just for everybody to remember what the vote on the -- the motion on the floor is, can Director or Corp Counsel have that repeated, please?

Ms. McLean: Yes, Chair, it's to approve the permit subject to the eight conditions in the Department's memo but replacing condition two with that the applicant shall comply with the Molokai Island Community Plan, and then replacing condition three with that the applicant allow the project area to revegetate and recover naturally.

Vice-Chair Poepoe: So voting on the motion, I'll start with Commissioner Sprinzel.

Mr. Sprinzel: Abstain.

Vice-Chair Poepoe: Commissioner Moore?

Mr. Moore: Yes.

Vice-Chair Poepoe: Commissioner Espaniola? Mute. Commissioner Espaniola?

Ms. Espaniola: Can we abstain or withdraw?

Vice-Chair Poepoe: Commissioner Pele?

Mr. Pele: No.

Vice-Chair Poepoe: Motion fails.

**It was moved by Commissioner Leonora Espaniola, seconded by Commissioner William Moore, then**

**VOTED: to approve the permit subject to the eight conditions in the Department's memo but replacing condition two with that the applicant shall comply with the Molokai Island Community Plan, and then replacing condition three with that the applicant allow the project area to revegetate and recover naturally.**

(Assenting - L. Espaniola-Abstain; W. Moore; J. Sprinzel-Abstain)  
(Dissenting - J. Pele)  
(Did Not Vote - L. Poepoe)  
(Recused - L. Buchanan; B. Mowat)  
(Absent - J. Perez, III)  
(Excused - J. Bicoy)

Vice-Chair Poepoe: I want to call a five-minute recess. Does that need a -- a vote? Anybody opposed to that?

Ms. Espaniola: I'm okay. It's alright.

Vice-Chair Poepoe: Okay, Suzie, five-minute recess, please.

*(A recess was called at approximately 2:03 p.m. The meeting was reconvened at approximately 2:13 p.m.)*

Vice-Chair Poepoe: I call the meeting back to order. So --

Mr. Pele: I have a question for staff.

Vice-Chair Poepoe: Go ahead, Commissioner Pele.

Mr. Pele: Staff, would you consider this project deemed to have met Section 6E-42A, of the Hawaii Revised Statutes? You want me to read the statute?

Ms. McLean: I'm going to -- I'm going to call it up on my computer right now, Commissioner Pele. Thank you. But if you want to read it for the Commissioners --

Mr. Pele: Okay, so Section 6E-42A, of Hawaii Revised Statutes, states that before any agency or officer of state, or its political subdivision approves any project involving a permit, license, certificate, land use change, subdivision, or other entitlement for use, which may affect historic property, aviation artifacts, or a burial site, the agency or office shall advise the departments, and prior to any approval, allow the department an opportunity for review or comment on the affected proposed project of historic properties, aviation artifacts, or burial sites consistent with Section 6E-43, including those listed in the Hawaii Register of Historic Places.

Ms. McLean: Yes, Commissioner Pele. This -- this says what we discussed a little bit earlier in the meeting that before the Department or before this Commission would take any action, we send it to the State Historic Preservation Division, which is what the statute refers to as "the department," that's the Department of Land and Natural Resources, State Historic Preservation Division, so we did send the application to SHPD prior to approval

to give them an opportunity to review and comment, and they have done that. So yes. It is in compliance.

Vice-Chair Poepoe: So County is in compliance of SHPD's recommendation to decline the permit?

Ms. McLean: I -- I was asked if it's in compliance with 6E-42, which says we're supposed to get the department's -- give the department the opportunity to review and comment, and that was -- and that was done.

Vice-Chair Poepoe: But, Commissioner Pele, did you read the -- the section below?

Mr. Pele: Right after that? I can. If you'd like me to, I can, as before. I was just reading through it right now.

Vice-Chair Poepoe: Yeah, please.

Mr. Pele: Yeah, as the project referred to above was undertaken prior to the obtaining of required County permits, it was impossible for the County to satisfy the statutory requirements that the activity subject to permit requirements be reviewed and commented upon by the SHPD prior to issuance of the permit of the County. Consequently, the applicant has foreclosed on the SHPD's opportunity to comment on the permitted activity. It is impossible for SHPD to provide meaningful comments under these circumstances. And in accordance with HR 13-284-13, the SHPD recognize the County decline issuance of the permit on this project. And my point, and we -- I know we all understand that, yes, it went through the process, and yes, they did have a opportunity to comment, my frustration level -- my level of frustration is trying to give their comment and their reaction to the denial of the permit, it's just due, which I think we would be able to do if we're in a brand new hearing of this application, as you have instructed us to do, yet, the work has already been done. That's a pretty heavy, in my opinion, as a Commissioner looking at it as unbiased, this is a fresh review of this process that is still a very -- very important part of this application that was not fulfilled. So I'm not -- I'm wondering how do we justify those comments from that department and without, you know, there's some justification there, and I'm not trying to be not prudent, I'm trying to be as prudent as I can at looking at this application and that's still the point of this application that is a problem, as far as I'm concerned. It was not fulfilled and if it's just, you know, a matter of paying a fine, then I guess we should amend the County rules to say that. But I'm just kinda in a quandry right now. Thanks.

Ms. Chen: Vice-Chair, if I could interject, maybe help give some guidance in the direction that this discussion could go. So in order for the Commission to approve this SMA permit, the Commission has to find that -- that there will not be any substantial adverse environmental or ecological effect except where that effect that can practicably be

minimized, and the, so that's number one, number two, the Commission has to find that the proposed activity is consistent with the purposes and objectives of the Coastal Zone Management Act, 205A-26, and then, number three, the Commission has to find that the development is consistent with the County General Plan and zoning. So I know there's a lot of curiosity into per the Department's involvement here and what -- where the Department came up with its decision, which is, you know, it's relevant in its discussion, but I think what the Commission has in front of it now is the opportunity to make its decision, the Department's already made the Department's decision, and the Director has been, you know, she's sitting here able to answer questions and all of that, which is great, but the Commission should, pursuant to the rules, move in the direction, so go off the checklist: Number one, is there a substantial adverse environmental or ecological effect? Can that be minimized? And we've already had this discussion for some time now about the conditions, but I'll leave that to you, and then we can go through steps two and three.

Vice-Chair Poepoe: So, Corp Counsel, are you going to read off the -- the CZM, the objectives and policies in the CZM? Was that ...(inaudible)...

Ms. Chen: The purposes and objectives? Sure, they're quite lengthy, so perhaps it would be better to just summarize some of the main ones, 205A-26, Hawaii Revised Statutes, they -- the purposes and objectives include protecting public access to recreational resources, protecting and preserving historic resources, protecting and preserving scenic and open space resources, coastal ecosystems and minimizing effects to those coastal ecosystems, there are economic uses that are also cited as part of the objectives and policies of the CZMA, reducing risk -- risks to coastal hazards and managing development.

Vice-Chair Poepoe: Is this 26?

Ms. Chen: Yeah. Let me make sure. Oh sorry, 205A-2. Sorry. So if the Commission, you know, finds that the project does not have any substantial adverse environmental or ecological effect, then that's one thing. If the Commission finds that it does -- it does have a substantial adverse environmental or ecological effect, then it cannot effect be minimized by the conditions that the Department has proposed or additional conditions that the Commission comes up with that are roughly proportional and related to the project and further the objective of the Coastal Zone Management Act. If the answer to that question is there are substantial effects but those effects can be minimized by the conditions that the Department has proposed and/or the amendments that Commissioner Leonora proposed, then the answer -- the Commission could vote to approve with those conditions, okay. If the Commission finds that there are no conditions that can mitigate those substantial adverse environmental or ecological impacts or effects, then -- then we move on to step number two and three, just for the record, but in

order to issue the SMA permit, the Commission has to find that all steps, one, two, and three are met.

Mr. Pele: So, Stephanie, if I'm hearing you correctly, if there's a step that cannot satisfy a Commissioner, it is a proper finding of act?

Ms. Chen: Well, it -- it needs to be based on something beyond just it doesn't satisfy, you know, it has to be based on something in the record that you can point to as specific as possible. So -- and I actually miss -- I misstated that. It's if -- if the Commission finds that a substantial adverse effect exist and it can be minimized by the conditions, the Commission still needs to move on to steps two and three. You determine if the project is consistent with the CZMA, and that it's also consistent with the County General Plan and zoning. So if the Commission finds there are no conditions that can satisfy, then what are the exact reasons that they can -- that there are no conditions that can satisfy or mitigate the damage. That could be any number of things in the record. Is the project consistent with the CZMA? If not, why not? And is the project consistent with the County General Plan and zoning? And if not, why not specifically? Does that help?

Mr. Pele: Yes. You wanna give it a shot, Laa? I'd like to --

Vice-Chair Poepoe: How much and is burial and NAGPRA laws involved in this as well? Does iwi take consideration -- is taken into consideration with the possible revegetation plan? Does it involve actions taken that address inadvertent finds, discovery of human remains and the proper protocols associated with -- with the inadvertent find?

Ms. Chen: Sorry, Vice-Chair, is this a question for me? I missed the very first part of it.

Vice-Chair Poepoe: Yeah the -- it would be possible to leave -- the disturbance alone and the natural revegetation take place, but there's -- there's no clear, it wouldn't be remediation, there's no clear address for -- for the possibility of discovering iwi or human remains even.

Ms. Chen: Yeah, and it's my understanding that SHPD provided documentation in the records to that effect. Is that what you're basing your finding on?

Vice-Chair Poepoe: Yeah, the lack of mention in the conditions, but I'm guessing that the recommendations were done with environment in mind, and not -- not as much culture.

Ms. Chen: Is there a condition that -- that you can think of that would mitigate that damage or would be roughly proportionate to the action already taken to somehow mitigate future harm or rectifying existing one?

Vice-Chair Poepoe: I honestly wouldn't be able to answer that by myself. I would have to consult with additional burial practitioners and experts, but that's not something I can come up with, and I don't think I -- it's for me to come up with as a Commissioner.

Ms. Chen: So what about including that as a condition, that the applicant shall consult with --

Vice-Chair Poepoe: No.

Ms. Chen: You know, an expert, a cultural practitioner or an expert in Hawaiian burial practices and history? I mean you can come up with some kind of wording there.

Ms. McLean: Vice-Chair, if I can add, I don't know if this is what you're looking for, but there is often a condition imposed on projects that says something to the effect of in the event any cultural resources are discovered, then activity in that vicinity shall cease immediately and the State Historic Preservation Division shall be contacted for guidance on appropriate action.

Vice-Chair Poepoe: Yeah, I'm aware of that. It's the fact that it's already been damaged.

Ms. McLean: Right.

Vice-Chair Poepoe: We're stuck on.

Ms. McLean: Right.

Ms. Espaniola: So can I, Vice Poepoe, Chair, Vice-Chair, can I speak?

Vice-Chair Poepoe: Go ahead, Commissioner Espaniola.

Ms. Espaniola: So I -- I'd like to restate our justification, our findings of facts, if I may, on page 3, it doesn't have the line, but it says, "Regarding the State Historic Preservation Division, ahapuaa natives, and the University of Hawaii Sea Grant College Program, according to Planner Sybil Lopez, who authored the staff report, Tara Owens, Sea Grant representative, did not provide written comments but did attend a site visit of the affected areas and suggested that the Papohaku Dunes Cultural and Natural Resources Preservation should be incorporated into the staff report and also be considered," and it spells out see Exhibit A and 3, 4, and Exhibit 7 and 11 attached, Exhibit D and 22. Line number nine, in the SHPD letter, dated January 29, 2019, in -- it noted that prior to the applicant's grading and grubbing, no archaeological inventory was conducted and, therefore, no opportunity to study possible historical properties took place. SHPD also pointed out that the type of sand located in the affected area is generally known to contain

human burial or features. SHPD concluded by stating that it would be impossible for it to provide meaningful comments given the fact that the grading and grubbing had already occurred. SHPD recommended declining to issue the after-the-fact permit, Exhibit 11.

Ms. Chen: Yeah so if the Commission finds that there are no conditions that would satisfy the concern or an archaeological inventory or survey because the project has already been completed and the agency commented that there -- that the point is moot, that could be a finding of fact.

Vice-Chair Poepoe: Thank you, Corp Counsel. Commissioners, anymore discussion? Is there a motion on the floor?

Ms. Chen: I don't believe so.

Ms. McLean: I don't believe so.

Vice-Chair Poepoe: Does any Commissioner want to submit a motion?

Ms. Espaniola: So based on this that I just read, I'd like a motion to deny the applicant, it does not comply to the Molokai Community Health Plan policies and, secondly, at the recommendations of SHPD declining to issue the after-the-fact permit.

Vice-Chair Poepoe: Motion by Leonora. Any Commissioners want to second?

Ms. Chen: Point of clarification. Commissioner Leonora, it was, the first part, was a motion to deny based on the project not complying with -- with what again?

Ms. Espaniola: The Molokai Community -- the Molokai Island Community Plan policies, MICP.

Ms. Chen: Okay. Do you --

Ms. Espaniola: And second -- oh, go ahead.

Ms. Chen: Oh, do you -- do find that the activity complies with the General Plan?

Ms. Espaniola: Vice-Chair mentioned specifics on some of the community island plan and it is not in compliance and I know you have to say why. Specifically, the revegetation, the burial, and in compliance with the -- the State Historic Preservation Division.

Ms. Chen: Alright, so based on SHPD's letter and the fact that there's no mitigation that can be done at this point.

Vice-Chair Poepoe: Corp Counsel, is the motion complete?

Ms. Chen: No, it hasn't been seconded but --

Vice-Chair Poepoe: Yeah.

Mr. Chen: Actually, I would advise you to -- to withdraw that motion and -- and come up with some more findings of facts for the record before making a motion, otherwise, we'll be making a motion and having to amend it based on additional findings of facts, so that would be my advice. So, Commissioner Leonora, would you be willing to withdraw your motion in order to discuss more findings of fact for the record and then, later, propose a motion based on those findings of fact?

Ms. Espaniola: Yes.

Ms. Chen: So --

Ms. Espaniola: I withdraw based on finding -- getting more findings and facts, facts and findings, yes.

Ms. Chen: Okay. So, Commissioners, can you please point us to some more findings of facts for the record regarding this activity and the Commission's, you know, after having reviewed the record with -- what -- what has the Commission found related to adverse ecological impacts, the compliance, the activity's compliance with the Coastal Zone Management Act, and the -- the project's compliance with the Community Plan and zoning. So far, I have that the project does not comply with the Molokai Community -- Molokai Island Community Plan or the General Plan, and I would ask for more clarification on the General Plan, if that is indeed a finding, and why, and I also have that the Commission finds that -- that the adverse environmental, ecological impact of potential burial disruption cannot be mitigate, and as evidenced by the letter from SHPD that is part of the record.

Vice-Chair Poepoe: Corp Counsel --

Mr. Pele: Vice-Chair?

Vice-Chair Poepoe: Would it be more efficient to submit a motion to deny and get a second before working on it?

Ms. Chen: It's my opinion that the Commission should detail its findings of fact that it can then adopt with a motion, say, if the Commission wants to -- somebody wants to make a motion to deny, they can say -- a Commissioner can say I move to deny this SMA

minor permit based on the following findings of fact, and then we go one, two, three, four, five, that's the cleanest for the record.

Vice-Chair Poepoe: Okay, anything that is procedurally correct. Thank you.

Mr. Pele: Chair, could I inject? Vice-Chair?

Vice-Chair Poepoe: Go ahead, Commissioner Pele.

Mr. Pele: Yes, Stephanie, along those lines, it seems like -- is there a quota we have to meet with these findings of facts because it, again, I'm just stating what we've already rehashed and rehashed again, but 205A-2(b)(2), historic resources, identifying and analyze significant archaeological resources, maximize information retention through preservation of remains and artifacts of salvage operations and supports State goal for protection, restoration, interpretation, and display of historic resources, and we've been through this, I know we've been through it over and over, but none of the conditions set forth are applicable to that. None of them.

Ms. Chen: Right, that's --

Mr. Pele: Because you all recognize that the work has been done already, so I mean we're in a catch-22 there, I mean like none of those eight conditions are applicable to 205A-2(c)(2), historical resources. We just can't apply them.

Ms. Chen: Okay, so that's a -- that's a great finding of facts.

Mr. Pele: But I feel like are we under some kind of quota on finding of facts here, I mean that's like the finding of fact, I mean it just always keeps coming back up, and I've read it, and I've read it again, and it just -- they do not address, the eight conditions do not address that section of 205A-2. They just don't.

Ms. Chen: Okay. No. There's no magic number, but the Commission's denial, you know, could be as well thought through as possible and if that is -- that's what you just -- the sole thing the Commission is relying on as its denial, then okay. You know, it has to be based on the actual record and -- and the Commission's findings today. So there is no magical number, quota.

Mr. Pele: I'm reading them again, one through eight.

Mr. Moore: You know, this is Commissioner Moore. I have a question for Sybil.

Ms. Lopez: Go ahead, Commissioner Moore. I'm here.

Mr. Moore: If an applicant, any applicant was to apply to alter a dune, what would be your office's response?

Ms. Lopez: It really depends on the -- the applicant, the intent, the purpose, and the extent of the application to which the applicant would submit, so it would go through extensive review according to the documents that are being presented and what was the findings of the -- towards the end after the analysis, so it really depends on the scope and that the Department would look and research in it and request for agency comments through OHA, through SHPD, in light of the project itself and if, in evidence that the -- that the proposed project is adversely impacted within the criterias under the Chapter 205A as stated, then -- well, the Department has that power to recommend to denial or approval, but as what we -- we trying to do is mitigate as much as we can in order that the recommendations with the Commission would be -- would be in compliance with all of the regulations and the laws that are in front of them. I hope that could best answer your question, Commissioner Moore.

Ms. Chen: So, Commissioner Moore --

Mr. Moore: Because wouldn't the circumstances render this application defective? I don't know if you can hear me or not, but under that circumstance, would that render this application defective?

Ms. Chen: Commissioner, if I could interject. I -- I think it's important to focus on what this Commission would do with this project proposal in front of it. So what the Department has done or would do, I don't believe is what we're discussing today. If Mr. Wehner came to you, the Commission, and said I want to grade this dune. What would the Commission say?

Mr. Moore: We'd say no.

Mr. Sprinzel: No.

Ms. Chen: And -- and why?

Mr. Pele: Vice-Chair? Vice-Chair, I move to --

Vice-Chair Poepoe: Yeah, go ahead.

Mr. Pele: I move to deny the permit based on the simple fact that none of the conditions stated in this remand can satisfy Statute 205-2, as it points to historical resources or any of the statements that you set forth with the Maui Plan and the Molokai General Plan as well as the West End Plan on Molokai.

Ms. Espaniola: I second that.

Vice-Chair Poepoe: Okay, motion by Commissioner Pele, seconded by -- seconded by Commissioner Espaniola. Move to discussion. Members, we in discussion. Any Members have information?

Ms. Espaniola: None.

Mr. Poepoe: Commissioner Pele, can you have the -- your -- your motion repeated?

Mr. Pele: Yeah, the motion was to deny based on the review of the eight conditions set forth in the application that was remanded to us and the fact that they are in direct conflict of Section 205A-2(b)(2), historic resources, to identify, which I read earlier, they can't satisfy those criteria as well as the criteria that you read off earlier, and I don't anybody wants them reread again, with the Maui General Plan, the Molokai Community Plan, and the West End Plan, and the direct conflicts along the lines of the historic resources, these documents.

Ms. Espaniola: Second that.

Mr. Pele: Anymore discussion on the motion?

Ms. Chen: So, sorry, was that an amendment with the second? No. Leonora just repeated her second of the original main motion. Okay.

Vice-Chair Poepoe: Okay, no more discussion. We can call for the vote. I'll do a roll call. Commissioner Espaniola?

Ms. Espaniola: Yes.

Vice-Chair Poepoe: Commissioner Sprinzel?

Mr. Sprinzel: Yes.

Vice-Chair Poepoe: Commissioner Pele?

Mr. Pele: Yes.

Vice-Chair Poepoe: Commissioner Moore? Commissioner Moore? Commissioner Moore? Oh-oh. You on, Commissioner? Commissioner Moore? Commissioner Moore? Oh my -- can -- Commissioner Moore, do you have -- can you hear? Can somebody get in contact with -- with Commissioner Moore, please?

Ms. McLean: Suzie, can you call him?

Vice-Chair Poepoe: If he cannot hear, we gotta start over.

Ms. Esmeralda: I'm trying to contact him. Hold on.

Ms. Espaniola: Commissioner Pele, that sign probably works well.

Ms. Lopez: Okay, Commissioner Moore left the meeting. He is no longer in attendance of this meeting.

Ms. Esmeralda: I think he had problems with his network so he's trying to log back on.

Mr. Sprinzel: Wonderful isn't it. We can talk to people on the moon; we can't talk to somebody five miles away. What wonderful technology we use.

Ms. Esmeralda: This is Suzie. He said he was having a message about his network so he -- he's trying to log back on.

Ms. Chen: Suzie, is he able to call in did he say or he's just trying to take the computer route first?

Mr. Moore: Okay, now -- now I'm on. I vote to deny.

Vice-Chair Poepoe: Okay, before we -- can we read it again, the motion?

Ms. McLean: Chair, the motion on the floor is to deny the permit.

Vice-Chair Poepoe: Commissioner Moore, did you hear the -- did you hear the motion? Can you -- can you vote in confidence?

Mr. Moore: Yes. Yes. I -- I vote to deny.

Vice-Chair Poepoe: So is that a yes or a no vote? Would it be a yes?

Mr. Moore: It's a no vote to the application.

Vice-Chair Poepoe: That's a yes vote?

Mr. Moore: I vote no the application.

Vice-Chair Poepoe: Yes for denial?

Mr. Moore: Yes for denial. Yes.

Vice-Chair Poepoe: Okay, just to make that clear. I needed that to be clarified for procedural matters. Thank you.

Mr. Moore: Okay.

Vice-Chair Poepoe: So my vote is yes. Motion passes.

**It was moved by Commissioner John Pele, seconded by Commissioner Leonora Espaniola, then**

**VOTED: to deny the application based on the review of the eight conditions set forth in the application that was remanded to the Commission and the fact that they are in direct conflict of Section 205A-2(b)(2), historic resources, that the eight conditions can't satisfy those criteria as well as criteria of the Maui General Plan, the Molokai Island Community Plan, and the West End Policy Plan, as discussed, and the direct conflicts along the lines of the historic resources.**

(Assenting - L. Espaniola; L. Poepoe; W. Moore; J. Pele; J. Sprinzel)  
(Recused - L. Buchanan; B. Mowat)  
(Absent - J. Perez, III)  
(Excused - J. Bicoy)

Mr. Sprinzel: Hooray.

Ms. McLean: It only took four hours. Thank you, Commissioners.

Vice-Chair Poepoe: Thank you. Next, item C, Director's Report. Director Michele McLean.

### **C. DIRECTOR'S REPORT**

- 1. Open Molokai Applications Report generated by the Planning Department with the June 10, 2020 Agenda Packet (Appendix-A)**
- 2. Completed Molokai Applications Report generated by the Planning Department with the June 10, 2020 Agenda Packet (Appendix-B)**
- 3. Agenda Items for the JUNE 24, 2020 meeting**

Ms. McLean: Thank you. Next are the open applications report and the completed applications report. Are there any questions on any of those items? Okay.

Ms. Espaniola: None.

Ms. McLean: Then the next regular meeting is June 24<sup>th</sup>. Sybil, do you know if there are items for June 24<sup>th</sup> yet?

Ms. Lopez: Yes. We have three agenda items that will be in front of you on the June 24<sup>th</sup> meeting. We've got SMA minor permit regarding the drainage ditch in Kawela. We have repairs that need to be done in – on Kanemitsu Bakery on Hotel Lane Road, and we have another, not emergency, and the Kanemitsu Bakery is to request to waive the review, and we have, let's see, I know we have one more. Hold on. And that's it. I know we had a third one but let me see if I can find it. I think that's it.

Mr. Sprinzel: Michele, before you go, if the Department overturns this decision, there's going to be a lot of trouble I'm sure.

Ms. McLean: We – we can't overturn your decision.

Mr. Sprinzel: Well, you did last time and Stephanie told us that you can override us at the last meeting.

Mr. Pele: No, but I think she corrected herself. I think she correct it.

Ms. Chen: No. I'm sorry that's – that's not – that's not my understanding of what the Department can do. So, at this point, only the Commission can issue the SMA permit.

Mr. Pele: Yeah, and I think you clarified that last meeting ...(inaudible)...

Vice-Chair Poepoe: Yeah. So back to order. Item D, Adjournment.

Ms. Lopez: And the third – and the third item – oh, I'm sorry. And the third item that will be seen would – you would be seeing the Maud Schroll gazebo project again, and I know that Chair Buchanan and I think was Commissioner Bicoy went on a site visit so for the Maud Schroll 'cause the engineer will be present to answer any questions on the next meeting.

Vice-Chair Poepoe: Schroll. Schroll at Pukoo?

Ms. Lopez: Correct. Schroll, Pukoo. The gazebo project.

Chair Buchanan: Vice-Chair Poepoe, this is Commissioner Buchanan. Thank you for that heads up, Sybil, because Julie and I went on a site visit that was asked for by the Planning Commission, so I will put together a short report for the Commission on our site visit for Julie and myself. We'll work to get that information to you folks for the 24<sup>th</sup> meeting. And I just wanted to tell my Commissioners I'm so damn proud of you guys. So damn proud of you guys. You guys did a good job today. Thank you for hanging in – Uncle Bill, we going help you with your computer. Okay, thank you, Vice-Chair, for hanging in there. Thank you, Staff.

Vice-Chair Poepoe: Thank you, Chair.

Ms. Lopez: And that's all I have for the agenda items for June 24<sup>th</sup>. Thank you, Chair.

**D. NEXT SCHEDULED REGULAR MEETING DATE: JUNE 24, 2020**

**E. ADJOURNMENT**

Ms. Mowat: Bye, Commissioners.

Vice-Chair Poepoe: Item D, Adjournment. Everybody go –

Ms. Mowat: Mahalo guys. Was a great afternoon.

Vice-Chair Poepoe: Bye everybody.

Ms. Mowat: Aloha.

**The meeting adjourned at approximately 3:06 p.m.**

Submitted by,

SUZETTE ESMERALDA  
Secretary to Boards & Commissions II

**RECORD OF ATTENDANCE:**

**Present:**

Lori Buchanan, Chairperson  
Laakea Poepoe, Vice-Chairperson  
Leonora Espaniola  
William Moore  
Bridget Mowat  
John Pele

John Sprinzel

**Absent:**

John Perez, III

**Excused:**

Julie-Ann Bicoy

**Others:**

Michele McLean, Planning Director, Department of Planning

Sybil Lopez, Staff Planner, Current Division, Department of Planning

Stephanie Chen, Deputy Corporation Counsel, Department of the Corporation Counsel

Suzette Esmeralda, Secretary to Boards & Commissions II, Current Division, Department  
of Planning