

MOLOKAI PLANNING COMMISSION
REGULAR MEETING
APRIL 25, 2007

A. Call To Order

The regular meeting of the Molokai Planning Commission was called to order by Chairperson Degray Vanderbilt on Wednesday, April 25, 2007 at 12:55 p.m. at the Mitchell Pauole Center, Kaunakakai, Molokai, Hawaii.

A quorum of the Commission members was in attendance (See Record of Attendance)

Chairperson Vanderbilt introduced the members of the Commission who were present. He also introduced Mr. Michael Hopper from Corporation Counsel, Ms. Kathleen Aoki from the Planning Department Long Range Division, Mr. Clayton Yoshida from the Planning Department and Mr. Ralph Nagamine from Land Use and Codes.

B. Approval of minutes of the March 28, 2007 Meeting

MOTION: TO APPROVE THE MINUTES FOR MARCH 28, 2007 MEETING AS CIRCULATED.

MOVED: COMMISSIONER BILL FEETER

SECOND: COMMISSIONER SHERMAN NAPOLEON

MOTION UNANIMOUSLY APPROVED.

C. Orientation Workshop Part 2

1. Powers and Duties
2. Discussion of Boards and Commissions Booklet distributed by the Department of Corporation counsel
3. The Sunshine Law
4. Ethics
5. Ex Parte Communications
6. Rules of Practice and Procedure
7. Recent Supreme Court Decisions on Takings Issues
8. Public Access Shoreline Hawaii (PASH) v. Hawaii County Planning Commission
9. Topliss v. Hawaii County Planning Commission SMA Case
10. General Plan and Community Plan Updates - Chapter 2.80B Maui County code
11. Chapter 343, HRS-Environmental Assessments and Environmental Impact Statements
12. Meeting Schedule

Commissioner Vanderbilt: We'll go right into the orientation workshop with number 10. Those are two processes that are going forward and the documents that are coming out of those will be coming to this commission. Kathleen has come over from Maui to give us an update on that. So if there's no objection from the commissioner's can we start with that? O.K. Kathleen?

I forgot to introduce our two Moloka'i, we have a Moloka'i Planner Nancy McPherson and our Moloka'i staff coordinator Nina Kawano who will be taking the minutes today.

Ms. Aoki: Good afternoon everyone. My name is Kathleen Aoki and I'm a planner with the Long Range Planning Division. I've been called over here to just do a brief over view of the Maui County General Plan Update, so thank you very much for the opportunity to come over here. What we're going to go through today is a short over view of the General Plan project and just a brief synopsis of what the Long Range Division is working on.

All General Plans have these characteristics in common. They are comprehensive and typically include elements like natural resources, land use, transportation, water, housing and infrastructure. They provide a frame work for preparing more specific plans such as your community plan and they are used for making decisions on land use and CIP projects. They provide a unified statement of policies and maps and texts. Our General Plan process is defined by Bill 84. Bill 84 highlights, well first of all Bill 84 was adopted by the County Council in 2004 and it enacted Maui County Code 2.80B which established a whole new frame work for the General Plan and the Community Plan. Maui County Code 2.80B redefined the structure of the General Plan to emphasize regional or island wide planning which we didn't have before. The new ordinance calls for island wide directed growth strategy for Maui island and for setting up priorities for budgeting and implementation. It also set up the need or requirement for General Plan Advisory Committee's for Maui, Molokai and Lanai.

The elements of the 1990 General Plan basically the 1990 plan had no map. So we're following that concept of having no, the General Plan which is now being called the overall Maui County wide policy plan. The Community Plans constitute another element of the Maui County General Plan and the Community Plans have their own maps and provide policies that are specific to each region. So now you have the county wide policy plan and under that you have the Lanai Community Plan, the Molokai Community Plan, Kaho'olawe Community Plan, the Maui Island Plan. Under the Maui Island Plan you have each region's community plan.

The County wide Policy Plan plays an important role in the over all planning frame work. It provides an over arching policy plan for all islands, it provides a vision, it contains core principals and themes and it has a list of broad goals of objectives and policies. Under the County wide Policy Plan it creates the frame work to structure your community plans and the island plan for Maui.

What is the role of the GPAC? Basically Bill 280B states they are to comment, advise and provide

recommendations to the Planning Director regarding the proposed revisions prepared and recommended by the Planning Director. After the GPAC'S look and provide comment to the Planning Department on our draft, our comments and the comments of the GPAC go to the Maui and Molokai and Lanai Planning Commission. The planning, which is what your role is, so your role is to review and provide recommendation, findings of proposed revisions on the County wide Policy Plan, scratch out the Maui Island Plan because you guys aren't going to look at that, you're going to look at your own Molokai Community Plan, to the Maui County Council regarding the proposed revisions prepared and recommended by the Planning Director and the GPAC.

So right now the sequence that we're in, we are working on all three islands on the County wide Policy Plan. After we're done with that we're going to start working on the Maui Island Plan. They have 6 months to do that plan with the GPAC. Phase two will be updating your community plan and the Lanai Community Plan.

So here's a chart that outlines how the process is. The Planning Department drafts a policy plan, the three GPAC's look at it, it goes back to the Planning Department to kind of incorporate all of the comments, put everything together, then we go back out to all three planning commission's, they provide their comments to us on our draft as well as the comments provided by the GPAC's, we compile all that together and then we go to County Council. It's up the County Council to adopt the County wide General Plan.

Per Bill 84, GPAC's have 120 days after their first initial public meeting and the receipt of the County wide Policy Plan to do their comments to us. So, the beginning date for the Molokai GPAC was February 15, '07, today is the 25th so it's day 69 and I believe the 120 days is June 15.

Other projects that the Long Range Division is working on include the Pali to Puamana Parkway project which is actually my project. It's a Master Plan that revisions realignment of Honoapiilani Highway, mauka of its current location and it goes from the Pali, right by Ukemehame and all the way to Laniapoko where it would meet up with the bypass. So the idea is to create an 8 mile stretch of park open space. Just preserve it from development and then move the highway mauka to get it out of the erosion and tsunami area where it's falling into the ocean anyway.

We're also working on land use designation data base. This project will digitize the community plan and the county zone map layers so that community plan and zoning layers can be used in GIS applications, so they can just bring it up onto a map digitally. Those maps are known as the dead sea scroll, so they created their desert, dead sea scroll replacement team. The development mitigation fee project is to establish impacts fees for services and facilities, that's also my project, where we're looking at creating impacts fees for development for water, police, park, wastewater, fire, schools because right now there are no impact fees for those kind of things and some how they gotta get paid. The traffic impact the ordinances currently up with Council and that fee is just on roads, it's not on anything else. So we need to look at all the other public facilities out there.

If you guys have any questions I'll be more than happy to answer them for you. Thank you.

Commissioner Vanderbilt: Any commissioner's have any questions?

Commissioner Chaikin: I just wanted to get a general idea of what the Molokai Community Plan timetable was going to look like?

Ms. Aoki: From what I understand they are putting in monies, requesting monies in this years budget to start with the Molokai Community Plan as far as studies are concerned. But we are obligated to do the Maui Island Plan first and that will take, they have 6 months, the GPAC has 6 months to just look at that. So as soon as we're done with this process with the County wide Policy Plan we're immediately going into the Maui Island Plan. After that's done, if there's staffing, from what I was told, if there's enough staff, see the thing is we're 50% short staffed right now. If there was staffing, maybe assign someone to do Molokai and Lanai there would be no question. It's just a matter of our resources and trying to do the Maui Island Plan. Because once the Maui Island Plan goes through GPAC then it has to go to the Maui Planning Commission. After it goes there, you know what I mean, we're still working on it. But if we're able to hire planners than we could staff that person to just handle the Molokai Community Plan, that's what we want to do and do that for Lanai as well. So it's hard to say at this point whether we're looking at maybe, 8 months from now or a year from now, it just really depends. But I do know that they are putting in monies to try and start your process going. Even if it just means working on the initial studies. Which is what we've been doing for the past four years for the County wide Policy Plan, just doing the studies and everything you need in order to get this document done.

Commissioner Chaikin: I just had one more question about the process. I understand it goes through all these different steps and finally ends up at the County Council level where they review it and make their decisions. Are they free to do what ever they want, make any changes what they want without any input from us, can they just rearrange the thing if they don't like what we've done?

Ms. Aoki: Essentially yeah. One would hope that they wouldn't because it's going to go through the whole community process with the General Plan Advisory Committee, then it goes to you folks and you review it and provide your comments, one would hope once it got up to Council that they would recognize all the hard work that everybody's done. But they ultimately have the final say in what's in the document.

Commissioner Chaikin: Thank you.

Commissioner Vanderbilt: Any other questions from the commission? Commissioner Dunbar?

Commissioner Dunbar: I think they recognize the hard work but I think they also recognize that they have to be sound. We can ask for the moon but we not necessarily get the moon.

Ms. Aoki: The County wide Policy Plan is very, what my previous director used to describe as the motherhood in apple pie. It's very visionary. It's not very specific. The over all County wide Policy Plan. With the Maui Island Plan there is an element in Bill 84 that requires a financial element attached to it. So it was recognized that a lot of these community plans and our Maui Island Plan, which we never had before, they do have to be fiscally sound. No sense saying we want all these things but there's no way to pay for it. There also has to be a prioritization now. There also has to be a report done by the other departments that works, we're supposed to work, coordinate with these other departments as far as their CIP and what their CIP is and what's in the Maui Island Plan. Same thing for the community plans.

Commissioner Dunbar: So this is something that you folks get from the GPAC advice and then you folks prioritize it? Or are you expecting the advisory group to prioritize it for you? Then you find the financial mean or...

Ms. Aoki: I think it's to try and work in coordination with what the community wants, what the GPAC wants, to be realistic at the same time. I'll give you an example, a Maui example. Relocate the Kahului wastewater treatment plant, that's not going to happen. We're not going to support it, Public Works is not going to support it, so why have it in there? It's going to cost \$450 million dollars. I mean it's a huge number that the public, the GPAC's, whomever, may not realize hey we want this done but what's the fiscal impact on that? That means your rates are going to go up to \$800 a month. So County Council obviously isn't going to support something like that and I don't think the Planning Department would either. So we are taking a much heavier foot if you will on being realistic. That's not to say you can't have visions for the next twenty years in the County wide Policy Plan sort of generally proposed kind of things. When it comes to push and shove it is up to the Planning Department to meet with Parks Department, Public Works Department, get sort of a rough number from them as to how much these great ideas are going to cost and then try to work out a financial plan.

Commissioner Dunbar: Right. One comment, one question, comment first. I think it's imperative that, and I'm glad to see it here, that you folks are looking at the impact fees on all of these here, the Police, Fire and refuse and that anybody who's going to develop pays the going rate. Probably Hawaii has the least amount of fees to developers in the entire nation. So I'm glad to see that. After having said that I might have forgotten my question. Oh, on your time line you were saying that 69 days have already lapsed on the Molokai plan so they basically have another 51 days to look at this to come up with something?

Ms. Aoki: Correct. And they've been very diligent, they've been working hard, they've been showing up at the meetings...

Commissioner Dunbar: Kind of low on attendance.

Ms. Aoki: You know every island has been as far as the public, there's not much. We have a website, we do have where people can submit their comments and the other day I checked it and within a week we had nine new e-mails which to me is good, it's better than nothing.

Commissioner Dunbar: Thank you.

Ms. Aoki: You're welcomed.

Commissioner Vanderbilt: Any other comments? Yeah I had a comment Kathleen. You said that Maui Island Plan is going to go before the Molokai and Lanai island plans.

Ms. Aoki: Correct.

Commissioner Vanderbilt: Who decided that?

Ms. Aoki: I think it was a departmental decision.

Commissioner Vanderbilt: But if you could hire, you have money to hire more planners right?

Ms. Aoki: We have vacancy's.

Commissioner Vanderbilt: But you can't find anybody to take the job?

Ms. Aoki: Correct.

Commissioner Vanderbilt: But if you found somebody to take the job you would be willing to assign that person, first priority would be to the Molokai and Lanai island plan?

Ms. Aoki: From what I was told, it is just a matter of staffing. So if we got the staffing then we could assign somebody.

Commissioner Vanderbilt: The only thing I worry about is that I understand the Maui GPAC which has 25 members and Lanai and Molokai I believe have 13, they're asking for an extension of time for their GPAC to work on the policy statements. Is that correct?

Ms. Aoki: That's correct. The Maui GPAC has requested, I believe it's an additional 23 days. Their period as you see on the slide here, June 15 is the 120 day for Molokai. What Maui is asking for even with their extension is till June 16. So it's actually better for the Planning Department because it brings the two of you folks closer together.

Commissioner Vanderbilt: Now if they want they can ask for another extension, the Council has to

approve it, is that correct?

Ms. Aoki: Correct. The Council has not approved this extension yet.

Commissioner Vanderbilt: The only thing that worries me is that I think you found, at least when I talked to you, that the Lanai and Molokai GPAC's, even if they have disagreements among the members, seem to be on the same page. They could move pretty quickly into working on the island plan and what I worry about is getting bogged down by the Maui people going into the Maui Island Plan because once they start getting away from this policy and start getting the specifics for each of their planning districts, Paia, Hana, Wailuku, it could take a long time. They could ask for more extensions and in the mean time Molokai and Lanai are sitting here. So it seems from a proficiency standpoint you would start from Molokai and Lanai and get them off the table because they're ready to go and then go deal with the chaos over in Maui.

Ms. Aoki: My response to that would be that we're actually more ready to go with the Maui Island Plan than we are with the Molokai and Lanai plan. Only because all the studies that we've been doing for the past four years, we've completed to get going with the Maui Island Plan.

Commissioner Vanderbilt: So this decision was made four years ago to go with Maui first?

Ms. Aoki: I don't know, I'm not... Well I think the thing is a lot of the things..

Commissioner Vanderbilt: That's o.k. I think that's the one thing that we worry about because just for everybody's reference Molokai finished its community plan in 1994. Then it didn't go any where, it sat at the Council until 2001, seven years later. So the community goes to all the hard work, puts together a plan and it doesn't get implemented. So I think people are a little leery of that not happening again. And when it did get to the Council they made some major changes at the last minute. So they really didn't listen to what the community had gone through. Anyway, that's it.

Ms. Aoki: I do have one other comment to add with the time frame with the Council, they now have a time limit. They can't take seven years or whatever it was, they have one year. Of course they're the Council.

Commissioner Vanderbilt: Their one year starts when they get the final deal, so that might be a year from now.

Ms. Aoki: Correct. I hope not though, but could be.

Commissioner Vanderbilt: Thank you for the presentation. Were there any questions, since this is a workshop, from anybody in the audience? O.K., with that thank you Kathleen.

So now we have Clayton Yoshida continuing on with the orientation. Are you going to go in the order we have on the agenda?

Mr. Yoshida: Mr. Chair and members of the commission, I'm going to be dealing with item #11, concerning Chapter 343 HRS regarding environmental assessments and environmental impact statements. This is an item that we couldn't get to at the last meeting of April 11 because we ran out of time.

Starting with page 19 from the handout that was distributed at the April 11 meeting, if you can follow along with the power point. Again in dealing with the planning frame work we talked about Chapter 343 regarding the environmental impact statements and environmental assessments. This law was adopted in 1974 by the state legislature to deal with environmental socio and economic consequences. Also to ensure public participation and that the Office of Environmental Quality Control OEQC is in charge of publishing the notices of availability of these environmental documents as well as decisions made on these environmental documents.

If you look at all of the projects, there are 9 triggers under Chapter 343 which subjects, various projects to review. Some of them could be exempted. The types of actions are divided between agency actions that are done by public agency's such as the State Department of Transportation, the County Public Works Department as well as private actions.

So excluding the exemption, if it's one of the 9 triggers and it cannot be exempted then they may require an environmental assessment or if not an environmental assessment more strenuous, an environmental impact statement. There are 10 classes of exemption listed in the statute.

Commissioner Vanderbilt: Clayton, just real quick, on Molokai what projects do we have coming up that are either going to be required to go for an EA or EIS?

Mr. Yoshida: Well I guess at this point, the only one that we have is the Kaluakoi Hotel renovation which the applicant has submitted an environmental assessment, the commission is the accepting authority and will have to make a determination as to whether findings of no significant impact will be issued or requiring an EIS. In the past the commission has been the accepting authority say for the Molokai General Hospital improvement project, phases I and phases II as well as for the new Kaunakakai Fire Station, the commission is the accepting authority. As far as the EIS the commission was the commenting agency on the EIS for the La'au Point, Molokai Properties Limited La'au Point project and the commission spent a lot of time in January and February making its comments, listening to the public, and making its comments on the EIS. The accepting authority for that La'au Point EIS is the State Land Use Commission.

Commissioner Vanderbilt: Thank you.

Mr. Yoshida: So there are certain key words in the statute regarding measuring significance and certain measures can be quantified such as care of water quality traffic measured by level of service, noise, scenic vistas and esthetics. Again there are 9 triggers under the statute including, in the case of the Kaunakakai Fire Station, we're using county funds. There's also the amendment to the County General Plan and Community Plan amendment is another trigger. I guess in the case of La'au Point, they're using lands that are currently in the State Land Use Conservation District as well as they're amending the Molokai Community Plan which is an up shoot of the County General Plan. There are two triggers there that the La'au Point triggers.

Commissioner Dunbar: The proposed waste water facilities, waste to energy facilities, landfills, oil refineries, power generating facilities, what are you folks determining power generating facilities? Is that include solar and wind power or is it merely diesel with a reclamation or I'm just curious.

Mr. Yoshida: As far as power generating facility....

Commissioner Dunbar: Alternative energy facilities.

Mr. Yoshida: I guess it could be. As far as I believe the process, there is a pre-consultation where significant, they're judging whether impacts may be significant if no they might do an environmental assessment, preparing a draft EA addressing impacts. There is a 30 comment period, we went through this with the Kaunakakai Fire Station draft EA. There is a 30 day comment period, after that a final environmental assessment is prepared. We're looking at impacts of the project. If there is no significant impacts than a findings of no significant impact or FONSI determination is issued and then there's a 30 day challenge period. In the case of the Fire Station the commission issued a findings of no significant impacts relative to the final environmental assessment and there was a 30 day challenge period, there were no challenges that resulted. We went through the permit processing so that after that we went through the community plan amendment, change in zoning, boundary amendment and the commission dealt with that in February of this year.

Commissioner Vanderbilt: Excuse me Clayton on the permit processing, could they have gone for those at the same time, concurrent processing with the environmental assessment?

Mr. Yoshida: Yes they could but we couldn't actually have the public hearing on those permit processing applications until this Chapter 343 process, the 30 day challenge period have been completed. So we waited until after the commission made a determination of a FONSI, we reported that to the Office of Environmental Quality Control, we did not schedule the public hearing on the community plan amendment, district boundary amendment and change in zoning until after the 30 day challenge period was completed and that there were no legal challenges through the commission's FONSI determination.

Commissioner Vanderbilt: Thank you.

Mr. Yoshida: If there will be significant impacts than there could be an environmental impact statement declared, then the first step is a preparation of a notice. There's a 30 day public comment period, and they prepare a draft EIS.

Commissioner Vanderbilt: Clayton, just so everybody might have something to relate to, could you let us know how, where, say the La'au environmental impact process is in relation to this chart.

Mr. Yoshida: for La'au, Molokai Properties, Limited is preparing an environmental impact statement. There was an EIS prep notice issued, a 30 day public comment period, there was a draft EIS that was issued I believe published in the December 23, 2006 OEQC bulletin. They were disseminated to various agencies and interested parties. There was a 45 day public comment period in which Molokai Properties Limited extended that period for another 16 days or what ever it was, beyond the 45 day comment period. Then there's a preparation of the final EIS addressing the comments made during the public comment period. That's where we are in the process right now, waiting, the Land Use Commission is waiting for receipt of the final EIS from Molokai Properties Limited. In that case the Land Use Commission would make a determination on whether the final EIS is acceptable or not. If it is acceptable, that determination is published in the OEQC bulletin and there is a 60 day challenge period. If it is not deemed to be acceptable by the Land Use Commission then there's a 60 day appeal period by the applicant.

Commissioner Vanderbilt: Clayton just on that, so we're waiting for a final EIS. Is there any time limit on which the Ranch has to file that EIS?

Mr. Yoshida: No, there's no specific time limit.

Commissioner Vanderbilt: Is there any time limit once the Land Use Commission gets the EIS that it has to determine whether it's acceptable?

Mr. Yoshida: No I don't believe there's a time period on that determination.

Commissioner Vanderbilt: O.K., I guess, maybe I'm wrong but I understood that the Land Use Commission has 30 days in which to schedule a public hearing on Molokai and take in comments and make a decision on whether it's acceptable or not and if they don't make a decision in 30 days it's automatically deemed acceptable. Could you check on that?

Mr. Yoshida: We could check on that and report at the next meeting. So after the challenge period or appeal period is done then likewise we can get into the permit processing.

Commissioner Dunbar: Clayton one question. So the acceptable part there is acceptable to the Land Use Commission, you said us but you meant the Land Use Commission, is that correct?

Mr. Yoshida: No the accepting authority, in this case, the accepting authority has been deemed the State Land Use Commission.

Commissioner Dunbar: O.K. so then if you say they accept it then there's a 60 day comment after they accept it.

Mr. Yoshida: There's a 60 day challenge period.

Commissioner Dunbar: That challenge can be made by the general public, the challenge can be made to the Hawaii Second Circuit or who, how do you register a challenge because we gave them reams of documents to include in the EIS so are we, at what point do we get something back that says here's what we've incorporated or we don't get it back before it goes to Land Use? They take our comments, they either have included them or not and then it goes to Land Use and Codes, the State Land Use Commission and they accept and what point and time....when it comes back to us to see something.

Mr. Yoshida: The applicant is required to address those comments that were received within the comment period. So if the commission comments, which were many, within the comment period then the applicant is obligated to address those comments in the document. They're also are obligated to inform the writer of the comments of their response. So I believe that Molokai Properties Limited will generate a response letter or letters to the Planning Commission responding to the many comments that were generated by the Planning Commission during the whatever, 60 day or more that the commission reviewed the document.

Commissioner Vanderbilt: Excuse me Clayton, I'd just like to follow up on that a little bit. They got to answer everybody's comments and I think almost a hundred individuals sent in comments plus the state agencies and everything and 1400 pages of comments went into the State Land Use Commission and they said that that was by far the largest response from any community they've ever had on any project since they've been doing business. So it may take a while for Molokai Ranch to actually respond to the comments. But the acceptable point is that if it's acceptable to the Land Use Commission, they're accepting the criteria but their acceptance does not state whether, they don't judge the merit so the responses might be right on, or incomplete, it might be inaccurate. They don't look at that, they just say did you respond to the comments and their acceptance in the OEQC bulletin says that just because the Land Use Commission accepted the EIS document doesn't mean that's their endorsement of the project.

Commissioner Chaikin: Can I just follow up a little bit on what Kip said, he was talking about that 60 day challenge period and he was asking who could challenge and how do they challenge and then I guess further to that, then what happens is the whole process come to a screeching halt until all these challenges are resolved and is there a time limit for resolving the challenges?

Mr. Yoshida: Well I believe they would appeal the decision of the Land Use Commission to the court and the scheduling of the court is up to the court. But basically if there is a legal challenge filed, typically we would wait until the litigation is resolved either in favor of the applicant or in favor of the person bringing the challenge on the EIS.

Commissioner Vanderbilt: Thank you. Just to follow up with Steve, if the people appealing went in court then they have to start the process all over. Clayton's right, there is no time limit on this thing and once it clears the legal challenge at that point the Land Use Commission has a complete document and everything else can move forward.

Commissioner Chaikin: Just to follow up, what happens if the court comes with a decision and says it was insufficient or inadequate in a particular area, then where does the process take off from there?

Mr. Yoshida: Depending on what the court says the applicant probably would have to address the concerns of the court. It was inadequate, not acceptable because of xyz, if they could produce a document that addresses the concerns of the court.

Commissioner Chaikin: But does that mean that if the court said something like that that it would revert back to another, since it was inadequate, does it revert back to another 60 day challenge period, do you know how that would work?

Mr. Yoshida: I guess we're moving into the legal realm and perhaps your attorney might have better insights than I have.

Commissioner Vanderbilt: Clayton at the next meeting could you find out if, I understand that if the Land Use Commission doesn't accept it, forget the legal challenge, they don't accept it it has to start all over again, the process from ground zero. But Steve also asked that if the court says that it's insufficient one area, they may be able to address that area and if they address that area what is the format for addressing the area, do they go back to the Land Use Commission, or is there a comment period or what? Could you include that in the report next meeting?

Mr. Yoshida: Yeah we could try....

Mr. Hopper: I just want to say from the court perspective, I don't think that's going to be really possible to address because it all depends on what the court happens to order in that given situation. Now as far as the LUC and what happens after that, I believe that's under the rules and Clayton and the department can certainly check that for you. But as far as what a court would order there are potentially several different reasons to say that an EIS should not have been accepted. I don't believe there's a rule or a policy that strictly says what happens if the court deems that the EIS should have been, was deemed incomplete. I haven't encountered that particular situation. But that

would have to be specified in the court order I believe and I haven't seen a court order in that situation. I wouldn't be able to really address that at this point I believe.

Commissioner Vanderbilt: Could somebody check with the Land Use Commission and see if they have an example of one that has gone through a legal challenge and the court has said it's inadequate in this way?

Mr. Hopper: We could look for a specific case in the past as an example, perhaps we could look at that, yeah.

Commissioner Vanderbilt: Because it was a legitimate question and the Land Use Commission is pretty clear if they say it's not acceptable, they don't say you gotta correct one thing, you gotta start all over again.

Mr. Yoshida: Can we move on Mr. Chair? Again there are...

Commissioner Vanderbilt: Excuse me Clayton let's go back to that last slide. You talk about the permitting process. Now you didn't talk about the permitting process on the environmental impact statement. It could start soon as it clears the 60 day appeal process is that correct?

Mr. Yoshida: Yes.

Commissioner Vanderbilt: Now this commission received testimony from people that were concerned about the fact that the Ranch has already filed their change in zoning and community plan amendment applications with the County Planning Department so when it clears that 60 day appeal period they're going to start those process running at the same time with the longer more drawn out process of the Land Use Commission is moving. So there'll be public hearings on all three processes going on at the same time and my question to you is, the Ranch wants to start it as soon as possible. What is the time frame our planning commission has to make its recommendations on the community plan amendment and the change in zoning applications to the Council? What time frame once we get the accepted EIS?

Mr. Yoshida: Under Chapter 19.510 of the county code, it would be 120 days after the applications are deemed complete. The applications would not be deemed complete in this case until the Chapter 343 process has been completed.

Commissioner Vanderbilt: Well which would be when it clears the 60 day appeal process right?

Mr. Yoshida: Yes.

Commissioner Vanderbilt: So now this Land Use Commission is a quasi judicial process where

there's a lot of detailed information that's uncovered but we won't have the advantage of that possibly because they have up to a year with which to complete their process and it sounds like talking with the Land Use Commission they anticipate several hearings on Molokai on this and it wouldn't get finished in one or two hearings. So I'm just wondering could the planning commission's action on the change in zoning and community plan amendment be moved further out so that our community and this commission could have the benefit of the information coming out of the Land Use Commission if the Ranch so desired?

Mr. Yoshida: That's a possibility but I believe you did hear the director and the deputy director say in the course of the EIS the community plan amendment should drive the process because we believe in home rule.

Commissioner Vanderbilt: Yes but we make recommendations to the Council but the Council can't act on our recommendations can it until the Land Use Commission is finish?

Mr. Yoshida: The Council could act on the community plan amendment.

Commissioner Vanderbilt: But not the change in zoning.

Mr. Yoshida: But not the change in zoning.

Commissioner Vanderbilt: Thank you.

Mr. Yoshida: Again we have discussed the issue of environmental assessment verses environmental impact statements that we are looking at impacts and also mitigative measures and alternatives for proposed actions. We're looking at all phases of actions, the types of impact, the significance criteria and unresolved issues.

Commissioner Vanderbilt: Excuse me Clayton, on the I guess I don't know if this is a question for you or the Land Use Commission, but, that was a pretty thick document, that draft EIS and had a lot of information in it on the Molokai Ranch La'au Point environmental assessment and included the Ranch's master plan and said that everything is inter-related. Many comments had to do with all phases of the master plan. Are all those comments subject to response by Molokai Ranch or can they limit their response to very specific items within the La'au Point project?

Mr. Hopper: Excuse me Mr. Chair. I just wanted to make the point that, I know that sometimes, from time to time in the orientation we give specific examples of EIS and things like that but I think we're getting very specific down to the La'au Point draft EIS and there's no agenda item about La'au Point or any of these issues and I'm just a bit concerned.

Commissioner Vanderbilt: Point well taken, I was just trying to orientate on what these things mean.

Mr. Hopper: I understand and that doesn't mean at a future meeting it could get more specific and these are all relevant questions of the process but I'm just a bit uncomfortable about the specific.

Commissioner Vanderbilt: Point well made.

Mr. Yoshida: Can we proceed Mr. Chair? We are looking at primary impacts as well as secondary impacts, as well as regional impacts and also sites specific impacts. Looking at short term impacts and long term impacts and cumulative impacts. These are the various significant criteria as spelled out in the statute which we have looked at in terms of the environmental assessments for some of these projects. We're also looking at mitigative measures. Measures that are planned for potential impacts which are identified through agency comments that reduce the level of significance. We are looking at alternative analysis.

So I guess that concludes our module on Chapter 343, environmental assessments and environmental impact statements.

Commissioner Vanderbilt: Any other questions from the commissioner's?

Commissioner Chaikin: There's the environmental impact statement and then there's the environmental assessment. Is the planning staff that kind of gets together and makes that final judgement along with the planning director on whether the EIS is required or is that something the applicant can decide on which way they want to go?

Mr. Yoshida: Again the applicant could submit the environmental assessment. But it's the accepting authority that makes the determination as to whether the impacts are significant or not to require an environmental impact statement. In some cases the planning commission is the accepting authority. In the case of the fire station the EA, the commission made the determination as to whether it was a finding of no significant impact based on the final environmental assessment or whether it should have required an environmental impact statement.

Commissioner Yoshida: Since you mentioned the fire station, maybe I could slip in La'au only as an example. You mentioned that the planning commission was the accepting authority on some and now we have the Land Use Commission as the accepting authority on La'au. Could the planning commission have been or the County of Maui be the accepting authority on the La'au Point thing and if so, who makes that determination? The State or the County that's the accepting authority?

Mr. Yoshida: I believe there was a case, I think it was Malama Maui versus Maui Land and Pine on the EIS Upcountry Town Center in Pukalani. I believe the courts ruled that it is the, the accepting authority would be the agency with the first discretionary approval. So say if somebody needed a community plan amendment, district boundary amendment, a change in zoning and an SMA, the community plan amendment ultimately is a legislative action because the County Council is the final

authority. The district boundary amendment if it's more than 15 or it involves lands in the conservation district is done by the Land Use Commission. That is deemed to be the first discretionary approval. So in those cases following that court case the Land Use Commission is deemed to be the entity with the first discretionary approval and therefore are the accepting authority.

Commissioner Vanderbilt: So actually it was up to Molokai Ranch to see what they wanted, if they had applied for a community plan amendment first, the County of Maui would have been the accepting authority but they chose to go for the Land Use district boundary amendment first. But if they had gone for the community plan amendment first, then the county would have been the accepting authority, is that correct?

Mr. Yoshida: If they weren't going through this concurrent processing with the community plan amendment and the district boundary amendment.

Commissioner Vanderbilt: Where do we go from here Clayton?

Mr. Yoshida: We have a brief mention on item 12, on the meeting schedule. We do meet on the second and fourth Wednesday of the month at 12:30 unless otherwise noted. Some of these hearings the commission asked to have an evening meeting, we've had late afternoon and evening meetings kind of on a case by case basis. Those are our regular meeting dates, the second and fourth Wednesdays of the month.

Commissioner Vanderbilt: Any questions on the meeting dates? Last year we had a little problem around the summer time, everybody had commitments to vacation and other plans, if we the commission finds that there's a certain day that we know we're not going to have quorum, can we make another date to replace that meeting?

Mr. Yoshida: If we know far enough in advance because typically for the public hearing items we calendar them like 45 days ahead of time so that the applicant can send out the notices to the neighbors and if they have to publish notices in the paper, they can publish notice in the paper on a timely basis. We don't want to have the applicant go through all that process and then change the date on them.

Commissioner Vanderbilt: O.K. Thank you.

Mr. Yoshida: If we're done with that then I guess your Deputy Corporation Counsel Mike Hopper can deal with the other matters on the orientation workshop agenda.

The commission took a short break and reconvened the meeting at 2:11 p.m.

Commissioner Vanderbilt: Before we continue on with the orientation, I'd like to see if there's anybody here that would like to give any public testimony or comment. On our agenda we say at the start of our meeting we'll allow people that come here that have other commitments or anything that want to say something. O.K., come on up Linda and identify yourself.

Ms. Place: My name is Linda Place and thank you for letting me speak. I just want to say that I'm practicing. Anyway some six months ago I came before the planning commission and I spoke to you folks about vacation rentals. I wanted to know because, what are you folks determine or what it is to enforce because there seems to be more vacation rentals open up on the east end. A friend of mine just gave me three websites to look on and I'm just going to bring up one. In fact Wailua there was about eight. I just happened to see one that caught my eye which was in Wailua, it was \$350 per night and when I looked to see how much of the nights were taken if there was any availability and for April they had 26 days at \$350 per month that comes out to \$9,100. For June they have 27 days rented and it's \$9,450. And I wanted to bring to your attention because it says here bamboo showers along stream. Now where is that water going? Into the stream. You know our local people been complaining because the limu and stuff that we can't get and they blame it all on the people abusing it. But there were other things like this creates, you know the soapy water that goes to the ocean, where the fresh water goes to the ocean to, that's how we have our limu. The other questions I had, and again my question is when are you folks going to enforce or who's going to enforce this law as far as the county goes. The other thing I wanted to talk about is beach access or right-of-way. From Kamalo to Puko'o there's only one beach right-of-way. It seems like beach access is being, I remember when we had a few more and now it's no longer there. The other thing I wanted to bring up was our parks. The frontage being eaten up my changes made by home owners that do walls up and down the shoreline. It seems like the county park at Rice Patch, the benches all fell in the water, the tree's fell in the water and the county is doing nothing to protect that park. They could do shrubs and what other people do. One more thing....

Commissioner Vanderbilt: Linda it's been three minutes...can you finish up in a minute?

Ms. Place: Yes. The homeowners are building the walls and so it's shifting the way the water goes and it eats away at the parks. Even One Alii park is getting smaller in the front. The other one is up at the road where the fishpond is, by the catholic church, that road is getting pretty bad, it's narrow and you can almost fall into the water there, you know with these big trucks going up there all the time, it's really, really dangerous. I know that's not the county but somebody has to take some kind of charge and see to these problems that they're taken cared of before people get hurt. Thank you for letting me speak.

Commissioner Vanderbilt: O.K. thank you. Just for your information, several of the things that you talked about is not on our agenda so we're not at liberty to discuss them at this time but we can address these at a future meeting.

Ms. Place: O.K. thank you.

Commissioner Vanderbilt: is there anyone else who would like to testify? Clayton as far as the orientation we completed all those other ones at the last meeting?

Mr. Hopper: I had some case law to report on.

Commissioner Vanderbilt: O.K. Michael, go ahead.

Mr. Hopper: The first thing actually is to clarify a question that was asked to Clayton once the accepting authority for EIS, receives the final EIS, the time period that they have to either accept or not accept that EIS. It is indeed correct under HRS 343 that the statement needs to be deemed accepted or not accepted within 30 days after receipt of the final EIS otherwise the EIS is deemed to be accepted. That time period can be extended by the request of the applicant but not for a period to exceed 15 days. So those are the rules with regard to an EIS, a final EIS submitted to an accepting authority.

I will now proceed to the other portion of the presentation. I'm not sure if you brought all the materials that you received at the last meeting. I will be following along the materials that I had. I would like to go through each segment and then have questions at the end of each segment, I think things would flow better that way. The first segment I want to talk about is ethics. I did talk briefly about this at the last meeting. You got a handout from the last meeting that's entitled orientation for board and commission members. This is for the code of ethics. Number one, code of ethics applies to board and commission members. That's you. You are subject to Maui County Code of Ethics. You're considered officers of the county and that's why. One of the issues that came up as a conflict of interest, the charter of Maui County states that you shall not engage in any business transaction or activity or have a financial interest, direct or indirect, which is incompatible with the proper discharge of your official duties or which may tend to impair your independence of judgement. In this case the primary concern though not the sole concern is a financial interest. Meaning if you have a financial interest in someone, for example an entity that's coming before the commission seeking a permit before the commission, you must not have a financial interest in the grant or denial of that permit. A financial interest has been defined by the Board of Ethics as a financial interest of you, your spouse or your dependant child. It could include an ownership interest in a business or your employment or prospective employment. An example would be that you sit on the planning commission and your spouse works for a developer seeking a special management area permit. Because your spouse is an employee of the developer and that would mean that your spouse has a financial interest in the approval of this permit. So in that situation that particular commissioner would have to recuse him or herself. If you have financial interest concerns, one thing is that you were required to file a financial interest disclosure sheet. That had to be submitted as part of your materials. But if you believe you may have a conflict of interest you can talk to me about it and I could either answer your question directly or can refer your issue to the Board of

Ethics and ask for an opinion from them. Cases are difficult to determine other than a case by case basis. So each case really has unique facts and are often times difficult to give sort of a blanket opinion on. But typically a financial interest is the primary concern of a conflict.

Commissioner Vanderbilt: Excuse me Michael, the financial disclosure form that we fill out doesn't ask where your wife works or your spouse or your dependant children.

Mr. Hopper: I'm not certain, can the planning department clarify that? I believe that it should. Well whether or not it does list that, if your spouse does work for a developer who comes before the commission for a permit you would have to disclose that and most likely recuse yourself. The next section involved is gifts. It says you shall not solicit, accept, or receive any gifts directly or indirectly whether in the form of money, service, loan, travel, entertainment, hospitality, thing promised or any other form under circumstances in which it can be reasonably be inferred as a gift intended to influence you in the performance of your official duties or intended as a reward for any official action on this part. We're looking as an objective test here, not, you may think it doesn't look bad but to an outsider observer it may look like you received a gift in exchange, for example, a favorable ruling on a permit. So if you're approached with a gift and you're uncomfortable taking it, if you believe it could have an improper appearance, you can talk to me about your acceptance of the gift. Again there's no dollar limit here, it all depends on the circumstances and gifts are not just monetary. There could be a lot of different types of gifts. For example, travel, golf games and things like that. Another requirement is that you may be subject to information that by law or practice is not available to the public in which you may require in the course of your official duties. You may not use this information for your personal gain or the benefit of anyone. That's confidential information that you may receive in your role as a commissioner. Other than that that's all I have to talk about.

Commissioner Vanderbilt: Excuse me Michael. What's an example of information that one of our commissioner's could have that, I wasn't quite clear on that last.

Mr. Hopper: Again it would have to be a case by case basis. It's difficult for me to think of an example in your situation. An example could be in my situation as an attorney for the county I might receive confidential information and I couldn't use that for personal gain. It is true that the vast majority of the information that you'll be receiving is open to the public. But in the case where there's information that you receive that's not available to the general public you could not use that information for your personal gain. Because you're subject to the Sunshine Law and everything, most of the information that you'll be receiving must be public record. Any additional questions?

I'll move on to the Sunshine Law. The Sunshine Law as I discussed a little bit at the last meeting is in HRS 92, the basic concept behind it is that the decision making of the boards and commissions what they call agencies of the state and county, aside from the Hawaii State Legislature, must be made in public. The decision making can't be made behind closed doors. There's several

requirements of the Sunshine Law. First thing a meeting must have an agenda specifying the business of that particular meeting and the business that you conduct is limited to the items on that agenda. If an item is not on the agenda it cannot be discussed and certainly no action can be taken regarding that agenda. That agenda may be amended by a two thirds vote to add additional items but only if those items are not of major significance. It's very difficult to find items that are not of major significance to certain people so that should be very conservative in terms of amending an agenda after its been posted. An agenda must be posted six days prior to the meeting. That's the timing requirement. If the agenda is posted say for example five days before the meeting the items on that agenda can't be discussed. The meeting would have to be cancelled if there's no agenda posted six days prior to that meeting. All members of the public must be allowed to testify on each agenda item. You can limit this testimony to not less than three minutes. The testimony must be limited to agenda items. Often times you have to give leeway, but technically the planning commission only has to allow testimony on a given meeting if that item is on the agenda. Again board members must not concur with each other outside of a properly noticed meeting regarding board business.

Commissioner Vanderbilt: Excuse me, you said that the commission could only hear testimony on agenda items.

Mr. Hopper: Typically yes but there's been a practice in the past about allowing leeway as long as there's not subsequent discussion or decision making on items. If the testimony is on items outside of the agenda, because it's obviously difficult to control what members of the public say and obviously the intent of the Sunshine Law is to allow people of the public to discuss, but, technically it's possible to limit public testimony based on agenda items but the practice is to give broad discretion because cutting off public testimony can usually do more harm than good. But it has to be careful that the items discussed after that testimony, if the item is off the agenda, would have to be restricted based what's on the agenda.

Commissioner Vanderbilt: Thank you and I think we had public comment on issues that people may feel apply to planning on Molokai. We had that and we took it off our agenda. At that point we can go back in the minutes and somebody mentioned that it was against the Sunshine Law or something. But, OHA has for instance public comment from the general public in the beginning and then another public comment from beneficiaries at the end on anything that they want to talk about. But the OHA board cannot discuss or take any action or do anything else on that. In fact the Office of Information Practice says that any board or commission can allow people to talk on non agenda items but they must be careful not to respond or discuss the matter other than this is something that's not in our jurisdiction, you have to go see the Department of Health or the commission may wish to put it on future agenda for further discussion.

Commissioner Chaikin: Today we had a testifier come up and she had a number of issues. Some of those issues were safety concerns. To me it seems like they were a minor importance in terms

of you know the public having, adverse reactions to us discussing it. It just seems that we're so handicapped that if somebody comes in here and says there's a dangerous situation out there that we can't discuss, I'm just wondering, like in her particular case we had the issue where the road was too narrow. Isn't that something that us, we can make a resolution to pass something on to the appropriate department without having to put something like that on a future agenda?

Mr. Hopper: Well that individual can certainly go to that department and give them the report. It's not necessary that the planning commission has to take action on every problem or safety concern. Honestly it's often times not the best form because of these restrictions. However, all you can do, I mean the Sunshine Law does place a lot of restrictions on how these boards and commissions work and it may make doing business burdensome. However you would still need to have that agenda item for your next meeting as an item to discuss. That doesn't mean that if there's an immanently dangerous situation that you could not go to, the individual couldn't contact the planning department or the public works department, they wouldn't necessarily need to come to the planning commission. I understand that the commission may be relevant as a forum but certainly an item such as fixing a road or something would be significant enough to be agenda item and the issues isn't necessarily always with the members of the public generally in favor of discussing that issue at the meeting. It's just that even just one member of the public who has a problem with that they could bring suit and for the Sunshine Law there's determine to be an intentional violation of it. It's punishable by a misdemeanor. With the opinions we've gotten from the OIP on these issues, I tend to have a very conservative view on what can be discussed because they're very tight on what they have allowed lately.

Commissioner Vanderbilt: Any other comments?

Mr. Hopper: One other issue on the Sunshine Law is that, well actually as I was moving into perhaps the most important portion is that board members may not discuss or confer with each other on board business items outside of a properly noticed meeting. Technically two members may discuss board business outside of a meeting as long as no commitment to vote is sought. More than two cannot discuss any business before the commission whether or not a commitment to vote is sought. There are exceptions to this general rule one of them is called an executive session. There are several reasons why an executive session can be called and one of them is to confer with me, your attorney which would involve issues related to the duties or potential liabilities of the board. For example if you needed clarification on the criteria of granting an SMA permit. You could have an executive session. For an executive session there needs to be a vote of two thirds of the members to which the board is entitled. That means you have nine members you would need six members to vote to have an executive session. At that executive session you may only discuss items relevant to the board, the reason for the executive session was discussed. No items can be discussed in an open session.

The commission rules, one issue is a quorum. You need to have at least five of your nine members

required to do business. Which means to anything from taking public testimony in addition for any action taken must be taken by motion, approved by five of the nine members of the commission. One additional issue is that by Robert's Rules, the chairperson must entertain a motion before a motion can properly be made. For example, motions being made during public testimony or at random times, under Robert's Rules the chairperson must entertain motions before a motion can be made. That's an item that's not always followed but really should be. The concern being the timeliness of the motions being made. Also note under your rules that if a commissioner is present and is silent on a vote, the commissioner silence is deemed to be an affirmative vote of that commissioner, unless they are disqualified by the conflict of interest rules. This is to prevent situations to where no action is take by a lack of votes. If you don't want to vote on something, not that your silence will be recorded as an affirmative vote. You would have to either vote for or against that particular item. There's really no right to abstain under your current version of the planning commission's rules.

Commissioner Chaikin: So is the chairperson required to vote?

Mr. Hopper: Generally the chairperson would only vote if it appears that the chairperson would be required to vote in order for action to be taken. The chair would vote to see where the votes stand and than they vote after viewing how many people vote.

Commissioner Chaikin: So What happens if the call for the vote and it's a tie?

Mr. Hopper: Than the chairperson would than vote.

Commissioner Vanderbilt: Commissioner's anytime you have a question, chime in, go ahead.

Mr. Hopper: Well I finished the rules portion, any question on the rules? Again this is not meant to cover everything, go ahead and read through the rules and if you have subsequent questions let me know.

Commissioner Vanderbilt: One quick question. In the rules it talks about intervention and on Maui Planning Commission agendas they reference interventions. What are the items before our commission that somebody can intervene on?

Mr. Hopper: Typically it would be an SMA permit. I believe items for which you have final discretionary authority, would be SMA permit, shoreline setback variance, perhaps Clayton could assist me on that.

Mr. Yoshida: Mr. Chair and members of the commission, it would be applications where the commission is the final authority. That's, as Mr. Hopper has stated, things like SMA permits, shoreline setback variances, county special use permits, state land use commission special use permit

15 acres or less, phase II project district approvals, planned developmental approvals, off site parking approvals and the like.

Commissioner Vanderbilt: Thank you.

Commissioner Chaikin: Getting back to the motions we talked about, the chairperson what they would normally do is entertain motions. Does that prohibit the chairperson from making a motion themselves?

Mr. Hopper: Well the chairperson would generally open the floor for motions and than see if there's any motions first. I don't think the chairperson is prohibited for entertaining a motion, but the proper procedure would be to see if there is a motion on the floor, primarily. I believe the chairperson on some circumstances propose a motion.

Commissioner Vanderbilt: You could clear that up at the next meeting. Because I know the Council, it seems like in some of the committees the chairman entertains the motion. Sometimes nobody listens to them and sometimes they do.

Commissioner Dunbar: I don't think the chairman can make a motion.

Commissioner Vanderbilt: So we can clear that up at the next meeting. Generally just for meetings to run smooth, before you get into a lot of discussion on something it's best to make a motion and a second and than open it for discussion.

Mr. Hopper: Yes, that's the procedure you have to follow. Entertain a motion, make the motion, it must be seconded and then you would open it for discussion. During discussions there could be motions to amend and than there's a call for the question and you typically have, you call for a vote and again you need five of nine members to actually pass a motion.

Commissioner Dunbar: I think when we came on the board we were give Robert's Rules of order which states all that.

Mr. Hopper: yeah you should have, well it all depends on which version of Robert's you have, mine is quite thick. I would like to take a look at that to tell you the truth.

The other issues I want to talk about is fairness and due process concerns. You must not develop pre-conceived final opinions regarding specific projects that come before or likely to come before the board. Certainly don't make any public statements for or against any particular project that may come before the board. This has to do with the fairness of the applicant. The applicant is entitled to a fair hearing, for you to not make up your mind before you've heard all the facts submitted by the applicant, be very careful. You may be in situations where newspapers are calling, wanting your

opinions on projects that may come before the board, the situation could be that if you do state an opinion for or against that project prior to that hearing, you would have to recuse yourself on that project. If you don't and you take a vote on the action, later on the applicant may be able to challenge that action. You may have to get a court to actually say this vote in this situation did not count, therefore the action will be treated as if this person did not have a vote. So the best way to avoid these situations is to not make those statements.

Commissioner Dunbar: If a person has made a comment with regards to, in some cases been published, a comment against, there's no time period between when that comment was made and when a hearing on the final is going to be heard? Once they made a comment they must or should recuse until after the hearing of the subject?

Mr. Hopper: Well not for all items before that. But for that particular item, it can, are you getting towards the person can sit during discussions?

Commissioner Dunbar: No, I'm saying that if a person is wearing a t-shirt that clearly is against some sort of a project or something, that's a pretty good public statement and if there's been no decision on that, do we preclude that person from either discussing or having any rights to vote on the subject?

Mr. Hopper: Again it depends on a case by case basis and the nature of the statement. But if there's a clear statement against the project there's really no time limit that's involved because if there's evidence that that person was bias and had made up their mind before the application was discussed at a public hearing or fully disclosed, then that individual would have to recuse themselves from a vote certainly. In terms of whether or not they have to recuse themselves from commenting that would depend. They certainly wouldn't want to make comments that could prejudice the entire process. That would be the concern but it would be on a case by case determination. It's difficult to make a blanket statement but there are situations that could cause problems, yes.

Commissioner Vanderbilt: So Michael if, you said on an application, so somebody's position on an application, if you're taking position on an application that's before this commission? Or say somebody said I would be against putting high rise hotels at the Kaluakoi Resort, there's no formal application before the county.

Mr. Hopper: The Problem is that if the application did come later on before the county, a question could be raised.

Commissioner Vanderbilt: So anybody in this community that has done anything since they've been born, they gotta really look through because times are changing and things might be happening?

Mr. Hopper: Again it's a case by case basis. You said, the issue is whether or not the applicant before you will have a full and fair hearing. If people have already made up your mind before you've seen this application than there's an argument that that person didn't get their full and fair hearing because this person had a bias. Generally the more specific the comment the greater chance that person would have to recuse himself.

Commissioner Vanderbilt: So if the person had said well I'm against this until I get some other information that may change my mind.

Mr. Hopper: Again we would have to look at the specific situation. The ultimate decision would be made by a court in these cases.

Commissioner Vanderbilt: I think it would probably be made by the individual and the commission saying they felt somebody should be recuse.

Mr. Hopper: Yes, and if there's a decision later on a consultation with me and perhaps review a case law that you would not have to recuse yourself than if there's a suit later on you would take your chances with the court after that decision. But my main concern is preventative measures. You do give up a bit of your freedom to speak out as being a commission member in those situations. You could certainly speak but you would sometimes run the risk of recusing yourself later on and we want you on the commission making decisions.

Commissioner Vanderbilt: That's whether you're for or against a project. I hate to bring up the La'au thing but in the Ranch's statement and in the master plan there's a list of people, they said a thousand people put this plan together. My name is in there. Bill's name is in there, I don't know if anybody else's name is in there. So would that cause a problem.

Mr. Hopper: Again I would have to evaluate every statement. I mean if there are statements that say I'm completely against this project or something than you've got problems. But again I don't want to get into specific projects until I know all of the facts surrounding the comments.

Commissioner Vanderbilt: Fair enough.

Mr. Hopper: I would like to move on to some of the other cases that you may deal with. One of the things that you would be exercising your discretionary authority over as a quasi judicial authority over and also in making proposed comments to recommendations to Council on change of zoning and community plan amendments involve conditions that you may impose on SMA permits and those applications that I just talked about and your final decision made on SMA permits. There's some case law on these issues that talks about when you're looking at SMA permit request you need to look at them in light of HRS 205A. In some court decisions there is a court decision in a case named Topliss. Among other things one of the holdings in that case was that you would not be able

to approve an SMA application unless you make findings that the proposed development a) would not have a substantial adverse and environmental or ecological effect except however where the substantial adverse effect is practicably minimized and clearly out weighed by public health, safety or compelling public interest. In addition the application must be consistent with the objectives, policies and SMA guidelines of the CZMA and that the project must be consistent with the county general plan and zoning. If an application comes before you and meets the statutory requirements a denial of a special management area permit is an abusive discretion. That means your decision may be over turned. One important note with this Topliss case is that even if a development is shown to have a substantial adverse effect in accordance with the statute, the commission is required to determine whether that effect can be practicably minimized and when minimized is purely out weighed by public health, safety or compelling public interest. In addition the commission may impose reasonable conditions to achieve the minimization. So those are the key points you need to look at whenever you look at SMA permit applications. The first thing is that you can't approve a permit if it's going to have a substantial adverse, environmental, or ecological effect. However at the same time you need to look at the potential to mitigate those effects and you need to look at the effects as minimized by the developer. The developer has proposals for how he or she is minimizing the effects. You need to look at the effect as minimized as those mitigation measures and base your decision on that criteria. So you can't refuse to consider proposed mitigating factors. If its been minimized to the extent possible based on the facts, you need to make a determination whether or not if these are out weighed by other factors under the CZMA that would warrant granting of the project or if you find the impact is so substantial, even when minimized that it's not out weighed by those factors than you would have to deny the permit. That's the criteria that you're basing those on. In addition, there are conditions that you can impose on SMA permits. That are substantial amount of US Supreme Court decisions based on what type of conditions you may impose on the SMA permit and this also will become relevant for change in zoning or community plan amendments because you'll have recommendations on those. The conditions that you impose must be deemed reasonable. Which means based on various supreme court cases they must be tied to a legitimate county interest, basically a legitimate government interest, there must be a essential nexus between the condition imposed and the project. Meaning that the conditions are related to the impact of the project. In addition the condition that you're imposing must be roughly proportional to the problem created by the project or the additional need created by the project. A good example would be in the Topliss case where for an SMA permit the commission denied the permit based on the traffic impact that the new development would have. However the commission did not look towards the impact the environmental or ecological effect that the development would have as it would relate to traffic. So that's what we're talking about a nexus. The development itself, the condition you impose has to be related to the impact that the development has and in proportion as well if you're building a single family home, a multi million dollar contribution to a fund to leviate the traffic impacts from that home may not be proportionate to the impact of that development. If you're talking about a large subdivision you can get into different issues in that particular application. The court determined in the Topliss case that if you're imposing conditions that involve traffic mitigation measures, those mitigation measures as it relates to the SMA permit must be

related to the ecological or environmental effect on the shoreline. It didn't apply whether or not there are possible, for example traffic impacts that could be related to the impacts on the shoreline, it just said that the commission in this case didn't consider that at all that it acted improperly in denying the permit. So those are basically the conditions that you may impose. There are obviously a myriad of potential types of development, types of impacts and types of conditions that you can impose. But just be aware that those are your considerations when dealing with these conditions.

Commissioner Defray: Let me ask you something, on the community plan amendment. Say our community plan said no hotel development at Puko'o and somebody wants to come in and change the zoning from ag to hotel so they can build a hotel, can the commission deny that community plan amendment because it's inconsistent one of the goals, objectives, or policies of the community plan?

Mr. Hopper: Well by definition a community plan amendment is inconsistent. You wouldn't vote to deny you would have to recommend denial in that case for a community plan amendment. You would have to look at 280B, I could do a review of that in that particular case to see under what circumstances you could grant or deny a community plan amendment. What I'm concerned about here is the conditions that you would impose, you could certainly deny it if you didn't believe that it meant the criteria, or recommend denial after you look at 280 B and decided that this doesn't meet the criteria. But the conditions you would impose if you're changing for example from ag to hotel, you would have to look at what kind of impact this hotel going to have on the community and you would have to look at any conditions that you would impose on that community plan amendment as relative to that impact, that degree of that impact and the type of that impact.

Commissioner Vanderbilt: The only reason I brought that up is because we're going to go through all these processes with the policy plan, community plan, we're going to have to lay out financial plans and then all of a sudden you just have various community plan amendments and sort of throw a monkey wrench in that because you're trying to make these community plans more detailed, more responsible now, there's nothing to permit any landowner for coming in and amending the community plan at will.

Mr. Hopper: That's why you would be guided by the standards and that person would have to go before you for recommendation and get action from Council to approve that. The Council is in place to over see that process.

Commissioner Vanderbilt: Thank you.

Mr. Hopper: One final issue is the PASH case which deals with, it actually states that the planning commission has an affirmative duty to protect native Hawaiian rights which includes native Hawaiian gathering rights to the extent feasible. Which means if those rights are being, if there's evidence on the record that native Hawaiian gathering rights, or beach access rights are being threatened by a particular development you do have a duty to consider those impacts and consider

those impacts to the extent feasible which would potentially mean imposing conditions that would protect that type of beach access. Again it depends on the situation and you would typically look for evidence in the record for public testimony or the report of the planning department in determining that native Hawaiian rights in a particular case is being threatened. That's something the Hawaii Supreme Court has stated in the Hawaii constitution and it's not only in your purview but it's mandated that you do look at those concerns. You can't refuse to hear those concerns and to address them by imposing conditions. The same proportionality in related to the development and the nexus discussed needs to be met in those conditions, but that's an additional wrinkle that the Hawaii Supreme Court has put on these SMA permits.

Commissioner Feeter: Chair question. On page ten can you give me some information or the board some information about distribution of written testimony?

Mr. Hopper: Is that the Sunshine Law guide? Well that's a good document to look at for that. Typically written testimony can be submitted to the planning commission at its meetings and would need to be distributed equally among the members. You wouldn't want to have one member getting the testimony and not by all members. But people have the right, members of the public have the right to submit written testimony to the commission at any time just as if they had the right to appear and give oral testimony. It's certainly a way for them, for example, to submit testimony that could be far longer than a three minute oral testimony and so they would be free to submit that type of testimony.

Commissioner Feeter: Question arises than how, what's the period of time prior to a meeting and does it have to be on the agenda?

Mr. Hopper: Well it depends on what's discussed at the meeting. I believe it can be fairly liberal as far as the public testimony that's distributed. However the Sunshine Law is concerned with the discussion at the meetings. Typically the testimony should be related to an agenda item but because oral public testimony, there can be a broad discretion given. Discretion is generally given to written testimony as well provided that the commission should not take any action or discuss that testimony unless they got that item agended. But it could be submitted for example if the Chair would like that to be on the next agenda, that could serve as a basis for putting that item on the agenda in the future.

Commissioner Feeter: Well two things come up, we were handed one for example today, so can we construe to be official or just informational, either one. The other thing is if a person transmits, wants to transmit a written testimony does it have to go through the Maui County Planning Commission or can it be distributed at a Molokai Planning Commission meeting?

Mr. Hopper: Maui County Planning Commission is completely separate from you. It may be that the items discussed are more appropriate for Maui County but they relate to Molokai business than there's no reason at all that they have to go to the Maui Planning Commission. They should go

through the staff of the planning department which is Nancy McPherson and her office. The best way to submit the testimony rather than giving it to an individual commissioner would be to give it to Nancy and to have, or her office, and have them make copies for everybody. You don't want to have a situation where there's incomplete information where certain commissioners get testimony and other don't.

Commissioner Feeter: O.K. I understand, thank you very much.

Mr. Hopper: That's it for me.

Commissioner Vanderbilt: O.K. how much time you got Clayton?

Commissioner Chaikin: I just think that a very important tool that we have with the SMA thing is our ability to put conditions on permits. I really don't know where our boundaries are with that. I asked at our last meeting a question, that if the commission felt that a particular project was blocking a view plain, could we ask them to make it smaller or make it a single story as a condition of the thing and basically the answer was no. I'm just wondering, if you could go a little bit more into what our boundaries are when putting conditions on SMA permits.

Mr. Hopper: If you could tie it to goals, objectives and policies of HRS 205A, which I'm not sure if they would include view plains, the issue would be not only would that requirement be in 205A, but in addition what are you requiring this particular developer to do? Is chopping off a story of their project proportional to the increasing view plain that you would get in that particular case. That's why we have to go on a case by case basis. Some of these cases are very close and courts would have difficulty making the decisions and arguments could go either way. But the main thing I'm concerned about is that you review 205A and the planning department is to assist you with this when the applications come before you and they're giving their recommendations and if you do impose a condition that you, to the best of your ability, tie it to a goal, policy or objective in 205A and also that it is proportionate to that development. If you can make a good argument for that position in imposing the condition than that's the burden that you need to meet.

Commissioner Vanderbilt: So you're saying the goals, objectives and policies of the state 205, how about conditions we might consider based on the goals, objectives and policies of our community plan, do they have any play in this whole decision making or is it just the state version?

Mr. Hopper: I believe that 205 A does make reference to the community plan. Again, the courts ruling in Topliss is looking at traffic impacts aside from any consideration of the ecological, environmental affect was an abusive discretion. So you need to be careful there in broadening it because the community plan is an extremely broad document. That you wouldn't have an educational contribution for a project that has absolutely no effect, detrimental effect on the education.

Commissioner Vanderbilt: Any other questions from the commissioner's? Clayton you want to get into the Directors Report?

D. Director's Report

1. May 9, 2007 Public Hearing Item:

MS. FRANCES FEETER requesting a State Land Use Commission Special Use Permit and a Conditional Permit to operate the Hale Maluhia, a short term rental in the State Rural District and the RU0.5 Rural District at 8770 Kamehameha V Highway, TMK: 5-7-007:011, Pukoo, Island of Molokai. (SUP2 2001/0024) (CP 2001/0031) (N. McPherson)

2. Pending Molokai Applications (report circulated for April 11, 2007 meeting).
3. Pending Molokai Applications
4. Closed Molokai Applications (report circulated for April 11, 2007 meeting)
5. Closed Molokai Applications
6. 2007 Hawaii State Association of Counties (HSAC) Conference on Maui

Mr. Yoshida: I guess very quickly Mr. Chair and members of the commission. At your next meeting on May 9, scheduled is the public hearing on the Frances Feeter Land Use Commission permit and Conditional Permit for the Hale Maluhia project in Puko'o. We did circulate copies of pending Molokai applications for your last meeting and this meeting as well as closed Molokai applications at the last meeting and this meeting. I guess we weren't able to get to those because of time constraints. I guess we did receive invitations to the 2007 Hawaii State Association of Counties conference on Maui being hosted by the Maui County Council. I guess I'm still waiting to get directions from the department heads on the degree that we could support sending boards and commission members to this meeting. You will be getting or should be getting information on the annual state planning conference in late September hosted by the Hawaii County Planning Department. It will be held at the Puna Prince Hotel. That's all we have to report Mr. Chair.

Commissioner Vanderbilt: Clayton you had on your report pending applications, I was just wondering, Ralph's here today, I see for the first time we have subdivisions on our pending list. Is that all subdivision request, it's on the last page a J. Johnson subdivision.

Mr. Yoshida: I guess if it shows up on the TMK sort, then you'll be seeing request for comments on subdivisions that are made by the Public Works Department to our department.

Commissioner Vanderbilt: Maybe we can get into it at the next meeting, but I understand a subdivision, there's a lot of subdivision applications coming in to subdivide those lots out there, but instead of going directly to subdivision they're coming to the Planning Department first. I was wondering when those come in to you that you could include those on here.

Mr. Yoshida: I guess we can discuss it at our next meeting.

Commissioner Vanderbilt: Terrific.

E. Chairperson's Report

Commissioner Vanderbilt: As far as the chairman's report I had some things but Clayton got this agenda out very quickly before he went on vacation so when I called up the other last meeting I saw that this agenda was already posted. Didn't you post it like a week or so earlier than you normally do?

Mr. Yoshida: We try to post it like a week or so...

Commissioner Vanderbilt: O.K. so we'll just bag on that.

F. Announcements

Commissioner Vanderbilt: Are there any announcements by the staff or the commission or anybody from the public that wants to share anything? No.

G. Other Business

Commissioner Vanderbilt: As far as other business, does anybody have any other business?

H. Next Regular Meeting Date: May 9, 2007

Commissioner Vanderbilt: Our next meeting date is May 9, 2007, same time 12:30 and that'll be a public hearing.

I. Adjournment

There being no further business before the Molokai Planning Commission the meeting was adjourned at 3:08 p.m.

Respectfully submitted by,

NINA-LEHUA KAWANO

Record of Attendance

Present:

Degray Vanderbilt, Chair
Steve Chaikin, Vice-Chair
Sherman Napoleon
Bill Feeter
Kip Dunbar

Absent:

Lynn DeCoite
Joseph Kalipi
Mikiala Pescaia
Linda Kauhane

Staff:

Clayton Yoshida, Planning Program Administrator
Nancy McPherson, Planner
Kathleen Aoki, Planner
Michael Hopper, Deputy, Corp. Counsel
Ralph Nagamine, Administrator, DSA, DPWEM