

**MINUTES FOR THE
MEETING OF THE
BOARD OF LAND AND NATURAL RESOURCES**

DATE: FRIDAY, OCTOBER 26, 2007
TIME: 9:00 A.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HI 96813

Chairperson Laura Thielen called the meeting of the Board of Land and Natural Resources to order at 9:07 a.m. The following were in attendance:

MEMBERS

Ms. Laura Thielen
Mr. Ron Agor
Dr. Samuel Gon III

Mr. Timothy Johns
Mr. Jerry Edlao
Mr. Robert Pacheco

STAFF

Mr. Russell Tsuji, Land
Mr. Edwin Matsuda, Engineering
Mr. Dan Polhemus, DAR
Ms. Kimberly Mills

Mr. Sam Lemmo, OCCL
Mr. Paul Conry, DOFAW
Mr. Wade Ishikawa, DAR
Ms. Dawn Heggar, OCCL

OTHERS

Mr. Colin Lau, Deputy Attorney General
Ms. Linda Chow, Deputy Attorney General
Mr. Bill Wynhoff, Deputy Attorney General
Mr. Robert McKnight, D-1
Mr. Dawson Miura, D-5
Mr. Francis Nishimura, D-8
Ms. Yvonne Izu, K-3
Mr. Harrilyn Kameenui, D-7
Mr. Ray Iwamoto, M-4

Mr. Dennis Niles, J-1
Mr. Mark Robinson, J-1
Mr. Randy Vitousek, K-1
Mr. George Wood, D-5
Mr. Bob Schnider, D-4
Mr. Gerald Park, K-2
Mr. Henry Curtis, M-4
Mr. Allan Murakami, K-3

{Note: language for deletion is [bracketed], new/added is underlined}

Item A-1 Minutes of September 28, 2007

Member Edlao recused himself

Unanimously approved as submitted (Pacheco, Gon)

Item A-2 Minutes of October 12, 2007

Unanimously approved as submitted (Pacheco, Johns)

Item J-1 Cancellation of Commercial Permit Issued to Iconoclast, Ltd. For Lahaina Small Boat Harbor and Reissuance of Iconoclast, Ltd.'s Vessel Moored Elsewhere Permit for Lahaina Small Boat Harbor.

The Board may go into Executive Session pursuant to Section 92-5(a)(4), Hawaii Revised Statutes, to discuss the contents of confidential attorney-client memoranda, and to consult with the Board's attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities.

Ed Underwood, Administrator for the Division of Boating and Ocean Recreation, provided some background information on this situation. He stated that the owner has a commercial vessel moored elsewhere (VME) permit offshore and has purchased a fishing corporation within the harbor under the name, Lahaina Bird 90. The rules allow that if you have a mooring permit within the harbor, you can bring your VME permit into the harbor and be issued a commercial use permit for the harbor. However, the issue is that it is two separate entities so the permit should not have been issued. Therefore staff is asking to rescind the permit issued to Iconoclast for Lahaina Bird 90's slip and reissue re-issue them their VME permit.

Dennis Niles, representative on behalf of Mark Robinson (the stock holder that owns both entities), gave additional background on the situation. He stated that he provided the Board with a letter that gave the facts in greater detail and put forth the legal analysis that lead him to the conclusion that the harbor agent did not make a mistake. He believes that they are here before the Board to determine whether the actions of Mr. Underwood in cancelling the permit should be ratified.

Motion was made to enter into Executive Session to discuss with the Board's attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities. (Johns, Edlao)

The Board went into Executive session at 9:27 a.m.

The meeting resumed at 9:38 a.m.

Unanimously approved as submitted (Edlao, Tim)

Item K-2 Conservation District Use Application (CDUA) OA- 3425 For a Barn, Paddocks and Landscaping by James & Lisa Hogg, Located at Kaneohe, Koolaupoko, Island of Oahu, TMK: (1) 4-5-042:008

Sam Lemmo, Administrator for the Office of Conservation and Coastal Lands, provided some background information. He stated that the area is 100,000 sq feet, located in the general subzone. The owners are proposing to construct a 1700 sq foot barn and clear two paddocks, about 14,000 and 87,000 sq feet. They also want to clear some hau trees to create fire breaks and stable two horses. They will do a horse management plan to manage the animal waste. Based on the circumstances of this case, staff feels comfortable that the use is compatible with the area and will not be a nuisance to the neighbors. Therefore, staff is recommending approval of this permit subject to standard conditions.

Gerald Park was present to answer any questions the Board had.

Unanimously approved as submitted (Johns, Edlao)

Item K-3 Enforcement Action Regarding Breach of Conservation District Use Permit (CDUP) OA-2670 Conditions #10 and #26 by HASEKO, Located at Honouliuli, Ewa, Oahu, TMK: (1) 9-1-012:xxx

Mr. Lemmo gave some background information. He stated that this project is a part of the Ocean Point Master Plan. On April 26, 2000 the Board approved an amended finding of fact, conclusions of law, decision, and order of conditions in granting Haseko a CDUP to construct a marine entrance channel. Along with that permit, the US Army Corp of Engineers also issued a permit that included an MOA signed by Haseko, the State Historic Preservation Division, the Office of Hawaiian Affairs, the Advisory Council on Historic Preservation, and the Army Corp. The MOA notes that the construction will have an adverse effect on 21 historic sites. For archeological site preservation and mitigation, buffer fencing was to be placed around archeological sites. On August 24th Haseko went before the Board to propose amendments to their permit, but at the time it was revealed that a site may have been damaged and a breach of the permit may have occurred. Staff did some investigation and found that the archeological sites that were damaged do not fall within the conservation district, therefore, OCCL has no regulatory enforcement. However, there are two conditions in the CDUP that requires compliance with the MOA. Because staff feels that the MOA was breeched, they consider it a breach of Haseko's CDUP conditions. Therefore staff is asking the Board to fine the permittee in violation in two instances; the breach of the conditions 10 and 26 of the MOA and are recommending that the Board fine the permittee \$40,000 with some administrative costs totaling \$4,500 and that the land owner amend the MOA to resolve the non compliance with the conditions.

Yvonne Izu, representative for Haseko, stated that Haseko is not disagreeing with Staff's recommendation nor disputing the fines. However, there are members of the Hoakole Cultural Foundation requesting that the fines be paid to the cultural foundation for its activities rather than the State and Haseko does support that. She believes that the issue

deals with the continuous use of a pre-existing cane haul road located within the archeological buffer zone. Prior to starting the project, Haseko asked the Army Corps for permission and their archeologist gave the okay. In regards to being in violation with the MOA, they confirmed with the Army Corps that they are not in violation with the MOA. However, they will move the road out of the buffer zone, but are requesting 30 days to find alternative access because they need to obtain permission from the Navy for access.

Members from the Hoakole Cultural Foundation testified in support of having the fines go to the Cultural Foundation rather than the State so that they can continue with their education and preservation efforts of the cultural sites within the Ewa area.

Allan Murakami, representing the Native Hawaiian Legal Corps, stated that there needs to be stronger monitoring of these areas.

The Board:

Amend recommendation 4 as follows:

“The landowner shall within 30 days comply with the MOA or amend the MOA to resolve the non-compliance conditions for CDUP OA-2670”

Add recommendation 7:

“Request that the Department devise a monitoring compliance plan.”

Unanimously approved as amended (Johns, Agor)

Item D-8 Quitclaim of State's Interests, if Any, in the Proposed Kuakini Street Extension Road and Adjacent Lands to the City and County of Honolulu and Hawaii Health Systems Corporation; Acceptance of a Quitclaim Deed from the City and County of Honolulu, and Set Aside to Hawaii Public Housing Authority for Stonewall Encroachment, Kapalama, Oahu, Tax Map Key: (1) 1-6-9:1 and Proposed Kuakini Street Extension Road. (ADMINISTRATION/Charlene)

Russell Tsuji, Administrator for the Land Division, gave some background information. He stated that this is in connection with the County's Kuakini Street Extension Project and the big issue that has been holding the project up is that that County only wanted certain lands which would leave the State with remnant pieces to maintain. This in turn becomes burdensome. Charlene Unoki and Linda Chow have been going to numerous meetings with the County and with Senator Chun Oakland and finally staff thinks they have found a solution that will work for both the State and the County. The County is insistent that they only want a certain portion of land that will result in a mauka remnant piece as well as a makai remnant piece. Through the help of Senator Chun Oakland the Maluhia Hospital Board has agreed to take the mauka remnant and plan to use it for

parking. Senator Chun Oakland has asked the Public Housing Authority to see if they would be willing to take the makai remnant.

Francis Nishimura, community coordinator for the Kuakini Extension Programs, testified in support of the project.

In response to a letter dated October 22, 2007 from Mr. Melvin Kaku, Director for Department of Transportation Services, staff proposed and the Board approved the following amendments to the written submittal:

Add to Page 4 Number 3: “On October 18, 2007, the HHSC Board authorized to accept the transfer of the mauka remnant for use as an at-grade parking lot, which will be built in compliance with City & County of Honolulu building codes, No other structure shall be built on the property except for security fencing.”

Add a NEW Recommendation 6 to read as follows: “Subject to construction funding of the City’s Kuakini Street Extension Project.”

Add a NEW recommendation 7 to read as follows: “Subject to Hawaii Public Housing Authority Board approval for the set aside of the makai remnant to the Hawaii Public Housing Authority.”

Unanimously approved as amended (Pacheco, Johns)

M-4 Issuance of Direct Lease to Imperium Renewables Hawaii LLC. At Kalaeloa Barbers Point Harbor, Honouliuli, Ewa, Oahu.

Member Johns recused himself

Glenn Abe, representing Department Of Transportation Harbors Division, wished to amend the submittal because they inadvertently left out the Environmental Assessment Requirement. He handed out a summary of the EA process that Imperium Renewables went through. He mentioned that the applicant has 1 year from whence the lease is issued to complete construction.

Ray Iwamoto, attorney for Imperium Renewables Hawaii LLC, stated they will be constructing the infrastructure for the site and will actually be constructing more than what is necessary for themselves so they will set up something for reimbursement when the construction is finished.

David Leonard, Chief Operating Office for Imperium Renewables Hawaii LLC, was present to answer any questions.

Mr. Iwamoto went over the supplement to the submittal that Mr. Abe had handed out.

Henry Curtis, representative for Life of the Land, testified against the project. He requested a contested case.

Motion was made to enter into Executive Session to discuss with the Board's attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities. (Edlao, Pacheco)

The Board went into Executive session at 10:42 a.m.

The meeting resumed at 10:55 a.m.

Chairperson Thielen gave instructions on what Mr. Curtis needs to do to formally request a contested case and that this item will be placed on the November agenda because in the event that there is no contested case, the Board may take action at the next meeting. However, she mentioned that the Board would feel more comfortable if the Department of Transportation provided additional information to the Board due to the scale of this project.

The Board:

Motion to defer decision making until November

Unanimously approved as deferred (Gon, Agor)

D-1 Encroachment on State Unencumbered Public Land by Robert C. McKnight Located at Kapaahu, Puna, Island of Hawaii, Makai of Plat (3) 1-2-001:

Mr. Tsuji stated that he will be calling on Mr. Lemmo because he was involved with the investigation of this encroachment issue. What had happened was the property in question was originally shoreline property, but because of lava accretion, that additional accreted land becomes State land. The respondent was apparently building structures on these State lands and Mr. Lemmo was looking at it as a conservation district use violation. However, an issue arose with the Attorney General's office about whether the accreted land is conservation lands, therefore, to be extra cautious, Mr. Lemmo approached the Land Division and asked them to deal with it as an encroachment action. Bottom line is that this respondent has been building structures on State lands and has received repeated requests from OCCL to cease and desist, but has not stopped the activity.

Mr. Lemmo stated that Mr. McKnight started to build a pavilion in the area and was given several cease and desist orders, but the work continued. Mr. Lemmo went out to the site once and noted additional work. Mr. McKnight has been continuously sending staff construction plans and drawings, so it appears that he has not stopped the work nor is he willing to stop the work. Staff has major concerns because on a hazard scale, with 1

being the most hazardous, this area is rated a 2. Also this area is an old lava bench and can collapse without warning.

Mr. Robert McKnight, the owner of the four ocean lots in question, stated that the land was un-surveyed when he started construction. He purchased the lots a little over 3 years ago and did an extensive clean up of the area. He has done his own measuring to determine the boundaries of his property.

Member Johns stated that a survey of the area was done in June 2006. Mr. Lemmo verified that it was done by the Department of Accounting and General Services survey crew and they GPSed the location of the pavilion and found that its about 200 feet seaward of the old shoreline.

Member John inquired if Mr. McKnight had anything to dispute the DAGS survey. He responded that he only had his own measurements and the existing shoreline.

Member Johns noted that the DAGS survey map is similar to that of the 1981 USGS map.

Mr. McKnight proposed that perhaps a variance could be granted because his intention was to keep those ocean front lots in conservation or he is willing to offer the State a boundary adjustment that would accommodate this discrepancy.

Chair Thielen asked whether Mr. McKnight is willing to abide by the certified line in the 2006 map and then remove the structure on State land. He responded that he is willing to abide by whatever is decided, but the letters he received from OCCL only suggested that he may want to remove this structure. Therefore, he decided not to. He wishes not to take down the structure because he's hand built it, bought the property, and has all of his money invested into this. If he has to take the structure down, not only does he not have the funds to do so, he also has take out the structure without causing damage to the area.

Mr. McKnight then mentioned that he had a survey done of his property and found that he is 180 feet from the somewhat nebulous, old coast line.

Chair Thielen questioned staff about why the administrative costs listed in the fine are higher than normal. Mr. Lemmo responded that it's because numerous people had to go out to the sight and the air fares add up.

Member Pacheco made a motion to make a change to the recommendations. He wished to delete the \$4,500 fine, therefore, making the total fine \$2,100.

Member Johns second the motion for the purpose of discussion.

Member Edlao noted that he was going to follow Member Pacheco's recommendation, but feels that there was blatant disregard against the notices, therefore, he can go either way; whether the fine stays or is taken out.

Member Rob stated that he understands how confusing it is out there and the survey of the shoreline was done completely piece meal, but he feels that compared to what took place in the Haseko case, this situation needs to be put into perspective. He also knows that Mr. McKnight will have considerable costs trying to remove the structure.

Members voted and Member Edlao and Pacheco were in favor while members Agor, Johns, and Gon objected.

The motion did not pass.

Member John made a motion to reduce the fine to \$2,500 plus the administrative costs.

The Board amended Recommendation No. 1 by reducing the fine from \$4,500.00 to \$2,500.00. The Board affirmed the assessment of administrative costs of \$2,100.00.

Unanimously approved amended (Johns, Pacheco)

K-1 Request for Deviation from Conditions Previously Approved by the Board of Land and Natural Resources on Fourteen (14) Conservation District Use Permits for Single-Family Residences, at Haena, Kauai c/o Roy A. Vitousek – TMKs (4) 5-9-002:18, 21, 22, 35, 39, 41, 43, 44, 46, 50, 51, 52, 61; (4) 5-9-005:21

Mr. Lemmo: Okay this is item K-1 Request from deviation from conditions previously approved by the Board on fourteen (14) CDUA's for single family residences this is in Haena area of island of Kauai. This is a rather short, detailed oriented submittal so I'm not sure how you want me to approach it. I can..I'm gonna have to read some of this. On March 23 the DLNR sent sixteen (16) certified letters to homeowners in the Haena area requesting them to cease unauthorized commercial use "vacation rental use" of their dwelling. We asked them to stop the use by June 30 of this year or face fines of up to \$2,000 per day. In April of this year we received a letter from their attorney, Randy Vitousek and he asked for an extension of that deadline to January 15, 2008 to discuss other avenues or means in which to resolve the alleged violations. In that transmittal, he also requested a contested case hearing. He's representing fourteen (14) of the sixteen (16) landowners at this time. On May 30, 2007, the DLNR issued a letter to Mr. Vitousek indicating that it might consider an extension until January 1. They had to agree to a number of stipulations of course one of them was that they had to stop doing what we asked them to stop. We also told him that his request for a contested case hearing was premature because we didn't consider the letter that we sent him a formal order of the department within the meaning of section 13-5-3, HAR. So basically, we issued another letter to Mr. Vitousek in September indicating that we might allow an extension of up until January 15 if they once again agreed to cease unauthorized commercial uses. Asking them to submit sworn affidavit that they agreed to stop using the single family dwelling for rental or any other commercial purpose, and actually stop such uses by January 15, 2008. We also said should his clients not agree to that, we

would commence enforcement immediately starting January 1, 2008. Meaning we would reissue orders and do the detail investigation and bring the case before the Land Board. On September 10, Mr. Vitousek submitted a letter requesting that you permit a deviation from the condition that prohibits the commercial use of the property. So in essence, in summary, Mr. Vitousek is asking you to delete any language that purports to prohibit the owner of a single family residence from renting the property. Basically we wanted to give Mr. Vitousek an opportunity to address the Board so I talked to the chairperson and we have scheduled it for today to give Mr. Vitousek an opportunity to address you with his concerns. However as the staff report points out we believe that this request for a deviation from the standard conditions of those, of everyone one of those permits is premature. It would represent a digression from our efforts to enforce our conservation laws. We have to keep in mind that these people have, the people that have been the subject of the investigation have been aggressively marketing vacation rentals on internet sites, through marketing companies, through management companies and this is clearly in our determination at odds with the intent of the conservation district and the specific conditions of those permits. So once again our remedy is to simply have them to stop doing it without us even having to fine them and they would just certify that. So basically we're recommending to you today that you set aside this request for a deviation pending the outcome of the Haena unauthorized vacation rental investigation. And there is also a, Mr. Vitousek submitted a brief which you should all have a copy of and I, so this is obviously his memorandum in support of the deviation, in support of discussing the deviation.

Member Agor: So basically Sam you're saying that after they comply up to the extension of January 15, if they comply from now until that time then the issue of deviation can come back to the Board?

Mr. Lemmo: The issue of the violation?

Member Agor: No deviation.

Mr. Lemmo: Deviation. Well there won't be a need for a deviation request. Well yeah if they want to stop, if they stop and they comply and then they say okay we're in compliance now and we're not doing it any longer and we want to discuss the deviation now so we can now commence doing that legally.

Member Agor: Yes. Okay that's the purpose of your recommendation.

Mr. Lemmo: Yeah, that's correct.

Chairperson Thielen: Any questions for staff? We have Randy Vitousek that have signed up to.

Mr. Vitousek: Good Morning. I'm Randy Vitousek and I represent the members of what we're calling the Haena Hui Hou. It's fourteen (14) property owners at Haena that are here today. I'd like to introduce Gary Apolonia Stice. Gary is a professor emeritus at the

University of Hawaii in Marine Geology. His wife is born and raised in Camp 11 in Spreckelsville, raised in Lanai. We have Collen Faye, she is a fifth generation Kauai resident her children who are part owners of the property are six generation. We also have Mike and Liz Tiernan. Liz is a proud graduate of Aina Haina elementary. I just wanted you to meet some of the people who are, who are among the Haena Hui members. Basically this started you know the Haena Hui is an unusual area, Haena Hui partition area is an unusual area. It was created by a partition lawsuit, it created a number of lots which were partitioned out to different people who held partial interest in the big parcel. And from the beginning, I mean these subdivisions were created without DLNR approval even though it was in conservation district and it's been recognized from the beginning that Haena is a little bit different. It's not like a regular conservation area where you have isolated parcels that are surrounded by lands of high resource value. This is really an area where there are lots side by side by side and there's an invisible boundary and more lots side by side by side which are in the residential district and regulated by the county. So the DLNR at one point proposed regulations that would treat Haena Hui lands differently from other conservation lands and would create a special category for Haena Hui conservation, residential lands. Interestingly, during that same propose rule making or proposed revisions to the rules they proposed changing this condition, the condition that is allegedly being violated for all conservation residences. What happened was these orders were served with cease and desist orders saying that they should stop operating vacation rentals on their property because they had a condition in their permit which prohibited rental and other commercial uses. Okay and so there were other owners in Haena who were, who had the same condition in their permit who were doing long-term rentals. In other words who would rent their property to other people including renting to Karen Diamond for example. Those people didn't get letters because somehow the Department decided that long-term rentals was different from vacation rental even though the condition prohibits rental. Okay there were also owners who used their property that had conditions like this for commercial purposes like scuba tours. They didn't get letters either.

Chairperson Thielen: Mr. Vitousek, I'm sorry its just been a long day and we still have quite a bit of an agenda between us and you sound like you're trying to get into an argument right now about whether this is commercial use or not. And what we have is a request from you for a deviation.

Mr. Vitousek: That's right.

Chairperson Thielen: to permit the vacation rental or the commercial use. So you do have conditions in your permit, in the permit for these properties that say no commercial use and you are before us today to seek a deviation to permit.

Mr. Vitousek: Actually what I am before you today, as I read the staff report, the staff didn't present the Board with information on the merits of the petition. Staff didn't present the Board with any information on the pros and cons of deviating from, from this, from this condition. What they asked is for a continuance

Member Johns: Until?

Mr. Vitousek: Until after they were able to prosecute us for violating the condition. And what we did when we were served with these, we requested additional time and we requested the opportunity to address the issues through alternative means. Now what I'm trying to do is address the issue by pointing out the condition as written is unpermissibly vague and ambiguous and has not been enforced by this Board on in a consistent manner for decades. And that's part of my basis to request that there be a deviation from the condition. So if I can't make that presentation then what I would ask is that this matter be set for like a determination on the merits of our application. In other words that the Department present its position to the Board on whether or not there should be a deviation and give you some data on it and like explain to you why it is that renting a house as opposed to living in it adversely affects the conservation district.

Thielen: So that we can take up when the staff completes its investigation on the.

Mr. Vitousek: Well, what we are request. Right now we're, we've requested an extension of time that was granted by this Department. The Department granted an extension to December 31. And so what we're trying to do is address it before we goes off into an enforcement action. In other words we could go to December and they could find us in violation, we could go to contested case, we could go done the whole route on a violation then we could come back here maybe a year in a half later and ask you to re-evaluate the condition exactly like you did in 1997 when you proposed, when the Department proposed that the condition be changed.

Thielen: And it did not change it. Correct.

Mr. Vitousek: That's correct but it said the condition as written was unreasonable, and unenforceable, and over broad.

Chairperson Thielen: I think that again is going into the discussion though at the end of the investigation when there is a recommendation that comes back to this Board on that condition itself.

Mr. Vitousek: What you're, right and I haven't right and I haven't

Chairperson Thielen: My understanding was there was a request for a deviation to permit the commercial rentals of these properties. Staff's recommendation before us today is to not grant that deviation.

Mr. Vitousek: Actually their recommendation is to set it aside whatever that means.

Chairperson Thielen: Sorry, to set aside the request for a deviation and allow them to complete their investigation.

Mr. Vitousek: Well it sounds to me like a request for a continuance and what I'm saying is that what we'd like to do is have this issue addressed before we go into an enforcement action. In other words, we know what the issue is, we know what the condition says, why can't we.

Member Johns: Randy, how would we do that then? The normal process would be or the process that's in motion is you have an enforcement action and you guys want to do a contested case and then we go to a contested case and it comes back to us like you described. How does what you're proposing change that?

Mr. Vitousek: Well the way it changes that is in the end

Member Johns: I'm not sure there is a petition

Mr. Vitousek: There is a petition.

Member Johns: Describe that process.

Mr. Vitousek: Yeah sure. What we do is look at the rules and we're trying to find a way to address the issue without it being based on them trying to prosecute us, the Department trying to prosecute us and us trying to defend. And what we found was rule 315-42C which allows someone to petition for deviation from conditions.

Member Johns: Okay.

Mr. Vitousek: And so that's what this is. We filed a

Member Johns: How does that get, how does that petition get processed normally.

Mr. Vitousek: Well I've never seen it before but what I assumed was because it had criteria that in other words it says deviation from a condition maybe considered by the Board when supported by satisfactory written justification stating 1, 2, 3, 4. So I have filed a written request stating those and what we're asking is that the Board make that decision. What OCCL is asking is that it be delayed.

Member Johns: Right, Right.

Mr. Vitousek: We're asking that it be decided before they prosecute us.

Member Johns: Right I understand but from the AG's standpoint, or Sam how do you normally process. I know how petitions for rule making changes have been processed but petitions for deviations is that just a regular Chapter 91 or Chapter 92 sunshine issue that comes to us or is it a separate hearing process? I'm just kinda asking . . .

Mr. Lemmo: No, there's no set . . .

Member Johns: Asking how logistically how it's done

Mr. Lemmo: We've had a couple of cases where people have asked for instance a reduction in a set back to a property line. And so we presented that to you in a context of a normal review, core review process and saying does this meet, can you grant a deviation from the set back in this case.

Member Johns: As part of a CDUA application or enforcement action

Mr. Lemmo: As part of a CDUA. Not enforcement. I've never done anything on enforcement. And there's been a, and certainly that's what the rules says that you can grant a deviation from the standard condition if it meets but we've never . . .

Member Johns: Cause what we're talking about is process. I think it sounds like because it's either do it through the process where you find a violation, you finish your enforcement investigation and find a violation or not. But if you do, then make the determination whether to have a contested case then we go through that, then it comes back to us. And that's one way and in that during that contested case these argument you make in here will be made in that contested case. And at the end of that, they don't like it, or we don't grant the deviation then we find an enforcement then we're in a contested case and make your arguments again. I'm just trying to figure out which way is more efficient.

Mr. Lemmo: I think it's more efficient to proceed with the enforcement action and

Member Johns: Because?

Mr. Lemmo: Because if we take up the petition and argue the merits of a deviation this is going to take a long time. At the end of the day, you might say yes, you might say no. If you say yes, then fine everybody is happy. If you say no, we go back into enforcement mode. And so we are going to be at least a year or year and a half behind the ball if you were to go to the negative on the deviation.

Member Johns: Okay.

Mr. Lemmo: So I'm saying we're in a violation proceeding here or a quasi violation proceeding and he's asking you to do something outside that proceeding and I'm saying I don't think that's in the greatest interest of the Department.

Member Johns: Is the process, the normal violation process with the contested case is that some how, do we get better information from that then we would get through the petition examination process. Or is one better than the other or we're going to get the same kind of information

Mr. Lemmo: The contested case you would be a good venue to produce that kind of information you have witnesses, you introduce evidence, you have examination and cross examination and you have deposition you have the whole quasi-process.

Member Johns: From its resource protection, just internal resource protection, if we go through the petition and then we don't come up with the result your client like then we're gonna be right where we are today anyway.

Mr. Vitousek: Oh yes but . . .

Member Johns: And so I don't know how that is better. So tell me why it's better.

Mr. Vitousek: Okay, the reason I think it's better because basically if we go into a contested case the issue will be, is the condition enforceable because it's too vague and you basically, the Department basically admitted it's too vague. And so if we get a determination it's too vague all that is going to do is decide we can't prosecute these people. It won't do anything to craft a condition which best fits the interest of the Department and the people in Haena where the Department has recognized Haena is different and that this condition is overbroad. And so what we're trying to do, is do it in a non-adversarial fashion to see if there is a way to avoid having prosecuting these people in order to craft a condition which protects the environment and yet allows people property rights that are consistent with the nature of their homes in Haena.

Member Johns: Consistent with . . . maybe this will come up later but the residential, urbanized property that's right adjacent does it have vacation rental restrictions? How does the county treat that?

Mr. Vitousek: Right now there's a, right now the county has a pending ordinance, as I understand it and Mr. Agor would know better than I. A pending ordinance to right now not to prohibit. There is a pending ordinance prohibitive to set up a use permit process where someone could apply to do a vacation rental if you met certain criteria. So there is a way to make that consistent with what's going on immediately next door in the urban zone portions of Haena. So that's kinda what we're asking and frankly that 's what we asked from the beginning when we asked for the additional time to try to find a way to resolve it that doesn't involve you know, litigating over alleged violations. Actually one other thing, and that is like you know there hasn't been a lot of consistency. The cease and desist order said no vacation rental. The next order said no commercial use. The next order said no rental or commercial use, you know. And right now what their saying, if we agree, if we sign an affidavit that says they won't use the property for rental use or other commercial purposes then they won't prosecute. But they haven't served anybody with a cease and desist order who rents their property on a long-term basis. So they're basically asking these homeowners to give an affidavit that they won't do something that they haven't prohibited statewide from doing in the conservation district. Which is, if you can't live in your house, you can rent it to somebody else. And so I'm afraid that if we go to a contested case on, if we go to court on it and the decision is that it's not an enforceable condition that applies everywhere, you know. That's going to be, it's gonna

say this thing is too big to enforce. Whereas we have the opportunity to recognize Haena is a little different and the condition could use some modification to accomplish that in a manner that doesn't have broader application and doesn't entail as confrontational decision making process.

Member Agor: Sam I was under the impression that we couldn't entertain the deviation while there's a violation.

Mr. Lemmo: Well, there was a, this is, there's been comments made in writing that were not technically, there is no formal order for them to cease and desist the use so we are not technically in a violation proceeding. What we've tried to do is tried to get them to cooperate with us and we've given them time to do that. And at the end of that time if we don't see the cooperation then we're going to a formal action. At that time yeah we could not discuss the deviation because the deviation amounts to an application in my mind and you can't entertain an application when you have, in the middle of a violation proceeding.

Member Agor: Right, right, right.

Mr. Vitousek: And so our point is we're not now so we can entertain a violation now. We can entertain it now. And now we can talk about it now and so let's try to do that and see if we can avoid going into the rest of the process. That's why we're trying to have this, that's why we asked for the extension. That's why we're trying to give some

Member Agor: So you're issued a cease and desist and

Member Johns: Is there a cease and desist?

Member Agor: What a the notes

Member Johns: There's a notice.

Member Pacheco: Yes.

Mr. Lemmo: There's a notice

Member Pacheco: This whole thing.

Mr. Vitousek: Was from December 31

Member Johns: The notice's that Randy referred to about vacation rental, commercial use

Member Agor: Right.

Member Johns: Rental this, what were those letters?

Mr. Lemmo: Those are the letters that we were sending to the homeowners and his talking about specific language. It's basically semantics.

Member Johns: No, I understand that but what were those letters, were those letters intended to be the beginning to triggering of an enforcement action? Were they cease and desist orders that you would then measure as the beginning of an enforcement action or not?

Mr. Lemmo: You know I'm not, I'm not an attorney and I don't really, I'm not qualified to get into the details of whether this constitutes a

Chairperson Thielen: Sam, we're referring, these are the letters you have as exhibits. Exhibit 2 and so you have, you have until June 30, 2007 to cease any unauthorized use on the subject property.

Mr. Lemmo: Sounds like a cease and desist

Mr. Vitousek: And that was extended to December 31. So we haven't reached the point where we are under an order to cease and desist.

Member Pacheco: Sam, would you agree with Mr. Vitousek's characteristic of Haena as a special case.

Mr. Johns: I was going to ask that same question. Is there a middle ground? I mean, is what your clients want, they want to do vacation rentals there however we define that – short-term rentals, daily basis, weekly basis or whatever cause if that's what your clients want, ultimately then you know we might view the deviation differently if there. I'm not sure what your clients exactly want other than saying that they don't want this violation brought against them.

Mr. Vitousek: All fourteen (14) clients don't want a violation brought against them.

Member Johns: I see that.

Mr. Vitousek: Other than that, there are differences. It's a question of a number of things. Right now, the problem is we are being told that they can't rent at all, you know. And that's a problem because these people you know the property tax on these properties are \$2,000 a month.

Member Johns: So how do we normally deal with that? Somebody that says the can't do quote unquote long-term rentals, however you define that.

Mr. Lemmo: Yeah, the rule says, the rules a rule. If you have a condition that says no rental or commercial purpose if your long-term rental is an exchange of money. It's the same thing.

Member Johns: So right now, the, the Department's position is that any rental is prohibited?

Mr. Lemmo: Unless otherwise approved by the Land Board.

Member Johns: And so, okay.

Mr. Vitousek: Yeah.

Member Pacheco: So the only people you brought forward was the ones you could find on the internet advertising for vacation rentals.\

Mr. Lemmo: Yes, and who had a condition that specifically prohibited commercial use.

Member Pacheco: Right.

Member Johns: Ron, under the county's rules about long-term rentals versus short term rentals, how is the county deal with that?

Member Agor: Right now they've got a proposal to address just vacation rentals.

Member Johns: And how do they define vacation rentals?

Member Agor: By the type of business that they do. If they are advertising vacation rental.

Chairperson Thielen: But is it, is it less than 30 days?

Member Agor: Yeah. Yeah.

Member Johns: Less than 30 days. So more than 30 days is kinda considered to be okay in any district residential or otherwise under county zone?

Member Agor: In the proposal, yes.

Mr. Vitousek: Right now it's all okay but they are proposing to limit it. They're proposing to make it now okay for renting under 30 days unless you have a use permit. And so I'm going to read here is from the 1997 discussion draft put out by the Department.

Mr. Johns: I read that.

Mr. Vitousek: This is an unusually broad condition strictly interpretive preclude a homeowner from renting his house if for example, he needed to live on another island or otherwise be unable to use the house of r period of time. Such restrictions seemed unreasonable.

Member Johns: I think it's a good, that's probably good thing that I withdrew that management report. When I was the chair we never did anything with it.

Member Vitousek: I understand that but it is a statement made by the Department.

Member Johns: For the record, I understand that but we never acted on that . . .

Member Vitousek: No, I understand that.

Member Johns: . . . on those management recommendations with regards to changing how you treat the conservation district with regards to single family residences which is something that still needs to be wrestled with, I agree.

Mr. Vitousek: Understood but when it comes to. But what I'm trying to say is pretty straight forward. It's just, it's just that you know both, there are two recommendations that were withdrawn. One is that the recognition that Haena is different and that the conditions for Haena should be tailored very specifically because it's more like a regular residential district. And the other was that the condition unwritten, as written is kind of unreasonable and it would be better to tailor it more specifically to identify what types of uses might adversely impact the conservation district and get a record, you know. And so that's what we are asking. We're asking that that consideration be made specifically for these parcels before we start prosecuting. That's, that's what we are asking.

Chairperson Thielen: I'm sorry, going back to Tim's question on what your clients' want. Would your clients agree to a deviation which would permit long term rentals, month to month or longer, but no vacation rentals?

Mr. Vitousek: You see, I can't answer that question for them right now but I can . . . That's the kind of thing that would come out in the process and that they would have to look at and consider. I just don't have the authority to answer that for all of them right now because what we don't. . . Frankly, when I got the notice Monday that this was being heard today I saw that this was to be continued and so what we'd ask is that it be continued until December 14th and that we actually have a hearing on it then. Where the Department presents its position and we present our position.

Chairperson Thielen: And have they agreed to cease and desist commercial use pending?

Mr. Vitousek: They don't have to, like I said the Department extended it to December 31st. So that date hasn't come yet.

Member Pacheco: If we do this petition process, and I mean I don't understand your worried about losing time, but it seems to me like we're going to end up if, if we're not successful in the petition process then we're gonna be, end up in a contested case hearing anyway.

Mr. Lemmo: I wanted her to bring me a copy of the rules for, Rules of Practice and Procedure because the Board can order a contested case hearing too, I think, on an issue. And this whole process has been one of Mr. Vitousek trying to buy more time for his clients, which is fine. Because I've been here from the beginning and I'm here now and I hopefully I'm gonna be here to the end. And its been we need more time, we need more time and we've said, we've granted them more time grudgingly. And if you, we go into a discussion about deviation this is going to be more time. At the end of the day, if someone is expecting my office to say publicly that we're going to allow short-term vacation rentals in the conservation district then I've missed something. I suggest we just by pass this, go into a contested case hearing, and let everybody make their arguments, get a determination from a hearing officer, and bring it back before the Land Board for a decision.

Member Johns: But a, the hearing officer in that situation would the hearing officer even go to the issue of a deviation or a quote un-quote settlement or anything like that or would they just merely say, violation. The rules are what they are and we interpret them this way that's the end of it. That's why I'm not sure that would happen in a contested case.

Mr. Lemmo: They could.

Member Johns: Until you, they could?

Mr. Lemmo : Sure.

Mr. Vitousek : On the enforcement action I think, I think what Mr. Lemmo is saying is that he wants the Board to order a contested case on our petition to deviate.

Mr. Lemmo: No.

Mr. Vitousek: No?

Mr. Lemmo: I am just saying, ordering a contested case on this issue of illegal vacation rentals so that it could go into a quasi-judicial process.

Member Johns: What you're saying, basically you take their petition up but take it not as a petition but take it as a contested case.

Mr. Lemmo: Yeah, as information and fact. Or we can set this aside and then wait til December and if we don't see the compliance, we'll initiate the process.

Member Johns: Let me just ask, other than wasting more time in a meeting like this, what, how would you see it if we did take the petition up in December? How would that change anything as we're doing now? Let's say at the end of the hearing we set aside some time or whatever you call it in December, we hear some arguments and at the end of that we say, continue on. Will it hurt or help us or dies it not do anything?

Mr. Lemmo: Well I don't know, that's fine.

Member Johns: Does it hurt us?

Mr. Lemmo: I'm not, I mean

Mr. Johns: Does it help us? Does it hurt us? Or does it not do anything?

Mr. Lemmo: If he doesn't get what, if he doesn't get he wants for his clients does he then. What other legal, what other legal avenues does he have to pursue at this point. I don't know. I'm not an attorney.

Member Johns: Well, I would assume at the end of that. Are you saying that allowing a hearing

Mr. Lemmo: Allowing a hearing on the petition, deviation

Member Johns: Allowing a hearing would allow another contest case hearing too, you only get once.

Mr. Lemmo: I don't know.

Member Johns: So that could be the down side of it?

Mr. Lemmo: That's one thing, I think. The other down side is you know . . .

Member Johns: Does it taint the contested case in anyway if we have this petition for deviation ahead of time then we make a decision not to grant the petition?

Mr. Lemmo: That's a good point.

Member Johns: I'm just asking. I'm just trying to figure it out. It's always better to have more information before we embark on a fight, but if we're not. . . but if we're gonna end up in a fight anyway. Or, does it hurt us to have that information before we decide to cause we're not, I don't think, well, we haven't decided to take you off your track where you are now. Where it stands right now is December 31, you're going to decide whether you're going to file or you're gonna start an enforcement action.

Mr. Vitousek: Hopefully, if there is a violation.

Member Johns: If there is a violation at that point. But that's where it stands today. December 31, you're going out there, finish your investigation and then sometime in January come to us and tell us what's happened.

Mr. Lemmo: Some people may have stopped already, some people may stop, but then they'll probably be a few that are going to continue.

Member Johns: You're not, well, we haven't decided that, whether we are gonna knock you off that. But I'm saying if we say stay on that track and we also say lets hear the petition in December, what's wrong with that?

Mr. Lemmo: To me, to me,

Member Johns: What's right with that?

Mr. Lemmo: I'm just the staff guy, in my mind it's so clear cut that you, they're in violation, that I'm simply just trying to be efficient, I don't want to waste people's time. And you know, schedule hearing upon hearing, you know, at his request. I mean so you may want to do it and that's fine and we'll do it if you ask us to do that. I'm not gonna fight you on that at all. For me, it's just, I don't have a good visceral feeling about it.

Member Johns: We'll, I'm just trying to find out what you think it would be a way for us to make a better decision.

Mr. Lemmo - I didn't think it would help.

Member Pacheco: You know if , if we go down and make this decision, and I agree with you, it is very clear cut. I mean, there's permits, no commercial activity but vacation rentals or whatever, that is a violation. To me, you know that's not getting to the issue of what's going on out there, which is that we've got you know, basically, this area of land that has this different you know set of rules for basically the same thing going on and its just common sense you know that, that market drive is gonna to be there. And so we've got these permits that are there allowing these things to happen and we've, there's probably people renting, doing commercial activity there now that we didn't send any cease and desist letters to. So this whole thing is going to be an on-going issue if we just come in and say, "yeah you guys are in violation and this is it." We're going to be revisiting over and over again because that is the nature of that place. And if it isn't, doesn't do any harm to the resource that the vacation use, if it is something that's the same as going on the other land, why can't we have that discussion to figure that out, you know if it is. I'm not saying that . . .

Member Agor: Let me add on this, I was hoping we could entertain the deviation, but without the cloud of the violation and I don't know how to get there because I thought we were in the face of a violation right now.

Member Johns: If you want to do that the enforcement . . . stands at the December 31 date.

Chairperson Thielen: You know Mr. Vitousek, I think one of the problems from the staff's perspective is a frustration in that in a situation where they've made a good faith

effort to work with your clients and have extended a cease and desist in going into a formal action that the request is coming now for a petition. And there is a concern that if the Department is. Any time they start to take a formal action, is there gonna then be a petition for a deviation. And I think maybe I'm hearing other Board Members coming up with a solution where they do not send staff off track, where they can continue the investigation, but also accommodate this request for a petition, but not prejudice that investigation in the event we deny this deviation. And so maybe one way of not prejudicing our investigation would you be willing to make some agreements with the Board that if we were to entertain a petition for a deviation in the event we were to deny it to then permit the investigation to move forward and not seek an appeal or an injunction against that investigation pending a

Mr. Vitousek: If I could I back up, I mean the initial letters from the Department went out on March 23. On April 23, I wrote a letter to Mr. Young, specifically said requested the extension specifically so that we could evaluate and discuss with the Department other potential avenues to resolve the alleged violation. So I'm not ambushing anybody. I told them from the beginning that this is, that's why I wanted the extension is so that we could find another way to resolve it. And when they tried to find another way to resolve it, I was told that, that we have until, we have to agree in writing and further certify in a sworn affidavit to discontinue any and all use of the single family dwelling for rental or other commercial purposes by January 15 and the Department notes its position is non-negotiable. That's the letter from you dated this September 6, 2007. So that cut off any ability to try to find any alternative resolution and that's all we're trying to do. You know, we're trying to put these issues before and like the petition is directed to the Board not to the Department you know. The Department would have a position on it, of course, but the Board makes the decision. And so we've been very consistent in what we want to do. We want to get the issue before the Board in a way that it could be you know evaluated without, you know where all the different issues could be considered rather than just the enforcement issues and that's what we're doing. So we just asking for an opportunity to do that.

Mr. Lemmo: I guess another finding would be for you guys to find that you're feeling we are in a violation proceeding and so therefore, we can't entertain this thing and it really has to wait.

Member Johns: The other

Mr. Vitousek: Because it might be prejudicial to the violation.

Member Johns: Yeah. The other issue, I mean the other way, there's nothing to stop if

December 31, there's still a finding of some, of a violation then you ask for a contested case, and we immediately go into settlement discussion. And then, I guess the only question then is you have a third party, maybe a hearing officer kind of chewing on it until it before it came to the Board. And then the Board would look at the settlement and

you would look further and we would act on it. Is that, why isn't that acceptable as oppose to entertaining a petition before that happens.

Mr. Vitousek: Well, I mean, I guess one reason is we filed the petition. There is a petition pending before the Board. And so we, so that's already been done and.

Member Johns: The petition is to the Department or to the Board?

Mr. Vitousek: To the Board. Under the rule it says the deviation from conditions may be considered by the Board. So it's a request to the Board.

Mr. Lemmo: He filed a contested case hearing. The point is we're trying to work with him. We are trying to tell him yeah, we don't want to fine him. We don't want , just comply with the permit. So we're trying to, not get into a bunch of legal things here. But it's clear they don't intend to stop. Otherwise, they would have agreed with us and said yeah we're going to stop and after a certain date.

Member Johns: I understand. The petition, how do we deal with the petition from the AG's standpoint? We have a petition put in from to us again, so what do we do with it.

Mr. Lau: You're talking about this, today's item on the Board agenda?

Member Johns: No. What's the item today?

Member Pacheco: It is the petition.

Member Johns: We have to, we have to act on it a request for deviation.

Mr. Lau: It's just a regular Sunshine Law agenda. They have permits. They're requesting a change in their permits. You go through the same analysis that Mr. Lemmo cited under 13-5-42.

Member Johns: So no different then if the department had put an item on the agenda to waive a condition. It's just a motion from somebody else.

Mr. Lau: Um huh.

Mr. Vitousek: And what I said on that earlier was that the Department hasn't put anything before the Board on the merits of that petition. So I just think, we don't feel we would have due process unless there was actually a presentation to the Board on the merits of our application for the petition and how

Member Johns: So I mean concerns about what happens from a denial of the petition aren't we already pregnant on this?

Mr. Lemmo: On what?

Member Johns: The petition is in front of us already. We have to do something with it. We could I guess, defer action on it. And then but eventually if we do something with the petition it's already there in front of us. We have to live with the consequences of it, of acting or not acting. Or we could dodge it and not act. And say we'll defer because we have to

Mr. Lemmo: And again, I could have probably worded this differently.

Member Johns: But the petition for whatever, the rules allow the petition to be filed, has been filed. We can either deny it, approve it or defer it. So we have to do something with it.

Mr. Lau: Well.

Member Johns: We can't just ignore it.

Mr. Lau: It says "failure to secure Board approval for deviation before such a deviation occurs constitutes cause for the permit revocation."

Mr. Lemmo: Huh. I didn't see that.

Chairperson Thielen: So I guess that's a good point. Sseeking a deviation isn't a

Mr. Vitousek: If you don't, don't apply for the deviation before you deviate that could be grounds for revoking the permit.

Mr. Lau: Right, exactly.

Mr. Vitousek: That's what it says. Just like violations could be grounds for revoking a permit.

Chair Thielen: So in seeking the deviation are you acknowledging that your clients are doing rental activity on the property now?

Mr. Vitousek: I am yes, I am acknowledging that they are doing rental activity.

Chairperson Thielen: Okay and in some cases is it short-term rental activity?

Mr. Vitousek: I know there are short-term. It's not really fair facing an enforcement proceeding to ask counsel to make admissions on behalf of the client. But I believe there are owners out there who are doing short term vacation rentals.

Chairperson Thielen: Okay. And your clients are aware that you can also seek permission to withdraw the property from the conservation district through a boundary amendment if you feel that it's not necessarily appropriate to be in the conservation district?

Mr. Vitousek: Absolutely, our petition for a change in the sub-zone or special sub-zone, absolutely. But, but and I understand that and I looked at the rules carefully. But there's also a provision to petition. Yet, you see the one issue is that the Department isn't alleging we're violating any statute or rule. They are only alleging that we are violating a condition . . .

Member Johns: of the permit.

Mr. Vitousek: . . . of the permit, right. We felt the most efficient way of approaching it was a deviation of a condition cause they can't point to any statute that says you can't rent in the conservation district. There isn't any, it's just a permit condition. So that's the most efficient way of approaching it.

Mr. Lemmo: It's in the rule.

Chairperson Thielen: I hope your clients also though understand that this is a chronic issue across the conservation district, across the board. Although, they may feel that in their particular area you know, it doesn't make as much sense, there are other options if it's not appropriate to be in the conservation district, but certainly the rules apply across the board and it is a standard permit condition for that reason.

Mr. Vitousek: Absolutely, I mean I absolutely understand it has not been enforced across the board for decades and that's part of the problem, statewide.

Mr. Lemmo: That's a contested case type issue, you know. I'm sorry I didn't, I missed the section that Colin just brought up about deviation, and I didn't, I didn't see that. It seems to me that you, it's very clear from that provision I mean to one extent.

Chair Thielen: I would've think that provisions in the rules to avoid that situation where when somebody is confronted with violating a permit condition is to immediately seeking a deviation. And I guess the intent is that people would seek a request to deviate from a condition and have permission.

Mr. Vitousek: Absolutely, absolutely unquestionable, unquestionably. And I think if the Department wants to move to take away these people's conservation district use permits for their single family homes that's, you can do that. Then we will definitely be in a contested case hearing. It seemed a little extreme after acknowledging that the condition is, is unreasonable. Anyone would also think that a never mind. I think I said my share.

Member Pacheco: Commercial um, there is rules for commercial use in conservation district. Am I right? In the subzone?

Mr. Vitousek: Yeah there is a specific definition and this doesn't really . . .

Mr. Pacheco: On just the permit condition.

Mr. Vitousek: No, there is a specific definition of commercial use, that's correct.

Mr. Lemmo: Commercial uses are, some commercial uses are identified such as forestry, agriculture and a few other things, private parks.

Mr. Vitousek: Actually it's an important point because the rules do define commercial purposes as the buying and selling and exchanging of commodities, services and goods, which doesn't really fit this. So, usually there is a distinction between buying and selling of goods.

Member Pacheco: Buying of vacation rentals is not a service?

Member Johns: No, its not.

Mr. Vitousek: Usually not. That's why this is an issue in all, all residential areas. That's why it is an issue in the county. The county also prohibits commercial use in the residential district. That's why they're having to craft new rules specifically to deal with it because it doesn't fit the usual definitions.

Chairperson Thielen – I think we might need to confer with Colin about the petition for deviation.

Member Johns: You can do it, ask him now. While the violations being alleged as opposed to

Chairperson Thielen: Well now that this rule has been brought to our attention.

Member Johns: Colin, read that section again. We don't have that little

Mr. Lau: Failure to secure Board approval for a deviation before such a deviation occurs constitutes cause for permit revocation.

Member Johns: See the deviation, in order to prove the deviation is the same thing as proving the violation. So until you have, right now, basically you have an alleged violation and you have an alleged deviation. I mean that's how, I'm not making your argument for you, but one way of reading that is. How do you know that there's a deviation?

Chairperson Thielen: Because he's just told us there has been a deviation.

Member Johns: Well, but I mean how do you know that there's really a deviation until there's been some finding of that?

Mr. Lemmo: You guys have to find, I mean

Member Johns: Find a violation or find a deviation, it's the same thing almost.

Mr. Lemmo: I'm getting frustrated.

Chairperson Thielen: I think that Sam should bring food. I think, we have a situation though were it's similar to the Haseko where we have an acknowledgement that there is an activity going on, on the property. And we have people who are asking us to basically waive a permit condition. Also, trying to reserve their argument that this permit condition is not enforceable. So we can choose to either grant a deviation and allow them to continue to do rentals within certain you know conditions. We can deny the deviation. We can put it on to an agenda item for a future meeting to have a discussion on the deviation request itself.

Member Johns: I don't think we can grant the deviation because we don't the evidence in front of us from, and we didn't allow you to make those arguments and Sam's not ready to make those arguments which again to me is when you do it and how you do it because it's gonna come out eventually. Those arguments is going to be made somewhere in the next 18 months.

Mr. Lemmo: See what's going to happen if you, if you want us to act on this deviation, I'm going to write a staff report and I'm going to basically say, I'm gonna have to build an argument why we don't think granting the deviation is consist with our function of protecting conservation lands and the health, safety and welfare of the public. And he's going to come in with his argument and then that in itself is going to then spring into some sort of legal argument. And we're going get challenged on everything we say in our submittal and we're going to challenge what he said. It's going to set off a whole new set of, and I think the rule is written to avoid this kind of thing from occurring.

Member Johns - You would need to have parallel legal proceedings dealing with the same issue. One dealing with the . . .

Mr. Lemmo: Well they've made the change.

Member Johns: . . .violation.

Mr. Lemmo: They've made the change and the rule says that.

Member Johns: I'm just saying the reason the rules, the intent for the rule was to prevent parallel things from going on. One argument about the deviation and one argument about

the violation with separate tracks going to separate contested cases, separate court rulings when they should be one or the other.

Mr. Lemmo: Yeah.

Member Johns: Or, one after the other or one before the other, but not at the same time.

Chairperson Thielen: Is there a way we can invoke Colin this contested case hearing where the Board can ask for one where we're just throwing this whole matter into a contested case hearing to be resolved. So it's not on the deviation or on the enforcement, but the just the entire thing. And get you guys in and moving forward on this.

Mr. Vitousek: I think the Board, if I may, I think the Board has the authority to could at this point the Board could decide to refer the petition to a contested case hearing. I think the Board has that authority.

Chair Thielen: No, I'm not asking for just the petition. I'm asking for both matters to go on into a contested case hearing so we can just resolve the entire thing at once. What may come out of that is a recommendation to this Board to grant certain deviations and to prohibit certain other things. But I'm not seeking to segregate the two. I'm seeking to put the two together into a single hearing.

Mr. Vitousek: Yeah, but see there hasn't been any finding of a violation. What that would do is if there was a member of the 14 who decided to avoid going into enforcement action then they could avoid it. In other words, basically you are forcing them into an enforcement situation where they may not want to go in. Basically, because of the timing we haven't gotten there yet.

Chairperson Thielen: Well, they can always say that they are going to abide by it and if there were any enforcement to come out of it, it wouldn't apply to them.

Mr. Vitousek: What I'm saying is there's no enforcement per se. And so I don't know what you'd be sending to a contested case hearing. You could send a petition, but I don't see, there's no enforcement proceeding. No ones been served with any enforcement proceeding.

Chairperson Thielen: We can ask for one on our own motion. And so what I'm asking

Mr. Vitousek: Not until December 31, though.

Chairperson Thielen: Well, that's the staff's recommendation.

Member Johns: You already extended it . . .

Chairperson Thielen: Again, what I'm trying to find is a compromise to allow us to get into a global one time proceeding that will resolve all the issues. As oppose to having separate proceedings that may run on parallel tracks.

Member Johns: Ron, you want to defer this? You can't two for that.

Member Agor: I am more inclined for the Board to put it to a contested case, but I'm not inclined to include the violation. I would have if my impression of this was that absolutely was a violation, but today I'm not certain.

Mr. Lemmo: So have a contested case hearing on the deviation request?

Member Agor: Yes.

Mr. Lemmo: That's ok.

Member Johns: What does that do to December 31? It's going come back to us on a separate track?

Chairperson Thielen: I think the question I would have for Sam on this is he was not really given an opportunity to bring forward the information on the investigation. This is mainly a presentation just on the petition for a deviation. And maybe to give them the opportunity to present that and whether you feel comfortable throwing everything into the pot for a contested case hearing because if one of the reasons that you're not comfortable withdrawing that enforcement action into a contested case hearing is because you haven't seen the evidence I mean that wasn't the purpose of the meeting, the agenda item today.

Member Johns: If just you moved on

Mr. Lemmo: By the time we have a contest case . . .

Member Johns: I was going to say, if you just moved on the that today come December 31 you're gonna be able to either consolidate or drop out one or the other and move along that path anyway. So, it might help.

Member Agor: To include it?

Member Johns: No, to not include it now but you would able to do it come December 31st. We are not telling you to stop doing your other thing, but then you could consolidate.

Chairperson Thielen: Mr. Vitousek would you be willing to agree to a consolidation in the event come December 31 as a recommendation to this Board to proceed with the enforcement would you be willing to agree to consolidate the two contested case hearing procedures.

Mr. Vitousek: I would be, I would agree to recommend it to the clients. I don't have the authority to make that representation on their behalf because it's kind of hypothetical but I think it makes the most sense and I would recommend that. It makes more sense to have one proceeding than two and to consider all issues. And when we get to December 31, there maybe, there maybe some enforcement proceedings, there maybe none.

Member Johns: It will be clarified.

Mr. Vitousek: Right.

Mr. Lemmo: Yeah, we ultimately, even if you got, ultimately on the deviation, that is going to be a kind of a contested question. And if you say have a contested case on the deviation with the option of after December 31, combining it with any pending violation proceedings you know by the time things get rolling in January you know it might actually come together as one action.

Chairperson Thielen: Um huh.

Member Johns: I think it would. Or be clarified.

Mr. Lemmo: As long as we're all able to do that.

Member Johns: What's going to happen, well does our AG see a problem with that happening?

Mr. Lau: Wait until December 31 to decide whether you're going to consolidate or not. If you are, if you even contemplate it.

Member Johns: Right, Is that is doable.

Mr. Lau: Doable.

Member Pacheco - I don't understand if we're willing to entertain a contested case for the request for the deviation why don't we just act on accepting the request and the Board discussing this instead of running a contested case.

Member Johns: We don't, I guess the question is how do we get the evidence and the arguments regarding that in front of us. And you could do it in the meeting in December or you could do it in a contested case where you are going to appoint a hearing officer and there will be discussions. During those discussions you can get to a settlement on that before all of this breaks. That's the difference. If you just, if you just leave it on as we will take it up because we don't have the evidence to act on it today so we'd take it up sometime in the next three meetings then he would make his argument, Sam will make the argument for the Department, then it would come to us and we would examine it at that point. There would be less opportunity I think for potential settlement discussions. To me that's the difference. But I don't know Sam what you think?

Mr. Lemmo: Well, I just think Randy is ultimately going to, I mean, it's up to you ultimately what happens. Staff is going continue to recommend that you know we don't believe that the short-term vacation rental is viable. And we believe that we can get you to agree with us on that. So Mr. Vitousek is going to ask for a contested case hearing.

Member Johns: I think you probably have, right and so . . .

Mr. Lemmo: So it's going to be a contested case anyway.

Member Johns: Right. And it's going to be a contested case anyway and if we go ahead and start one today then that's earlier than any other proposal to do it.

Mr. Lemmo: It's an early Christmas present.

Member Johns: Yes, we can start it now. But I think your guess is probably right is that the Board might have a hard time supporting a vacation rental based on the history of what the Department has done in the past that the Board may have a hard time supporting a change that would allow. And I'm not trying to bias, but I'm just trying to recognize what the Board has done, the Department has done in the past that it might be hard to support that. It's a heavy

Mr. Lemmo: It's a heavy thing.

Mr. Johns: It's a heavy burden.

Mr. Lemmo: But he's got, Randy's got all kinds of legal issues that he's going to respond.

Member Johns - I understand. I'm just trying to say that as far as the clients could hear that basically that one's going to be hard. So if they think they're going to get a settlement and that we are going to quote, un-quote go aloha on that, it is going to be hard to do that on that particular thing. Doesn't mean we can't reach settlements on a bunch of other stuff, but recognizing that that's a separate area. And we don't want to go down that slippery slope, but it is a different conservation district. Ultimately, it doesn't belong in the conservation district anymore.

Mr. Lemmo: That's, that's, a certainly a valid argument.

Chairperson Thielen: Okay, so at this point then we have to take a motion on the contested case hearing.

Member Agor: Anyone from the public?

Chairperson Thielen: I'm sorry, is there anyone else from the public who wants to testify on this matter. Okay

Member Agor: Madame Chair, I move to put the request for deviation into a contested hearing case.

Mr. Lau: I'm sorry. I thought you were considering a deferral at one point with regard to the motion for the petition for the deviation.

Chairperson Thielen: You got to keep up Colin. We were considering a lot of things. I think more recently

Member Johns: That's why I asked that first.

Mr. Lau: I just don't remember Mr. Vitousek actually making the request for a contested case on the deviation.

Mr. Vitousek: No. Actually, this is the Board action pursuant to 13-1-28.

Mr. Lau: Got it.

Mr. Vitousek: The Board is making that motion.

Chairperson Thielen: And in the event come December 31 there's a staff recommendation for enforcement at that point there will probably be a request for a contested case hearing or the Board may make a motion to do one and then we would recommend consolidating.

Mr. Lau: Ok. What I'm wondering about is if you're going directly to a contested case then you are going to be incurring a number of expenses, and there's going to be a lot of procedural deadlines that will be coming up. If you're deferring this item for this discussion and I don't know whether you might seek an opinion from or formal advice from my office with regards to the issues involved that might avoid some of the, this, rather than going directly into contested case mode.

Chairperson Thielen: One of the questions that's been raised is whether we could do, entertain a petition for a deviation once an enforcement action is recommended by the staff and so

Mr. Lau: Basically the deviation, the conditions that are being contemplated aren't exactly the same as the ones that are the enforcement right?

Mr. Vitousek: Yes.

Chairperson Thielen: Yes. So could we

Member Johns: We don't know that, yet.

Mr. Lemmo: He's just asking if you could defer one meeting to have an informal discussion with them to make sure on what we're asking.

Chairperson Thielen: Okay. So could you

Member Johns: Yes, but I think the Board Member from the island is recommending that we move to a contested case even though I asked for the deferral for a meeting. So and those are policy issues about whether we want to spend the resources on doing it at this point. Not legal issues. Is that right?

Mr. Lau: Right.

Member Johns: So it's up to the Board on how they want to deal with the procedure.

Chairperson Thielen: You want to withdraw your motion?

Member Agor: And bring this up again?

Chairperson Thielen: Defer for a month.

Member Agor: Okay, I'll withdraw my motion.

Chair Thielen: Okay so we have a withdrawal of the motion. The Board wishes to defer for consulting with counsel and others. We can place the matter on the agenda next month if anyone wants to make that motion.

Member Agor -- I move to defer this issue until the next Board hearing.

Member Johns: Second.

Chairperson Thielen: All those in favor?

All Board Members: Aye.

Chairperson Thielen: Oppose?

Chairperson Thielen: Deferral passes.

Mr. Vitousek: If I may. So my understanding then is that the next Board meeting will be the board meeting at which the matter is scheduled for disposition? Because I have to, if I'm going to request a contested case hearing I have to do it at the first Board Meeting where the matter is scheduled for disposition. I'm not going to wave my right to a contested case hearing by a deferral.

Member Johns: But you're not, we don't know what the agenda item is going to look like when it comes back. Is it still going to be the same?

Mr. Lemmo: I don't know. I'm going to talk with...

Chairperson Thielen: We'll need to consult.

Member Johns: But we recognize that.

Mr. Vitousek: Ok. But what I'm saying is if there's any argument going to be made at any point that I'm waiving a contested case hearing right, I am making a request

Chairperson Thielen: I think the one thing we're certain about is everybody knows this is going into a contested case hearing in one form or another.

Mr. Vitousek: Thank you. Thank you very much. Thank you for your patience.

The Board:

Motion to defer.

Unanimously approved as deferred (Agor, Johns)

Item K-6 Conservation District Use Application (SSBN) MA-07-04 for Small-Scale Beach Nourishment Project at Spreckelsville Beach, Maui, by Cirrus, LLC, TMK: (2) 3-8-002:072

Mr. Lemmo stated that they will be putting 3,000 cubic yards of sand on the beach. He gave some background information on the process and explained that they expedite these projects because they are seen as positive for the environment and an alternative to sea walls. It was decided that the larger restoration projects would be brought before the Board to allow for due process and seek the Board's consent to allow the Chairperson to approve the permit. Staff does not spend a lot of time on the analysis of the project at this point because they're not seeking approval yet. Therefore, staff is asking for the Board's consent to allow the Chairperson to review and authorize this project.

Unanimously approved as deferred (Edlao, Gon)

Item K-5 Conservation District Use Application (SSBN) KA-07-03 for Small-Scale Beach Nourishment Project at Poipu Beach Park, Kauai, by the County of Kauai, Department of Parks and Recreation, TMK: (4) 2-8-017:001

Mr. Lemmo stated that this is a similar request to the previous item, just a different location and is a request from Mayor Baptist.

Unanimously approved as submitted (Pacheco, Agor)

Item K-4 Withdrawal from Contested Case KA-07-05, by David Smith, in the Matter of Enforcement File (KA-06-72), and Confirmation of Prior Board Conditions Regarding the Unauthorized Construction of a Chain Link Fence Within the Conservation District, at Wainiha, Hanalei, Island of Kauai TMK: (4) 5-8-009:025

Mr. Lemmo reported that Mr. Smith has withdrawn his petition for a contested case. He has paid the fine and removed the fence.

Mr. Lemmo wished to make an amendment to the submittal. He would like to add a condition that states that OCCL and the landowner do an inspection of the property to make sure the applicant has complied with the conditions of the Board.

Mike Carroll, representative of the landowner, stated that he has no objection to them going out to look at the site. However, he is concerned that if they go out there and assess another fine, whether that changes things. He stated that his client did comply with all the requests so he has no objection to it.

The Board:

Add recommendation number 6 to read as follows:

“6. OCCL and the landowner shall conduct an inspection of the property to make sure applicant has complied with the conditions of the Board.”

Unanimously approved as amended (Johns, Edlao)

Item D-5 Consent to Mortgage and Extension of Lease Term, General Lease No. S-4477, S.C. Ranch Co., Inc., Lessee, Kaohe II, Hamakua, Hawaii, Tax Map Key: 3rd/4-3-10:08 (HDLO/Wesley)

George Wood is in agreement with staff's recommendations.

Mr. Tsuji wished to make a correction verbal statement. The written submittal correctly states the original term was 35 years and they are requesting a 20 year extension so the total term will end up being 55 years.

Unanimously approved as amended (Pacheco, Edlao)

Item D-4 Grant of Perpetual, Non-Exclusive Easement to the Pono von Holt Trust and Weliweli Pio, Ltd., for Utility and Access Purposes, Puuanahulu, North Kona, Hawaii, Tax Map Key: 3rd/7-1-03:portion of 02 (HDLO/Wesley)

Mr. Tsuji reported that this land was originally deeded with no legal access and therefore the von Holts were encroaching on State land because they had created their own access.

There is a \$500 fine included in the recommendations and staff is also recommending the granting of an access and utility easement.

Bob Schnider, representing the von Holt family, stated the von Holts understand they are being fined and the conditions of the easement.

There was some discussion on a preexisting gate.

Unanimously approved as submitted (Pacheco Edlao)

Item D-7 Cancellation of Easement "A" of Land Office Deed No. 28135 to Hawaiian Electric Company, Inc. and Grant of Perpetual, Non-Exclusive Easement to Hawaiian Electric Company, Inc. and Hawaiian Telcom, Inc. for Access and Utility Purposes, Waimanalo, Koolaupoko, Oahu, TMK: (1) 4-1-035:013 (Portion). (ODLO/Steve)

Member Johns recused himself.

Unanimously approved as submitted (Gon, Edlao)

Item D-2 Sale of Lease at Public Auction for Intensive Agriculture Purposes and Issuance of Revocable Permit to Lance K. Laney, Hanalei Homesteads, Hanalei, Kauai, Hawaii; Tax Map Key: (4) 5-4-02:34 & 38. (KDLO/Joanne)

Item D-3 Grant of Perpetual, Non-Exclusive Easement to Kauai Island Utility Cooperative and Hawaiian Telcom for Access and Utility Purposes and Issuance of a Right-of-Entry to the Department of Transportation, Wailua, Kawaihau, Kauai, Tax Map Key: (4) 3-9-06:portion of 16. (KDLO/Thomas)

Item D-6 Set Aside to City and County of Honolulu for Park Purposes and Issuance of a Right-of-Entry Permit, Waikele, Waipahu, Ewa, Oahu Tax Map Key: (1) 9-4-11:103. (ODLO/Al)

Item D-9 Issuance of Right-of-Entry Permit to City and County of Honolulu, Department of Design and Construction, on Lands Encumbered by General Lease No. S-5261, Sand Island Business Association, Lessee, and Governor's Executive Order No. 2704, Department of Land and Natural Resources for Sand Island State Recreational Area, Situate Sand Island, Honolulu, Oahu, TMK: (1) 1-5-041:103 (Portion) and TMK: (1) 1-5-041:06 (Portion). (ODLO/Steve)

Unanimously approved as submitted (Johns, Agor)

Item M-2 Issuance of Lease by Direct Negotiation Together with a Right-of-Entry to Jems Enterprises, LLC, dba Hawaiian Ice Company, Parcels 4 and 5, Domestic Commercial Fishing Village, Pier 38, Honolulu Harbor, Oahu.

Marshall Joy, President of Jem Enterprises, was present.

Item M-3 Rescind Prior Board Action of April 28, 2006, Agenda Item M-3, Issuance of Lease by Direct Negotiation to Izuo Brothers, Limited, Parcel 4, Domestic Commercial Fishing Village, Pier 3, Honolulu Harbor, Oahu.

Unanimously approved as submitted (Johns, Gon)

Item M-1 Issuance of a Direct Lease FedEx Ground Package System Inc. Honolulu International Airport.

Ross Smith from the Airports Division at the Department of Transportation was present to answer any questions.

Unanimously approved as withdrawn (Edlao, Johns)

Item C-1 Approval of Interim Grant Evaluation Form for use by the Legacy Land Conservation Commission ("the Commission") in making Legacy Land Conservation Program funding recommendations to the Board.

Unanimously approved as submitted (Pacheco, Gon)

Item E-1 Selection of Projects for Federal Grant Awards through the Land and Water Conservation Fund Program for Fiscal Years 2006 and 2007.

Unanimously approved as submitted (Johns, Gon)

Item E-2 Request for Approval to Amend Lease S-5301 to Jolene Peapealalo Ahuapua'a `O Kahana State Park, Kahana, O'ahu.

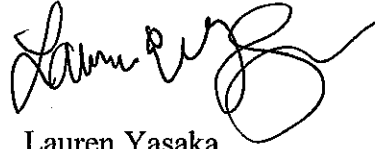
Unanimously approved as submitted (Johns, Edlao)

Item J-2 Request for Approval to Increase the Mooring Rates for the State Small Boat Harbors According to Hawai'i State Administrative Rules, (HAR), §13-243-3, (see Exhibit 1).

Unanimously approved as submitted (Johns, Pacheco)

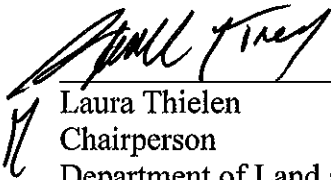
There being no further business, Chairperson Thielen adjourned the meeting at 1:10 p.m. Recordings of the meeting and all written testimony submitted at the meeting are filed in the Chairperson's Office and are available for review. Certain items on the agenda were taken out of sequence to accommodate applicants or interested parties present.

Respectfully submitted,



Lauren Yasaka

Approved for submittal:



Laura Thielen
Chairperson
Department of Land and Natural Resources