

MINUTES OF THE
SPECIAL MEETING OF THE
BOARD OF LAND AND NATURAL RESOURCES

DATE: July 30, 1987
TIME: 2:00 p.m.
PLACE: Kalanimoku Building
Room 132, Board Room
1151 Punchbowl Street
Honolulu, Hawaii

ROLL
CALL

Chairperson William W. Paty called the meeting of the Board of Land and Natural Resources to order at 2:07 p.m. The following were in attendance:

MEMBERS Mr. J. Douglas Ing
Mr. Moses W. Kealoha
Mr. Leonard Zalopany
Mr. John Arisumi
Mr. Herbert Arata
Mr. William W. Paty

STAFF Mr. Manabu Tagomori
Mr. Mike Shimabukuro
Mrs. LaVerne Tirrell

OTHERS Mr. Johnson Wong, Deputy A.G.
Messrs. David Sterrett, Carroll Taylor, Hank Wynand,
Allan Nevels, Jr., Senator Bert Kobayashi and
Mesdames Joan Hayes, Georgia Miller, Laura
Thompson, Carolie Simone, Marijo Oakley, and
Linda Wong (Item F-1, Waikiki Shell)
Messrs. Creighton Matoon, Donald Nakamoto, David
Chinen, Myrone Murakami, Charles Reppun, George
Hudes, Leonard Wong, Allan Murakami, Bob Nakata,
Chuck Melrose, Mesdames Judy Givens, Martha
Black, Irene Tokuaifu and Lola Mench (Item D-1,
Adoption of Interim Instream Flow Standard)

RESUBMITTAL - CITY AND COUNTY OF HONOLULU REQUESTS RECONSIDERATION FOR
AUTHORIZATION TO ISSUE A CONTRACT FOR A COMMERCIAL SHOW WITHIN THE WAIKIKI
SHELL AT KAPIOLANI PARK, HONOLULU, OAHU.

ITEM F-1

Mr. Paty explained that staff would not be asked to make the initial presentation inasmuch as this was already done and this is a continuation of a meeting which was held previously (July 10, 1987) and action was deferred to assure that we are in compliance with the notice required for the parties concerned. Mr. Paty then asked that anyone wishing to give testimony or add something which they perhaps felt had not been properly addressed or which had not been reviewed, was welcome to do so.

Representative Joan Hayes, representing part of Waikiki, testified as follows:

"Thank you for the chance to appear. The proposal before you masquerading as an effort to increase our offerings for tourists is an insult to the members of the community. I am appalled at the prospect of the 50 buses, five nights a week, jamming Waikiki streets, to deliver a thousand tourists to a Shell extravaganza. The theory that the Shell's roof, extending 90 feet into the air, will contain the noise has not yet, so far as I know, been shown to the man who designed the Shell, Iwao Miyaki. I have serious doubts as to the effectiveness of the roof in containing noise. And the fact that the Council has not yet considered the proposal and to proof it as is usually done before submission to you for decision, is short circuiting the public's opportunity to comment.

'A public park is not a money-making source to be judged on the basis of profit and loss. It is provided for the enjoyment of the public, not just for visitors. Profit comes from public use in many different activities. If the City Council feels that a roof over the Shell is needed, then care should be taken to make sure that noise will be contained, not that the roof will serve as a megaphone, amplifying the noise imposed on unwilling listeners.

'I urge the board to reject the request before it.'

Ms. Georgia Miller, from the Waikiki Resident's Association, said:

"Our community association's outermost boundary is the lighthouse. For this reason we have been concerned with Kapiolani Park's preservation for the entire existence of the Waikiki Resident's Association. Kapiolani Park was set aside by deeds of trust as a free park and recreation ground and not for commercial use in any way.

'According to the Board of Land and Natural Resources' legal newspaper ad, there is a proposed contract for commercial show. We understand the lessee also expects to sell and make money on food and drinks. This isn't the atmosphere expected in a family-oriented area -- for beaching, picnicking, game and athletic contests among fabulous trees and open space.

'Finally, the park was dedicated to a revered Hawaiian Queen, Queen Kapiolani, and, as such, has much historic significance. Therefore, commercialization as proposed today should be denied.'

Senator Bert Kobayashi testified that Kapiolani Park, as a public theatre or entertainment place, should be differentiated from that of a Waikiki Show. He felt that a Polynesian entertainment show could be held in many different locales but the park is a special and singular kind of environment. In that sense, he felt it should be reserved for as broad a public purpose as possible. He also stated that the Legislature, as well as the Board, have a fiduciary trust to protect the park for public purposes. Should this trust be broken, then the people from the Irwin Trust will have the right to reversion.

Mr. Paty asked Senator Kobayashi, "do you feel that if it is used as indicated that this would have a negative effect on activities elsewhere in the park -- the tennis courts, or other uses around there, if the show starts at 8:00 p.m. and ends at 10:00 p.m., or whatever it is? Would this affect the other activities of the park, the park being ancillary to the show?"

Senator Kobayashi felt that we would be taking away the opportunity for people to use the Shell if someone has a ten year lease of the Shell for most nights of the year. The question about whether the activity within the Shell would disrupt the activity outside the Shell perimeter, Senator Kobayashi felt was a bigger question which had a lot of ramifications since both the City and County and the State Department of Health Noise Abatement units had been either unsuccessful or unwilling to really crack down on what they had admitted to be noise violations. He suggested that if there are three noise violations then the law would be that the lease arrangement would be automatically revoked.

Mr. Paty asked Senator Kobayashi, "then what you are saying is that if the board went along with the application you would feel that very stringent requirements of a monitoring plan would have to be imposed that would meet the legal requirements now set forth by the Board of Health?"

Senator Kobayashi said that his basic contention is that Kapiolani Park is and should be a public park. Setting it aside for special purposes 225 days of the year is in conflict with his notion of a public park.

Mr. Paty asked Senator Kobayashi if he felt that the benefit derived from the presumed improvements would not be sufficient to justify providing them with a five night week opportunity to use the Shell.

Senator Kobayashi replied, "I realize that the current underutilization of the park is a bad situation. The fact that the Shell does not make a profit is a bad situation, and the fact that the Shell needs improvements is a bad situation. But to use this opportunity to correct a bad situation he felt was not justified -- two wrongs don't make a right."

Mr. David Sterrett, President of the West Diamond Head Community Association, presented written testimony urging the board to deny this intrusion of commercial development into Kapiolani Park.

Mrs. Laura Thompson, a tax paying property owner, presented written testimony asking that this request be denied for many reasons, a few of which were:

1. The shell's charm lies in its open and airy character. Covering it will destroy the pleasure of many patrons who enjoy seeing the stars, the clouds and being in Waikiki's balmy air.

2. The City and County of Honolulu is not fulfilling its managerial responsibility by proposing that a private entrepreneur be allowed to lease the Waikiki Shell. The City has allowed the deterioration of the facility and we taxpayers should have to pay to put it into proper condition.

3. I resent businesses and promoters coming to Hawaii, making big profits and not leaving some of those profits here. Wynands Productions proposes to renovate the Shell for its needs, to pay the City a percentage, to pay costs of its operations. Nowhere have I read that it will contribute any of its considerable profit to Hawaii. It should be required to donate to the Aloha United Way, the University of Hawaii Foundation or some similar agency which would benefit Hawaii's people.

Mr. Paty asked Mrs. Thompson if she didn't feel that employment is one way of contributing.

Mrs. Thompson said that employment certainly is, but how many companies come in and employ many people?

Mrs. Carolie Simone, President of the Outdoor Circle, before submitting her written testimony stated that the Outdoor Circle has always been concerned with preserving open green areas such as public parks and right now there are only two major public parks in downtown Honolulu, Ala Moana and Kapiolani Park.

Mrs. Simone's written testimony said in part:

"We would like to reiterate our opposition to this request. We firmly believe that the leasing of these park lands for commercial ventures violates the original deed of Trust which sets aside Kapiolani Park as a free public park.

'Further, this requested use requires a variance from the Diamond Head Historic, Cultural and Scenic District Ordinance.

'The proposed project will create a substantial degradation of the environ, mental quality of Kapiolani Park and the existing natural resources will be seriously affected.

'We wholeheartedly support the recommendation of the Land Management staff in requesting denial of this request."

Ms. Mary Jo Oakley strongly opposed this proposal.

Mr. Carroll Taylor, Attorney for the Kapiolani Park Preservation Society, read the following testimony, which was then presented to the board:

"At the July 10, 1987 Land Board meeting, Board Member Zalopany was concerned that a Hawaii appellate court has yet to rule on the legal issues presented by commercial development of Kapiolani Park and stated that he preferred to defer any action on the City's application until the Hawaii Supreme Court or Intermediate Court of Appeals rules on this issue. Please find enclosed a copy of the Notice of Appeal which we filed on July 20, 1987 to appeal from Judge Au's ruling in the Burger King litigation. Although the Zoo restaurant concession and the Shell project are extremely different uses, there is a common legal thread binding them together in that the legality of both projects depends on whether leasing of the underlying land is permitted. This is one issue which we will be asking the appellate court to decide. We share Mr. Zalopany's concerns and, therefore, request that the Land Board defer any action on the City's application until such time as a Hawaii appellate court rules on the legal issues presented in the pending appeal.

'Should the Land Board decline to defer action pending resolution of the Burger King litigation, we wish to emphasize two points. First, we feel that the threshold issue which the Land Board must decide is whether the City's proposed use of the Shell is legal under the trust deeds and applicable legislation. It is the Society's position that the proposed use of Kapiolani Park lands is illegal as it involves a lease of the underlying land and therefore violates the deeds of trust which created Kapiolani Park and the legislation enacted to protect the Park. The City's conscious decision to avoid labelling its agreement with Wynands a lease is of no import because such agreement enables Wynands to mortgage the facility and is for all practical purposes a lease. Since the proposed use is illegal, whether it is an appropriate or inappropriate use is presently irrelevant.

'The second point which we wish to emphasize is that the City justifies this project by stating that it will generate tremendous revenues for it. However, although the City frequently cites Hawaii Revised Statutes 171-11 as the legislation which enables it to carry out this project, that statute clearly provides that any revenues derived from projects situated on land subject thereto "shall be deposited in the general fund of the State...". Thus, even if the Land Board approves this project and if the project were to eventually obtain the approval of the Governor and withstand litigation, all funds derived from the project would properly belong to the State and not to the City and County of Honolulu. Therefore, the justification propounded by the City evaporates when the actual language of the statute is reviewed.

'The Land Board is in the position of successor trustee and its members are obliged to faithfully discharge their duties as trustees. Should it ultimately be held that the Land Board has permitted and authorized an illegal act, its members may be personally liable for the resulting damages. In order to avoid this exposure, the Land Board may be well advised to file a Petition for Instructions in the First Circuit Court seeking direction as to your responsibilities and obligations as trustees. That is the course of action which prudent trustees normally take when confronted with legal issues. This would be especially appropriate in this case given the December 10, 1986 Attorney General's memorandum advising the Land Board that the proposed Shell concession is not an appropriate use of Kapiolani Park. We are not your counsel, but we think that the potential legal liability which all Board members would face should cause the Board to proceed cautiously on this sensitive issue."

Mr. Taylor added that this is peculiar land, this is not run-of-the-mill state land. There are peculiar conditions that govern this land and he really believes that the land board has obligations with respect to this land which are far different to its obligations to other state lands. He felt that it would be imprudent for the board to go forward with this sort of a concession without having clear legal authority to do so.

Mr. Ing asked Mr. Taylor whether this statute would also cover the zoo.

Mr. Taylor said, yes, because the zoo is within Kapiolani Park.

Mr. Ing remarked, "then we are already in trouble, because they take admission."

Mr. Taylor stated, "then the City should account to the State for the zoo admission fees."

Mr. Taylor could foresee a situation where, if permission is given to Mr. Wynand to go forward with his project, and he does go forward, and a year down the road the Hawaii Supreme Court agrees with them that the Burger King cannot have that kind of commercial activity in Kapiolani Park, the effect of that is going to make this project also illegal, then Mr. Wynand is going to say, "I spent a million dollars improving that property and I can't put on my show, then somebody's gotta give me money back" and, from the State's point of view, if it is an illegal act the State can't be paying out money to make right an illegal act. He felt that, as trustees, responsibility falls on the board. He reiterated that it is foolish to go forward without clear authority to do so.

Mr. Ing asked, "doesn't he proceed at his own risk? He has full knowledge that you are going to appeal -- that you are going to file a lawsuit?"

Mr. Taylor said that if the State is, in some manner held liable, if there is some obligation owing from the State to Mr. Wynand for his out-of-pocket expenses, he did not think that it is proper state expenditure to reimburse it. On these lands, said Mr. Taylor, the board not only sits as a land board but as successor trustees. Your obligation as successor trustees are different from, and greater than, your obligations as Land Board members and liabilities that result from those obligations are different from, and greater than, your obligations as Land Board members.

Deputy A.G. Johnson Wong, in answer to the question as to who gets the money as defined in Section 171, said that Mr. Taylor's point with respect to the money going to the State comes into play only when the board makes the disposition. In this case, the board is not making the disposition, the City is.

Mr. Taylor felt that this land is different inasmuch as it is covered by an executive order that delegates management authority to the City.

Mr. Wong said that the earlier sections of 171-11 provides that the agency to which the land has been set aside may be disposed of by that agency also, subject to the approval of the Land Board. There is nothing in that particular section which says that all such revenues will also go to the State.

Mr. Taylor remarked that he must have only read the last paragraph. However, although he could see the argument, he did not agree with Mr. Wong.

Mr. Ing said that as he reads the section, it says that all funds derived from disposition by the board shall be deposited in the general fund. He told Mr. Taylor that he had only quoted "it shall be deposited in the general fund of the State". That clearly only refers to funds derived by disposition by the board.

Mr. Taylor argued that his position is that because they are coming back to the board for approval it looks to him like a board disposition. They could not do it without the board's action. As per Mr. Wong's interpretation, that is separate from any power the agency has on its own.

Mr. Wong said that, in practice, any revenues derived from any departments or agencies, those revenues don't come to the board, they don't go to the State, they go to the department.

Mr. Taylor said that if that's been the practice, he can't dispute that.

Ms. Linda Wong, Executive Assistant to the Mayor, representing the City and County of Honolulu, said that right now the Shell is not in litigation. Also, the Shell is not a lease but rather a concession agreement which the City is trying to get approval for use of an existing facility.

Ms. Wong explained that the City, in its request for proposal, is required to get City Council approval. They also have to clear the Diamond Head Historic, Cultural and Scenic district approval. In addition to that, they need to get a shoreline management permit. The reason they are before the board is because of Executive Order 22, wherein anytime the City is going to be involved in leasing a concession of a property for more than two weeks duration, this would require prior consent from the Board of Land and Natural Resources and that is where they are right now.

Ms. Wong said that one reason the City called for a request for proposal for the Waikiki Shell was the sound problem. In its request the concessionaire is going to be required to construct the canopy which would include the installation of a sound tracing unit. In addition to this, special care also is to be given to distribute the sound within the shell as well as providing a sound barrier in containing the present sound problem that they now have and bringing them into compliance with the noise code. That is one reason why the City asked for the canopy. The other was because of the underutilization of this existing facility. Last year it was used only 49 times but she found out that in the prior administration it had only been used 14 times -- the previous year before their administration took over.

Ms. Wong continued as follows:

"As far as the canopy blocking the stars in the sky, the 8000 seats on the grass area will be open. People can sit there and look at the stars.

'The other thing is that the Preservation Society and those opposing this Shell concession agreement want to preserve and protect open space. The City feels that this entertainment concession will not interfere with the present use of Kapiolani Park. As stated previously, the total area of the park is 162 acres and the Shell complex only encompasses 7.6 acres. The concession agreement itself would only cover the existing improvements and the new structure that would be created. Therefore, you will not be taking away any land presently being used by the public as open park space nor displacing any recreational and/or park activity. What will happen, by granting approval, is that the existing 33-year old facility will be improved at no expense to the taxpayer. The public will be able to utilize it more often and we will be able to then correct the noise problem.

'I think that this entertainment concession that is before you is simply an extension of the use to which the shell is currently and legally being put. It is not a new use. Today, anyone can come in and rent the Shell, put on a production, and it is perfectly legal."

Ms. Wong left with the board a conceptual drawing of what is being planned.

Mr. Zalopany asked whether there was any proposal in the event more than one complaint is received.

Ms. Wong said that the concessionaire, under the City's agreement, is required to contain the sound to meet the noise code set up by the Department of Health. If they don't, they should be cited. However, she understood from their sound people that from the test which they have made they feel confident they will meet the City's requirement to keep the noise level within the noise code.

"What if they don't," asked Mr. Zalopany?

Ms. Wong said that the City would have recourse to go in and say that you have not met the requirements that have been set forth in the request for proposal.

Ms. Wong said that the people think that this production will be put on for the tourists only but what they have in mind is for the local people as well as the tourists to enjoy and to see through song, dance, visual images, old Hawaii all the way up to present Hawaii. She thought that, through a letter to the Department of Auditoriums, the board had wanted to include some educational opportunities for the children in Hawaii. At one of the meetings Mr. Kealoha was concerned that they provide educational opportunities for students and senior citizens. They have indicated, through correspondence with the Department of Auditoriums, that they would like to do something like that.

Mr. Paty suggested that any further testimony be something that has not yet been brought to the board.

Ms. Whitney Sterrett said that what she had to offer was very new. She had been attending the court hearings...Hawaii's Thousand Friends vs. The Mayor and Managing Director...re Waiola Housing. At this meeting she heard Patsy Mink, Marilyn Bornhorst, Leigh Wai Doo and Randall Iwase testify. Over and over they said that they must follow at all times the City Charter. This caused her to read again various sections of the City Charter and, as a result of her searching, had the following to submit to the board, which she asked to be an official part of this meeting:

"It should be noted that Judge Au and his ruling on June 12, 1987 said, "I do not see that the authority of the City and County of Honolulu is constrained by Act 53, nor Act 163, nor by the executive order." Judge Au did not give the City permission to violate their charter. In fact, the Judge may have been misled since the City Deputy Corporation Council in his deposition said that the City owned a large part of Kapiolani Park."

Mrs. Sterrett felt that the City & Council of Honolulu is without authority to seek the approval for the entertainment concession for the Waikiki Shell. The general instructions to the application for the entertainment concession of the Waikiki Shell, on page 2, section 5a, directs that the proposal be submitted to the City Department of Finance. The City authority covering the transaction appears in the revised charter of the City and County of Honolulu, 1983 Edition, Section 6-203(k), which details powers and functions of the Director of Finance. Mrs. Sterrett said that because the State is a key holder to Kapiolani Park, the City lacks authority to carry out the proposed concession lease, even with the permission of the Land Board. If the State feels this project must go forward it must be the State that grants the lease and not the City.

She continued that the City Charter is a controlling document over acts of the City. It may not be superceded by opinions of the Corporation Counsel, resolutions or ordinances of the City Council and may only be altered by an amendment in the General Election. Therefore, it is proper for the Land Board to deny the request for an entertainment concession. She said that the City Charter outlines very carefully that the Director may only do it on City land.

Mr. Hank Wynand, in response to some of the comments made by Mr. Taylor, Attorney for the Kapiolani Preservation Society, said that in the request for the proposal saying that he could come back to the State and the City to collect monies in case this court fight should go on, he said that it says that: "should the awardee incur expenditures for materials, supplies, and equipment or any other cost in advance of the City signing the contract, such expenditures and costs shall be considered as having been done at his own risk and expenses and shall not obligate the City in any way."

Mr. Wynand said that he was fully aware of this. A while back some young lady said that he would be making a lot of money -- but he didn't know this. He does know that he will have to give \$3-1/2 million to the City first. He does not know the Shell will fly. There may not be one person showing up. Another thing, said Mr. Wynand, I cannot mortgage the property because the land does not belong to me so this is a high risk venture.

Mr. Allan Nevels, Jr., Hawaii Attorney for Wynands Production, stated that there have been some mis-statement of facts which he is sure is inadvertent, but which also need to be disposed of. He attempted to clear this up with respect to noise, commercialization, etc.

Mr. Zalopany asked Ms. Wong whether or not they would be in charge of uses of the Shell by others.

Ms. Wong said that this would be handled by the Department of Auditoriums and also that the Shell would be available on Fridays and Saturdays for use by the public as well as the two weeks for May Day and Aloha Week.

Mr. Ing asked Ms. Wong, "wouldn't the Shell also be available for use everyday up until the time it is then used by Mr. Wynand?"

Ms. Wong said that they would need to have time to set up. The general usage right now has been that it has never been used during the day.

Mr. Wynand said that if the City needs it in the day for special occasions then they would make clearance for that.

Ms. Robin Smith, a member of Neighborhood Board #9, Waikiki, said that they had submitted written testimony. Also, on July 9th, the Neighborhood Board #9 voted to oppose any further commercialization for Kapiolani Park. They feared that if something like this project is approved it will open the doors for many other concessions.

ACTION

Mr. Ing moved that the Board:

- A. Find that the public benefits to be derived from the improvements to the Waikiki Shell outweigh the potential detrimental impacts.
- B. Find that the proposed use and contract are consistent with park usage and will allow greater usage of the Shell by the general public.
- C. Approve City and County of Honolulu request for permission to issue the contract for the use of the Waikiki Shell at Kapiolani Park subject to the following conditions:

1. User construct improvements at Shell to reduce noise, provide rain cover, and additional restrooms.
2. Final building plans to be submitted to and approved by the Board prior to any construction.
3. Hours of operations be limited to 6:00 p.m. to 10:00 p.m.
4. User be allowed up to a maximum of 225 days, not more than five days in one week, and not on Fridays and Saturdays.
5. Noise monitoring plan to be prepared by the City and submitted to the Board for approval. If noise regulations exceeds that, then the show shall be stopped until corrected.
6. City shall indemnify and hold harmless the State from any liability as a result of this approval and improvements.
7. As a condition subsequent to this approval, if a court later finds that this contract is illegal for any reason or contrary to park usage or that the City cannot issue such a contract, that the approval is void.
8. Review and approval by the Department of the Attorney General.
9. Other terms and conditions as may be prescribed by the Chairperson.

Mr. Kealoha seconded. He added, however, that should the court rule favorably that we look further into 1) clarifying and defining those related products to be sold by vendors; 2) reviewing noise systems as proposed which is different from the EIA as was presented; 3) the question of one night per month for students and senior citizens; 4) the problem of the parking situation on Monsarrat and in the parking area.

Mr. Paty asked Mr. Kealoha if he wanted this to be an amendment to the motion.

Mr. Kealoha said that it would be further conditions to be added to the motion.

Accordingly, Mr. Ing moved to amend his motion by adding the following conditions:

10. Transportation plan be prepared by the City and submitted to and approved by the Board.
11. Review of noise abatement system by the Board.
12. One night per month be set aside for senior citizens and/or students.
13. City shall submit to the Board for approval the products to be sold at the Shell.
14. Transportation and parking plans shall be prepared by the City and submitted to and approved by the Board.
15. Concurrence of the Governor.
16. City shall provide a fully executed copy of the contract to the Department.

Mr. Paty called for the vote. Vote was unanimous; motion carried.

RECESS: 3:30 p.m.

RECONVENE: 3:50 p.m.

ITEM D-1

RESUBMITTAL - ADOPTION OF INTERIM INSTREAM FLOW STANDARD FOR WINDWARD OAHU WITH RECOMMENDATION AS AMENDED ON JULY 10, 1987.

Mr. Paty said that the board this afternoon would like to get testimony or reaction as to what they feel is the most equitable way to work some of the problems out. He recognized that nothing of this kind is easy. No matter which way is developed, there will still be some who will seriously question it. He asked the audience to keep in mind that under the Water Code the Water Commission itself would address matters of this kind. Maybe, at that time, in their wisdom, they will seek to modify whatever is developed here. This board hopes to give them the basis of this board's thinking so input is needed.

This submittal was deferred on July 10, 1987 in order to allow the public additional opportunity to review this department's proposed standards. Mr. Tagomori reiterated that Act 45 requires establishment of an interim instream flow standard by July 31, 1987 for Windward Oahu. He stated that interim instream flow standard is a temporary standard of immediate applicability to be adopted by the Commission on Water Resources Management or this Board until the Commission is established, without the necessity of a public hearing and terminating upon the establishment of a permanent instream flow standard. Interim standards may be more general than permanent standards and may be applicable to an entire stream or drainage basin, or possibly all streams within a region.

Mr. Tagomori recommended:

- A. That the Board approve and thereby establish an interim flow standard equal to 60% of the median streamflow for all Windward Oahu streams subject to the following conditions:
 1. Existing diversions and all established water rights will remain unaffected.
 2. Where actual streamflow records exist, these records will be used to calculate median flows.
 3. Where actual streamflow records are unavailable, the regression formula recommended by USGS will be used to calculate median flows.
- B. That Kawainui Marsh and stream system be designated a "status quo" stream, thereby prohibiting any new stream diversion or reduction in streamflow until permanent instream flow standards are adopted by the Board of Land and Natural Resources or the new Commission on Water Resource Management.

With respect to recommendation "B", Mr. Ing asked what would happen with the improvements to the Maunawili Ditch system -- whether it would affect the flow in the Kawainui Marsh or stream.

Mr. Tagomori said that the Maunawili Ditch improvement is underway -- roughly about 75% complete and should be done by the end of the year. They do not feel that the project will be affected.

Mr. Ing asked, "if less water leaks out of the ditch system, would that potentially decrease the flow in Kawainui?"

Mr. Tagomori said that from the leaking condition, yes. It would decrease the flow in the Maunawili Stream system.

In response to Mr. Kealoha's question as to how the flows were calculated, Mr. Tagomori said that the median flows were calculated after accounting for all of the diversions.

Mr. Paty asked for testimony from the audience.

Ms. Judy Givens, attorney for Hawaii's Thousand Friends, presented written testimony supporting a moratorium on new or enlarged diversions or withdrawals from windward streams, pending adoption of permanent standards. They also opposed the use of median rather than mean in the formula.

Mr. Paty asked Ms. Givens if she felt that the mean, because of the higher figure, is more appropriate in view of the high and low levels that staff encourages here?

Ms. Givens said that she is not a hydrologist but, as purely logical argument, she knows a little bit of the hydrology of Montana. She did confer with the USGS in Montana who said that the mean would also be a higher figure than the median. Dr. Tennant based his whole percentage system on the higher value. To then go in and substitute a lower value and expect to use the same percentages and achieve the same results did not seem to make any sense to her as a logical matter.

Mr. Creighton Matoon, Chair of the Koolauloa Neighborhood Board No. 28, testified as follows:

"After reviewing a summary of gauging stations, basin characteristics, annual rainfalls, and flow data for Windward Oahu as well as the Tennant's Montana Method for estimating stream flow, we would like to voice some very serious concerns. The formula which DLNR applies to estimate median stream flow does not appear to yield fair and accurate values for streams with recorded historically observed flows. It drastically reduces Punalu'u Stream's median flow. By using the median instead of the mean the estimated stream flow is even further reduced. It would seem that the lower the instream flow standards the more water that can be used for other purposes. For example, more wells may be developed for transmission of water out of Koolauloa. What will happen if there is not enough water to enable the stream to flush itself naturally? Very likely debris will accumulate to a point that in the event of heavy rains, there will be a high risk of flooding. Further, if the flow standards are set too low there will be a limiting effect on the irrigation capacity for agriculture lands. Additionally, stream biota will face extinction.

'Koolauloa Neighborhood Board No. 28 recommends that the level of stream flow be set at 100% of the observable mean flow."

Mr. Matoon said that after the last correspondence from DLNR, which he received yesterday where it calls for status quo for Kawainui, he said that he would also, personally, like to call for status quo for the streams, especially for the Punaluu Stream.

Mr. Paty asked, "if you just maintain a status quo, how would you establish a standard on that basis?"

Mr. Matoon suggested waiting until the permanent standards were established.

Ms. Martha Black of the American Association of University Women, presented written testimony voicing concerns that control over water resources in the State of Hawaii is so fragmented that great damage will be done to irreplaceable resources unless restraint and caution prevail in protecting the biological aspects of stream ecosystems. She stated that the ecosystem must be protected and the streams must not be depleted while interim or permanent stream flow standards are being formulated on a stream by stream basis.

Mr. Donald Nakamoto of Waiahole Valley said that he has been watching this water issue since 1974. He felt that this instream standard business should have been done a long time ago. He suggested measuring the streams which are flowing right now and not reduce it any more. Even if there are no diversions from the streams right now, he felt that with the amount of wells which the Board of Water Supply have in the ground today, you will see over the years it will gradually dry up the streams with the way they are pumping the water right now.

Ms. Cathleen Matoon, a member of the Kahana Park Advisory Committee, presented written testimony strongly supporting the recommendation that the level of stream flow be set at 100% of the observable mean flow. She felt that the study which produced today's recommendation is flawed and unreliable. She recommended adoption of a higher level of stream flow than has been recommended in staff's report.

Ms. Matoon added that since Kawainui Stream is being considered as a status quo stream that Kahana Stream also be status quo.

Mr. David Chinen, President of the Waiahole/Waikane Community Association, which consists of about 80 families, said that they are in favor of 100% of the median stream flow. He went on to explain the situation in the Waiahole/Waikane Valley.

Mr. Myrone Murakami, Legislative Chairperson for the East Oahu Farmers Association, thanked Mr. Tagomori for sending his staff to explain how they would be affected by this standard. He also presented written testimony supporting the recommendation that the interim level of stream flow be set at 100% of the historically observable stream flows and that there shall be no further diversions of any stream until standards are set on a stream-by-stream basis.

Mr. Charles Reppun was happy to see that the use of the formula for gauge streams had dropped. He was concerned about the un-gauged streams. He felt that the 100% of the mean flow at the mouth of the river should be the standard and that no additional diversion should occur until permanent standards are set. You also have to distinguish between the kinds of diversion that can occur. The diversions that would take the water completely out of a watershed are the ones they are most concerned about.

When you say 100%, Mr. Paty asked, then you are saying leave it is as it and then if anybody else comes in we study it on a case-by-case basis with the best available information?

That's right, said Mr. Reppun.

Ms. Irene Tokuaifu asked why we had to use a formula from Montana and why the big rush to give away our streams before hearings and input. She felt that this Montana plan would be a blight on our laws and, as temporary things go, they become permanent and a loss forever. Her plead was that the board be a trust for all Hawaii and its people and its water, not just those who have the money to pull the wool over the eyes of the general public and then divert away half of our streams for their profits. She asked that the Board consider the oppositions made against this cockeyed plan by those who live on the Windward side. She asked that the streams be left at the 100% mean flow observed until a true stream-by-stream study is done and the water board is functioning and know what they are doing.

Mr. George Hudes presented written testimony in support of an interim streamflow standard of 100% of the median flow being adopted for Windward Oahu streams. He felt that if only 60% is allowed to remain in a stream that is already severely stressed, all you get is a more severely stressed stream. He said that DOWALD only used one criteria, which was survival of species in

the streams. By the letter and spirit of the State Water Code, Mr. Hudes did not feel that DOWALD's recommendation met the minimum criteria to be considered in establishing a standard. He wondered if the 60% was set since there was nothing in the positions which have come forward to DOWALD, which shows a pressing need for that 40% of the water.

Mr. Leonard Wong showed pictures of his 50 acre farm saying that he was the largest luau farmer in the State. He said that he grew up as a farmer -- both agriculture and aquaculture, and explained how he created all of his ponds to dike the water off so he could irrigate the rest of his fields. He has done this through a system of plastic pipes. He captures every bit of his water. If there is 110%, he takes 110% so nobody uses the water after him. He said to take water out of the Kaalae Stream would definitely dry out the stream. He has lived in this area for over 40 years and during that time there were ten farmers using that stream. Today, only two of them (Myrone Murakami and himself) are using the stream and yet, when Myrone uses it for his bananas during a dryspell even his farm fields will dry up. He suggested that before the Board approves any diversion of pumping of water from the Waihee Wells that they should think about the farmers on the Kaalae side because they will dry up.

Mr. Allan Murakami, Attorney, reiterated what was said earlier and that is to put the burden of establishing permanent standards on those who seek to divert from the current stream flows that exist in the streams right now. If it is done the way that is being proposed now, what will happen is that the burden is placed on the people who have been before you and others like them to try to establish it, they will be hurt in advance of setting of that standard.

Mr. Murakami urged, on behalf of his clients who are farmers in both the Windward area and the East Maui coastline, that the recommendation by the staff be modified, that mean figures be used instead of median figures, and that rather than 60%, 100% be utilized and, if the Board does consider the adoption of status quo type of recommendation, that the list be expanded to beyond Kawainui Stream so that you have moratorium on those streams.

Mr. Arisumi stated that there is nothing going to his place so there is nothing to divert.

Mr. Murakami felt then that the Board should protect whatever is there by setting the high standards.

Mr. Bob Nakata, one of the plaintiffs on the Waiahole case, said that in light of preceding speakers, he felt that the recommendation is somewhat internally inconsistent. Number 1. says that all existing diversions and all established water rights will remain unaffected. However, we are hearing now where the situation of these rights may not remain unaffected if diversions are allowed in certain streams. If we take the Waihee and Kaalae examples where the standard of Waihee is set at 60% and further diversions occur there, then the rights of the users of Kaalae Stream are affected.

Ms. Lola Mench, a resident of the Windward side and also representing the Sierra Club, presented written testimony recommending that interim standards for minimum stream flow for Windward Oahu be set at 100% of the historically observable mean. Where there is no field data, there should be no additional diversion of any stream until data is available for the stream in question. They would also prefer to have special protection given to: 1) streams tributary to Kawainui Marsh; and 2) the more pristine streams such as Koloa and Kaluanui. She added also that she had reviewed the Board of Water Supply's Windward Regional Plan and the disturbing thing about that overall plan is that they have said over and over again that they did not have the

data to verify how much water would be taken from the stream by any particular well. Another point, the Sierra Club, statewide, said they have a big concern about the Board's decision setting a precedence for their islands.

Chuck Melrose of AMFAC Hawaii, representing Oahu Sugar Company, Waiahole Irrigation Co., and HSPA, voiced the following concerns: 1) that existing diversions are clearly grandfathered; 2) in situations where there are existing gauges in the stream that the stream flows be determined after the diversions take place; and 3) in the case where there no existing gauges in the stream, that the formula be adjusted to clearly reflect the subtraction of existing diversions. In summary, Mr. Melrose said that they support DOWALD's 60% recommendation, which they feel is a reasonable compromise, allowing for some taking in some streams albeit a small amount of water for other kinds of economic uses.

MOTION: Mr. Ing said that he did have some questions of the Attorney General with respect to the interpretation of certain aspects of the Water Code and therefore moved that the Board go into executive session to resolve that. Mr. Arisumi seconded; motion carried unanimously.

EXECUTIVE SESSION:: 5:12 p.m.

RECONVENE: 5:40 p.m.

ACTION: Mr. Ing moved:

- A. That the Board set as interim instream flow standards the following:
1. With respect to gauge streams, that the standards be set at 100% of the median flow computed after existing diversions have been deducted.
 2. With respect to ungauged streams, no further diversions be allowed and that these interim instream flow standards can be modified on a case-by-case, stream-by-stream basis by individual applications when additional and more specific data becomes available for such individual stream.

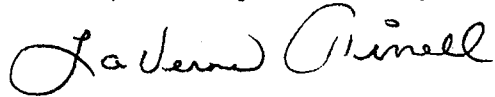
Mr. Kealoha seconded.

Mr. Paty asked for further discussion on the motion.

Mr. Ing explained the difference between median and mean. He said that the reason he is in favor of the median as opposed to the mean is that in the short term, in the streams where you do not have a long history of data that the flow may be distorted by a storm situation such as you may have a real high reading and, until that is averaged out over a number of years, even the existing farmers would be extremely limited in drawing additional water from that particular stream and that is why he is proposing that the median be used. In addition, in the long term, over a number of years, the median and the mean should come closer together and, in the long term, should not make much of a difference.


ADJOURNMENT: There being no further business, the meeting was adjourned at 5:45 p.m.

Respectfully submitted,



Mrs. LaVerne Tirrell
Secretary

APPROVED:



WILLIAM W. PATY
Chairperson

It

WRITTEN
TESTIMONY

Written testimony on the Interim Instream Use was also presented to the Board for inclusion in the records by the following people:

1. Hawaiian Sugar Planters' Association, dated July 20, 1987, signed by Bert Hatton, Land and Water Committee.
2. AMFAC, dated July 30, 1987, signed by Bert L. Hatton, Vice President.
3. Life of the Land, dated July 27, 1987, signed by Fred Paul Benco, Vice President.
4. Wai'Olā, dated July 27, 1987, signed by Mina Morita, Director.
5. International Research and Training Center on Erosion and Sedimentation, dated July 30, 1987, signed by David C. Penn.
6. Glennon M. Trevenen, Windward Oahu property owner, dated July 27, 1987.
7. Castle & Cooke, Inc., dated July 24, 1987, signed by George Yim, President.
8. Kawai Nui Heritage Foundation, dated July 30, 1987, prepared by Susan E. Miller.
9. U.S. Fish and Wildlife Service, dated July 30, 1987, signed by Allan Marmelstein, Pacific Islands Administration Fish and Wildlife Service.
10. Board of Water Supply, dated July 30, 1987, signed by Kazu Hayashida, Manager and Chief Engineer.