July 14, 2003

Ms. Erika Ginsberg-Klemmt

Re: Land Use Commission Minutes

Dear Ms. Ginsberg-Klemmt:

This is in response to your email to the Office of Information Practices ("OIP") dated February 24, 2003, on the above-referenced matter.

ISSUE PRESENTED

Whether the Land Use Commission ("LUC"), which is subject to the "Sunshine Law" at part I of chapter 92, Hawaii Revised Statutes, must make corrections to approved minutes of its November 14, 2002 meeting.

BRIEF ANSWER

No. The minutes at issue are "a true reflection of the matters discussed at the meeting and the views of the participants," as required by section 92-9(a), Hawaii Revised Statutes.

FACTS

The following facts have been presented by you. During the LUC[1] meeting of November 14, 2002 ("Meeting"), you made a 35-minute

[1] The LUC was established by the Legislature to, among other things, "group contiguous land areas suitable for inclusion" in designations of urban rural, agricultural, or conservation. Haw. Rev. Stat. § 205-2 (Supp. 2002). Counties have power to govern zoning within certain districts, and the Department of Land and Natural Resources governs conservation districts. Haw. Rev. Stat. § 205-5 (Supp. 2002).

presentation on certain boundary line and residential zoning issues.[2] Minutes of the November 14, 2002 meeting ("Minutes") were approved at the LUC's December 5, 2002 meeting. You allege that the Minutes do not accurately reflect any of the points you and your husband made, and do not reflect the reaction and interaction that occurred at the meeting. You enumerated eleven points from your presentation that you feel should have been included in the Minutes. You also questioned the importance of some of the information that was included in the Minutes, while comments favorable to your presentation were left out. Specifically, you stated that the "LUC staff who drafted these minutes, from either the transcript or however they do it, must have decided to insert erroneous information and leave out critical information to our petition." You seek issuance of a declaratory order[3] from the OIP providing that the Minutes be revised and reissued giving a true reflection of the matters discussed and the views of participants. Finally, you noted that the LUC makes tape recordings of its meetings "part of the public record," but that these do not substitute for minutes.

After the Minutes were published, you filed a Petition for Declaratory Order "correcting the minutes of November 14, 2002" with the LUC. According to the minutes of the LUC meeting of February 20, 2003, a copy of which was provided by you, your Petition was ruled "out of order" by the LUC Chair. The minutes of the February 20, 2003 meeting also note that the Chair provided the opportunity for the LUC members to sponsor a motion seeking correction of the Minutes, and there was no response. You also provided the OIP with a portion of the transcripts of the LUC's November 14, 2002 meeting.

In response to a request by the OIP for information relating to issues raised by your email, the LUC asserted that its Minutes comply with section 92-9, Hawaii Revised Statutes, without specifically addressing your allegations. The LUC also advised that a full transcript of all public meetings and any documents presented to the LUC are made available to the public. Your presentation is in the LUC's public file. The LUC noted that future minutes will note whether a full transcript is available and will incorporate by reference documents presented to or discussed by the LUC.

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[2] The text of your presentation differed slightly from the copy of the transcript of the meeting you provided.

[3] The OIP's jurisdiction is limited to those items found in sections 92-1.5 and 92F-42, Hawaii Revised Statutes. The OIP does not have jurisdiction to issue declaratory orders to the LUC.

DISCUSSION

I. SUNSHINE LAW

The Sunshine Law requires that all State and county boards[4] conduct meetings[5] open to the public subject to certain exceptions. Haw. Rev. Stat. § 92-3 (1993). The LUC is a board subject to the Sunshine Law. Haw. Rev. Stat. § 92-6(b) (1993).

The Sunshine Law also requires that boards keep accurate minutes of all meetings:

> **§ 92-9 Minutes.** (a) The board shall keep written minutes of all meetings. Unless otherwise required by law, neither a full transcript nor a recording of the meeting is required, but the written minutes shall give a true reflection of the matters discussed at the meeting and the views of the participants. The minutes shall include, but need not be limited to:
>
> (1) The date, time and place of the meeting;
>
> (2) The members of the board recorded as either present or absent;
>
> (3) The substance of all matters proposed, discussed, or decided; and a record, by individual member, of any votes taken; and
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> (4) Any other information that any member of the board requests be included or reflected in the minutes . . . .

Haw. Rev. Stat. § 92-9 (1993) (emphasis added).[6]

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[4] "Board" means "any agency, board, commission, authority, or committee of the State or its political subdivisions which is created by constitution, statute, rule, or executive order, to have supervision, control, jurisdiction or advisory power over specific matters and which is required to conduct meetings and to take official actions." Haw. Rev. Stat. § 92-2 (1993).

[5] "Meeting" means "the convening of a board for which a quorum is required in order to make a decision or to deliberate toward a decision upon a matter over which the board has supervision, control, jurisdiction, or advisory power." Haw. Rev. Stat. § 92-2 (1993).

[6] You asked that the OIP review the LUC's actions pursuant to section 15-15-15, Hawaii Administrative Rules and section 92-9, Hawaii Revised Statutes. As section 15-15-15, Hawaii

II. TRUE REFLECTION OF THE MATTERS DISCUSSED AT THE MEETING AND THE VIEWS OF PARTICIPANTS

You allege that the Minutes do not give "a true reflection of the matters discussed at the LUC's November 14, 2002 meeting and the views of the participants," in violation of section 92-9(a), Hawaii Revised Statutes. In furtherance of this allegation, you provided the OIP with copies of the Minutes and a partial transcript of the Meeting. The transcript is approximately 67 pages, and includes your presentation, a presentation by the LUC's Executive Officer, and discussion.

The Minutes note that you made a "slide presentation together with a map orientation and brief history of the site," but do not elaborate on the contents of your presentation. The transcript contains your presentation on approximately 16 pages. The Minutes go on to state "Questions were asked by the Commissioners. There was much discussion with respect to the physical conditions of the site." A recess was then taken. The transcript notes that there was about one page of questions and answers before the recess was taken.

After the break, the Minutes note that you passed out a letter to the Commissioners, and then the LUC's Executive Officer, Anthony Ching, "presented the Commission with an overview of the rationale behind staff's boundary interpretation." The Minutes list seven points[7] made by Mr. Ching. In the transcript, Mr. Ching's presentation goes on for ten pages. Discussion between Commissioners, and discussion by the Commissioners with you, your husband, and Mr. Ching goes on for another 36 pages.

Other jurisdictions have concluded that the primary purpose of minutes is to record board members' actions. In deciding on the sufficiency of minutes under North Carolina law[8], the court in William F. Maready v. City

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Administrative Rules contains the same language as section 92-9, Hawaii Revised Statutes, and because statutes supercede contradicting rules, only the statute is discussed herein.

[7] These seven points are in the transcript at pages 45-54.

[8] North Carolina's statute differs from Hawaii's, using the term "full and accurate minutes" rather than our "true reflection of the matters discussed at the meeting and the views of participants" language, and states:

> Every public body shall keep full and accurate minutes of all official meetings, including any closed sessions held pursuant to G.S. 143-318.11. Such minutes may be in written form or, at the option of the public body, may be in the form of sound or video and sound recordings. When a public body meets in closed session, it shall

of Winston-Salem, et. al., 342 N.C. 708; 467 S.E.2d 615 (S. C. N. C. March 8, 1996, as corrected April 2, 1996), cited to an Institute of Government publication, which stated, in part:

> the purpose of minutes is to provide a record of the *actions taken* by a board and evidence that the actions were taken according to proper procedures. If no action is taken, no record (other than the fact the meeting occurred) is necessary.

Maready 467 S.E.2d at 630-631, *citing* David M. Lawrence, *Open Meetings and Local Governments in North Carolina* 29 (4th ed. 1994) (emphasis added). The Maready court went on to note that the language quoted above is in accord with the common understanding of the purpose of minutes. Id. at 631. Minutes "should contain mainly a record of what was *done* at the meeting, not what was *said* by the members." Id. *citing* Henry M. Robert, *Robert's Rules of Order Newly Revised* (9th ed. 1990). Finally, the Maready court noted that, according to *Robert's Rules 9th Edition*, "the purpose of minutes is to reflect matters such as motions made, the movant, points of order, and appeals -- not to show discussion or absence of action." Id. *citing Robert's Rules of Order Newly Revised* (9th ed. 1990).

The current *Robert's Rules*, which differs slightly from the version cited by the Maready court, states that minutes of meetings that are not to be published should "contain mainly a record of what was *done* at the meeting, not what was *said* by the members." *Robert's Rules of Order Newly Revised* § 48, at 451 (10th ed. 2000) (emphasis in original).[9] *Robert's Rules 10th*

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> keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired. Such accounts may be a written narrative, or video or audio recordings. Such minutes and accounts shall be public records within the meaning of the Public Records Law, G.S. 132-1 et seq.; provided, however, that minutes or an account of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session.

N.C. Gen. Stat. § 143-318.10(e) (1997).

[9] *Robert's Rules 10th Edition* also recommends that unpublished minutes include the following:

1) the kind of meeting;
2) the name of the society or assembly;
3) the date and time of the meeting, and the place;
4) the fact that the regular chairman and secretary were present, or in their absence, the names of the persons who substituted them;

Edition also notes that "[t]he name and subject of a guest speaker can be given but no effort should be made to summarize his remarks." *Robert's Rules of Order Newly Revised* § 48, at 454 (10th ed. 2000).

Published minutes, such as those of the LUC, should, according to *Robert's Rules 10th Edition*, "include the same information as minutes that are not typically published, and should also contain a list of speakers on each side of every question, with an abstract of the text of each address, in which case they may be called 'proceedings,' 'transactions,' or the like." *Robert's Rules of Order Newly Revised* § 48, at 458 (10th ed. 2000). Thus, *Robert's Rules 10th Edition* indicates that minutes should memorialize what happened at a meeting, including an abstract[10] of what was said by speakers, but need not memorialize everything that was said.

Hawaii boards are bound by the Sunshine Law, but are not bound by *Robert's Rules* unless *Robert's Rules* has specifically been adopted by a board. The LUC, via its administrative rules, has adopted *Robert's Rules*.[11] Where, however, the Sunshine Law imposes requirements in addition to or different from those set forth in *Robert's Rules*, an agency such as the LUC which has adopted *Robert's Rules* must comply with the statute's requirements.

In this case, applying the Sunshine Law's requirement that minutes reflect the participants' views, the OIP concurs with the reasoning in Maready and concludes that the primary purpose for keeping minutes is to reflect what the board did. In other words, looking to the Sunshine Law's

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5) whether the minutes of the previous meeting were read and approved – as read, or as corrected ;
6) all main motions including the wording in which each motion was adopted or otherwise disposed of, and the disposition of each motion;
7) secondary motions that were not lost or withdrawn when it is necessary to record them for completeness or clarity;
8) all notices of motion;
9) all points of order and appeals; and
10) the hour of adjournment.

Robert's Rules of Order Newly Revised § 48, at 452 (10th ed. 2000).

[10] An "abstract" is defined generally as a summary. See Black's Law Dictionary 9 (7th ed. 1999); Webster's Ninth New Collegiate Dictionary 47 (1988).

[11] See Haw. Admin. R. 15-15-10 (1999) ("The parliamentary procedure to be utilized by the commission in the conduct of its meetings shall be based on the current edition of Robert's Rules of Order Newly Revised, only if it does not conflict with chapters 91 and 92, HRS, or these rules.").

policy of protecting the public's right to know[12], it is of primary importance to know the actions taken by the decision-makers, i.e. the board members, so that the public can scrutinize their actions. The OIP therefore concludes that, while the statute requires the minutes to reflect the views of non-board members who participated in the meetings, it is sufficient for the minutes to describe, in very general terms, the positions expressed by the non-board members. In this instance, we find that the Minutes sufficiently reflect your presence at the Meeting and, more importantly, provide understanding of the LUC's action.

In other words, the OIP believes the LUC's Minutes do memorialize what was done at the Meeting. The Minutes provide an abstract of what you said, noting that you made a slide presentation and provided a map orientation and brief history of the site. The Minutes note Mr. Ching's overview of the LUC staff's boundary interpretation. The Minutes also note that discussion was had, and questions were asked by Commissioners.

Although there appears to be a difference of opinion between you and the LUC as to whether the Minutes should have included specific points raised in your presentation and other information you deem important, the evidence presented to the OIP does not show that the Minutes were not "a true reflection of the matters discussed at the meeting and the views of the participants" as required by section 92-9(a), Hawaii Revised Statutes. Accordingly, the OIP finds that the LUC did not violate the Sunshine Law. Therefore, at this time, the OIP does not make any recommendations to the LUC.

Further, because transcripts of all LUC meetings are provided upon request, the public has full access to what was said by you. The LUC has also made your presentation part of its public file, thus allowing any interested member of the public full access to a record of what you said. The OIP notes that the LUC is not required to make full transcripts available to the public[13], and doing so shows its intent to further openness and participation in government.

Finally, the OIP notes that after being informed of this complaint, the LUC advised that future minutes will note whether a full transcript of the meeting is available, and will incorporate by reference documents presented

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[12] Haw. Rev. Stat. § 92-1 (1993).

[13] See Haw. Rev. Stat. § 92-9(a) (1993) ("neither a full transcript nor a recording of the meeting is required").

to or discussed by the LUC. The OIP believes this shows the intent of the LUC to be as open as possible and to provide information to the public.

III. REMEDIES

Notwithstanding the OIP's conclusion that the LUC's minutes comply with the statutory requirements, the Sunshine Law allows any person to file a law suit under the following circumstances:

> Any person may commence a suit in the circuit court of the circuit in which a prohibited act occurs for the purpose of requiring compliance with or preventing violations of this part or to determine the applicability of this part to discussions or decisions of the public body. The court may order payment of reasonable attorney fees and costs to the prevailing party in a suit brought under this section.

Haw. Rev. Stat. § 92-12(c) (1993). Should you disagree with the OIP's opinion and wish to continue pursuing this matter, the OIP recommends that you seek the counsel of your own attorney on whether or not a law suit is appropriate.

Very truly yours,

Carlotta Dias
Staff Attorney

APPROVED:

Leslie H. Kondo
Director

CMD: ankd

cc: Anthony J. H. Ching, Executive Officer
Land Use Commission

Lawrence N. C. Ing, Chair
Land Use Commission