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Sound Planning?

The Land Use Commission began its hearings on the O'oma redistricting petition last month, and the community was out in full force to testify on the first day. There were, of course, the critical comments that greet any proposal to develop open space, particularly coastal open space. And there was the cheering section, made up mainly of construction tradesmen who turn out to boost any development that will require moving earth and putting up buildings.

But there was another element as well – one that sees the proposal as fraught with risk for the taxpayer and the Kona airport. Whether good planning and visionary design can drown out the noises from ever larger numbers of planes taking off just a mile distant is one of the most important questions that the LUC will face in this case.

Also in this issue, the Board Talk column leads with yet another round in the battle to save palila critical habitat from the depredations of ranching. Finally, we invite readers to participate in our reader survey, which appears on page 4.

IN THIS ISSUE

Noise from Kona Airport Casts Pall Over Proposed Development at O'oma

By almost all accounts, the vision behind the residential and commercial development proposed for about 300 acres on the Kona Coast, in an area known as O'oma, is a model of progressive, state-of-the-art thinking when it comes to urban planning. Pedestrian friendly, with broad ocean setbacks and extensive parks, convenient mixed commercial and residential uses and a variety of housing choices to meet diverse economic needs and lifestyle options, the design has won an award for outstanding planning from the American Planning Association, Hawai'i Chapter, and embodies many of the smart-growth concepts championed by environmentalists.

At the meeting of the Land Use Commission last month in Waikoloa, praise for the design was not in short supply. Many of the dozens of members of the public who testified were liberal with their compliments. But time and again, witnesses concluded with the same thought: it's a great project, but in the wrong place.

The site is about seven miles north of the village of Kailua-Kona, but only a mile south of the Keahole airport. And when the noise contours of approaching and departing planes are laid over the development area, the planned residential complexes in the project just barely squeeze under the level of noise deemed acceptable in Hawai'i for dwellings and schools.

'Nonsensical Development'

Kathy McMillen, one of the public witnesses, made an eloquent case for the LUC's denial of the redistricting petition, which covers 181 acres, or roughly two-thirds of the entire project area. Her objections were not typical of most open-space advocates, but focused instead on the inappropriateness of siting homes so close to the airport.

"I'm not anti-development," she told the commissioners, "but I'm against nonsensical development." The operation of the Kona airport was essential, she said, and it was sheer folly to allow residential development in such close proximity to the airport.

McMillen disputed the acoustic study done by Y. Ebisu for the landowner, Midland Pacific Homes of Atascadero, California. "I take issue with the logic provided in the noise study," she said. "The data may be factually correct, but the focus of the report centers on [Federal Aviation Administration]

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PHOTO: O'OMA BEACHSIDE VILLAGE

O'oma shoreline

Environment Hawai'i

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NEW AND NOTEWORTHY

Mangroves Get a Champion: Sydney Ross Singer, the hero of waiawi and defender of coqui, has found another invasive species to champion: the red mangrove. In February, Singer brought suit against the state Department of Land and Natural Resources, the County of Hawai'i, the "U.S. Department of Fish and Wildlife" [sic], the Big Island Invasive Species Committee, the Hawai'i Tourism Authority, and the private group Malama o Puna, over their collective efforts to eradicate mangroves from coastal areas, notably the Wai'opae Marine Life Conservation District.

PHOTO: FOREST AND KIM STARR

Red mangrove prop roots

At the heart of Singer's lawsuit is the allegation that the use of pesticides in sensitive aquatic or marine systems violates clean-water regulations and was improperly exempted from environmental review.

Mangroves have no natural place in Hawai'i ecosystems, and they are threatening native coastal vegetation at many sites across the state. Attached to Singer's complaint is a letter from the supervisor of the Kaloko-Honokohau National Historical Park, who supports manual rather than chemical eradication. At the time mangroves were eradicated from the national park, however, the manual labor was provided by state prisoners. Now that the state prison on the Big Island has closed, that option is no longer feasible.

Koa Lands to be Logged? A company based in Eugene, Oregon, has told its creditors in bankruptcy that it can log koa from land it owns near Hilo, Hawai'i, to pay them off. According to an article last month in the Eugene *Register-Guard,* John Musumeci, the executive vice president of Arlie & Co., told creditors the 6,000 acres of land held near Hilo is "one of the largest privately held forests of a commodity that is in high worldwide demand."

Records at the Bureau of Conveyances do not show any land held by Arlie & Co. However, a company called Hawai'i Forest Products, LLC, does turn up as owner of two parcels totaling about 2,837 acres. In January, just prior to the bankruptcy filing, Hawai'i Forest Products merged with Arlie & Co. The principal of HFP was Suzanne Arlie, wife of Musumeci who is also president of Arlie & Co.

The larger of the two parcels is 2,812 acres, of which 2,553 are in the Conservation District. This parcel is west of Hilo and lies in the ahupua'a of Kukuau 2nd. The second parcel lies about four miles to the north, in the ahupua'a of Pu'ueo, and is just east of the eastern boundary of the Hilo Forest Reserve. Both lots were owned by the Mauna Kea Sugar Co., a subsidiary of the now-defunct C. Brewer & Co.

According to Douglas Schultz, attorney for unsecured creditors, Musemeci said the appraised value of one of the parcels is $270 million, adding that his company would be sending emissaries to Hawai'i later in March to look into harvesting some of the koa. "Now is the time for us to harvest it," the Eugene *Register-Guard* quoted Musumeci as telling the meeting of creditors. "It would mean a tremendous amount of cash flow," the paper quoted him as saying. "If we do this, it could generate several million a month in positive cash flow." The bankruptcy filing shows Arlie & Co. have indebtedness totaling some $65 million.

The larger Hawai'i lot was purchased in 2002 for $1.5 million. The smaller lot was purchased the same year for $90,000. According to Hawai'i County property tax records, as of mid-March, real property taxes had not been paid on either parcel since the first half of 2009.

Musumeci lived in Hawai'i in the 1980s. Before leaving the islands, he gained some notoriety for having filed for bankruptcy, with debts totaling in excess of $1 billion. The bankruptcy case was transferred to California after Musumeci left the state.

A Moving Target? The company planning to build a food irradiator on a site at Honolulu International Airport is apparently willing now to consider alternative locations. Pa'ina Hawai'i, whose plans called for the plant to be up and running by February of 2006, has now informed the Atomic Safety and Licensing Board that it would like the board to order the Nuclear Regulatory Commission staff to conduct "suitability studies" of a site on Ualena Street, near the airport, and another in Kunia.

The site near the airport – 2309 Ualena Street – is owned by the state Department of Transportation. No ownership information could be found for the second address, 92-1860 Kunia Road. However, it is the address from which the now defunct Del Monte pineapple plantation conducted much of its business.

Quote of the Month

"We taxpayers… are buying land, people's houses, because this kind of thing is happening, everywhere in the country."

— Kathleen McMillen

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Extreme Makeover – EH Style

Almost daily, tremors in the landscape of print media are registered on the Richter scale of journalism. The recently announced takeover of the *Honolulu Advertiser* by the owner of the *Star-Bulletin* weighed in at about a 5.5. Barring a white knight, the *Star-Bulletin* will soon be history.

It's happened to far more distinguished papers, in areas with vastly greater readership.

The challenges that we at *Environment Hawai'i* face are similar in nature, if not in scale, to those faced by nearly every other periodical publishing today. Simply put, readers are turning their backs on the printed word – the word printed on paper, at least – and getting more and more of their news, or what passes as news, from electronic sources.

How is *Environment Hawai'i* coping with these changes?

So far, not too well. For one thing, our reader profile is against us. (No offense, dear reader.) With a subscription base as small as ours, it is possible to get a handle on its demographics without recourse to extensive surveys, and the truth is, our readers are generally older and better educated than the general population. As a rule, our average reader does not share in the belief that the internet is the be-all and end-all of reliable information. Sadly, however, our readers belong to a pool that is diminishing. One of the looming mountains we must climb, if we are to survive, is to draw in a larger, and younger, reader base.

For this, improving our online profile is imperative.

Since the mid-1990s, *Environment Hawai'i* has had an online presence. Initially, it consisted of an index of articles and little more. As time passed, we added content, making our full archive of past issues available to any and all who were interested, without charge.

It soon became apparent that people were taking advantage of this and opting to read *Environment Hawai'i* for free over the internet. As a result of this, when we updated our website several years ago, we installed a toll gate on our archives. The fee to non-subscribers is modest: $10 for non-subscribers to get a two-day full archive pass. Millions of people think nothing of charging far more, on a regular basis, for music downloads. Still, many potential readers still seem to balk at the thought of paying for articles such as those we produce.

Often we are asked by subscribers if they could opt for an electronic version, skipping the paper one entirely. They can do this, but at present, it saves us nothing. So long as we have to print one copy, it costs little more to print a thousand. Until 100 percent of our subscribers are on board with online-only access, the economic gains we might see from going entirely paperless will not be realized.

Even if we were to eliminate our paper edition, readers should be aware that our production costs – typesetting, printing, mailing – represent a relatively small part of our expenses. Far and away our largest costs are associated with personnel. Paying two full-time employees and covering related costs we have no control over (health insurance the largest of these) eats up more than 70 percent of our annual operating budget.

To continue the kind of reporting we love to do (and we think you appreciate), our options are limited. The most viable ones follow:

❖ We increase our subscription rates to cover increasing costs and diminished foundation support. (In recent years, nearly all charities have experienced difficulties in garnering support from foundations, many of which have seen their endowments diminish with plummeting stock values and disappearing investments. This may change – we hope it does – but in the meantime, we need to make up the loss somehow.)

❖ We go paperless and let our subscribers know by email alerts when we post new articles to our website.

❖ Reduce printing frequency.

As you mull over these, it may inform your thinking to know that at no point have the combined annual salaries of our staff (two full-time, one part-time) exceeded $90,000. For the last two years, we have tightened our belts substantially, this being the only really elastic element of our budget.

We need to face up as well to the notion that perhaps the pool of potential readers is just too small to support our work. We feel our work is important, and ever more so in an age when news sources, while they seem to procreate like bunnies, offer coverage that is shallow and derivative. When considering *local* news, the level and seriousness of attention paid to the environment is nothing short of tragic. But if there is no support for what we believe is necessary and for the kind of journalism that follows from that belief – fact-based, research-dependent, *expensive* journalism – then we need to accept that.

To help us decide our future course, we would appreciate hearing from you. On the reverse of this page is a reader survey. You need not give us your name, but please do so if you would like to discuss any of these ideas with us in person.

Thank you for your thoughtful consideration.

Sincerely,

Patricia Tummons
Teresa Dawson

Reader Survey

1. If you are a subscriber, how long have you been reading *Environment Hawai'i?* _____

2. Do you read it because:
   - It is helpful to you in your work? _____
   - You have an interest in environmental issues? _____
   - You appreciate the depth of reporting we provide? _____
   - You occasionally appreciate the work we do, even though you may not read us cover-to-cover every month? _____
   - Other _____

3. Do you believe our subscription rates as currently structured are:
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4. Would you continue to subscribe (if a current subscriber) if we increased our rates
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7. How frequently do you visit our website? _____

8. Would you visit it more frequently if we offered: _____
   - Free online access? _____
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   - Periodic summaries of environmental news, with links to other sources? _____
   - Additional services/features, i.e., opportunities to comment on all articles? _____

9. If *Environment Hawai'i* were available only in an online format, would you prefer to read it in pdf format or html? _____

10. What percentage of your information about Hawai'i's environment do you receive from the internet?
    - Below 25 percent _____
    - 25 to 50 percent _____
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    - 75 to 100 percent _____

11. Do you think there is a need for the kind of reporting we provide? _____

12. Are there areas where you feel our coverage should be increased? If so, please list them:
    _____
    _____

13. Are there topics we cover that you feel are not important to you? If so, please list them as well:
    _____
    _____

14. Do you have any additional thoughts or suggestions? If so, please list them below.
    _____
    _____
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You need not give us your name, but if you would like to have us call you to discuss these issues at length, please do provide your name and a daytime phone number.

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BOARD TALK

DLNR Staff Backs Off Proposal To Extend Lease in Palila Habitat

Do we have to watch extinction happen all over again? Do we have a choice?" University of Hawai'i zoologist Sheila Conant wrote last month in her testimony against a proposed 20-year extension of K.K. Ranch's pasture lease high on the slopes of Mauna Kea. Some 2,100 acres of the ranch's lease area have been used for the past several years for palila (*Loxioides bailleui*) habitat mitigation under a 10-year conservation easement granted to the Hawai'i Department of Transportation by the state Board of Land and Natural Resources in connection with the Saddle Road realignment.

And although the Land Board in 2001 attempted to appease the ranch and three others whose lands were affected by the easement by agreeing "in principle" to extend their leases, staff with the state Department of Land and Natural Resources have recently voiced the opinion that the easement areas should be placed into the forest reserve, especially given the dire state of the palila population.

"It was with great dismay in 2008 that I read an article by [DLNR's David] Leonard and his colleagues in the Hawai'i Audubon Society journal *'Elepaio* documenting a 53 percent decrease in palila since 2003," Conant wrote in her testimony. In light of evidence that ungulates threaten growth of the mamane trees that palila rely on for food, as well as the Land Board's duty to take a precautionary approach toward protecting the state's resources, she continued, "it is clear that the only choice for conserving the palila is increased protection of its habitat from grazing animals. Renewing the grazing lease in question is highly inappropriate."

While the ranchers had reluctantly agreed to the easement in exchange for reduced rent and a possible lease extension, several of them decided last year that this wasn't enough, even though fencing delays, among other things, allowed all of the ranchers to use the easement areas rent-free for years. (K.K. Ranch's cattle, in particular, have consistently been seen within the easement area, according to Leonard.) During the 2009 session, the Legislature passed Senate Bill 1345, written with the Mauna Kea ranchers in mind, which would compensate agricultural or pastoral leaseholders of state land whose properties were withdrawn for public use. In the ranchers' case, they lost the use of about 6,500 acres covered by the 10-year conservation easement, which expires in 2012.

DLNR director and Land Board chair Laura Thielen, who was the only person to testify in opposition to the legislation, pointed out in her testimony that the ranchers' lease rents had been reduced in accordance with state law. She also noted that the bill's provision requiring the DLNR to pay for insurance costs and speculative income losses could be very expensive.

"Further," she wrote, "the bill provides compensation for lost income as opposed to lost profits. A lessee should not be compensated for income without deducting the operating expenses required to generate that income. Finally, on the compensation aspect of the bill, there is the potential for costly litigation resulting from a dispute between the state and a lessee over the calculation of losses resulting from the taking." She also opposed the bill's automatic extension provision, stating that existing laws are sufficient.

> *"[I]f cows are allowed back on the property it will never be of any use to palila."*
>
> ***— George Wallace, American Bird Conservancy***

Lingle ultimately vetoed the bill, but a revised version resurfaced this year as Senate Bill 2951, introduced by Sen. Dwight Takamine. Thielen has again testified against the bill, but this time she has been joined by the DOT, Conservation Council for Hawai'i, the Sierra Club, Hawai'i Chapter, the American Bird Conservancy (ABC), and others.

"Many hundreds of thousands of dollars have been invested in [the easement area] in the form of fencing and restoration and the Division of Forestry and Wildlife plans to plant 29,000 trees there in the next several months," George Wallace, vice president of ABC, wrote in his testimony. "If SB 2951 passes, it is likely that the state will be unable to provide financial compensation to the lease holders, cattle will be allowed back on the area, and they will quickly destroy the mamane that have been planted, or germinated naturally, and those trees that have recovered. Because mamane are slow growing and palila rarely use trees less than 20 years old, it will be a long time before the area can support the bird. However, if cows are allowed back on the property it will never be of any use to palila."

Many of the arguments against the legislation apply as well to the proposed 20-year extension of K.K. Ranch's lease. Even so, the DLNR's Land Division chose to process the ranch's request like any other.

In its report to the board, the division notes, in boldface type, "As a condition of the [DOT easement approval], the Board agreed in principle to extend the terms of the lease...to assist in compensating the lessee for the lands withdrawn."

K.K. Ranch said it was requesting the extension so it could amortize $124,985 in fencing improvements. Because the lessee was in compliance with all lease terms, the division recommended approval.

Land Division administrator Morris Atta explained that his Hawai'i district office had merely looked at the legal criteria for extensions and "typically, when we get any request, regardless of controversy, we try not to treat applicants differently as long as they meet statutory minimum requirements. As public servants, we feel we have to bring it to the board and what happens, happens."

Perhaps because lease extensions are often routine, Thielen approved it for submittal to the Land Board without realizing who the lessee was.

"This happened to slip by," Atta said.

But on March 9, Marjorie Ziegler of the Conservation Council for Hawai'i sent out an alert about the proposed extension and by the next day, more than two dozen people — including Conant — had submitted testimony to the Land Board in opposition.

Because the Land Division had not solicited comments from interested agencies and other parties before making its submittal, especially given the controversy now swirling around the palila mitigation leases, Thielen directed Atta to withdraw the extension proposal from the day's agenda.

Atta said he was told the department did not want to "blindside the board" and was ordered to seek comments from the state and federal transportation departments and the DLNR's own Division of Forestry and

Wildlife, among others, before bringing the matter back.

"We were chastised for not being more thorough," he said.

Informed ahead of time that the matter would be withdrawn, K.K. Ranch owner Jason Moniz (a former deputy state veterinarian) did not attend the Land Board meeting. He was, however, present during a meeting with Atta and Sen. Clayton Hee following the board meeting.

Hee had called Atta into his office to discuss why the matter was withdrawn and to request that it be placed on the agenda again. Atta said he told Moniz and Hee that he can't promise anything since there is a discretionary layer — the chair and/or the DLNR deputy director for land — that all proposals must pass through.

Atta said he is preparing a resubmittal and his division is in the process of seeking agency comments, which usually takes about a month. The matter may come before the board again depending on whether the chair's office approves it for submittal.

♣♣♣

Shark Culling in NWHI Refuge

With reluctant support from the environmental and native Hawaiian communities, the Land Board unanimously approved on March 11 a permit to allow the culling of 20 sharks within state waters of the Papahanaumokuakea Marine National Monument to protect endangered Hawaiian monk seal pups.

The one-year permit to Frank Parrish and Alecia Van Atta of the National Marine Fisheries Service will allow them to remove sharks seen "pursuing, injuring or killing pups or those observed to be patrolling within 400m of the shoreline of Trig, Gin, Little Gin and Round islets [at French Frigate Shoals] when pups are present," a report by the DLNR's Division of Aquatic Resources states.

PHOTO: PACIFIC ISLANDS FISHERIES SCIENCE CENTER

Galapagos sharks at French Frigate Shoals have been killing endangered monk seal pups for about a decade.

For years, monk seal researchers have been trying to control Galapagos shark predation on seal pups at FFS, which is apparently the only place in the Hawaiian islands where this is happening. But they have not been successful, despite getting Land Board permission a few years ago to take up to 10 sharks and to implement non-lethal measures in 2008-2009.

Researchers have failed in recent years to kill any sharks and are developing a new method to trap them — "net surprise" — that uses a remote-controlled net to catch animals in shallow water.

If NMFS does not remove 20 sharks this year, it plans to seek permission to reach that goal in 2011. If it succeeds in removing 20 this year, "next year they would propose starting with monitoring and only removing up to an additional 20 sharks if predation remained high," the DAR report states.

In his written testimony in support of the permit, Marine Mammal Commission executive director Timothy Ragen notes that 20 sharks is "less than 10 percent of the French Frigate Shoals Galapagos shark population, only a very small fraction of any total allowable catch level as might be calculated and considered sustainable for commercial fishing purposes....[T]he shark removal likely would not have a measurable effect on predation rates for any species other than monk seals." At the Land Board's meeting, monk seal researcher Charles Littnan added that the shark culling was part of a larger plan to fortify the age structure of the monk seal population, which right now has dangerously low juvenile survival. Among other things, he said, NMFS also plans to rehabilitate sick seals at a care facility in the Main Hawaiian Islands and relocate threatened seals to areas where they are more likely to survive.

In response to concerns by some native Hawaiians that sharks are their aumakua (a family or personal god), William Aila, chair of the Papahanaumokuakea cultural advisory group, testified as an individual that aumakua are individual animals with very specific relationships and that it was unlikely that any of the Galapagos sharks at French Frigate Shoals were anyone's aumakua. He added that killing rogue sharks is not unheard of in Hawaiian culture, citing the legend of Nanaue, a shark-man who was captured and killed after going from island to island eating people. Although the cultural advisory group failed to reach a consensus on the proposal, member Trisha Kehaulani Watson also testified in support of the permit.

"No one wants to find themselves in the position we do today. Yet, we nonetheless find ourselves here having to consider whether or not to support the intentional taking of animals...I firmly believe that the future survival of the Hawaiian monk seal requires us to take these drastic actions," she wrote. "As a Native Hawaiian, I believe it is culturally appropriate to allow for the taking of sharks, because we are doing so to restore balance to the ecosystem. It was commonplace in traditional Hawaiian times to take action, however drastic, to restore balance to our environment so that long-term ecological sustainability was maintained."

Even so, she added, sharks are revered animals and must be taken with "the utmost respect for the animals and Hawaiian cultural practices." She recommended that the NMFS team undergo cultural training and include a cultural practitioner.

The Marine Conservation Biology Institute and KAHEA: The Hawaiian-Environmental Alliance did not oppose the proposed actions. But at the board's meeting, KAHEA program director Marti Townsend did restate her longstanding concerns that the DLNR has been disregarding requirements of the state's environmental review law, Chapter 343.

> *"The intentional killing of one species on behalf of another is neither basic nor research."*
> ***— Marti Townsend, KAHEA***

She pointed out that the NMFS chose to conduct an environmental assessment, but the state did not. Also, the "basic research" exemption from environmental review cited by DAR in its report to the board is inapplicable since the permit is for "conservation and management," she wrote.

"The intentional killing of one species on behalf of another is neither basic nor research," she wrote. "[I]f the intentional killing of sharks in Hawai'i's most protected waters does not trigger an environmental review under state law, what activity ever would?" she asked.

At-large Land Board member Samuel Gon agreed with Townsend that an EA and cultural assessment would be helpful in evaluating the proposal. As a whole, however, the board did not seem to think any laws were being broken and approved the permit with very little discussion.

Board Again Defers Action on Logging Case

Land Board chair Laura Thielen seemed even more upset than Big Island member Rob Pacheco was, addressing attorney Douglas Ing at the board's March meeting like he was a child.

Speaking slowly and deliberately, Thielen told Ing, "In response to your client's request to have an extension, we were expecting you to come in today with a presentation on this matter to be able to make a case on behalf of your client and to put your case on the record, which would then be considered in the event this board made a decision in any appeal. So is this the sum total of the case on the record that you are presenting to this board today?"

"I'm sorry. I didn't come prepared to do that," Ing said, adding that he thought the Land Board would simply support the recommendation of its staff.

Two months earlier, Pacheco was the sole opponent to the Land Board's decision to defer for two months a proposal by its Land Division to resolve an illegal logging case that began about a decade ago. In the late 1990s, logging company Steve's Ag Services, with assistance from loggers Raymond and Wesley McGee, logged nearly 1,000 koa and other trees from Conservation District and state lands in Ka'u. The company had an agreement with Kahuku Ranch at the time to log "downed or severely distressed" koa trees on the ranch's property, but strayed into areas it shouldn't have and cut perfectly healthy trees. In 2002 and 2003, the Land Board fined then-Kahuku Ranch owner Damon Estate a half-million dollars for the Conservation District violations and the loggers more than $1 million for cutting trees on state land.

During the contested case hearing over the state land violations that followed, Ing, representing the loggers, questioned the state's ownership of the property and argued that it was actually owned at the time of the logging by Kahuku Ranch and is now owned by the U.S. government as part of the Hawai'i Volcanoes National Park. The case's hearing officer and the Land Board agreed that the case should be dismissed without prejudice and directed the DLNR to pursue a quiet title action for the land in court, which the state did in 2007. The loggers then, on behalf of the U.S. government, appealed the action in federal court, lost their case, and filed an appeal last December in the 9th U.S. Circuit Court of Appeals.

Once U.S. District Judge Samuel King found in favor of the state in November 2009, the DLNR sought to put an end to the case by proposing a revised and reduced set of fines. On January 8, the Land Division recommended a fine of roughly $631,965, "considerably less than the maximum amount that might be assessed, which amounts would include a fine of $1,000 per tree and damages based on the amount grossed by loggers, $1,035,900."

Attorney Ronald Self, representing the loggers that day, asked for more time to prepare a response. The Land Board agreed to take up the matter at its March 11 meeting.

At that meeting, deputy attorney general William Wynhoff provided a lengthy background of the case, since none of the current board members participated in the original deliberation over the violation. Wynhoff acknowledged that the loggers probably tried to ascertain where they were, but said there was "no way for experienced people to go up there and think you're on mauka border when you're actually on the makai border [of the Kahuku Ranch property]. I've been up there myself. If the end of the kipuka is 50 feet away, it's not possible you're on the mauka border." He also noted that intent does not factor into whether or not there was a violation.

> *"We would very much like to settle."*
> ***— Douglas Ing, attorney***

In the two months since its January recommendation, the Land Division significantly increased its proposed fines. In January, the division proposed fining the loggers $500 per tree cut for a total of $105,000, and imposing damages of $291,000 for restoration and $213,000 for the value of lumber taken. The division also proposed about $22,500 in administrative costs. In March, however, the division decided to impose the $105,000 fine against each logger — Steve Baczkiewicz and the McGees — individually, eliminate the damages for restoration, increase damages for the value of lumber taken to $409,423.44, and increase administrative costs to $53,870.80.

When it was Ing's turn to testify, he immediately requested a contested case hearing. Thielen then asked what for, since the board had not taken a vote, and recommended Ing make his case to inform the board's decision. Ing admitted he was not prepared, but eventually disputed the DLNR's claim that the loggers cut down all the trees on the state land, as well as its recommendation to impose a per-tree (as opposed to a per-day) fine on each individual logger.

Thielen managed to get Ing to admit that the loggers had logged in the area of dispute, but he would not agree the land belonged to the state. He added that he is not yet sure he will be representing the loggers in their federal appeal.

Thielen was clearly baffled that Ing would rather enter into an expensive contested case hearing and federal appeal rather than pay fines that would be less than or equal to his potential legal fees. When asked why he would go that route, Ing said that the loggers are broke and that he is representing them free of charge. In fact, he continued, they hadn't even paid him fully for representing them in the contested case hearing and would probably be unable to pay even the proposed $105,000 fine, let alone the rest.

"I felt bad for them," he said.

Thielen, however, recommended deferring the matter again for a month and possibly increasing the proposed fines. In the end, the board voted to defer for one month and authorize Thielen (with the understanding that Wynhoff would be participating) to try to settle the matter in the meantime.

"We would very much like to settle," Ing said. Wynhoff agreed that mediation was a "great idea" but also said that if the loggers think they have to file a contested case, they will.

Case Family Seeks to Rezone Tantalus Conservation Land

The Land Board has authorized public hearings for a proposal by Mr. and Mrs. James Case of Honolulu to amend the DLNR's Conservation District rules to redesignate 63,219 square feet of their Tantalus property from the Limited subzone to the Resource subzone. The rules prohibit development in the Limited subzone, which encompasses lands susceptible to flooding, erosion, tsunami inundation, volcanic activity, landslides, or have a general slope of 45 percent or more. A rule change moving the Resource subzone boundary further downslope on the Case property would make the current residence there — built in the 1940s and designed by noted architect Vladimir Ossipoff —a conforming use and would allow the couple to apply for a permit to build a new structure on the site at some point in the future.

Sam Lemmo, administrator for the DLNR's Office of Conservation and Coastal

Lands, told the Land Board on March 11 that his office had decided not to discuss the merits of the project, but merely recommended that the board allow his office to continue processing the Cases' request.

"In fairness to the applicant, [should we] not give some type of read of how this is going to be viewed by the department, before we engage in this long process?....Is [the proposed rule change] the norm in this area?" Thielen asked Lemmo.

Lemmo responded that a similar application had been filed in the 1990s and was quite controversial, referring to a Conservation District Use Application filed by Mr. and Mrs. Randolph Grobe. The Land Board ended up denying the Grobes' request after a contested case hearing.

⁂

Board Issues $9,000 Fine for Illegal Trail in Hanalei

Kaua'i Land Board member Ron Agor wanted to go easy on Justin and Michele Hughes, but some of the other board members just weren't buying their story.

The couple, whose company Secret Beach Properties, LLC, owns 23.8 acres of Conservation District land in Hanalei, Kaua'i, claimed last month that in 2008 they built about 1,000 feet of trail across a section of their property in the Conservation District — without Land Board approval — so that they could keep an eye on any illegal tree cutting on their property and remove trees allegedly felled by their neighbor.

On March 11, the OCCL recommended that the Land Board find that the couple illegally landscaped in the Limited subzone and fine them $7,500 for the violation and $1,500 for administrative costs. The OCCL recommended giving them the option of remediating the area or applying for an after-the-fact Conservation District Use Permit within two months of the board's decision.

After listening to the couple explain why they cut the trail, Agor recommended that the board approve a reduced fine of $3,500 and accommodate the couple's request for four months to apply for a CDUP. His reasoning for the reduced fine: "This issue would not have come up had the neighbors not cut the trees."

But Big Island Land Board member Rob Pacheco, who owns the nature tour company Hawai'i Forest and Trail, had a completely different take. After sifting through pictures of the trail work, which showed a very wide, flat path fortified with boards, he said, "I look at these pictures here and I have some experience building trails... I really don't believe this trail was put in merely to clear stuff out. To me, this looks like a trail for traverse to be used long-term. The fact that they laid board down to hold the trail back, this is the building of a trail for access." Member Sam Gon, senior scientist and cultural advisor for The Nature Conservancy of Hawai'i, agreed, as did the OCCL. Its report to the board states, "The design and durability of the trail indicates that this was intended to be a permanent addition to the land, and one which would increase its value to prospective investors for the subject and neighboring parcels." The report also notes that, in 2007, following an investigation of illegal tree cutting, OCCL had provided the couple with a copy of Conservation District rules.

In response to Agor's suggestion, Gon pointed out that the trail opened up the Conservation District to other activities and said he wanted it remediated. He recommended that the board delete the option to file for an after-the-fact permit, but board chair Thielen said she didn't think the board could ban anyone from filing for a permit. The board could, however, deny the application.

Agor's motion to approve a reduced fine failed. A motion by Pacheco to approve the OCCL's recommendation with an amendment giving the couple four months to submit a CDUA, passed, with Agor the sole dissenter.

⁂

Board Approves Funding For Legacy Land Projects

At its March meeting, the Land Board unanimously approved nearly $4 million in funding for eight projects under the state's Legacy Land Conservation Program, including the acquisition of a conservation easement over 614 acres in East Moloka'i owned by Kainalu Ranch. The easement is expected to cost a total of about $4,274,000, with $500,000 coming from the Legacy Lands program and the rest from private sources and the federal Forest Legacy Program.

The board also authorized its chair to enter into agreements and encumber funds for the purchase of 10.61 acres of the North Kohala coast, 63.701 acres of coastal wetland in West Maui, 0.75 acres near Kaua'i's Black Pot Park, the historical H.N. Greenwell Store in Kona, and conservation easements over East O'ahu's Fong Plantation, 11.14 acres of agricultural land in Puna, and six acres adjacent to Hawai'i's Kahauale'a Natural Area Reserve.

— Teresa Dawson

For Further Reading

More background on several of the issues in this month's Board Talk can be found at our website, www.environment-hawaii.org.

Palila Critical Habitat:
- "Hunters Block Saddle Road Work, Professing Concern for the Rare Palila" (October 2000)
- "State, Environmentalists Argue Over Fencing as Palila Population Declines on Mauna Kea," and "Ranchers Who Lost Land to Palila Seek Extra Compensation from State" (July 2009)

Shark Culling in the NWHI:
- "Board Denies NMFS Request to Cull Sharks in Northwest Isles" (May 2006 *Board Talk*)
- "Up to 10 Galapagos Sharks May Be Culled to Protect Seal Pups at Northwestern Shoals" (July 2006 *Board Talk*)
- "Longline Gear Approved for Catching NWHI Sharks" (August 2007 *Board Talk*)
- "Non-Lethal Shark Control at French Frigate Shoals" (June 2008 *Board Talk)*

Steve's Ag Logging Case:
- "Poachers Take Timber Valued at $1 Million" (January 2003)
- "Damon Estate Contests Fines for Illegal Logging in Ka'u" (May 2003 *Board Talk*)
- "Damon Estate Hopes to Avoid Fine, Restore Logged Lands in Ka'u" (June 2003 *Board Talk*)
- "Record Fine for Illegal Logging in South Kona, Ka'u" (August 2003 *Board Talk*)
- "Damon, Park Service to Restore Logged Land" (September 2003 *Board Talk*)
- "Koa Loggers at Center of Two Violation Cases" (May 2005 *Board Talk*)
- "Koa Logger Countersues Damon Estate, Claims Trust Kept Conservation Land Secret" (June 2005)
- "Loggers Seek Dismissal of $1.5M Violation Case" (August 2005 *Board Talk*)
- "Koa Loggers File Complaint Against Board, Attorney General" (August 2007 *Board Talk*)
- "Board Delays Closing Steve's Ag Logging Case" (February 2010 *Board Talk*)

Tantalus Conservation District:
- "Andy Anderson Would Turn Public Land into Private Garden" (January 1992)

Water, County Plan Conformance, Access Also at Issue in O'oma Development Proposal

The proposal for O'oma Beachside Village calls for development in three general areas. Closest to Queen Ka'ahumanu highway is a mauka "village," including a mix of housing types (small lot, multi-family, and live-in retail units) and a commercial center. The historic Mamalahoa Trail generally defines the boundary between the Urban and Conservation lands. Makai (shoreward) of the trail is a residential development that is planned for about 600 single-family houses (up to 85 on relatively large lots, including some that front the neighboring Kohanaiki golf course to the south), about 100 multi-family units, and a makai "village," with about 50,000 square feet of commercial space.

Wide buffers along the Mamalahoa Trail define one large open space area, while the second major area of open space consists of about 75 acres along the shore, where a broad setback of up to 1100 feet separates the coast from the nearest house site or commercial building.

The National Park Service was the only party requesting intervenor status before the Land Use Commission as it considers the O'oma boundary amendment petition. Its concern was to protect the quality and quantity of underground water flowing into the coastal areas of the Kaloko-Honokohau National Historical Park, which lies less than a mile south of the southern boundary of the petition area.

Before the LUC began formal hearings last month on the petition, the NPS had resolved its issues with the developer, O'oma Beachside Village, LLC. Among other things, the developer plans to obtain water for desalination from the state Natural Energy Laboratory of Hawai'i Authority, which is immediately to the north of the O'oma area.

But use of seawater from NELHA pipelines raises other questions, not addressed in the environmental impact statement or other planning documents. At NELHA, several bottlers use deep seawater as feedstock for their desalination plants, which employ the same reverse-osmosis technology that O'oma Beachside Village is proposing to use. Reverse-osmosis, however, adds considerable demand to the area's electrical grid. While the developer's proposal calls for the village to be designed with energy conservation in mind – with light-colored roofs on buildings, EnergyStar appliances in houses, solar water heating on every roof, and so on – it is silent on the electrical requirements of desalination.

Yet another question associated with the use of NELHA pipeline water is what would happen should NELHA tenants' demands for seawater increase? At present, NELHA has seawater to spare, but if that changes, it is not clear that any obligation to an offsite user would supersede NELHA tenant demands. The diversion of seawater to a private water supply system offsite was not among the uses anticipated at the time the pipeline was built with public funds. Whether that proposed use can withstand legal scrutiny is an unresolved question.

Conformance with the Kona Community Development Plan, accepted in 2008 as part of the county's general plan, was a question raised by many of those commenting on the EIS for the project as well as in public testimony last month. The developer's planner, PBR Hawai'i, has argued that there is no divergence between the Kona CDP and the O'oma project.

The CDP calls for most of the new development north of Kailua village to be focused in an area along a new mauka transportation corridor, midway between the Queen Ka'ahumanu Highway and the Hawai'i Belt Road (Mamalahoa Highway). There, the CDP envisions a series of transportation-oriented developments, which will facilitate efficient public transportation systems and lessen the need for travel in connection with shopping, entertainment, schools, and the like.

PBR Hawai'i notes, however, that the CDP also calls for "traditional neighborhood developments," along the lines of self-contained villages, much as that proposed for O'oma.

As for public access, PBR notes, "Unlike any development on the entire Kona Coast, O'oma Beachside Village invites the community, not just to a nominal space on the outer edge of the area, but all the way through the community to a makai village and a significant coastal open area preserve." Eighteen acres along the coast will be a public shoreline park, and 57 acres (including some sites of archaeological importance) will be left in open space.

At present, a jeep road along the shore connects O'oma to the NELHA road on the north and to Kohanaiki on the south. Whether the public will be able to continue to drive vehicles along the coast is still unsettled, as is the issue of access to the shore by vehicles from within the O'oma area itself. This was brought out in a question posed to PBR's Tom Witten by LUC member Lisa Judge.

"How would someone living in an area near, for example, the wastewater plant [proposed for the northeastern portion of the property] get to the community center [in the southwestern part], or the shoreline?" she asked.

Witten replied that they could walk or ride their bicycles along paths within the community. "They'd have the ability from any residence to get on a trail with minimal conflicts with roadways," he noted.

"From a vehicular standpoint," he continued, "to get to the pavilion and park, … you'd have to get on the highway and drive down there."

Judge said she admired the planned network of trails, "but I think people will want to take their coolers" to the beach.

Witten: "That's a good point. We should look at that." ***— P.T.***

PHOTO: O'OMA BEACHSIDE VILLAGE

Existing shoreline trail

Developer's Expert Differs with DOT On Projections of Future Noise Levels

Noise – current, future, acceptable or compatible – has taken center stage in the debate over the proposed O'oma Beachside Villages just a short distance south of the Keahole airport on the Kona Coast of the Big Island.

As a rule, the level most people would describe as 'very quiet' is around 30 decibels (dB), while 100 dB is deafening. The decibel scale is itself logarithmic, which means that something measured at 70 dB has 10 times the acoustic energy of 60 dB and 100 times the energy of 50 dB.

Since 1980, the Federal Aviation Administration has had a set of land use compatibility guidelines for noise exposures. Residential uses were deemed to be compatible with noise exposures up to 65 DNL (the average sound over a 24-hour period). Residential uses above that were allowed only when building codes required insulation and other noise-mitigation measures sufficient to reduce the indoor noise levels to 40 dB. The only residential uses allowed in areas where the DNL exceeded 75 would be transient accommodations, and even then, only when noise-level reduction (NLR) measures achieved indoor levels of 40 dB.

Given the fact that construction in Hawai'i typically does not use the levels of insulation seen elsewhere in the United States, the difference between indoor and outdoor noise levels is not nearly so great here. To address that, the state Department of Transportation has adopted its own recommendations for compatible land uses. Residential construction of all types (including transient lodgings with limited outdoor use and high-density apartments with limited outdoor use) are classified as compatible up to the 60 DNL contour line.

Within the 60 to 65 DNL contour, residential uses are generally not compatible. However, in a footnote to its guidelines, the DOT states, "where the community determines that these uses must be allowed, Noise Level Reduction (NLR) measures to achieve interior levels of 45 DNL or less should be incorporated into building codes and be considered in individual approvals." In Hawai'i, "normal local construction employing natural ventilation can be expected to provide an average NLR of approximately 9 dB. Total closure plus air conditioning may be required to provide additional outdoor-to-indoor NLR, and will not eliminate outdoor noise problems."

An Imperfect Metric

The DNL is a measurement of average noise, and, like other averages, it does not describe very well the extremes that may occur over the course of a day. The average is arrived at by measuring the noises, in decibels, that occur at a given site over the course of a day, with noises that occur between 10 p.m. and 7 a.m. given extra weight (10 dBs are added to the measured levels), to reflect the additional level of the population's general sensitivity to noise during the night.

Other ways to measure noise exist, and, although they do not factor into what may or may not be regarded as compatible land uses for planning purposes, they do give a number to the level of pain and annoyance that people living near airports or other noise-generating activities experience.

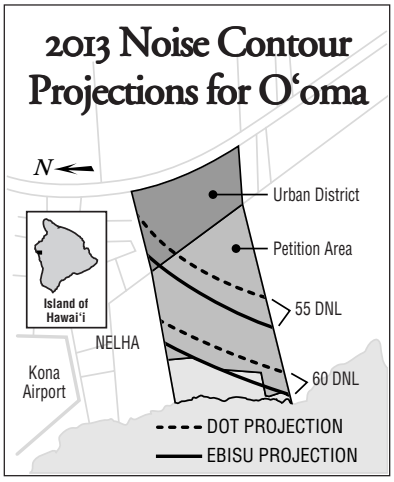
The Sound Exposure Level (SEL) factors in duration of exposure as well as the decibel level. Tables that the developer's noise expert, Yoichi Ebisu, prepared show noise from overflights of a range of individual aircraft measured at selected sites near the southern boundary of the O'oma property. At Location A, which lies roughly midway between the 55 and 60 DNL contour lines, as shown on a DOT map reflecting 2001 noise levels, the SEL measured during the take-off of a Boeing 737 averaged 92.1 dB. (Over the six days of measurements made by Ebisu in March of 2007, there were 81 take-offs of 737s recorded at Location A.)

Then there is the maximum sound level (or Lmax). This is merely a measure of the peak noise a given aircraft generates when passing over a site. To look at the same set of data for Location A, the maximum sound level for the Boeing 737 take-offs ranged from a low of 75.3 dB to a high of 89.0, with an average Lmax of 81.

At Location B of Ebisu's study, an area that lies well inside the 55 DNL contour, the sound exposure levels for 64 Boeing 737 take-offs were only slightly less than they were for Location A: 88.7 as opposed to 92.1 dB. The Lmax was 79.8 dB on average.

Updates

If one looks at Ebisu's maps, none of the uses proposed for the O'oma project is incompatible with state guidelines on noise. Even in 2013, when, under the developer's timetable, construction will have begun, the projections drawn by Ebisu for noise contours indicate that noise-sensitive uses still fall outside the 60 DNL contour. To be sure, the distance between the 60 DNL contour line and the closest lot lines for large-lot houses and multi-family units in the so-called Makai Village is close – on the order of 100 feet or less. It's a line drive, but doesn't cross into foul territory.



Sources: State of Hawai'i Airports Division, Noise Maps for KOA; O'oma Beachside Village, Final EIS, Volume 2.

The story is different if one superimposes the state Department of Transportation's official Noise Exposure Maps – accepted by the FAA on January 12 – onto the plans for O'oma Beachside Village. By 2013, the DOT maps show the 60 DNL contour will reach as much as 800 feet mauka of where Ebisu had placed it. The entire Makai Village will be in a zone where residential uses are incompatible under state standards. A substantial fraction of the large-lot portion of the development also will fall into the area where the noise level exceeds 60 DNL. In addition, roughly 80 percent of the area to be developed that is included in the Land Use Commission redistricting petition would be subject to the noise disclosure notice requirement; under Ebisu's maps, less than half would be.

Ebisu's study was begun before the state Department of Transportation had published draft maps showing both five-year (2013) and long-range forecasts for noise. By the time his study was completed, however, the draft maps were available, and, reading the final noise study and EIS for the O'oma project, it had become clear to Ebisu that a discrepancy existed.

"During the course of this acoustical impact study … the Hawai'i State Department of Transportation, Airports Division produced two pairs of … noise contours for [Keahole] airport for years 2007/2008 and 2012/2013," Ebisu wrote in his report. "These draft contours [now final] were compared to this acoustical impact study's noise contours, and were critiqued via correspondences to the HDOTA. Attempts were made to obtain copies of the noise modeling computer input files used for

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sound levels." The study suggests that anything lower than a level of 60 DNL (a measure of the average noise levels over a day and night, or 24-hour period) is acceptable, she said. "It is not."

[For a more detailed discussion of noise measurements and standards, see the sidebar in this issue.]

McMillan went on to note that in Hawai'i, because of the mild climate, houses tend to be more open and less sound-proof than houses built elsewhere in the United States. FAA standards were developed for the mainland, while in Hawai'i, the state Department of Transportation suggests that noise-sensitive uses – schools, houses, churches, and the like – be restricted to areas where the DNL is 55 or lower.

If the O'oma development is allowed to be built as proposed, McMillan said, "it is only a matter of time before taxpayers will be bailing out homeowners" there. Under FAA rules, the federal government has to purchase houses or pay for sound mitigation whenever airport activity increases to the point where noise levels are incompatible with residential use. The long-term projections for the Kona airport "were underestimated in a 1997 study" by the state, she noted. "The Conservation-zoned O'oma land is the last buffer we have for an airport that is only going to be more active in the future," she warned.

McMillen distributed copies of a map, contained in the recent (2009) draft Kona airport master plan, depicting radar flight tracks at Keahole airport for a four-day period in January 2007. The tracks, showing arrivals, departures, and touch-and-go landings, formed a nearly solid pattern over much of the O'oma parcel. Projections for future noise contours show most of the petition area falling within the 55-60 DNL contour by 2013.

Bryan Yee, deputy attorney general representing the state Office of Planning, asked McMillen what kinds of mitigation measures she might recommend.

McMillen discounted the idea of sound insulation. "I'm not an expert in this, but do have some knowledge of it," she said. "Once you have an opening, it blows the insulation. You open a window, and the insulation is gone." The only way to avoid opening windows would be to have air-conditioning, she said – and she, for one, could simply not afford that.

"My concern here," she said, "is that we taxpayers, with federal taxes, are buying land, people's houses, because this kind of thing is happening, everywhere in the country."

Yee asked if any other kind of mitigation measures might work.

"In the next development over," she answered, referring to Kohanaiki, "they do have … noise easements." Such easements, which give the state the right to use airspace, generally protect the state from having to purchase land or pay for sound attenuation where houses are later affected by increasing noise from airport operations.

But, she added, Kohanaiki is "kind of at the limits, if you look at the maps. In this parcel" — the O'oma one — "this doesn't work."

"Your objection is to residential use, not commercial?" Yee asked.

"Yes," McMillen replied.

Noise Concerns

The following day, the developer's attorney Jennifer Benck began presenting the case for the project with a series of expert witnesses. The last one to testify was Yoichi Ebisu, who prepared the noise analysis that was used in the environmental impact statement for O'oma Beachside Village.

"Yesterday we heard a lot of discussion about FAA regulations and 65 DNL contour lines versus 50 and 55 DNL lines," Benck asked Ebisu. "Can you explain what these are?"

Ebisu responded that the federal Aviation Safety and Noise Abatement Act of 1979 required the FAA "to define how to best measure aircraft noise, define an acceptable threshold, and develop a program whereby airports develop noise exposure maps… In return, these maps get disclosed to the public and the airport receives limited immunity from litigation should anyone move into an unacceptable contour level."

The FAA, he continued, "determined that as far as a federal regulatory level for aircraft noise is concerned, the 65 DNL line represents the threshold, the line of demarcation between what's acceptable aircraft noise and unacceptable."

Benck asked whether the O'oma project proposed any "incompatible development" within the 65 DNL area, as the state DOT projects it will exist in 2013.

"That's a negative," Ebisu replied. "There's no incompatible development proposed" in that area. Hawai'i's definition of what constitutes "incompatible" development is more stringent than that of the FAA, he went on to say, with the DOT having developed "planning criteria" – not standards, but criteria, he emphasized – that recommend no incompat-

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the HDOTA's draft noise contours, but these attempts were unsuccessful…" Ebisu alleged that the DOT's "original modeling assumptions … were considered to be questionable or arbitrary." He included in his study a list of reasons for the different analyses, including possible incorrect assumptions about day and night winds and corresponding runway uses; "apparent lack of authoritative input from the military when forecasting future military operations" at the airport; failure to take into account the new seaward runway planned for C-17 touch-and-go operations; continuing use of B-737(200) aircraft (Ebisu's forecasts had assumed these would be phased out and quieter aircraft substituted); and finally "inclusion of questionable noise monitoring data, which if deleted, would contradict the study conclusion that the south side of the airport is noisier than the north side of the airport." ***— P.T.***

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ible uses where noise levels exceed 60 DNL.

"The state 60 DNL level, does that take into account the fact that people in Hawai'i do keep their windows open?" Benck asked.

"Yes," Ebisu answered. "That's why it [the incompatible use level] was recommended to drop at least 5 units." Below 60 DNL there are no incompatible uses, he explained. "Above 60, more sensitive uses, like residences, schools, et cetera, become incompatible." The 55 DNL contour line, he said, is recommended for "disclosure purposes…. The reason for that is in coming up with the 60 DNL recommendation, we were aware … of the [Environmental Protection Agency] recommendation that the level of 55 DNL is a so-called safe level, the level below which there should be absolutely no adverse impacts from environmental noise. That 55 DNL level is out there in the scientific literature as being the safe level."

"So why didn't we pick 55 as the recommended level for local construction?" Ebisu asked himself.

"The reason," he answered, "is that, like the federal government [the state] were also aware of the 55 contour, but made the determination that if we use 55 as a regulatory level, the cost of mitigation would be too high, it becomes impractical. So instead of picking 55 as the level for build or no-build, they decided to use 60."

As far as the "twilight zone" – as Ebisu put it – between the 55 and 60 DNL contour lines, that's where the need for disclosure kicks in. State law requires potential buyers be notified if properties for sale fall within this area, similar to tsunami zones, he said.

Benck raised the idea of possible mitigation measures. "When a home is constructed, what sort of interior noise should someone expect to consider in that band" of 60 DNL? she asked.

"For naturally ventilated homes, with no air-conditioning, most sound from outside will come in through open windows and doors, irrespective of how well you build walls and the roof," he said. Still, there would be a reduction of about 10 points, or DNL units, he added. "If I'm on 60 contour line, when I go inside my house, the interior noise level should be 50 DNL," he said. For a typical naturally ventilated house, "if I'm on the 55 contour, my interior level will be 45 DNL," the level, he said, that the Environmental Protection Agency has found to pose no risk whatsoever of adverse impacts from noise.

Deputy attorney general Yee asked what it would take to reduce the noise inside houses in a 55 DNL contour down to 45 DNL.

"You need to air-condition," Ebisu answered. "It requires total enclosure."

Who Pays?

By the time commissioners were able to ask their questions of Ebisu, the time was approaching when the meeting would have to be adjourned if the LUC members and staff were to catch their flights.

Still, commissioner Lisa Judge was keen to follow up on the issues raised by McMillen in her testimony of the previous day. Judge asked Ebisu what would happen if the noise contour lines "move mauka" by 2020 – that is, if noise over the project area increases.

"An act was passed by Congress to address those types of situations," Ebisu replied. "The act required disclosure of [current] noise plus a five-year period. Once those [noise contour] maps are disclosed, it puts the burden on airports to mitigate" if the noise increases to the point that once-allowed uses are in zones where they are no longer compatible.

If a developer builds something inside a noise contour zone that is incompatible, "then triggers for easements and noise mitigation and attenuation should occur," Ebisu says. "But if he stays outside that contour, then he shouldn't have to do anything."

All bets are off, however, if the noise contours expand. "If," Ebisu said, "20 years from now, things have changed, the [federal act] does not immunize the airport… If…the contours grow, where it now encompasses development, there is no immunization for that…. You're not immunized for any increase that occurs over formerly compatible land that becomes incompatible."

Judge: "What happens in 2040 if all houses are now in the 65 DNL contour. Is the airport responsible then to mitigate it?"

As long as the buildings were constructed without encroaching on the 65 DNL contour when they were built, Ebisu said, "then, yes."

"So today, somebody buys a house, and it's in the 60 DNL, and 20 years from now, it's 65, it's the federal government's responsibility to fix that problem?" Judge asked.

"Right," Ebisu replied.

The LUC will continue hearings on the O'oma petition over the next several months. For details on upcoming hearings, check the LUC website: http://luc.state.hi.us

— Patricia Tummons

For Further Reading

Background on past proposals for the O'oma land may be found in an article that appeared in the March 2009 edition of *Environment Hawai'i:* "Residential Villages Are Proposed for Area near Kona Airport, NELHA."

The final environmental impact statement for O'oma Beachside Village and appendices are available online at the website of the Office of Environmental Quality Control. Click on the line to the January 23, 2009, edition of the OEQC "Environmental Notice:" *www.oeqc.doh.hawaii.gov.* The Y. Ebisu analysis of noise impacts may be found in volume 2, appendices.

The noise study for the Keahole airport is available at: *www.kona-airport.com/resources.html.*

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