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Win, Lose, Draw

The state Land Use Commission was unusually busy last month, with hearings on three controversial projects, all in West Hawai'i. One won, one lost, and one continues to be a burr in the commission's saddle, as it has been for, oh, say, the last five years at least.

Topping off a rough month for the commission was an appeal of a hard-fought docket involving land in Central O'ahu. The appeal challenges the right of a sitting commissioner to vote.

Meanwhile, the Board of Land and Natural Resources has had to deal with several full agendas as well, including resolution of a disastrous effort to create an artificial reef off Maui and a dispute over vacation rentals of houses in the Conservation District of Ha'ena, Kaua'i.

Finally, we look at the pathbreaking decision of the Public Utilities Commission designed to make it easier for alternative energy sources to make their way into the state's power grids.

Happy holidays!

IN THIS ISSUE

More Promises from Developer As 'Aina Le'a Fails to Meet Deadline

Here's what's happening – or not – with the Villages of 'Aina Le'a, a development on a thousand-acre tract of land put into the Urban district more than 20 years ago:

- Construction of affordable townhouses has stalled out after completion of 16 units last spring; the primary contractor is owed more than $4 million for work already done;
- Finding a source of construction funds is, by the developer's own admission, an uphill climb;
- The November 17 deadline for completion of 385 units intended for sale to low- to middle-income families passed, with the developer acknowledging that they probably won't be ready for occupancy until late next year;
- The Land Use Commission is continuing to hear arguments on whether the land should revert to its prior Agriculture classification.

On November 18, the day after the deadline for completion of the affordable units passed, the LUC held a hearing on the status of its order to show cause why the land should not be reverted. That order, issued more than two years ago, was rescinded when the current developer, DW 'Aina Le'a Development, LLC, took over the project from Bridge Capital and committed to moving heaven and earth to get the affordable housing done by the 2010 deadline. That deadline was set in 2005, at the request of Bridge, in return for reducing the affordable portion of the project from 60 percent of all units built to 20 percent.

As the meeting began, the King Kamehameha Hotel ballroom in Kona was packed with partisans of the developer: real estate agents, lumber purveyors (including one who recently withdrew a petition for a mechanic's lien against the project), a mortgage banker, a consultant, an electrical contractor, a civil engineer, an architect. All gave the project their hearty endorsement in testimony to the commission.

Only two discouraging voices were heard: That of George Robertson, of the Puako Community Association, and Randy Vitousek, representing the Mauna Lani Resort Association. Robertson said his constituents were "very upset about the design and construction of the affordable homes that were once promised to be interspersed throughout the development. Right now, they're clustered… [into] an affordable ghetto…

"It seems to me like we, including the folks in this audience, have been enabling a drug addict that constantly comes back for more, and we keep giving him more and more extensions. It's concerning for us that the Land Use Commission, its integrity and credibility is at stake when

An artist's rendering of a completed structure for Villages of 'Aina Le'a.

to page 8

Environment Hawai'i

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NEW AND NOTEWORTHY

Disputed No More: For the last 25 years, a 10-acre parcel of land in North Kohala, just south of the hauntingly beautiful Lapakahi State Park, has been the object of heated disputes as owners sought to obtain Conservation District Use Permits to build a luxury house on the site.

Last month, however, the area was acquired by the County of Hawai'i, using funds set aside to purchase open lands, with assistance from the Department of Land and Natural Resources' Legacy Lands program and the Trust for Public Lands. Total cost of the land, sold by Jonathan Cohen, was $1.89 million.

The site is littered with historic and cultural sites. It is part of an extensive network of sites. It is traversed by the Ala Kahakai National Historic Trail, stretching 175 miles along the leeward coast of the island of Hawai'i.

Efforts to develop the property have been the subject of many reports published in *Environment Hawai'i*. A former owner, Michael Rearden (a.k.a. Roark McGonigle) lost a CDUP in 1995 after years of extensions – and a convoluted court case. (See the "In the Conservation District" columns of October and November 1993, May and August 1994, and July and August 1995.) More recently, Cohen sought to build on the property. (See the "Board Talk" columns in the June and August 2006 issues of *Environment Hawai'i*.)

PHOTO: ALOHA PROPERTIES

Slow Start for Ag-Aid: The Hawai'i Conservation Reserve Enhancement Program, which provides federal funds to farmers and ranchers protecting natural resources, has suffered through some initial growing pains, but is finally making some headway, according to a recent annual report.

Launched in March 2009, the program generated a lot of interest at the start from 20 potential participants on Maui and Hawai'i covering about 1,300 acres, which equates roughly to the 1,500 acres program staff had targeted for enrollment within the program's first five years.

As of October, however, only two projects totaling 25.4 acres had been officially enrolled and about 15 others were in the pipeline.

The CREP has assisted in the acquisition of conservation easements over 4,500 acres of Kukaiau Ranch on the Big Island and 614 acres of Moloka'i's Kainalu Ranch, providing nearly $18,000 in funds.

The total cost of CREP funding, including in-kind contributions, has been about $2.3 million. On November 12, the state Board of Land and Natural Resources authorized its chair to approve future CREP projects.

Quote of the Month

"It seems to me like we ...
have been enabling a drug addict
that constantly comes back for more,
and we keep giving him more
and more extensions.
It's concerning for us that the
Land Use Commission,
its integrity and credibility is at stake
when you keep doing this."

— George Robertson
Puako Community Association

New NAR at Nakula: A proposal to designate approximately 1,500 acres of the Kahikinui Forest Reserve as the Nakula Natural Area Reserve may have raised opposition from Maui's hunting community back in April, but at the Land Board's October 28 meeting, it received approval without anyone voicing dissent.

The only member of the public to testify on the matter was Marjorie Ziegler, executive director of Conservation Council for Hawai'i, who supported the proposal and added that she's been happy with the DLNR's recent efforts to expand the NAR system statewide after more than a decade of inactivity.

Despite being trampled by cattle and goats for the past 200 years, Nakula maintains a decent leeward koa forest. Two endangered bird species as well as the Hawaiian bat inhabit the area, which has also been proposed as a reintroduction site for the endangered Maui parrotbill, Maui 'alauahio, and 'akohekohe, according to report by the DLNR's Division of Forestry and Wildlife.

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Renewable Energy Projects Trickle In With Launch of Feed-In Tariff Program

The state's long-awaited feed-in tariff (FIT) program has gone live.

Last month, an independent observer appointed by the state Public Utilities Commission launched a website for the FIT program, which allows owners of small solar photovoltaic (PV), wind, in-line hydro, and concentrated solar power (CSP) projects to sell electricity to Hawaiian Electric Company utilities.

Seen as an easier route than negotiating with utilities on power purchase agreements, the FIT program guarantees renewable energy producers grid interconnection and standard rates for 20 years.

In response to concerns raised with the PUC by HECO regarding the impacts of buying renewable energy on rate-payers, as well as the potential that variable renewable energy projects have to affect grid reliability, the PUC capped FIT projects at 5 percent of each utility's 2008 peak demand. That means a capacity of 60 megawatts for O'ahu, 10 MW for the Big Island, and 10 MW for Maui, Moloka'i, and Lana'i, combined.

On launch day, November 17, the applications didn't exactly come pouring in, but the website did receive nine applications for solar PV projects on O'ahu totaling nearly 2.4 megawatts. Two were Tier 1 applications (for projects generating 20 kilowatts or less), and seven were for Tier 2 projects, which are those producing more than 20 kW and up to 100 kW of wind and hydropower and 500 kW of PV and CSP on O'ahu. (Also included in Tier 2 are projects of up to 100 kW of PV and CSP on Lana'i and Moloka'i, 250 kW of PV on Maui and Hawai'i, and 500 kW of CSP on Maui and Hawai'i. The FIT website began accepting applications for those islands on November 24.)

The O'ahu projects submitted so far will be located in Haleiwa, Kapolei, and Honolulu, and the two largest, each for the maximum 500 kW, are located at the Pier 2 cruise ship terminal and Foreign Trade Zone downtown. They are expected to be completed next December.

According to Hawai'i Renewable Energy Alliance (HREA) president Warren Bollmeier, the minimal first-day response may have been related to the fact that FIT rates are lower than retail rates.

HECO priced PV electricity so low that it all but requires owners to develop larger projects, up to 5 MW, to make it financially worthwhile, he says.

A launch date for Tier 3 of the FIT program, which would accommodate these larger projects, has not yet been set. Tier 3 projects include all systems larger than the Tier 2 caps, up to 5 megawatts on O'ahu and 2.72 MW on Maui and Hawai'i. No wind projects on Maui or Hawai'i may exceed the Tier 2 cap of 100 kW.

"We all figured there wouldn't be much response to Tier 1. There was talk about an allocation of 5 percent [of the O'ahu cap being reserved for Tier 1]. It doesn't look like that's ever going to be met. ... Most people figured most of the action would be in Tier 3, but at this point, there's nothing reserved for Tier 3," he says, adding that things could change after the program's formal review in two years.

Reliability Standards

Despite the perceived guarantee of grid access provided by the FIT program, the utilities have the ability to refuse projects that will "substantially compromise reliability or result in an unreasonable cost to rate-payers."

In the eyes of some of the parties involved in the PUC's FIT docket, the utilities have too much discretion.

When HECO recommended in February that, based on its own reliability studies, no new wind or solar projects be added to its Maui or Hawai'i island grids, the blowback from the industry and energy advocacy groups led the company to propose the establishment of a reliability standards working group, which the PUC approved.

The group is intended to help answer questions about how renewable energy will impact grid reliability and to set reliability standards, but, to date, it's unclear who the group will include, how the group and associated technology committees will be governed, and who will facilitate discussions, among other things.

"What's anticipated is that the group will advise the [PUC's] technology working committee on what studies need to be done," says Haiku Design & Analysis president and former docket intervenor Carl Freedman, adding that identifying and completing those studies and developing standards based on them could take years. "It's not a quick thing."

Bollmeier adds that the group might also discuss some of the FIT program's current limits — for example, why Maui wind projects are limited to 100 kW.

"There's kind of a qualitative definition of reliability and it's been up to the utility until now to interpret that. Hopefully, there will be some consensus to make it quantitative," he says.

Right now, the utility requires any power producer to conduct a potentially costly and lengthy reliability study if it's facility places more than a certain amount of electricity on a particular grid circuit.

"That's been shown to be a deal-killer for some projects," Bollmeier says, adding, "These things have been up to the industry."

I.F.

Right now, parties involved in the FIT docket are awaiting the PUC's selection of an independent facilitator for the reliability standards working group. Freedman has applied for the job, as has Harold Judd of the Accion Group, which is the FIT program's independent observer. HECO and several docket intervenors have nominated others.

In a November 3 submittal to the PUC, state Department of Business, Economic Development, and Tourism energy planning and policy manager Estrella Seese — on behalf of the department and the the Solar Alliance, the Hawai'i Solar Energy Association, HREA, and Blue Planet Foundation — stated their strong opposition to Judd as facilitator.

They wrote that in his role as the independent observer, who is in charge of the FIT program's queueing procedure and implementation, Judd was "quick to form opinions and reach conclusions on issues without a firm grounding in the record and process of the docket, most especially the Commission's [decision and order]. This resulted in misunderstanding of the issues and even of his role as an IO, thereby adversely affecting his ability to facilitate resolution of issues amongst the parties."

Specifically, they complained that Judd sided with HECO's arguments that there was already a high level of penetration of variable renewable energy on Maui and Hawai'i and that more could affect service reliability.

"DBEDT and the joint parties note that the IO did not provide or offer any independent analysis or study to support his belief that HECO's concerns are legitimate," she wrote.

Seese also criticized Judd's deliberate slowness in implementing the FIT program "which disregarded the Commission's order to implement FIT Tier 1 and Tier 2 as soon as possible."

Whoever the commission chooses, the facilitator will likely be tasked with helping determine who will be allowed to participate in the group.

Bollmeier notes that the group grew out of the FIT docket, but will probably deal with broader issues.

"HREA [a party to the docket] suggested we open up a new docket if it was limited to FIT parties, because that leaves out a lot of people: people in the net metering docket and people interested in wheeling (which deals with electricity transmission)," he says. ***— Teresa Dawson***

Source: DLNR

BOARD TALK

Land Board Settles Dispute Over Reef Damage at Keawakapu, Maui

The attorneys negotiated until the last possible moment, and after the vote, it wasn't entirely clear whether the approved language assigned responsibility for the incident.

On November 12, after months of fruitless attempts to resolve the matter administratively, the state Board of Land and Natural Resources approved a settlement amount of $132,000 for damage caused to roughly 312 square meters of coral near Maui's Keawakapu artificial reef when American Marine Corporation (AMC), a state contractor, inadvertently dropped 125 concrete forms onto an existing reef. The amount is roughly equivalent to one-third of a proposed $400,000 fine for the damage.

Although AMC representatives argued that the state Department of Land and Natural Resources' Division of Aquatic Resources was to blame for the December 2, 2009, incident, the attorney representing the company's insurance provider said he would rather settle the matter than have the board impose a fine, which he would then have to contest.

AMC would like to avoid a contested case hearing, Joachim Cox told the board. "The party that will benefit from a contested case is my law firm," he said.

But a contested case hearing is exactly what Land Board chair and DLNR director Laura Thielen thought was the best way to flesh out the facts of the case while maintaining momentum to resolve the issue with an incoming administration.

"We put forward a fine so that we could be assured to go into a contested case," Thielen told the board.

Based on the evidence and testimony presented at the board's meeting on Maui, however, board members wanted no such delay.

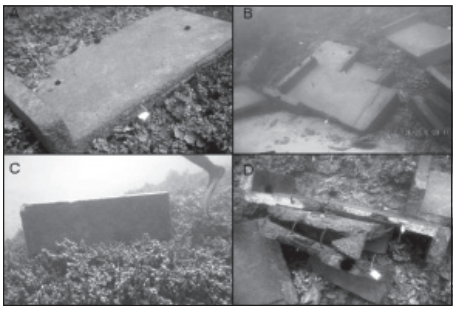


PHOTO: DLNR

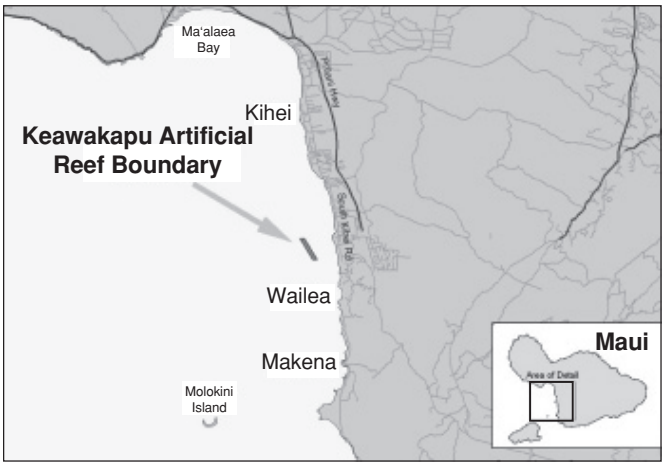
Z-modules on the reef at Keawakapu.

A Complication

Some of the state's biggest payments for natural resource damage have come from private individuals or companies whose actions impacted coral reefs. In the case involving AMC, DAR's proposed a fine of about $824,000 for the coral damage could have been one of the largest, except for one thing: DAR, by all accounts, was partly responsible.

Since the early 1960s, DAR has overseen the construction of artificial reefs in barren or sandy ocean habitats around O'ahu and Maui. The reef at Keawakapu was first built with junked cars, then old tires, an old vessel, then, finally, recycled concrete forms known as Z-modules. According to a report by AMC, it has been DAR's primary contractor for 20 deployments and has been working with the division since the mid-1980s.

DAR biologist Francis Oishi told the board that the best way to deploy the forms is to build an underwater mound rather than spread them out. Before a contractor deploys any forms, DAR staff surveys the ocean floor around the project area with cameras to determine where the drops should occur to avoid sensitive habitats, he said. For the Keawakapu project, staff completed a survey in late November.



On December 2, 2009, AMC's 80-yard-long barge, a tug, and two other boats containing DAR staff motored out to the buoy at the site, and, under DAR's direction, AMC deployed approximately 1,400 Z-modules, each weighing a little over a ton.

The very next day, a follow-up survey found that coral had been damaged and the DLNR launched an investigation. Thielen stated in a press release that her department took "full responsibility for any possible damage to live coral" and added that it had suspended the artificial reef program. She promised mitigation would occur as soon as possible.

By the following March, an independent investigation by the National Oceanic and Atmospheric Administration and the U.S. Fish and Wildlife Service of the extent of the damage had been completed. The DLNR, in announcing a public informational meeting on the findings, issued yet another apology, this time from then-DAR administrator Dan Polhemus: "We are extremely sorry and deeply embarrassed that live coral damage occurred during the deployment of an artificial reef project overseen and managed by the Division of Aquatic Resources .... The Division of Aquatic Resources apologizes to the citizens of the State of Hawai'i for this unfortunate incident," he said.

Damage Assessment

At the Land Board's November 12 meeting on Maui, DAR explained that it was proposing an $824,000 fine, which was derived by assigning a per-square-meter value of impacted coral using two recent coral damage cases for comparison.

In one case, where the tour boat *Kai Anela* damaged high-value ecosystem habitat in the Marine Life Conservation District at Molokini atoll, the settlement amount came to an average of $3,644 per square meter of damaged reef. In the second case, involving the boat *Kai Kanani,* the habitat affected was mostly barren and the settlement amounted to a mere $140 per square meter.

DAR staff determined that the habitat impacted at Keawakapu had "medium ecosystem value," even though most of the coral impacted — 77 percent — was of low-ecosystem value. It applied a discount of $1,000 per square meter from the high-value ecosystem rate, since the area that was damaged had less ecosystem value than what was damaged at Molokini and the damage did not occur in an MLCD. The Keawakapu reef value that DAR then came up with was $2,644 per square meter, or roughly $11 million per acre, as O'ahu Land Board member John Morgan pointed out.

In DAR's report to the Land Board, staff noted that AMC's contract for the job required the barge to be anchored or to hold itself in position at all times no more than 50 yards on either side of a deployment marker

installed by DAR. The report states that AMC's barge appeared to have drifted 100 to 133 yards away from the marker and had to be called back twice by DAR staff.

While DAR admitted that it had not surveyed the area as much as it would have liked, it pointed out that the nearest Z-module impacting coral was 62 yards from the marker — 12 yards past where the boat should have been. The furthest Z-modules were 200 yards away.

"The evidence suggests AMC was negligent and failed to meet its contractual obligations," the report states.

A Rebuttal

In his response to DAR's report, AMC president Scott Vuillemot argued that 95 percent of the modules were deployed in accordance with the contract. He tried to argue that his 80-yard barge (plus a tug boat) couldn't fit within the project area and presented a map showing that the bow of AMC's barge had stayed in contact with the edge of the 50-yard limit most of the time the 125 modules were being dropped on the reef. Only seven modules were dropped when the barge drifted past the 50-yard limit, he claimed.

He said that despite the contract condition, the 50-yard limit had never been an issue in past deployments. Last December 2, he continued, the deployment occurred as it always had, with DAR monitoring the position of the barge and directing AMC's captain where to move. He admitted that DAR staffers had called the barge back a couple of times when it drifted too far, but he said they never halted the deployment.

"It is unfair for the DLNR to admit responsibility for the incident, yet to fine AMC for the full amount of the damage," he said. Even so, he said, AMC was open to settling the matter. However, if the parties failed to reach an acceptable amount, Vuillemot said he would ask for a contested case hearing.

When at-large board member David Goode asked whether the company would take responsibility for the seven modules that had been dropped in apparent violation of AMC's contract, Cox said that it would.

During public testimony, fisherman Darrell Tanaka, who supports the artificial reef program, pointed out that keeping just the bow within the 50-yard limit doesn't make sense, since the company was pushing the modules off the middle.

The middle of the barge should had been within the 50-yard limit, he argued, adding that since DAR adequately surveyed the area within the 50-yard limit, "how responsible is the DLNR?"

To Big Island Land Board member Robert Pacheco, the fact that DAR staff directed AMC where to drop the modules was a key factor in determining responsibility.

"I have a hard time thinking, based on what's presented, that the department is not responsible," he said. If he had hired a contractor to dump soil on his yard, overseen its placement, then realized afterward that it had been misplaced, he wouldn't blame the contractor, he said. He added, if Atlantis Submarines, and not a state agency, had hired AMC, "would we be going after AMC or Atlantis Submarines?"

Whether Vuillemot accurately described the events of December 2 is unclear. After Vuillemot's presentation, Thielen told the board that DAR's report does not contain everything that happened. DAR's Oishi had a chance to rebut Vuillemot and said he had a "lot of things to say," but didn't say them. He said only that Vuillemot's account of events contained a lot of interpretation and speculation, he pointed out that AMC is supposed to be an expert at these deployments, and he suggested the company could have used a different technique to keep the barge from drifting.

Hashing It Out

Board member Morgan had heard enough.

"I'll have to go with Rob [Pacheco]. The evidence was compelling that AMC was not liable for the majority of what happened," he said. And he was not comfortable with Thielen's suggestion that the board could vote to go directly into a contested case. "They want to settle and we're dragging them in [to a contested case] against their will," he said.

Pacheco said that he also didn't want to "punt the issue" to a contested case hearing officer. "I want to hash it out," he said.

After an executive session, the board struggled to find a better way to calculate damages. Among other things, they tried to assign different dollar amounts to the high-, medium-, and low-ecosystem value corals that were damaged, using the *Kai Anela* and *Kai Kanani* cases as proxies. But even those numbers, Thielen pointed out, were settlements that factored in things, like willingness to cooperate, that were unrelated to the actual value of the coral.

"No matter what," Morgan said, "there's always going to be some arbitrary [element to the calculations.]"

Board members Sam Gon and David Goode supported the idea of splitting a fine of $400,000 evenly between AMC and DAR.

While Pacheco and Morgan said they felt the state was mainly to blame, "in the spirit of settlement," Morgan noted that splitting the fine 1/3-2/3 resulted in a $132,000 fine for AMC.

Following advice from deputy attorney general William Wynhoff, Thielen phrased a motion for Gon to direct the board chair to negotiate a settlement for $132,000, "representing a 1/3 responsibility for the total damage," and direct DAR to recommend a course of mitigation for the remaining 2/3 responsibility within 60 days.

Apparently concerned about the language regarding responsibility, Cox said that because it is a settlement, AMC would not be admitting any liability.

When Thielen asked Wynhoff to confirm that the language she had used was adequate, Wynhoff said it was. With that, the board unanimously approved the motion.

Board Grants Contested Case Over Ha'ena Vacation Rentals

Statutes, rules and permit conditions regarding commercial use and renting of homes in the Conservation District are set to be picked apart in a contested case hearing granted October 28 by the Land Board in response to a petition by a hui of Ha'ena, Kaua'i, landowners.

The decision came despite advice from the board's deputy attorney general that a contested case wasn't necessary and against recommendations from the Department of Land and Natural Resources' Office of Conservation and Coastal Lands.

OCCL administrator Sam Lemmo argued that not only are contested cases a hassle, the issue of the most concern to the Ha'ena hui — whether or not vacation rentals are allowed in the Conservation District — may be resolved by rule amendments, expected to come to the Land Board for approval within a few months.

Those amendments revise standard conditions on land uses in the Conservation District so that rentals of less than 180 consecutive days are prohibited, except for campsites approved by the Land Board. The current standard conditions simply ban all rentals and commercial use.

A Long Slog

In March 2007, the DLNR sent 16 cease and desist letters to landowners allegedly using their homes in the Ha'ena Conservation District for commercial use in direct violation of conditions in their Conservation District Use Permits. When most of them requested, through their attorney, Randy Vitousek, more time to stop their operations, the DLNR tried to negotiate a commitment from them to stop using their homes for rental or any other commercial purpose.

Instead, Vitousek filed a petition for a deviation from the permit conditions, argu-

ing before the Land Board that the prohibition on rentals is unreasonable and unenforceable. The OCCL opposed the petition and asked the Land Board to allow it to continue its enforcement proceedings.

At an October 2007 board meeting, deputy attorney general Colin Lau pointed out that failing to secure board approval for a deviation before it occurs is cause for permit revocation. Vitousek said he believed some owners were operating vacation rentals. But as an alternative to revocation, on December 7, Vitousek proposed that his clients' permits be amended to prohibit commercial uses, but allow rentals, including vacation rentals under certain conditions. He also proposed creating a special Ha'ena Hui conservation/residential subzone.

That proposal went nowhere and at the Land Board's December 14 meeting that year, Lemmo argued that the proposed deviation did not meet any criteria set forth in rules. He also reminded the board that a deviation request must be made before the deviation occurs.

Several Ha'ena residents testified against the deviation and one of them submitted a petition signed by 106 Ha'ena residents against it.

The Land Board denied the deviation request, but Vitousek followed up with petitions for a contested case hearing, which Land Board chair Laura Thielen denied on her own in January 2008.

The landowners appealed her decision in 5th Circuit Court, which found in Thielen's favor. In their appeal, the landowners argued that the no-rental rule and conditions are vague, ambiguous, and do not give fair notice of prohibited conduct, and that enforcement has been inconsistent.

This past June, the Intermediate Court of Appeals did not address the concerns raised about the no-rental prohibition, but did find that the Land Board, not just its chair, must decide whether or not to grant a contested case hearing.

Board Discretion

When the contested case hearing petition was brought to the Land Board on October 28, Lemmo's report to the board cited Hawai'i Administrative Rule 13-5-42(a), which sets forth the standard conditions for any land use within the Conservation District. The fifth condition listed prohibits rentals.

"Despite the no-rental conditions in their CDUPs and in the rule, some of the owners (by their own admission) rented their properties for short-term vacations. Some were doing so for decades. Others would like to do so," Lemmo wrote.

He stated that, with regard to the contested case hearing request, the Land Board's December 2007 decision to deny the deviation request did not decrease or take away any of the appellants' property or property rights.

"Refusal to grant additional rights is not the due-process equivalent of taking away already existing rights," and therefore, a contested case was not required by due process, he argued.

Lemmo recommended denying the contested case, noting that the Land Board had already rejected the owners' request to be exempted from the no-rental prohibition and arguing that a contested case would not help the board exercise its discretion.

"Moreover, staff does not believe it is good policy in general to allow a contested case in connection with a request, like this one, that seeks a wholly discretionary change to long established CDUP conditions," he wrote.

Deputy attorney general William Wynhoff, who had helped draft Lemmo's report, said the board had the discretion to grant or deny a contested case, except when it came to whether or not the no-rental rule was valid. A court, not the board, has the jurisdiction to decide the validity or constitutionality of the board's rules, he said.

In the past, items brought to the Land Board regarding contested case hearing requests mainly dealt with whether or not a petitioner had standing, not whether or not a case should be granted. In this case, with standing not at issue, Big Island Land Board member Robert Pacheco was confused about what, exactly, he should be weighing.

Wynhoff tried to explain. There are two separate but related issues, he said: one, whether someone is entitled to a contested case because it is required by law or by due process, and two, whether a petitioner has standing. "In this particular case, the issues overlap," he said.

"I can't remember ... having this issue brought forward where ... we had this discretion [to determine whether or not to grant a contested case]. I'm just wondering ... what we need to evaluate in order to make that decision," Pacheco said.

Wynhoff said, that for future cases, the board could ask the deputy attorney general to determine the scope of board's discretion.

Pacheco, however, said he was concerned that the board could be setting policy regarding contested cases and wanted a clear "path down the line" that illuminates how the board's decision will impact other situations.

Addressing Pacheco's concerns about the scope of the board's discretion, Vitousek said he was astounded that neither the OCCL report nor Wynhoff had mentioned the recent Hawai'i Supreme Court decision of *Kaleikini v. Thielen*.

"This involves **you** ... on the issue of contested case hearings," Vitousek told the board.

Vitousek, who now represents only a subset of the original petitioners, said the court decision, issued in August, found that a contested case hearing is required if it is needed to determine the rights, duties, and privileges of parties involved. He also said that the court found that the board's discretion is limited to whether the petitioners meet the procedural criteria for a contested case hearing, and if they do meet it, they are mandated to get it.

"In this case, the AG remarkably admitted these people have standing ... and yet he's arguing a contested case hearing is not required by law," he said.

Seeking Clarity

A discussion of the state's ban on rentals in the Conservation District followed.

Vitousek claimed that the DLNR's no-rental rule — 13-5-42(a)-5 — refers only to permit conditions and that there isn't an actual rule that bans commercial use or rentals outright. He claimed that this is why the OCCL had only pursued enforcement action against those whose permits contained conditions specifically prohibiting commercial use and rentals.

Vitousek had contended in court that the CDUP conditions prohibiting commercial use exceed the board's statutory authority and are inconsistent with the standards of Chapter 183C. He said that Chapter 183 requires any conditions on land use to further the preservation of natural resources.

Chapter 183C doesn't include any ban on commercial use, but does require the DLNR to hold a public hearing "in every case involving the proposed use of land for commercial purposes."

"All we're trying to do is get this issue addressed ... what is the scope of the limitation on these owners' use of their own homes and is that scope of limitation consistent with statutory authority and constitutional protections for private property," he said.

The board then convened an executive session with Wynhoff. Upon returning, Wynhoff insisted that the administrative rules prohibit rentals in the Conservation District "in all cases."

Addressing Vitousek's contention that the rules and permit conditions are vague with regard to the definition of a rental, Wynhoff said, "The rule may or may not be vague in some instances. For instance, if you let your father use it and he mows the lawn. That's not the situation here. People are doing vacation rentals."

Lemmo added that the only time that a vacation rental would be allowed in Conservation District without Land Board approval would be if it was occurring before the district was created. Pacheco asked why the OCCL chose to shut down only those with conditions in their

permits and why some permits contained no-rental provisions and some didn't.

Lemmo addressed the second question only. He explained that, originally, Conservation District rules didn't have any conditions regarding vacation rentals, and that applications for residences in the 1960s and '70s were approved with no special conditions. In the 1980s, the board began including specific conditions regarding rentals, and those conditions subsequently evolved to a rule, he said.

Regardless of Vitousek's arguments about whether or not the rule or conditions are valid or clear enough, Land Board chair Thielen pointed out, "These people were more than happy to accept those permits at the time to build single family homes and I think they full well understood what the condition was."

Addressing Vitousek's claim that Conservation District conditions must deal only with natural resource protection, at-large Land Board member Samuel Gon argued that they can indeed address broader issues. To him, the Conservation designation provides guidance on appropriate land use.

"Whether or not residential units should be allowed on Conservation District lands at all is a question in my mind and certainly when you take it to a commercial or vacation use, that pushes it further," he said.

Gon echoed the sentiments of all of the board members when he said he'd rather be involved in deciding these issues than pushing them to the courts.

Kaua'i Land Board member Ron Agor made a motion to deny the OCCL's recommendation.

"I want to be part of the process to bring clarity to this issue and I feel like I need a process of facts and findings to be able to take part in the final decision. ... If [Vitousek] just takes it to court, then we have no say," he said.

Lemmo made a final pitch against a contested case. "I'm speaking selfishly, but it is a bit frustrating for staff if we have to go through a contested case on this when we've already figured it out. It's a huge input of resources of time, effort and money. We should have contested cases for many things, but in this case, I feel we corrected it and I would like to move on," he said.

Despite his protest, the board voted unanimously to allow a contested case hearing.

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Fish Farm Wins Lease

Hawai'i Oceanic Technology, Inc., (HOTI) now has a 35-year lease to construct and operate a floating fish farm in some 247 acres of ocean off the North Kohala coast. The first year's rent has been waived to offset the substantial improvements that will be required for the operation.

The company must still obtain a permit from the U.S. Army Corps of Engineers.

The fact that the company recently changed the design of its test cages did not deter the board from approving the lease, despite concerns expressed by environmental groups, including KAHEA: the Hawaiian-Environmental Alliance, and the Sierra Club's Maui group.

HOTI had originally proposed to raise tuna in large, untethered ocean spheres that would be submerged deep underwater and kept stationary by a system powered by ocean thermal energy conversion. The Land Board approved a CDUP for three cages in October 2009, but the Army Corps of Engineers required HOTI to modify the design and limited the Army Corps permit term to five years. In September, HOTI resubmitted its Army Corps permit application, this time for just a single cage that is closer to the surface than the design approved under the CDUP and which uses a different feeding system.

At the Land Board's October 28 meeting, DLNR Land Division administrator Russell Tsuji explained that while the Army Corps is planning to grant only a five-year term for the test cage, HOTI needs a longer-term lease for financing purposes.

KAHEA program director Marti Townsend and the Sierra Club/Food & Water Watch's Rob Parsons argued that HOTI's change in scope and design should require a supplemental environmental impact statement, an amendment to the CDUP or both. Sam Lemmo, administrator for the DLNR's Office of Conservation and Coastal Land said HOTI might need to amend its CDUP.

HOTI president Bill Spencer explained that the company still plans to use ocean spheres, but it is using the smaller test cage to "answer a lot of questions" about how the project should proceed.

When board chair Laura Thielen asked whether the $100,000 performance bond proposed by the lease would be sufficient to cover any resource damage the spheres might cause, Tsuji said he wasn't sure. According to the Land Division's report to the board, the bond amount roughly reflects the $90,000 it would cost to dispatch a tug from Honolulu Harbor to where a lost cage would likely drift, plus six hours (at $1,200/hour) to secure the cage and tow it back to the lease site or to Kawaihae Harbor in west Hawai'i.

Despite requests by Townsend and Parsons to defer the matter, the Land Board approved a 35-year lease for the farm, on the condition that, should HOTI fail to obtain a new Army Corps permit after the initial five-year permit expires (assuming it's granted), the lease would be void.

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Board Grants Lease For 2nd Maui Wind Farm

Kaheawa Wind Power II received Land Board approval of a lease for a 21-megawatt wind farm on 333 acres of state land adjacent to an existing farm owned by parent company First Wind Energy. The board is allowing the company to break ground before receiving various state and federal approvals regarding its power purchase agreement (PPA) and endangered species protection that would normally need to be acquired beforehand.

To ensure that the company is eligible for tax credits, the company asked for permission to begin construction — but not erect any windmills — before the state Public Utilities Commission approves the PPA with Maui Electric Company, Inc., the state approves a Habitat Conservation Plan and Incidental Take License, and the U.S. Fish and Wildlife Service issues an Incidental Take Permit for the injury or killing of any species listed as threatened or endangered (especially nene).

At the Land Board's November 12 meeting on Maui, public testimony on the lease was mixed, with environmental groups like Maui Tomorrow and the Maui group of the Sierra Club's Hawai'i chapter in favor, and others concerned about natural resource impacts and native Hawaiian property rights arguing against the project.

Some members of the public and the board were concerned about whether the lease ensures that there will be sufficient funds to remove the wind turbines should the project fail or be abandoned. Representatives from the DLNR and the Department of Business, Economic Development and Tourism assured the board that the $1.5 million performance bond being required is sufficient, since research has shown that it costs about $100,000 to remove one turbine.

The board unanimously approved the lease with certain conditions regarding monitoring and notification that had been recommended by the U.S. Fish and Wildlife Service. ***— Teresa Dawson***

Sierra Club Sues to Nullify LUC Vote on Koa Ridge Project

The Sierra Club, Hawai'i Chapter, is appealing the recent action of the Land Use Commission to reclassify lands in Central O'ahu for the Koa Ridge development proposed by Castle & Cooke.

The organization was an intervenor in the LUC's formal contested case on the boundary amendment petition. Its proposed conditions of approval were by and large rejected by the commission, when the Koa Ridge petition was approved in September.

On November 10, Colin A. Yost, the attorney representing the Sierra Club, filed an appeal in 1st Circuit Court.

The basis for the appeal is the claim that the commission's 6-1 vote approving the boundary amendment petition should be nullified because one of the commissioners voting in favor, Duane Kanuha, is not legitimately a member of the commission.

If Kanuha's vote is disqualified, the commission would not have the six votes that are required for any boundary amendment petition to be approved.

Kanuha's first term on the LUC expired June 30, 2009. Lingle did not submit his nomination for a second four-year term to the Senate until April of this year. His reappointment passed initial review by the Senate Committee on Water, Land, Agriculture and Hawaiian Affairs, which gave him a lukewarm vote of confidence. But the full Senate rejected him, with just nine senators voting in favor and 14 opposed.

Unconstitutional

In his appeal, Yost argues that the presence of Kanuha on the LUC violates the state Constitution, state law, and one provision of the LUC's own rules.

Article V, Section 6 of the state Constitution, Yost notes, specifies what is required for gubernatorial appointments to boards and commissions. If an appointment is made while the Senate is not in session, it is valid only until the end of the next session of the Senate. If the Senate has not confirmed the appointment by that time, "the person so

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LUC continued from page 1

you keep doing this."

Vitousek noted that while his client had no position on the specific matter before the commission, it was concerned that if the LUC did approve any time extension, it include a condition that intersection improvements on Queen Ka'ahumanu Highway be completed before any occupancy is allowed.

He went on to note that the developer's final environmental impact statement, released earlier in the month, had given inadequate attention to the likely impact that future residents of the project will have on the resort. "Their promotional material," he said, "contains photographs of the beach at Mauna Lani, the pool, and the golf course. We ask the commissioners to consider requiring further offsite mitigation with respect to the recreational and cultural resources in the area."

Land Tenure

The first witness called by DWAL after the public testimony had concluded was James Leonard, the consultant who prepared the EIS. At several points, the EIS mentions that the developer owns the land that it will be developing. Comments received on the draft EIS note, however, that the only discrete parcel that DWAL has a registered interest in is the 61-acre lot where the affordable units are proposed.

Deputy attorney general Bryan Yee, representing the state Office of Planning, questioned Leonard about DWAL's interest in the property. "Is it your understanding that Bridge owns the majority of the petition area?" he asked. Despite the assertions in the EIS, Leonard demurred. He wasn't "that versed in terms of ownership," he said. Appended to the EIS, however, was the sale agreement between Bridge and DWAL; while Bridge gives DWAL development rights to the Urban land, the agreement calls for phased-in purchase. To date, title to only the 61-plus acres for the affordable units has been transferred from Bridge to DWAL.

An unfinished building at the 'Aina Le'a site.

Robert Wessels was the second (and last) witness called by the developer's attorney Alan Okamoto. Although Wessels was not asked directly about ownership of the land outside of the affordable housing parcel, he did acknowledge that under an unusual financing scheme DWAL had entered into with a Southeast Asia company called Capital Asia, title to the affordable housing parcel is now held by more than 600 tenants in common, with more being added each week.

As Wessels explained, each investor purchases an undivided interest in the land. Once the condominium property regime is approved, the individual investor's interest becomes attached to a specific unit (or units, in the case of investors who have bought multiple shares). When that unit is sold, or 30 months after the investor purchased a stake (whichever occurs first), the investor receives his or her final payout. According to Wessels, an initial payout is made as soon as the investor buys a share: $5,000 "lease rent" for each $96,000 investment. When the investor cashes out, he or she will receive interest amounting to 12 percent a year, less the $5,000 payment. In other words, for every townhouse purchased, $120,000 off the bat goes to pay off the investor.

Under questioning from LUC member Normand Lezy, Wessels said that the revenue flow from Southeast Asia was a pretty steady stream of between $200,000 and $300,000 a week. More than half of that, Wessels said, was going to pay off the $4 million in outstanding billings from Goodfellow Bros., the primary construction contractor.

Timelines

Another focus of the hearing was on the prospect for completion of the affordable units. In his testimony, Wessels said he was hopeful the units could be put up for sale, with certificates of occupancy in hand, by March 31, 2011. The package sewage treatment plant, Wessels said, "was supposed to have been shipped from Austin, Texas, two to four days ago. It's somewhere en route… It was supposed to arrive by the 20th, but I don't believe it'll be here by then. But it'll be here in the next couple of weeks." Given that it's a turnkey operation, he suggested, attaching it to sewer lines and getting it operational would take little additional time. "According to the manufacturer," he said, "installation and phase-in of operations, other than permit-

appointed shall not be eligible for another interim appointment to such office."

Furthermore, if someone is nominated but fails to win the Senate's consent, that person is ineligible to serve as an interim appointment. "Mr. Kanuha violated Article V, Section 6 . . . by continuing to act as a commissioner after the Senate's rejection of his nomination on April 26, 2010," Yost writes in his appeal.

Section 24.36, Hawai'i Revised Statutes, sets the conditions on holdover appointments. "Any member … whose term has expired and who is not disqualified for membership … may continue in office as a holdover member until a successor is nominated and appointed" until the end of the "second regular legislative session" following the expiration of the member's term. (A separate section of this law precludes membership beyond eight consecutive years, however.) By having failed to win confirmation to a second term, Yost argues, Kanuha was effectively disqualified from membership under this section of the law.

By deeming the Koa Ridge petition approved, the LUC violated yet another section of Chapter 205 and the commission's rule, HAR 15-15-13. Without Kanuha's vote, just five votes favoring the petition would have been cast, causing the petition to be denied, Yost points out.

The Sierra Club is asking the court to stay the LUC order and prevent Castle & Cooke from taking action on it, reverse the commission's order in the case, remand the case to the commission, and grant attorneys' fees and court costs.

Koa Ridge

The Koa Ridge petition involved a total of 767 acres in central O'ahu, straddling the H-2 highway near Mililani. Castle & Cooke's plans for the area are to build a total of 5,000 residential units, a medical center, commercial area, hotel, light industrial park, schools, parks, churches, and a recreation center on the land.

The LUC approved the redistricting into Urban of the 576-acre area west of H-2, known as Koa Ridge Makai, as Increment 1. The eastern 191 acres, known as Castle & Cooke Waiawa, Increment 2, was given conditional approval, with redistricting to occur when and if an adjoining project, Waiawa Ridge, commences development. (Waiawa Ridge, which was urbanized in 1988, has not yet been developed; according to the LUC's decision and order, the current landowner "is assessing the status of the development and has not formulated definitive plans.")

— P.T.

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ting, takes 30 days or less…. We have planned on phasing it in so we can actually turn it on in the first part of the year."

Water tanks for potable water are likewise en route, "shipped on the 7th of November from a port in Australia," Wessels said. The 250,000-gallon tanks "will be available by the end of December," although some trenching would still need to be done for the water pipes.

Materials needed to finish the interior of buildings that are now up (three eight-unit buildings, in addition to the two nominally completed in March) are "primarily there…. Of the 40 units, all materials are effectively on site… almost all rough-in plumbing is on site," although, he added, "I don't believe there's electrical for those."

Foundation slabs for three more of the affordable townhouse buildings were nearly ready, he said: "Wire just has to be rolled and concrete poured."

Landscaping? It "is designed… Some of the plants for models [model units] are on order."

Getting HELCO to bring electric service to the site was a bit stickier, Wessels said. In the meantime, he had ordered solar panels to be installed on the carport roofs of 16 units, along with battery packs. "Because of tax credits, they'll be in our facility by the end of December… We anticipate having the power from the solar functioning in January or by the first week of February… Our intent is to be able to roll through all 432 units with solar carports," he added. The photovoltaic systems won't eliminate utility bills for the homeowners, however. Although Wessels claims that each carport roof system will generate about 25 percent more energy than the household consumes, it will be his company, and not the homeowners, who enter into a power purchase agreement with HELCO. Eventually, he said, "we want to do it like a co-op, where the homeowners will get the proceeds," but the details still have to be worked out with the Public Utilities Commission.

As to the intersection improvements that should be completed before occupancy, Wessels noted that designs had been submitted to the state Department of Transportation, but no approval had been given yet.

Questioned by Yee, Wessels backed off. "If I said [the infrastructure] was almost done, the engineering is done, some of the trenching, some of the blasting for trenching, sewer piping, and manholes are on site," he said. "Easements and surveying for easements … are there. The legal descriptions for the roadways are done. A lot of work has been done, but I don't want to misrepresent it's been completed."

Still, Wessels estimated that Phase I of the project would be done by the end of March 2011, if one of the construction loans he had applied for came through. But under further questioning, Wessels clarified that he didn't mean the entire Phase I (all the townhouses), but merely the first increment – five eight-unit buildings – of the work. As to a date for completion of the entire first phase, that, Wessels said, "will take us through probably June." June of 2011? Yee asked. "2011," Wessels answered. If the financing doesn't come through, then it would probably "take us until October 2011," he said.

Commissioner Charles Jencks, a developer himself, was obviously skeptical of Wessels' optimistic time frames. He went through the outstanding items needed to be done before occupancy, each time eliciting agreement from Wessels that the time required might be three or four times as long as he had originally thought. "Given all the questions I just asked you," Jencks said to Wessels, "and, truthfully, what is the lack of submittals [for permits] and the time that takes – they're all unknowns. They're all discretionary… We're talking about a significantly longer period of time than the end of the first quarter, wouldn't you agree?"

"When you put it that way, yes," Wessels responded.

"Sounds to me you're looking at a year," Jencks said.

"You may be correct," Wessels finally acknowledged.

Reversion

In his closing argument, Yee raised the argument that in light of the failure of DWAL to meet the November 17 deadline, and given its earlier failure (in the eyes of the LUC) to meet the March 31 deadline for completion of 16 affordable units, by rights, the 1,062 acres urbanized in 1989 had already been reverted to the Agriculture district.

"Let's be clear what we mean by the order to show cause," he said. "The Land Use Commission issued the order to show cause, and we had a hearing, and the commission reverted the property. It then went back and decided to say, 'if you complete these 16 units, then we'll lift the reversion.' And then it decided, no, those 16 units were not completed.

"Because those units weren't completed, there's an order that has reverted the petition area. So there's no further decision to make per se… The land has been reverted."

Complaints made by Bruce Voss, the attorney for Bridge Capital, about procedural irregularities "are made too late," Yee said.

Notwithstanding Yee's remarks, the LUC did not make any decision on the order to show cause. A hearing on DWAL's motion to amend three conditions (relating to deadlines for construction, a school site, and a sewage treatment plant site) has yet to be scheduled; if the commission should decide that the land is properly reverted to the Ag district, then there will be no need to hear the motion to amend.

Finally, on November 12, six days before the November meeting, Voss, attorney for Bridge, filed a lengthy motion on the order to show cause, arguing that the LUC has no legal right to take any further action on this matter as a result of numerous procedural irregularities and due process violations. DW 'Aina Le'a attorney Okamoto joined in Voss's motion three days later. The LUC will schedule a briefing on that motion in weeks to come, followed by oral arguments.

For Further Reading

Environment Hawai'i has published the following articles on the Villages of 'Aina Le'a. All are available in the Archives section of our website, www.environment-hawaii.org.

- "2 Decades and Counting: Golf 'Villages' at Puako are Still a Work in Progress," March 2008;
- "Hawai'i County Board Deals Setback to Stalled Bridge 'Aina Le'a Project," December 2008;
- "Bridge 'Aina Le'a Gets Drubbing from the Land Use Commission," March 2009;
- "After Years of Delay, LUC Revokes Entitlements for Bridge 'Aina Le'a," June 2009;
- "Commission Stays Decisions to Revert Puako Land," July 2009;
- "Under New Management, 'Aina Le'a is Given Yet Another Chance by LUC," October 2009;
- "Some Progress Reported at Kohala Site that Won Reprive from LUC," March 2010;
- "Office of Planning: 'Aina Le'a Has Not Met, Cannot Met LUC Deadlines," June 2010
- " 'Aina Le'a Faces Compliance Hearing," August 2010
- " 'Aina Le'a Seeks Two-Year Extension of Deadline for Affordable Housing," October 2010.

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LUC Gives Thumbs-Up For 'Affordable' Kona Project

Two weeks ago," said Bryan Yee, the attorney representing the state Office of Planning, "the Queen Lili'uokalani Trust said in its opening argument that it felt as if they were standing in front of a steaming locomotive," referring to the expedited, 45-day time frame within which the state Land Use Commission had to weigh the issues and come to a decision on Kamakana Villages, a 272-acre project near Kailua-Kona. The expedited hearing was required under state law giving favorable treatment to residential developments where "affordable" units account for more than 50 percent of the total.

"I know how that feels," Yee continued. "We've stood in front of steaming locomotives a couple of times."

But this was no steaming locomotive, he continued. When the OP determined the original archeaeological inventory was insufficient, it put a stop to the project while a more thorough inventory was completed.

Then the OP director, Abbey Seth Mayer, took the position that the project was going to have to mitigate its impacts and comply with all requirements. "We told the petitioners they had to stop, and they did," Yee said.

On top of everything else, the developer, a subsidiary of the large national development company Forest City Enterprises, had to go through a lengthy negotiation process with the Hawai'i Housing Finance and Development Corporation – and "steaming locomotive is never a term one uses with respect to dealing with state agencies."

If this project were to make it through to approval, Yee continued, "it's not because it's a steaming locomotive, but the little engine that could."

Ben Kudo, on the other hand, the attorney for Queen Lili'uokalani Trust, told the commission in his closing argument that, "having lived these last three or four weeks, I feel like I've been dragged under a train." Kudo, who usually represents developers before the LUC, said it was an "interesting experience" to represent an intervenor.

"Ultimately," he said, "this commission will approve this petition. I know that. The [Hawai'i] County Council may approve it as well. We realize that's a reality."

Still, he said, he believed some good had come out of the involvement of the trust in the process. "When we appeared before this commission four weeks ago, there were 91 exemptions being sought at the county level. It's now been reduced to 54." Also, he added, "I think we've sensitized this commission to some of our concerns." The Queen Lili'uokalani Trust had sold the land in question to the state in 1992 and still owns land surrounding the parcel.

The decision facing the commission "presents an interesting decision," he said. "It pits two types of good uses against each other. It pits affordable housing, which we support, and which is a legitimate state interest, against what we represent, which is social welfare services. If social welfare services have to give way because of affordable housing, the choice is homes over children. I have a problem with that." The mission of the trust is to serve orphans and indigent children; lease rents from the trust's developed lands make up the bulk of its operating revenues.

There was, in the end, little dissent among the commission, which voted seven to two to approve the project at its meeting on November 4, just one day before the 45-day window for LUC action was to close. Had the commission not reached a decision by that time, the project would have been allowed to proceed as anticipated in the petition to redistrict the land, shifting it from Agriculture to Urban.

A Moving Target

Despite the approval, it was clear that the commissioners had misgivings about some aspects of the project.

First of all, there were discrepancies between the project as described in the development agreement signed in 2009 by Forest City and HHFDC and the project as described in the LUC petition. The number of dwellings and the breakdown of the type of units to be allocated to each category of affordability (up to 80 percent of Hawai'i County's adjusted median income, 100, 120, and 140 percent) were anything but clear.

The commissioners also seemed concerned about the density of residential units, picking up on testimony offered by Mark Boud, a marketing consultant for Queen Lili'uokalani Trust. "The density is too high, the square footage too low," said Boud. What's more, the target prices for the affordable units were, in today's depressed real estate market, no less than those of other houses for sale. "Right now, there is so much selection, at lower prices than contained in the Hallstrom report, that this would be a hard sell," he said. The Hallstrom Group prepared the market analysis for Forest City, estimating that the sales price for the multifamily units would range between $300,000 and $400,000.

"Who would want to buy an affordable condo at 37 units per acre when you can get a single family home for the same price, or lower, in the same area?" Boud asked.

Thomas Contrades, commissioner from Kauai, explained his objections to the project before the final vote.

"I know I'm going to be all alone on this, but I still have to say it anyway. I'm going to vote no…. I've spent most of my adult life representing workers. The average wage of a worker in the state today is $15 an hour. The average worker earns $30,000 a year. If both mom and dad work, that's $60,000. You're going to have two cars, education… Nobody's going to be able to afford to live in this place…. There's no such thing as affordable housing if we do it the way it's being proposed…

"People don't want to live in small little houses, especially if you're from Hawai'i… The type of development in this application is so intense, it would not be a good place to live….

"This project has just too many questions that need to be answered: How many 80, 100, 120 percent affordable – how many are going to be produced? What happens if they can't hook up to the wastewater treatment plant after the first two, three phases are done? We all know [the county] is going to be at capacity very quickly. What happens if the units don't sell? … What happens if Forest City exercises its rights to walk away? … Who will take over? How will HHFDC find anybody else to take over?...

"I look on this as a terrible deal… We don't know how it's costed out, we don't know what they're going to charge, but 'trust us.' I've trusted many people over the years… I can't do that any longer."

Nicholas Teves was the only other commissioner joining Contrades in opposing the project.

Approval by the County

On November 17, the Hawai'i County Council approved a resolution granting the Forest City project 54 exemptions from the County Code. The exemptions, the developer said, were needed to make the project financially viable and to make it conform to LEED-ND (neighborhood development) standards (such as narrower than standard roads and streets, tighter turning radii, smaller house lots, and the like). The only council member to object was Brenda Ford.

(An account of the Senate Ways and Means Committee hearing on the Forest City project may be found in the EH-Xtra column on the front page of our website, www.environment-hawaii.org.)

O'oma Petition Fails

In the end, it was all about the noise.

When the state Land Use Commission voted last month on the petition of O'oma Beachside Villages to shift roughly 181 acres of coastal land at O'oma, just south of the Kona airport, into the Urban District, members of the commission were torn.

"I find this a very difficult decision," said Ronald Heller, commissioner from O'ahu. "There are a number of things I do like about the project, including the amount of conservation space and open land… I respect the commitment to preserving beach access and appreciate that [the developer] has gone to great lengths to ensure beach access."

"However," he continued, "for me, the factor that tips the balance is airport proximity. It is inevitable that if a number of homes are built that close to the airport, it will lead to problems down the road…as the airport expands and as that many people are living in close proximity."

He stated he liked the project, which proposed about a thousand housing units of various types as well as parks, shops, and a school site. But, he continued, it was "in the wrong place with respect to the airport." He would therefore be voting a "reluctant no," he said.

At-large member Nicholas Teves Jr. was bothered not only by the airport noise, but also by the outpouring of public testimony against the project, which persisted throughout the many commission hearings over the last several months.

"The airport noise," he said, "would be unbearable and would only cost the state in the future countless time and money." In addition, though, there was the fact that "the people of Kona and the island spoke against this project. Most of all, this is conservation land. It was put there for a purpose. The whole petition area should be denied any development."

The crowd attending the hearing on O'oma.

Lisa Judge, commissioner from Maui, concurred with Teves and Heller. "It's a well-designed development," she said, but "the airport issue really bothers me. I recall yesterday we had testimony from some high school students. They made a poignant point that the decisions we make today don't affect just our generation, but theirs and all generations to come. While [airport noise] may not be an issue in 10 or 20 years, there's a great potential for it to be an issue in the future. I just can't get past that. So I'm also going to be voting no on this petition."

Joining the three in voting against a motion by fellow commissioner Duane Kanuha, of the Big Island, to deny the petition in part and approve it in part were commission chair Vladimir Devens and Thomas Contrades, commissioner from Kaua'i. (Kanuha's motion would have approved redistricting of all the petition land except whatever lay within 1,100 feet of the shoreline. To many, the

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motion was confusing, since the petition for redistricting did not include any land within a 1,100-foot-wide shoreline buffer.)

The crowd, consisting of mostly project opponents, broke into loud whoops and cheers – but when commission executive director Dan Davidson announced that the motion failed, many of the opponents appeared confused. Under LUC regulations, Davidson explained, for a motion to pass, it has to have six affirmative votes from the nine commissioners.

Devens then asked for another motion. Teves responded with a motion to deny.

That also failed to pass, with the commission splitting along the same lines as the previous vote.

After a short executive session, Devens announced that after a review of the law and the commission's own administrative rules, "It appears that I was incorrect. The motion to deny did pass, because only a majority of five votes is required as opposed to six votes…. I hope we didn't make a mistake on our interpretation."

With so much at stake, and O'oma Beachside Villages having invested heavily in both the land and the effort to entitle it, any ambiguity over the LUC's vote would have invited litigation.

Bryan Yee, the deputy attorney general representing the state Office of Planning, attempted to bring some clarity to the matter. "I've always believed you should decide issues on substance rather than procedures," he said. "Ask the petitioners whether they accept the decision that a 5-4 vote constitutes denial. And if they don't, … allow the commission the opportunity to fix it if they think it's appropriate."

Steve Lim, representing the developer, said that because the commission did not have six affirmative votes on any motion, the proper procedure would be to continue the matter until the next regularly scheduled meeting and put it up for another vote then. "If it fails at that time, the action is denied," he said.

Yee then cited the LUC rule that states if a petition fails to receive six votes for approval, then the staff prepares a decision and order to deny it. "If you appeal," he suggested to Lim, "appeal on substance. Don't appeal on procedure." He then suggested to the commission that someone make a motion to approve the petition, straight-up.

That's just what the commission did. With none of the commissioners in favor wanting to kill the project with a motion to approve, it fell to an opponent, Heller, to do so.

"Without necessarily conceding that this is required, for purposes of clarifying the record, I make a motion that the petition … be approved." With the motion receiving just four votes, the petition was, finally, denied.

Three Strikes

The vote marked the third time that the commission has rejected a petition to redistrict this particular slice of land. In 1987, the LUC voted down a proposal by Kahala Capital for a resort on the property. In 1991, the company came back with a revised proposal for a hotel, a smaller "inn," condos, a golf course, residential lots, conference center, water park, and a "Marine Exploratorium." Again, the LUC rejected the petition, citing (among other things) concerns about the company's financial ability to undertake what was touted as a $300 million project.

In 2001, another company took ownership through foreclosure. The efforts of Clifto's Kona Coast, a Nevada partnership headed up by Cliff Morris, to obtain county rezoning for the 83-acre mauka parcel, already in the Urban District, faltered when it was vetoed by then-Mayor Harry Kim in 2004. Morris sold most of his interest to a company headed up by Dennis Moresco, which formed O'oma Beachside Village and developed the most recent proposal. ***— Patricia Tummons***

For Further Reading

Environment Hawai'i has published the following articles on the O'oma project. All are available in the Archives section of our website, www.environment-hawaii.org.

- March 2009: "Residential 'Villages" Are Proposed for Area Near Kona Airport, NELHA;"
- April 2010: "Noise from Kona Airport Casts Pall over Proposed Development at O'oma" and "Water, County Plan Conformance, Access Also at Issue in O'oma Proposal;"
- June 2010: "Another Packed Hearing on O'oma Petition;"
- August 2010: "With Conditions, O'oma Development Wins Support of State Planning Office;"
- November 2010: "Closing Arguments in O'oma Petition."

PHOTO: O'OMA BEACHSIDE VILLAGE

O'oma shoreline

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