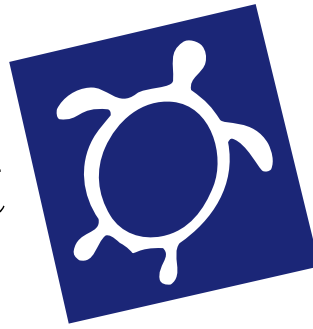


# Environment



# Hawai'i

*a monthly newsletter*

Price: \$5.00

## *Take a Hike!*

**R**eally. If you know of a public access easement and haven't used it lately, put on those boots and head out the door.

As our cover article suggests, public easements can often be use-it-or-lose-it affairs, with some landowners eager to close them off if they think no one is looking. One thing is certain: in Hawai'i County, at least, the Planning Department cannot be counted on to enforce them – or anything, for that matter, if the three case histories considered this month are typical.

It is a situation that must not be tolerated a day more.

And on the same subject of incorrigible violators, we report on recent court action taken in response to tragic events at Pila'a, Kaua'i, associated with grading done by Jimmy Pflueger.

Teresa Dawson's regular "Board Talk" column rounds out the issue.

## Shoreline Easement Lost as Builder Racks Up Repeated SMA Violations

**E**nsuring public shoreline access has never been an easy task in Hawai'i. Almost always, it involves the state or county government acquiring easements across private property as a condition of development.

Take the case of a subdivision in Pepe'ekeo, a community on the Hamakua coast of the Big Island, about 10 miles north of Hilo. The land, once part of a vast sugar plantation, was purchased about a decade ago by a mainland entity, Continental Pacific, and subdivided into small agricultural lots. As a condition of subdivision approval, the company surrendered an extensive system of easements for public pedestrian access to and along the shoreline.

But though the public's right to get to and follow the coast would seem to be as ironclad as any language can make it, in practice, the armor appears to be rusting away.

### *The Map Is Wrong!*

At least that is the case at a 1.81-acre lot that sits right at the entrance of a gated shoreline subdivision. The lot has been owned since 2009 by Big Island resident Scott R. Watson and an LLC called Hilo Project whose sole member is a San Jose attorney, Gary L. Olimpia.

The deed to the property clearly states that it is subject to not just one but two public access easements. The first, described on conveyance documents that memorialize the subdivision conditions as Easement 6, allows the public to park on roughly a quarter-acre of the lot – the westernmost portion of the property that extends beyond the fence, wall, and vehicular-access gate that mark the start of the gated development. The second, Easement P-14-A, provides for lateral pedestrian public access along the shoreward boundary of Watson's lot, with the total area of the pedestrian easement coming to roughly three-quarters of an acre. In other words, the area of Watson's and Olimpia's land that is *not* burdened with access easements is less than the area over which the public has been granted unimpeded access.

Because of the existence of foundations of structures dating back to the time when the old Pepe'ekeo sugar mill was in operation, the pedestrian easement on Watson's lot first meanders inland along the private roadway to the northern boundary of his lot, then switches back toward the shore, hugging the top of a small precipice along the makai limit of the lot until it runs into the neighboring property to the north.

And if the maps that accom-

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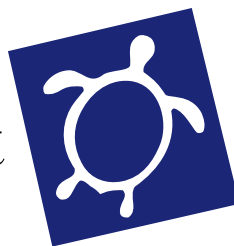
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*Board Talk: Illegal Subdivision in Puna, Shoreline Easements, Axis Deer and More*



Piles of recently excavated earth have been placed in front of the only pedestrian entry to the Pepe'ekeo subdivision.

# Environment



# Hawai'i

Volume 23, No. 6

December 2012

## NEW AND NOTEWORTHY

**'Aina Le'a Update:** The slow pace of development at the Big Island project known as the Villages of 'Aina Le'a seems to be matched these days only by the slow progress of challenges to it in court.

The state has been stalled in its efforts to reverse the decision of a 3<sup>rd</sup> Circuit Court judge, Elizabeth Strance, overturning a Land Use Commission vote to revert the land back to the Agricultural District and thereby void approvals for development. The state had appealed Strance's decision, but the Intermediate Court of Appeals determined in October that her decision did not count as a final one. She is being asked now to amend it — for the second time since she issued her first ruling last February.

Another lawsuit, this one filed in 2011 by the Mauna Lani Resort Association, challenges the Hawai'i County Planning Department's acceptance of an environmental impact state-

ment for the project. Judge Strance has scheduled oral argument on that for December 3.

The resort association has also appealed the county Planning Department's approval of a planned unit development, or PUD, proposed by 'Aina Le'a LLC, for 70 single-family house lots on 23 acres next to the 432 town houses being built to satisfy the affordable housing requirement imposed by the LUC. A hearing on that is scheduled before the county Board of Appeals on December 14, by which time Judge Strance may have issued her opinion in the EIS case. The main basis for the challenge to the 70-unit PUD is the unsettled matter of the sufficiency of the EIS.

**Parallel Universe:** The contested case hearing over the decision by the state Board of Land and Natural Resources to issue a Conservation District Use Permit for the Advanced Technology Solar Telescope dragged on for two years. Last month, in its final decision and order on the case, the Land Board reaffirmed its December 2010 decision.

But the fight isn't over. Before the formal contested case had begun, Kilakila O Haleakala (the petitioner) appealed the board's decision in circuit court and, later, to the Intermediate Court of Appeals. Both courts found that they lacked jurisdiction because a contested case hearing had not yet been held.

That, Kilakila's attorneys argue, does not matter. The fact that the University of Hawai'i had attempted to start construction in the midst of the contested case hearing — and the Land Board was going to allow it — proves that the Land Board's 2010 decision to grant the

CDUP was a final, appealable, decision, the Native Hawaiian Legal Corporation argues in court filings.

"As discussed at length in its opening and reply briefs filed with the Intermediate Court of Appeals, it is irrelevant that after the filing of this appeal the BLNR conducted a contested case hearing because (a) the permit that was issued authorized construction activities to begin and (b) the BLNR cannot legitimately grant a conservation district use permit before conducting a formal contested case hearing that has been properly requested," they wrote in their appeal to the Hawai'i Supreme Court.

On November 13, the Hawai'i Supreme Court accepted Kilakila O Haleakala's request for a review of the ICA's decision. Oral arguments are scheduled for December 20.

**Ka'anapali Tours Update:** On December 10, the U.S. District Court is expected to hear arguments on the state's motions for summary judgments in a lawsuit filed last year by Ka'anapali Tours, LLC, against the state Board of Land and Natural Resources, the Department of Land and Natural Resources, and some of its staff.

After receiving complaints, the DLNR last year blocked the company from using its permit to operate either a monohull or multihull vessel at Ka'anapali, claiming the one-of-kind permit is not valid. Under DLNR rules, the issuance of Ka'anapali catamaran permits is strictly regulated and is supposed to be subject to a waiting list.

The company, however, had designed and custom-built a 65-foot catamaran, *Queen's Treasure*, because its permit appeared to allow it to swap out a monohull vessel for a catamaran, effectively, bypassing the waiting list.

The company's estimated total losses as of mid-November came to \$2.7 million, according to the company's pre-trial statement.

A jury trial has been scheduled for January 8. (For more on this complicated case, read our February cover story, "Permitting Missteps Threaten to Unravel Commercial Boating Regime at Ka'anapali," and our March New & Noteworthy column. Both are available at [www.environment-hawaii.org](http://www.environment-hawaii.org).)

### Environment Hawai'i

72 Kapi'olani Street  
Hilo, Hawai'i 96720

Patricia Tummons, *Editor*  
Teresa Dawson, *Staff Writer*  
Susie Yong, *Office Administrator*

*Environment Hawai'i* is published monthly by Environment Hawai'i, Inc., a 501(c)(3) non-profit corporation. Subscriptions are \$65 individual; \$100 non-profits, libraries; \$130 corporate. Send subscription inquiries, address changes, and all other correspondence to *Environment Hawai'i*, 72 Kapi'olani Street, Hilo, Hawai'i 96720. Telephone: 808 934-0115. Toll-free: 877-934-0130. E-mail: [ptummons@gmail.com](mailto:ptummons@gmail.com) Web page: <http://www.environment-hawaii.org> Twitter: [Envhawaii](http://twitter.com/Envhawaii)

*Environment Hawai'i* is available in microform through University Microfilms' Alternative Press collection (300 North Zeeb Road, Ann Arbor, Michigan 48106-1346).

Production: For Color Publishing

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ISSN 1050-3285

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### Quote of the Month

*"The idea they didn't realize the issue was about destroying the reef struck me as being rather disingenuous."*

— deputy attorney general  
**William Wynhoff,**  
on *Pila'a 400, LLC*

## EDITORIAL

## Lax Policy of Hawai'i County Eggs On Violators

Scott Watson may be a “serial violator,” to use the description of him offered by an employee of the Hawai'i County Planning Department. But as serious and numerous as his infractions may be, the real villain in the sad stories that take up much of this issue isn't Watson.

It's the county Planning Department.

Maybe the problem lies in the fact that with every change in administration, a new director takes office. Or maybe it can be traced to over-worked staff that don't have the time to do the research that would give them a better understanding of the pattern of problems associated with a certain developer or project.

Whatever the cause, it has created a situation that the public should no longer have to endure.

Immediately, the Planning Department should ensure that public access is restored wherever it is guaranteed. If a developer has created circumstances on the ground that make access dangerous, then he should be required to make it safe at once or be slapped with a stop-work order until safe access is restored. In the case of the lot where Watson is building a self-described “Pepe'ekeo Palace,” he has instead been told that, if he resolves an outstanding violation, the department may look with favor on his request to shut down lateral shoreline access for two more years – and possibly beyond that.

This cannot stand. The Hawai'i County Council values the public's ability to access coastal areas and recently has gone to great lengths, and expense, to acquire easements for this purpose. That the Planning Department would even think of surrendering them, temporarily or otherwise, is simply outrageous.

The department also must crack down on Special Management Area and shoreline setback violators, especially those responsible for repeated and brazen infractions. In this issue, we look at just three instances of permits where the same builder has repeat-

violations are just as tough. The Planning Department's own rules provide for imposing a fine of \$10,000 per violation and a maximum daily fine of \$1,000 until the violation is corrected.

Whether even those would be stiff enough to deter someone with the deep pockets that Watson evidently has is an open question, since at no time has the Planning Department ever come close to imposing fines at the upper end of the range. What should no longer be doubted is that the penalties imposed on him so far have not made any observable difference in his behavior.

Finally, there's the troubling suggestion of political interference. One of many Facebook photos Watson has posted shows a beaming Mayor Billy Kenoi standing alongside Watson on the terrace of Watson's Ninole house. In Planning Department files, at around the same time, Watson – once more begging for a reduced fine on the very deadline for him to pay an \$8,000 fine, already reduced – informs the

planning director that Kenoi has “asked if you could cc him all my info on this matter.” A staffer in the department confirmed that the letter responding to him, mailed out more than a month later, had been discussed with Kenoi by top Planning Department staff, including the director.

To be sure, the piddling \$8,000 fine was not further reduced, but the apparent involvement of the mayor in what should be a straightforward enforcement effort by the Planning Department is troubling, to say the least.

Whether or not a developer is a friend of Billy, whether or not a builder has connections in the County Council or the Legislature or even Congress, is wholly immaterial to the requirement that state and county rules be equitably and firmly enforced.

Anything less is absolutely intolerable.



“Big Island Mayor Billy Kenoi Listens to me discuss My future Hamakua coast plans,” states the description for this photo posted on Scott Watson Development's Facebook page. This photo was taken at Watson's Ninole house.

PHOTO: SCOTT WATSON DEVELOPMENT FACEBOOK PAGE

edly been warned of serious consequences – only to escape time and again with figurative wrist-slaps. Really, who can argue with straight face that a \$2,000 or even \$8,000

*Whether or not a developer is a friend of Billy, whether or not a builder has connections in the County Council or the Legislature or even Congress, is wholly immaterial to the requirement that state and county rules be equitably and firmly enforced.*

fine is a meaningful deterrent to someone who is building million-dollar mansions with fountains, pools, and even a helipad?

As Watson has been sternly reminded in almost every notice of violation sent to him, the county's penalty powers are not trifling. The state's Coastal Zone Management Act, which the counties are to enforce, provides for a fine of up to \$100,000, plus restoration costs and \$10,000-a-day fines for ongoing violations. The county's Planning Commission rules for Special Management Area

# Builder Defies Planning Department With Helipad on 'Sod Farm' Dwelling

"Waterfalling Estate."

That is the name that Scott Watson has given to a house he has built at Ninole, on the Hamakua Coast of the Big Island about 20 miles north of Hilo.

Like most other houses with names, it is imposing. According to plans submitted to the Hawai'i County Planning Department, it includes:

- A theater room (replete with sloped floor and eight theater-style seats);
- A circular three-floor elevator;
- A "grand lanai" on the ground floor, along with two bedrooms and two bathrooms;
- A "grand living room," kitchen, bar, dining room, powder room, computer room, lanai, and "portecashere" on the second level;
- Two master bedroom suites on the third floor, each with his-and-hers bathrooms, plus a library and more lanais.

The plans also called for a helipad on the roof, but that was scratched out, with "omit" written alongside it. Helipads are not something the Planning Department allows on single-family homes.

On a clear day last July, however, not one but two helicopters left Hilo airport, flew up the coast to Ninole, and landed at Waterfalling Estate. One (operated by Blue Hawaiian) set down on a clearly marked helipad on the roof of the house. The other (owned by K&S Helicopters) landed on the driveway. And, as if to flaunt the violation in the Planning Department's face, the event has been memorialized in a seven-minute-long YouTube video.

That may be one of the more flagrant violations associated with the development of the property owned by Watson and Laurie Fraser Robertson on a former mac nut orchard. It is not the only one.

## Instant Infractions

Almost from the start, the county Planning Department was issuing notices of violation in connection with the Special Management Area Use Permit Assessment Application (SAA) Watson submitted in April 2008 for development of what was described as a "sod farm." A department inspector visiting the site in May noticed a "number of violations on subject property including: grading of land greater than 1 acre in area, grading and digging within 40 foot of shoreline setback, construction of a paved driveway within the SMA,

various cemented structures (unclear of proposed uses), land cuts with house and garage pads, utility trenches dug, no [Best Management Practices] implemented."

That prompted then-Planning Director Christopher Yuen to issue a notice of violation in July, citing:

- The clearing of 7-plus acres of mac nut trees without a permit;
- Grading within the shoreline setback area for which no variance had been applied for or permitted;
- Active digging within the shoreline setback by a "mini-excavator," which had not been permitted;
- "Cuts over five feet in height" made to the natural grade of the land to prepare for the as-yet unapproved house and garage;
- "Various additional construction activities ... including concrete poured for a fountain, utility trenches dug, and other identified work. Most of this work was not proposed [in the SAA application] and none of it had yet been permitted;"
- "A drainage trench was dug between the house pad and garage pad. ... No permit was granted to allow runoff from the construction site to be directed into the nearby stream which exists into coastal waters less than 100 feet downstream;"
- Placement of soil mounds within the shoreline setback that were not bagged or covered, so the mounds were being eroded, "likely over the edge of the cliff;"
- No construction barriers or silt fences.

Yuen noted that the Planning Department staff had issued a verbal stop-work order at the time of the inspection and that a written one had been issued the following day. Watson was required to correct the violations and pay a \$1,500 fine, all of which were done by August 8. In the letter closing the file, Watson was warned by Yuen that future violations by Watson of Planning Department or Planning Commission rules "will be considered recur-



A helicopter is shown atop the helipad at Watson's Ninole house in this photo from Facebook.

ring and will be subject to an increased fine, up to a maximum of \$100,000 per Special Management Area violation and \$10,000 per Shoreline Setback violation. In addition, daily fines may be imposed."

At the same time he paid the fine, Watson submitted a second SMA use permit assessment application, describing the nature of development/activity as "a turf farm with a single family residence." Total value was placed at \$750,000. The objectives of the proposed project were said to be "to raise sod and live on the farm."

## A Belated Permit

It was not until October 2008 that Watson and Robertson received the SAA permit for their house, a tennis court, and "sod farm." With the estimated value of construction not crossing the threshold for a major SMA permit, Yuen approved the application – excluding, however, what was labeled on plans as a "west wing" attached to the garage, which included a bedroom, "lunch room" with kitchen, a game room, and office. This addition, wrote Yuen, "for all intents and purposes, reflects the construction of a second single family dwelling on the subject property, which is not permitted unless approval for an additional farm dwelling is first issued by this office." It could not be approved as a guest house, since it exceeds the zoning code limit of 500 square feet, he noted. Nor could it be approved as a detached bedroom, "since it includes much more than simply a bedroom addition and is situated more than 50 feet from the main living area of the farm dwelling."

Watson could apply for a second farm dwelling, but for this he would need to obtain an SMA Major use permit, Yuen noted, but "we do wish to explain to you that we have some reservations about any such attempt to apply for an additional farm dwelling since we simply can't justify such an approval based on the limited amount of agricultural activity involved in the turf farm that you proposed on this property."

Watson received a building permit for construction of the main "farm dwelling" in December of 2008. The value of the construction he placed at \$1.5 million.

## An As-Built Pool

Nothing further appears in Planning Department files until October 2011, when Watson submitted an after-the-fact application for an SAA permit for a "proposed 10,000 square foot swimming pool."

Although construction of the pool without a permit almost certainly involved violations of Planning Department rules, Watson's ap-

## A \$6 Million 'Private Resort' Closes Off Public Access

If anyone is in the market for a "private lresort," complete with swimming pool, water slide, high-dive platform, half a regulation NBA court, and a three-level house with seven bedrooms, eight and a half bathrooms, and kitchens on all levels, there's one for sale in the little community of Pauka'a, just north of Hilo.

And it can be yours for \$5.9 million – a steal if you consider it was originally priced at nearly \$8 million. (For details, see the YouTube video posted by real estate broker Kelly Moran titled *Honolii, By the Sea*.)

If that's out of your price league, you can still enjoy a stay in part of the house as a short-term rental. That will set you back more than \$1,500 a night.

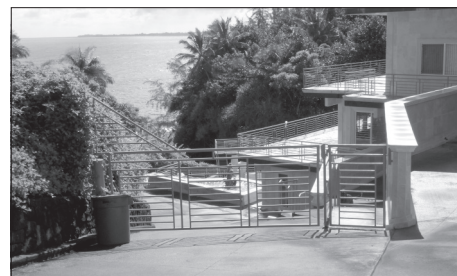
When the house was built, it was as a single family residence.

Back when the lot was being subdivided and initial grading was being done, the county Planning Department issued a cease-and-desist order and notice of violation to Scott Watson, who had at the time had no

permits for any work on the site. He was required to obtain a stream channel alteration permit from the state Commission on Water Resource Management for work that affected Pauka'a Stream to the south of the parcel and submit a topographical map and grading plan. He was ordered to pay a \$2,000 fine for the unpermitted work.

On September 15, 2002, Watson wrote then-Planning Director Chris Yuen, stating that work to correct the violations was underway and asking him to "reconsider the \$2,000 fine... I am on a tight budget to build the houses and have money troubles [sic] at home." The fine was reduced to \$1,000, which Watson paid in October.

When the county issued a Special Management Area permit for the subdivision, it included a provision that the public be allowed access to Pauka'a Stream on an easement that traversed the property. The map accompanying the permit shows the access clearly, stating that "pedestrian public access... goes between house and highway down to Pauka'a Stream."



The public access easement to Pauka'a Stream has been blocked by these gates.

The easement is also called out as condition 5 of the SMA permit.

Yet when a recent attempt was made to hike to the stream along the easement, the hiker was confronted by an iron gate, an angry dog, and even angrier tenant, who insisted that the owner had informed him that no public access existed.

As far as the county is concerned, however, the easement is still on the books. The Planning Department is currently investigating the matter. — P.T.

plication was approved with no questions asked by current Planning Department director Bobby Jean Leithhead-Todd.

In YouTube videos too numerous to count Watson may be seen showing off the pool, which he says is probably the largest residential pool ever built. It holds 240,000 gallons, he says, and is 16 feet deep at its deepest point. A 30-foot water slide runs from the second floor level of his house down to the pool, which also sports two Jacuzzis, gas jets that light up the infinity edge, and three racing platforms. Along one side of the pool is what Watson says is a 15-car parking area.

The building permit for the pool, which Watson finally received in March of this year, indicates that the cost of the project was \$692,000 – more than twice the \$300,000 figure cited in his SAA application to the Planning Department.

### Conservation District Issues

One of the earlier documents in Planning Department files relating to this property is a boundary determination issued in 1999 by the state Land Use Commission. According to the map recording that determination, roughly a third of Watson and Robertson's property lies in the state Conservation District, which is tightly regulated by the state Department of

Land and Natural Resources.

The owners were reminded of this in Yuen's first letter to them, the Notice of Violation of July 2008. It was brought to their attention again in 2012, when the Planning Department responded to a question about the deferral of action on a subdivision request for the same

property. "This application proposes to subdivide the property in the state Land Use Conservation District," wrote staffer Jonathan Holmes. "The subdividers will need to coordinate with the Department of Land and Natural Resources' Office of Conservation and Coastal Lands to ascertain the possible need to obtain a Conservation District Use Permit."

A site map Watson submitted to the county showing the improvements suggests that much of the pool, a long stretch of a concrete drive, all of one constructed pond and part of another lie within the Conservation District. Further, the tree-cutting and grading that were apparently carried out in the Conserva-



Watson's Waterfalling Estate in Ninole.

tion District, at the makai end of the property, would also constitute Conservation District violations.

*Environment Hawai'i* asked Sam Lemmo, administrator of the DLNR's Office of Conservation and Coastal Lands, whether he had received any application for a CDUP. He said he had not. He did receive a complaint about possible Conservation District violations on the site in 2009, he said, but did not follow up because his reading of the map at that time suggested the department might not have jurisdiction.

However, in a recent email to *EH*, Lemmo indicated that his office had not closed the case. "We are looking at it," he wrote. — P.T.

### Access from page 1

pany the grant of easement are not clear enough, there's also a formal metes-and-bounds description of them.

In October, *Environment Hawai'i* heard reports that access had been either denied or rerouted at the site by Watson, who is in the process of building what he calls the "Pepe'ekeo Palace" on the property—a two-story, 7,200-square-foot house with a large swimming pool and tennis court. Two visits to the site confirmed the reports.

Piles of earth, excavated from the worksite, had been placed in front of the only opening in the wooden fence leading from the public parking area into the subdivision. While it was possible to walk around the piles, an effort to follow the map of the easement was frustrated by Watson himself, who informed *Environment Hawai'i* that he had received written permission from the Hawai'i County Planning Department to relocate the lateral shoreline easement to the northern side of his property for at least two years.

But a boundary map that Watson himself had given to the Planning Department indicated that the new easement Watson was offering was not on land he owned, thereby making anyone who used it a trespasser over land owned by Continental Pacific.

Watson continued to insist, however, that the land did belong to him under a proposed parcel consolidation and resubdivision with Continental Pacific that was in the process of being approved at the county. The original property lines were drawn incorrectly, he said, so even though the PC&R was still not completed, he was nevertheless owner of the land that would be included on the final map, when all was put right.

In addition to the redrawn northern boundary, Watson also claimed to own land up to 20 feet of the paved private road, although, again, tax maps and the metes-and-bounds description of the property in his deed do not support this.

The encounter ended with the visitor being directed to an unmarked path Watson had mowed through the tall grass that led to the shoreline. Anyone wanting to follow the public easement fronting Watson's land would be prevented from doing so by a sturdy fence that ends right at the cliff face.

### Repeated Violations

Back in 2002, Watson was issued a cease-and-desist order while he was developing a lot just outside of Hilo. The county deter-

mined Watson had been grading and grubbing in the Special Management Area without having obtained permits for the work. He was fined \$2,000, but, after Watson requested the fine be reduced in light of the costly corrective action, the county pared it back to \$1,000.

In 2008, Watson was working on an 8-acre shoreline parcel at Ninole, around 20 miles north of Hilo. Once again, the Planning Department issued a cease-and-desist order and notice of violation for unpermitted improvements and cleared land, among other things, within the SMA and also inside of the shoreline setback. For this, he was fined \$1,500. Following payment of the fine, the Planning Department notified him that future violations by him of county rules regarding work in the SMA or shoreline setback would "be considered recurring and will be subject to an increased fine, up to a maximum of \$100,000 per Special Management Area violation and \$10,000



Looking toward Hilo through the fence blocking lateral shoreline access at Pepe'ekeo.

per Shoreline Setback violation. In addition, daily fines may be imposed."

Fast forward to 2012. Watson had been working on the Pepe'ekeo lot, for which he had obtained in May an SMA permit allowing for construction of a house, swimming pool, and tennis court.

In July, however, a site inspection revealed "ongoing land altering activity and the extensive removal of vegetation within the 50-foot shoreline setback line of the subject property and on the lands immediately makai of the subject property under separate ownership." The work had been done without compliance with conditions in the SMA permit, according to the notice of violation the Planning Department issued on July 20. Among other things, the letter stated:

- Nearly all vegetation between the shoreline and the 20-foot side property setback and 50-foot SMA setback lines had been cut down. This included vegetation on property belonging to Continental Pa-

cific, which owns the land makai of Watson's down to the shore.

- Silt barriers were not properly placed.
- There had been no prior notification to the Planning Department in advance of their installation, as required by the SMA permit.

- "Some excavation and ground disturbance by heavy equipment makai of the 50-foot SMA setback line was observed, including mechanized equipment being within 10 feet or less of the top of the pali."

- "Significant amounts of vegetation debris remained within the area makai of the area where the construction and silt barrier was supposed to be located."

- Finally, a "gate-type barrier" had been erected within Easement P-14-A with a sign stating, "Posted – Keep Out."

Watson was ordered to take a series of corrective actions by August 24, 2012. The actions included restoration of public access easements, all of which "shall be kept open in full accordance with the terms of [recorded easement documents] unless prior written approval by the Planning Director is granted authorizing the temporary closure of any portion of said easements as being necessary to ensure the safety of the public." He was also ordered to replace "each shade tree removed that was of 6" or more in diameter, as measured at not more than 12" above grade."

Although the county's Planning Commission rules allow for civil fines of up to \$100,000 per violation, plus \$10,000 for each day the violation persists, the Planning Department proposed a fine of just \$10,000 in total. All corrective action, including payment of the fine by cash, cashier's check, or money order, was to be done by August 24.

Even so, that was too much for Watson. According to a Planning Department letter to Watson dated August 22, at a site inspection that took place on August 15, he "verbally requested a reconsideration" of the \$10,000 fine. "Taking into account your cooperation in trying to resolve this matter," wrote April Surprenant, planning program manager, "we are granting a reduction of the civil fine from \$10,000.00 to \$8,000.00." Surprenant set a deadline of September 20 for payment "or a daily fine will be assessed."

She noted that public access easements "are [to be] kept open. However, a reminder that prior written approval by the Planning Director for temporary closure may be allowed for public safety reasons only." Also, a revised SMA assessment application (SAA) would need to be submitted and approved

for deviations Watson was now proposing from the original plan.

Both Surprenant and Planning Director B.J. Leithead-Todd confirmed to *Environment Hawai'i* that no written approval for any change in the public access had been issued. Surprenant did say that she had discussed with Watson a possible temporary closure of up to two years to accommodate his construction activities, but that nothing would be done until he resolved the violations and had a revised and approved SAA.

Leithead-Todd, reached by telephone, told *Environment Hawai'i* that she had discussed with Watson the possible relocation of some of the access. "The public was still going to have access, but things would be moved around," she said. "I was unaware he had blocked anything off."

### **Indulgences**

But on September 20, when Watson arrived at the Planning Department, it was not with a cashier's check in hand. Instead, he turned in another hand-written request that the Planning Department further reduce his fine.

He laid out a story of him being given different instructions by the State Historic Preservation Division, by the county's SMA planner, and others. And he added a postscript: "Mayor Kenoi asked if you could cc him all my info on this matter. Mahalo." (A photo of Kenoi and Watson apparently taken on a terrace of the Ninole house where Watson now lives was posted to Watson's public Facebook page on October 3.)

On October 25 – more than two months past the original deadline for the fine, and more than one month past the second deadline—Leithead-Todd informed Watson that his request for further reduction of the fine was denied. According to one source in the Planning Department, the letter was a result of extensive discussions involving the mayor, department director, and planning staff.

"We note an apparent pattern of grading and grubbing of the parcel, and subsequently, also including construction activities, without first submitting a Special Management Area Use Permit Assessment Application for each proposed development," Leithead-Todd wrote, after summarizing his several previous infractions.

"Please note that the \$8,000 must be paid by Friday, November 16, 2012, or a daily fine will be assessed," she wrote. That afternoon, Watson delivered an \$8,000 personal check to the Planning Department, which the Planning Department accepted, notwithstanding its earlier demand for payment with cash, certified check, or money order. Esther Imamura, the planner who accepted the check,

told *Environment Hawai'i* she was just happy to have the fine paid. She said the county would not know until November 28 if the check cleared.

### **A Bedroom Easement?**

Suprenant was also questioned about the Planning Department's decision to allow the house to be built as close as 20 feet to the top of the small pali that runs along the shoreline in this area and which also defines the property boundary.

According to the SMA permit for the subdivision, "No house or other substantial structure shall be built closer to the ocean than 40 feet from the top of the sea cliff. This condition shall apply even if the shoreline is later certified at a location makai of the top of the cliff."

However, a plot map showing the layout of the structures Watson is building on the property indicate that only a 20-foot setback has been required for the house, even though the public access easement runs along the same setback.

Suprenant insisted that the public will be able to use the lateral shoreline easement, even if erosion may eventually narrow the setback to less than 20 feet.

"You mean the public could eventually be traipsing through Watson's bedroom?" she was asked.

"Yes," she replied.

Watson justified the decision to allow a 20-foot setback, rather than the 40-foot one required in the SMA permit, by describing it as a side-yard setback.

"We consider that 20-foot setback a side yard because it is the property line and there is land beyond/below it well before reaching the certified shoreline," she stated in an email. She did not respond to a follow-up question asking how that determination could be consistent with terms of the subdivision conditions, especially the provision stating that the 40-foot setback is to be imposed regardless of where the certified shoreline is fixed.

The county has also allowed Watson to extend the driveway and pool deck up to five feet within the 50-foot SMA setback area.

Watson's original application for an SMA use permit, filed with the county in October 2011, stated that the cost of the project ("construction of (1) single family residence with pool and tennis court") would have a fair market value of \$1,000,000. House plans showed a structure with a total of 7,892 square feet.

The Planning Department responded by noting that the proposed development would require an SMA major permit, since the house area exceeded 7,500 square feet and the value

was \$1 million.

In April, Watson submitted a revised house plan, indicating he would now have a total living area of 7,035 square feet (excluding, however, an attached garage of 994.5 square feet). This apparently satisfied the county, which then went forward with processing of a Shoreline Area Assessment, rather than an SMA major, permit for the project.

One of the requirements of the SAA that was issued on May 25 was that Watson "submit for our review and approval the additional plans when the pool and deck design is confirmed."

In October, work was well underway on the pool. However, no plans for it were found in repeated reviews of Planning Department files.

As *Environment Hawai'i* was going to press, Leithead-Todd stated that her department was going to be issuing a cease-and-desist order to Watson for the work on his pool. "Maybe we gave him too much rope," she said.

### **A PCR on Hold**

When Watson refers would-be hikers on the shoreline easement to a path that goes over a neighboring lot, he insists that the property to which he is directing the visitors really belongs to him, as will be shown when a property consolidation and resubdivision application receives county approval.

The county did receive such an application in 2009. However, it cannot be approved until a Shoreline Assessment Application is completed and approved. That, in turn, cannot happen until there is resolution of the notice of violation Watson was issued back in July.

### **No NPDES**

One of the requirements in the subdivision SMA permit calls for lot owners to obtain an NPDES permit "for any land disturbance of more than one acre." (The National Pollutant Discharge Elimination System permit is to ensure compliance with the federal Clean Water Act. The program is administered by the state Department of Health.)

Nothing in county files indicates that Watson has been asked to do this. When *Environment Hawai'i* called the DOH's Clean Water Branch, the clerk who checked the records could find no NPDES application for the Pepe'keo property.

Suprenant was asked why the Planning Department did not include this (and other subdivision SMA permit requirements) in the permit it granted to Watson. She responded that the department was now looking into these issues.

—**Patricia Tummons**

## Appeals Court Hears Arguments In 2001 Pila'a Reef Damage Case

The end may be near for a decade-old case involving the largest fine ever levied by the state Board of Land and Natural Resources.

After five years in stasis, the Intermediate Court of Appeals finally heard oral arguments on October 10 on the appeal of Pila'a 400, LLC, of a 5th Circuit Court ruling. That ruling upheld a 2005 Land Board decision to fine the company \$4 million for damages to the reef at Pila'a Bay on Kaua'i's North Shore resulting from grading and other activities on 400 acres owned by the company.

Judging by the court's questioning of Pila'a 400 attorney Wesley Ching, Ching's arguments — nearly identical to those he made before the Circuit Court and during the Land Board's contested case hearing — may again be falling flat.

The state already has a lien on Pila'a 400's land. Whether it remains depends on the ICA, or possibly, the state Supreme Court. Given that Pila'a 400 manager James Pflueger has already paid more in federal fines and restoration costs than the \$6.7 million he paid for the property in 1997, an appeal to the Supreme Court (should the ICA uphold the Circuit Court's decision) would be no surprise.

### *After the Flood*

Heavy rains in November 2001 washed tons of mud from Pila'a 400's property onto the beach and across the reef, nearly smothering the home of kuleana landowners Rick and Amy Marvin along the way.

A plateau on Pila'a 400's property had been extensively and illegally graded by the land's previous owner, Pflueger Properties. Both companies are owned and operated by Pflueger. (Pila'a 400 is no longer a company in good standing, according to the state Department of Commerce and Consumer Affairs.)

In August 2003, the Land Board fined Pflueger and his two companies \$8,000 for unpermitted work in the Conservation District. In addition, the board imposed damages, to the tune of \$1,000 per square foot of damaged coral at Pila'a. The total fine came to nearly \$6 million.

During the ensuing contested case hearing over the damages portion of the fine, Pflueger and Pflueger Properties were dropped from the enforcement action — at Pila'a 400's request — since Pila'a 400 was the owner of the property at the time of the mudslide.

In late 2004, contested case hearing officer

Mike Gibson recommended a fine of \$2.3 million to be held in trust and used to remediate the company's property. Gibson noted in his recommendation that Pila'a 400 was going to have to spend several million dollars remediating its property to resolve a separate enforcement action for Clean Water Act violations. (That case involved the state Department of Health and Attorney General's office, the federal Environmental Protection Agency, Kaua'i County, the Limu Coalition, and the Kilauea Neighborhood Board Association. It culminated in a consent decree filed in U.S. District Court in June 2006.)

On behalf of the Department of Land and Natural Resources, deputy attorney general William Wynhoff vehemently opposed Gibson's recommendation. Allowing the fine to offset remediation costs would be tantamount to mooted any penalty, he argued, and Pila'a 400 should be required to fix its own property at its own expense. The Land Board agreed.

The board ultimately fined Pila'a 400 just over \$4 million, to be paid to the DLNR: \$3.333 million in damages to the Conservation District and \$700,000 in monitoring and administrative costs.

"Economic and use (market) values alone cannot and do not capture the full value of Pila'a," the Land Board's decision and order stated. "Economic valuation alone understates the true social loss from natural resource damage."

In calculating the amount of damages, the board considered the impact to the intrinsic and commodity values of the bay, as well as reef restoration and beach cleanup costs, among other things.

On July 27, 2005, Pila'a 400 appealed the decision to the 5th Circuit Court. In December 2006, Judge Kathleen Watanabe ruled that the Land Board's fines were reasonable and that no procedural errors had occurred during the contested case.

### *The Arguments*

In its appeal to the ICA, Pila'a 400 regurgitated many of the same arguments it presented to Watanabe:

- Because the mud that flowed into the ocean came from Pila'a 400's property in the Agricultural District, the DLNR lacked juris-



PHOTO: KAUAI COUNTY

A November 2001 shot of Pila'a 400's graded plateau.

diction to seek damages under Conservation District statutes and rules.

- The DLNR did not reveal until the end of the contested case hearing — just before final arguments — that it was intending to seek damages under an administrative rule prohibiting the dumping of solid material in the Conservation District without a permit (HAR 13-5-24). Therefore, Ching argued, the department violated Pila'a 400's due process rights. Mud is not a solid material, he told the court.

- The DLNR lacked administrative rules to levy fines for damages to state land.

- The Land Board lacked the authority to penalize Pila'a 400 for land use violations that occurred before the company owned the property.

- The Land Board's fine amount was not supported by the record in the contested case.

Ching also argued that Watanabe should have vacated the Land Board's decision because the matter was resolved in June 2006, when the U.S. District Court approved the consent decree regarding the Clean Water Act violations.

To this, deputy attorney general Russell Suzuki pointed out in a brief to the ICA that the consent decree was entered nearly a year after the Land Board issued its final decision. (Suzuki represents the Land Board in this case. Deputy attorney general Wynhoff represents the DLNR.)

What's more, Suzuki added, the state Department of Health and the DLNR are separate departments. "Neither department is authorized to enforce the other department's laws," he wrote.

With regard to Ching's complaints that Pila'a 400 failed to receive adequate notice, Suzuki observed that the contested case hearing notice stated that the hearing would deal with "an enforcement action involving the alleged damage to state lands and natural resources due to excessive sedimentation at Pila'a."

The notice also stated that the hearing would be held pursuant to chapters 91 (regard-

ing contested case hearings) and 183C (regarding the Conservation District) of Hawai'i Revised Statutes, and chapters 13-1 (DLNR practices and procedures) and 13-5 (Conservation District) of Hawai'i Administrative Rules.

The notice did not specifically refer to HAR 13-5-24. Even so, the notice satisfied requirements of HRS Chapter 91, Suzuki wrote.

"The notice refers to the statute and rules involved by chapter. Nothing more is required," he wrote. He added that if Pila'a 400 wanted more information, it could have asked for a more detailed statement of charges (a 'bill of particulars') – and "not wait three years and claim, on appeal, that it needed more information."

"If appellant somehow felt it was in the dark (which of course it did not), its remedy was to apply for a bill of particulars. Having failed to do so, it cannot now argue that the notice was inadequate," he wrote.

"The idea they didn't realize the issue was about destroying the reef struck me as being rather disingenuous," Wynhoff told the ICA.

Both Wynhoff and Suzuki argued that it does not matter what land use district the mud came from.

"I fail to see how it makes a difference that [the mud] came from the Ag District. ... What if they dug it from the Ag District and dumped it on the reef? Would that make a difference?" Wynhoff asked the ICA. "The fact of the matter is, dumping intentionally or causing it to slide into the Conservation District is a land use."

Regarding Ching's argument that the Land Board cannot issue a fine for damages absent administrative rules, Suzuki argued in his brief that because of the myriad ways state land can be damaged, it would be impossible to devise a single rule prescribing a methodology for quantifying damages. Determining damages must be made on a case-by-case basis, he wrote.

Finally, Wynhoff ridiculed Pila'a 400's attempt to shirk its liability in the case. The company's claim that "it is not liable because Pflueger Properties did it shows the quality of their arguments," he told the court. "Liability for physical harms is with the possessor of land," he said. Pila'a 400 itself had argued that point successfully in the contested case.

"To now come back and continue to argue that Pila'a 400 is the wrong person is wrong," Wynhoff said.

### Probing Questions

Coincidentally, one of the three appellate judges assigned to review the case was former DLNR director and Land Board chair Mike Wilson. (Alexa Fujise and Randal Lee were the others.) During oral arguments, Wilson asked

most of the questions and, at times, almost seemed to be arguing the case on the state's behalf.

Wilson asked Suzuki what legal authority allows the Land Board to make a damages determination on something as intangible as cultural value.

"That's a tough question. ... I would say that the board is required to exercise their responsibilities to make a determination and the reviewing standard that you would apply would be, was their decision an abuse of their discretion?" Suzuki replied.

When Wilson pressed him about whether the Land Board included damages to intrinsic (i.e., cultural and recreational) values in its fine, Suzuki said, "I didn't really look at that particularly. ... I think they were looking at restorative cost to rehabilitate the reef. I think that was the standard that applied."

Wilson then directed similar questions to Ching. For example, is intrinsic value something susceptible to determination by the Land Board?

Ching replied that Pila'a 400's expert economist, John Dixon, had addressed intrinsic value during the contested case hearing, stating that intrinsic value is hard to measure. And if it could be measured, "it's very small," Ching said.

"So, he did consider that in his valuation. That's why I wanted to get your viewpoint on the appropriate, if you will, decision-maker for intrinsic value," Wilson said.

Wilson then referred to a case from the 1950s where a fisherman sued Lihue Plantation over runoff damages. A jury decided that case. In the Pila'a case, it was the Land Board determining damages, acting as a sort of konohiki or group of elders, Wilson said.

"Theoretically, they're the spokespeople for the community on certain issues and, in this case, I guess we would concede, intrinsic value. Certainly, Mr. Dixon was in a position where he was conceding there should be intrinsic value," Wilson said.

"So that brings me to the issue about valuation being susceptible to rule making. How is it you would anticipate the Land Board members would make a decision on intrinsic value? And wouldn't it seem that they would be a more appropriate group to do so, perhaps, than a jury that hasn't been selected through the Constitution, through the intent of the Legislature to have certain groups speak on behalf of natural resources and enforce the law in order to protect the resource?" he asked Ching.

The Land Board could have adopted Dixon's damages calculation or one of the figures offered by the state's expert, which reached into the tens of millions of dollars.

Instead, Wilson continued, the Land Board members made a determination based on the record and on consultation amongst themselves.

"I'm interested in your thoughts as to whether that was a legally appropriate process to follow," Wilson asked Ching.

"That goes back to our lack of rule making," Ching replied. When he tried to explain what factors — in addition to intrinsic value — the Land Board should have taken into account, Judge Lee interrupted.

"Are you suggesting that the board didn't consider multiple factors when they rendered their decision?" Lee asked.

"What we're saying is they didn't articulate those factors," Ching said, adding that the board certainly didn't take into account the remediation Pila'a 400 was doing to its property.

"Wouldn't you fairly conclude that the board ... took the effort to listen to all of the experts, and looked at the extent of the damage, and that you could reasonably conclude from their award that they did consider these factors?" Lee asked.

Again, Ching stated that the Land Board did not articulate what factors it took into account.

The ICA had not issued a decision in the matter by press time. —*Teresa Dawson*

### For Further Reading

For more background on this case, read the following articles available on our website [www.environment-hawaii.org](http://www.environment-hawaii.org).

"EPA Imposes Largest Fine Ever for Run-off Violations in North Kaua'i," April 2006;

BOARD TALK: "Pila'a 400 Appeals Fine for Coral Reef Damage," September 2005;

BOARD TALK: "Pflueger Company Is Fined \$4 Million For Reef Damages at Pila'a Bay, Kaua'i," August 2005;

BOARD TALK: "\$2.3 Million Fine Is Proposed For Reef Damage at Pila'a Bay," March 2005;

"Pflueger Contested Case Overshadows Additional Problems at Pila'a Sites," November 2003;

BOARD TALK: "Contested Case to Resolve Pflueger Damages to Pila'a," October 2003;

"At Pila'a, Kaua'i, A Reshaped Landscape Sparks Litigation," August 2003;

BOARD TALK: "Honda Magnate Bull-dozes Kaua'i Bluff, Causing Mud to Blanket Pila'a Bay," September 2002.



## BOARD TALK

# Illegal Subdivision of Conservation District Halts Puna Couple's Effort to Build a Home

They should have told us a long time ago," Maureen Gapp said through tears after the vote of the Board of Land and Natural Resources to deny her a Conservation District Use Permit.

The Department of Land and Natural Resources' Office of Conservation and Coastal Lands had recently determined that the 5.6-acre property in Puna she and her husband, John, own is not a valid lot. At their November 9 meeting, Land Board members said they needed more time to determine whether the issue could be resolved. But because the 180-day deadline within which the board was required to act on the Gapps' Conservation District Use Application was quickly approaching, the board had little choice but to deny it. Otherwise, their application for a permit to build a single-family residence would have been automatically approved without any special conditions.

As the Land Board had anticipated — and recommended — the Gapps requested a contested case hearing.

In 1999, a previous landowner consolidated two lots — one in the Agricultural District and one with land in both the Conservation and Agricultural districts — then subdivided them so that each of the resulting two lots included land in the Conservation District.

The county approved the subdivision, but Hawai'i Administrative Rules require subdivisions of Conservation District land to be undertaken for a public purpose and approved by the Land Board.

"In this particular case, the County-approved subdivision outcome is not an identified land use that could be applied for within the Conservation District," an Office of Conservation and Coastal Land report states.

Maureen Gapp said she told Department of Land and Natural Resources staff in 2003 that her property had been subdivided. (At that time, the DLNR was pursuing an enforcement case against the Gapps for unauthorized grading and grubbing, tree cutting, and rock removal. The case ultimately resulted in a \$6,000 fine.) Even so, the OCCL accepted the Gapps' CDUA this past May and eventually issued a Finding of No Significant Impact on their environmental assessment, albeit with reservations.

During the EA process, the OCCL had

suggested that the Gapps site their house in the Agriculture District. But because that portion of the lot is riddled with archaeological sites that need to be preserved, the Gapps stuck with their plan to build in the Conservation District, about 200 feet from the shoreline. The OCCL argues that if the Gapps were to shrink the size of their proposed 5,000-square-foot house, there would be ample room in the Agriculture District for it.

"I can see impact both ways. We have a practice of avoiding Conservation District uses if they can be" avoided, OCCL administrator Sam Lemmo told the board. "I just don't see compelling reasons to go into the Conservation District. No net gain in preservation."

The area where the Gapps plan to build is also highly susceptible to subsidence and wave damage.

"Currently, a nearby landowner south of this proposed site is working with the OCCL to relocate his residence as far away from the Maku'u shoreline within his lot as possible. This nearby residence was recently repaired due to wave damage," the OCCL's report to the board states.

Maureen Gapp said she had spent \$65,000 on permits for her house. "Before we spent [it], they could have told us, 'That's not really a lot,'" she said.

After an executive session, Big Island Land Board member Rob Pacheco said the subdivision issue is a serious legal problem, "and we don't have the answer."

Because the deadline to decide on the permit application was only days away, Lemmo recommended that the Gapps either withdraw their application and re-file later, or that the Land Board deny it and they could seek a contested case hearing.

Deputy attorney general Linda Chow noted that a contested case hearing is cheaper. It costs just \$100 to file a petition and that fee can be waived. It costs \$2,500 to file a new CDUA, no exceptions.

Chow and Lemmo added that should the board grant a contested case hearing, the board would not need to hire a hearing officer. It could mediate a settlement.

The board went round and round trying to choose the best way forward; Pacheco said his head hurt. Chow warned the board that if it did approve the permit and it turns out that

the approval was illegal because the subdivision was illegal, the Gapps could end up receiving a CDUP anyway, but without any special conditions.

"We need time to resolve the subdivision issue. ... A contested case hearing seems like our only way forward at this point," Land Board chair William Aila said.

At-large board member Sam Gon, however, moved to approve the permit on the condition that the subdivision issue be resolved and the resulting conditions be set by the OCCL and the board's chair. But after Chow told Gon that the issue may not be resolvable, he withdrew his motion.

Pacheco then moved to approve OCCL's recommendation to deny the permit. He added that if the Gapps requested a contested case hearing, the fee should be waived. His motion was unanimously approved.

"Sorry, folks," he told the Gapps after the vote.



## Former Board Chair Opposes Easement Enforcement Cases

Former Land Board chair Peter Young appears before the board from time to time as a consultant to companies or landowners seeking its approval. But on October 26, Young was simply a member of the public when he testified at length on a request by the DLNR's Land Division to grant a non-exclusive easement to the Puamana Community Association for five "illegal" shoreline encroachments in Lahaina and to assess a \$500 fine and \$940 in administrative costs.

The association is seeking a shoreline certification so that it can repair a swimming pool that was built in the 1930s. The association's representative, Mark Roy, did not oppose the recommendation to grant an easement for 1,895 square feet for a seawall, a groin, and some footings. He also did not object to the proposed fines.

Young, however, had a problem with the whole thing.

"I'm not hired by anyone to work on this. I do believe there should be some amendments incorporated," he said.

His main concern was the DLNR's policy of penalizing landowners for encroachments on state land resulting from beach erosion. The fines and often expensive easements arising from these situations are unintended consequences of a Land Board policy against shoreline hardening that he helped create, he said.

In 1999, the Land Board adopted COEMAP (Coastal Erosion Management Plan), which

strongly recommended minimizing and, if possible, prohibiting shoreline hardening. Since then, the Land Division has brought several cases to the Land Board where erosion has caused once-private shoreline structures to sit on state land. In nearly all of those cases, the board imposes a fine, usually around \$500, and requires the landowner to obtain a market-value easement for the structures or to remove them. In some of those cases, the seawall easements have cost hundreds of thousands of dollars.

"In this particular case and others in the future, we have landowners following the policy [to not harden the shoreline], but are suffering consequences because of it," Young told the board.

At Puamana, a swimming pool was built in the 1930s that was surrounded by land. Today, it's at the ocean's edge.

"If you look at the staff submittal, the swimming pool looks like a natatorium," Young said.

Under state law, if the shoreline moves inland, so do property lines. As a result, landowners are now having to pay the DLNR "for land they already own. ... They paid for that some time before," Young argued.

"We need to recognize, these things aren't encroachments," he said.

Young supported the creation of easements (at no or nominal rent), but not the fines. If structures become exposed due to natural processes, is it fair to have landowners pay a fine? he asked.

"Given what we see in the erosion maps and elsewhere, it's one of those things that's not going to go away," Land Board member Sam Gon said. He acknowledged recommendations by some to work toward a planned retreat from the sea.

Managers are now better able to predict how erosion will affect certain areas. "We didn't have these tools before. ... We certainly do now," Gon said.

But given the current rules and policies, "you have these strange situations that you've outlined for us," he told Young. "It's bothered me every single time, that a person who's lived on a property ... through no malice or intent to violate ... is faced with these kinds of things."

Land Board chair William Aila said the DLNR recognizes Young's arguments, but according to the law, the structures are, indeed, encroachments. However, he added, in the next legislative session, the DLNR will propose legislation that will allow the Land Board to impose nominal fee easements for structures that were originally built far from the shoreline.

"That's the answer," Young said. "The

next answer related to this is changing what you call it. ... One might argue that the ocean encroached on their land and took it away."

He added that enacting the legislation may take a couple of years and asked the Land Board to defer the rent for the Lahaina easement until at least 2013.

"This is a consequence of COEMAP. My fingerprints are on that one. So let's find a way ... of trying to change the law," he said.

With regard to the Lahaina case, at-large member David Goode asked Roy, the association's representative, whether it had considered providing a new pool farther inland.

"There are limitations looking at that scenario. The structure is really a valuable historic asset. ... There's a lot of emotional attachment," Roy replied.

Gon said he understood the historical significance. "It still flies in the face of a planned retreat from the sea. ... It's the kind of thing you can anticipate will have problems in the future," since erosion maps indicate that the area will continue to see accelerated erosion, he said.

Landowners need to recognize the power of the sea and natural processes, he said.

Maui Land Board member Jerry Edlao said that the board must proceed based on the current interpretation of the law and moved to approve the Land Division's recommendations as submitted.

Gon asked to soften the language in the recommendation.

"Being fined for illegal encroachments puts a negative mark on the landowner. ... When Peter says maybe we can call it something different, maybe we can sympathize with that."

O'ahu board member John Morgan agreed.

"Why don't we just take out the word 'illegal'? Just say 'encroachment,'" Land Division administrator Russell Tsuji suggested.

The board then unanimously approved Edlao's motion with the amended language.



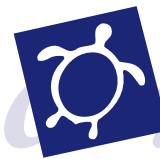
## Board Declares Open Season On Big Island Axis Deer

The state Division of Forestry and Wildlife is charged with two seemingly opposing mandates: protect forests from destructive ungulates and, at the same time, manage those ungulates as game mammals.

But on October 26, DOFAW made a strong case for why axis deer on the island of Hawai'i, at least, must be eradicated. And on its recommendation, the Land Board declared that the deer on the island were destructive to agriculture and native plants and wildlife, and authorized the killing of axis deer — without a permit — until October 25, 2017.

The deer run wild on Maui and Moloka'i, where they were first introduced from south-

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east Asia in the 1860s. The DLNR considered introducing them to Hawai'i island in the 1970s to enhance hunting opportunities, but after strong protests from the conservation community, it backed off the plan. Such an introduction would "result in unacceptable levels of damage to natural resources, including economic damage to local farmers," a DOFAW report to the Land Board states.

In recent years, however, hunting enthusiasts have surreptitiously and illegally transported deer on Maui to the Big Island. DOFAW estimates that fewer than 100 of them now roam the Big Island. Division staff had shot and killed three of the deer as of late October.

The deer reproduce rapidly, at an estimated rate of 30 percent a year, the DOFAW report states. Their hooves disturb soils, contributing to erosion. Their feces on agricultural lands threaten public health. And they are voracious, eating everything from forest plants, to cattle feed, to crops.

"Maui County has estimated the two-year cost of damage by axis deer to farms, ranches, and resorts in Maui County at over \$2 million. Over that same two-year period, an additional \$1 million was spent to remove deer from farm, ranch, and resort locations. Based on the proportional loss of agricultural product on Maui, the University of Hawai'i estimates the potential impact to agriculture on Hawai'i Island at over \$8 million annually," DOFAW states.

A Land Board declaration that the animals are pests on the island and may be destroyed without a permit eliminates the need for DOFAW to amend its hunting rules, agency administrator Paul Conry told the board at its October 26 meeting.

"This is a move to continue our efforts to totally remove axis deer on the Big Island," he said.

When asked by Big Island Land Board member Rob Pacheco why the division was only seeking five years of unfettered axis deer

eradication, Conry said that the department's rules require a time limit.

"I love the fact that they're being declared a pest. That's not the case on any other island," said at-large board member Sam Gon.

Conry admitted that people have asked why the same action isn't being taken on any of the other islands. He said only that on Moloka'i, at least, "we have sustained hunting." He added that on Maui and Moloka'i, there are no bag or season limits on axis deer.

Land Board chair William Aila noted that his office had received a number of testimonies supporting birth control over the killing of deer.

"It's not practical," Conry said, adding that the same suggestion has been made for controlling feral cats.

"Even if you spay them, they're still there for how many years ... continuing to contribute to degradation," Conry said.



## Board Grants Chair Power To Close State Parks

Is it right to take this public policy forum and give it to an individual? ... Sometimes there's wisdom in numbers," said Geoff Hand, a kayak tour operator at Kealahou Bay on the island of Hawai'i.

At the Land Board's November 9 meeting, the DLNR's Division of State Parks asked the board to delegate its authority to the chairperson to establish visiting hours and to "close or restrict public use of all or portions of any state park when necessary for the protection of the area and/or the safety and welfare of persons or property."

In 2006, the board delegated its authority to the chair to establish park hours, which would allow a chairperson to close an entire park by setting no hours. A chairperson could not, however, close only a portion of a park.

Although the public notice on the item didn't name any particular park that would be targeted, a few kayak tour operators from Kealahou Bay flew in from the Big Island to testify. They seemed to believe the expanded authority would be used to close at least some part of Kealahou Bay State Historical Park.

One month earlier, the Land Board cancelled an executive order giving jurisdiction of an underwater portion of Kealahou Bay to the DLNR's Division of Boating and Ocean Recreation. That area was then assigned to State Parks.

The purpose was to have the entire bay under one jurisdiction, Land Board chair William Aila said at the November meeting, State Parks administrator Dan Quinn added that it was an attempt to regulate kayak activities.

Big Island Land Board member Robert Pacheco asked Aila whether the DLNR was, indeed, looking at a limited closure at Kealahou Bay.

"We're looking to close, beyond hours, to close sections of the park. ... We're looking for added flexibility ... to address concerns at Kealahou Bay or other state properties," Aila said.

Hand said it wasn't clear why the chairperson's authority needed extending. "There's nothing to justify it," he said. "There could be abuses under this."

Pacheco said he was ambivalent about the request.

Aila said that less than a year ago, he was asked to visit Kealahou Bay to address a wide range of issues, including extortion, drug dealing, illegal kayaking, and dolphin harassment, among other things.

"This would address all of that at one time," Aila argued.

After an executive session, Pacheco voted with the rest of the board to approve the delegation, with the understanding that Aila would brief the board on a management plan for Kealahou Bay within the next month or so.

—T.D.