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Cluster Bomb

It is hard to argue with a straight face that a proposed development of 13 two-acre lots and all that this entails – roads, driveways, house pads, catchment tanks, septic systems – is appropriate for a pristine old-growth 'ohi'a forest.

Still, that is exactly what received the Hawai'i county planning director's stamp of approval last year. One could have hoped that she'd have the grace to hide behind an underling's clerical error and claim the discretionary approval was a mistake. But B.J. Leithead-Todd was unapologetic in her testimony before the county Board of Appeals, now in the final stages of a contested case over the development.

It is also difficult to fathom how the federal fishery managers' Council Coordination Committee could have the cheek to hold its meeting at the upscale Mauna Lani resort, especially in light of the recent scandals over government conference excesses. But shame has never been a strong point of Wespac's Kitty Simonds, in charge of meeting arrangements.

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A Subdivision in an 'Ohi'a Forest Gets OK From Hawai'i Planning Director

PHOTO: RICHARD AND PATRICIA MISSLER

Old-growth 'ohi'a forest at Waikaku'u, South Kona.

A challenge to a proposed 14-lot subdivision in an old growth 'ohi'a forest on the western slopes of Mauna Loa has resulted in the Hawai'i County planning director admitting that her department made mistakes in the process of approving the so-called planned unit development (PUD).

Whether those mistakes are sufficient to cause the county Board of Appeals to overturn the approval won't be decided until its July meeting, at the earliest. But on May 11, the Board of Appeals concluded the evidentiary portion of the contested case hearing on the matter. Richard and Patricia Missler, who own adjoining land, requested the contested case last fall, soon after planning director B.J. Leithead-Todd approved the application.

The land that is the subject of the application is owned by Malama Investments, LLC, and the Saxton Trust. It consists of three lots totaling 72 acres in the South Kona ahupua'a of Waikaku'u, about 13 miles south of the town of Captain Cook. The property runs from the Mamalahoa Highway mauka, gaining about 800 feet in elevation. The proposed subdivision would see development of 13 two-acre lots clustered in the steeply sloped, forested mauka portion of the land, with a 41-acre remainder lot occupying the makai area. Access would be by means of a private road through the existing Ka'ohe Ranch subdivision, immediately to the north.

Although heavily forested and bordered on the east by state forest reserve land, the Malama Investments/Saxton Trust property lies in the state Agricultural District; county zoning allows for five-acre agricultural lots. With a planned unit development, the total density would remain at 14 lots, but the size of 13 of them could be smaller than the minimum set in county zoning.

In addition to the acknowledged error, the Misslers and their attorney, Michael Matsukawa, argue that the approval was flawed in other respects as well: that the project does not comply with mandatory provisions of the Kona Community Development Plan; that the applicants do not have a legal right to use the proposed access road; and that the county's rule for timely processing of applications was violated, among other things.

Changing Players

The first application for the PUD was filed on October 2, 2010, on behalf of two prospective purchasers, Richard Lewis and James Petty. The forms filed with the County of Hawai'i indicated the applicant was Riehm Owensby Planners Architects, whose principal, Michael Riehm, had been hired to develop a subdivision plan by Lewis and Petty.

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Environment Hawai'i

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NEW AND NOTEWORTHY

Water War: On June 6, the Hawai'i Supreme Court will hear oral arguments in the appeals of the Commission on Water Resource Management's June 2010 amendments to the interim instream flow standards (IIFS) for four west Maui streams collectively known as Na Wai 'Eha.

The Water Commission, Hawaiian Commercial & Sugar, and Wailuku Water Company have all argued that because no permits are involved, the court lacks jurisdiction to hear the appeals filed by Hui O Na Wai 'Eha, the Maui Tomorrow Foundation, and the Office of Hawaiian Affairs.

In related news, Na Moku 'Aupuni o Ko'olau Hui's appeal of the Water Commission's decision to deny it a contested case hearing over a ruling made in October 2010 not to amend the IIFS for 19 east Maui streams appears to have come to a halt.

Environment Hawai'i
72 Kapi'olani Street
Hilo, Hawai'i 96720

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

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Telephone: 808 934-0115. Toll-free: 877-934-0130.
E-mail:ptummons@gmail.com
Web page: http://www.environment-hawaii.org
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In January, the Hawai'i Supreme Court remanded the group's appeal back to the Intermediate Court of Appeals, which had initially dismissed the case because, in its opinion, the commission had not issued an appealable order. But the ICA has been silent since the Supreme Court ruling.

Native Hawaiian Legal Corporation attorney Alan Murakami, representing Na Moku, says he is preparing to take his fight back to the state Board of Land and Natural Resources, which controls how and whether the East Maui Irrigation Company/Alexander & Baldwin, Inc., diverts east Maui water, over state lands, to central Maui.

The Land Board must also address the water needs of the 19 streams that the Water Commission chose not to restore any flow to, Murakami says.

"They're not supposed to rubber stamp what the commission did," he says.

Reef Rent: A mishap during the deployment of artificial reef modules off Keawakapu, Maui, has not only caused a delay in building a new reef site off 'Ewa, O'ahu, but is also costing the state an extra $80,000 in storage costs.

Last month, the state Department of Land and Natural Resources requested a procurement exemption so that it can repay a former contractor, Pioneer Machinery, Inc., $80,000 in rent paid to store 2,500 concrete artificial reef modules left idle after 125 modules mistakenly fell on a live coral formation off the Keawakapu artificial reef, off Kihei, Maui, in December 2009.

Pioneer had a one-year contract to construct, deploy, and store some 4,000 modules for the DLNR, nearly 1,500 of them at Keawakapu. But the incident prompted the U.S. Corps of Engineers to delay permit renewal and plans to install the remaining modules in waters off 'Ewa, O'ahu.

"The permit delay is expected to continue until sometime this fiscal year or early next fiscal year when an environmental assessment is completed on the Keawakapu incident," the exemption request states.

Pioneer's contract expired in September 2010, but former DLNR director Laura Thielen had agreed to reimburse the company for all storage costs until all the modules were deployed or moved elsewhere.

The DLNR has made arrangements to move the remaining modules to a parcel it owns.

Quote of the Month

"Somehow, with all these after-the-fact permits, we've got to stop saying, 'Oh, naughty, naughty,' and slap them on the wrist."

— William Balfour, Water Commission

Save the Date: August 24, that is. On that evening, *Environment Hawai'i* will be having a fund-raising dinner and silent auction in Hilo, at the 'Imiloa Astronomy Center.

Jonathan Price

The special guest speaker will be Jonathan Price of the University of Hawai'i-Hilo Geography Department. Anyone who has heard Price talk knows just how engaging his presentations are – whether he's talking about the origins of Hawaiian plants, the likely consequences of global warming at the local scale, or the intricacies of mapping distributions of species and ecological communities.

Join us for an evening of music, delicious food, conversation, and enlightenment. Watch this space for details.

BOARD TALK

Land Board Approves Legacy Land Projects

On May 11, the Land Board unanimously approved funds totaling $4.6 million for seven projects of the Department of Land and Natural Resources' Legacy Land Conservation Program aimed at protecting more than 12,000 acres statewide.

On O'ahu, the projects include the only relatively intact heiau in the Ko'olauloa region, a significant portion of the popular 'Aiea Loop Trail, and a monk seal resting area on the North Shore.

On the island of Hawai'i, they include an easement over and a fee simple purchase of portions of Kuka'iau Ranch. The state will pay $600,000 for a conservation easement over 3,688 acres in Hamakua restricting operations to sustainable forestry practices. Although the applicant was The Nature Conservancy of Hawai'i (TNCH) and the DLNR's Division of Forestry and Wildlife, only DOFAW will hold the easement.

The Board also approved $1 million for the fee simple purchase by TNCH of 4,469 acres of Kuka'iau Ranch for watershed and palila habitat protection. (On May 22, a Big Island real estate agent announced that the entire Kuka'iau Ranch – 9,390 acres – was for sale, with an asking price of $16.8 million. For more on Kuka'iau Ranch, see the March 2012 issue of *Environment Hawai'i.*)

In addition to the Kuka'iau lands, the purchases include 635 acres in O'ahu's Kalauao Valley for critical habitat and watershed protection ($192,750); 9.08 acres protecting the Maunawila heiau ($650,000); 0.75 acres of sand dunes adjacent to the Ka'ena Point Natural Area Reserve on O'ahu ($86,450); 34.64 acres in Kaiholena South, Hawai'i, to add to the Ala Kahakai Trail ($1,449,555); and 3,127.95 acres of coastal land in Ka'u to protect shorelines and access to an area adjacent to the Manuka NAR ($621,245).

At-large member Sam Gon, who is also TNCH's lead scientist, recused himself from voting on the matter.

⁂

Land Board Writes Off Uncollectible Accounts

With more than $100,000 at stake, Land Board members Jerry Edlao and Samuel Gon pored over the list of uncollectible accounts submitted by the DLNR's Division of Boating and Ocean Recreation, looking for anyone they could help track down.

Sixty-four former boating permittees have skipped out on fees and fines totaling $118,159.61, according to a DOBOR report. And that's just the first round.

DLNR's collection agency, Medcah Inc., informed DOBOR in August 2005 that the accounts had been removed from the collection process because it had been unable to locate the debtors, some of which owed more than $10,000.

On April 27, DOBOR asked the Land Board to write off the accounts.

"It's just so sad when you have to write off these uncollectibles," Edlao said.

DOBOR administrator Ed Underwood noted that the list submitted to the board was just one small portion of uncollectible accounts that the division will eventually forward to the Land Board.

"A lot of these people left and there's just no way to track them down," he said.

Land Board chair and DLNR director William Aila said the department is investigating whether it can recoup the money through the debtors' tax returns.

"Letting these things get up to $11,000, $13,000, $14,000 in arrears, I hope we're not allowing that," Big Island Land Board member Robert Pacheco told Underwood.

Underwood explained that once a penalty is imposed for non-payment, they increase exponentially, very quickly.

"By the time we run through the process, the clock is ticking," Underwood said. "We can impound the boat, but then we forgo fees. The boat may be worth only $500 and you owe us $10 grand."

He said the department has tried for the past two years to revise statutes governing DOBOR's ability to recover fees so the division isn't stuck with a bunch of old, worthless boats.

"In Ke'ehi small boat harbor alone we disposed of 40 boats last year," he said.

⁂

Board Approves Limited Access Over Old Haleakala Trail

On May 11, over objections from hiking groups, the Land Board approved a memorandum of agreement with Haleakala Ranch Co., to allow a minimum of two guided hikes a year on a trail in Makawao that cuts through the ranch toward Haleakala National Park — with a stipulation that an attempt must be made to reasonably accommodate demand.

In January, Public Access Trails Hawai'i (PATH) filed a lawsuit in 2nd Circuit Court against the ranch, the DLNR, the Land Board, the Office of Hawaiian Affairs and other entities seeking to confirm the state's ownership of the trail and to force the state to provide reasonable public access.

Paul Conry, administrator for the department's Division of Forestry and Wildlife, told the Land Board on May 11, "we maintain we own the trail," but the MOA does not address ownership or who has access rights. It does, however, allow DOFAW staff to immediately work on the trail and coordinate with the ranch on a minimum of two guided hikes a year.

DLNR staff had determined in 2000 that the state owned the trail and a deputy attorney general found in 2003 that there was significant evidence to support that conclusion. But in 2009, deputy attorney general Pam Matsukawa had a different opinion. She advised then-DLNR director Laura Thielen that the state may be able to prove it owns an easement over the trail, but it was not clear whether the state owned the trail in fee simple. She recommended an MOA.

DOFAW's May 11 report to the Land Board claims that PATH doesn't have the right to litigate the ownership issue on behalf of the state. Not only is litigating the matter an imprudent use of the state's resources, it

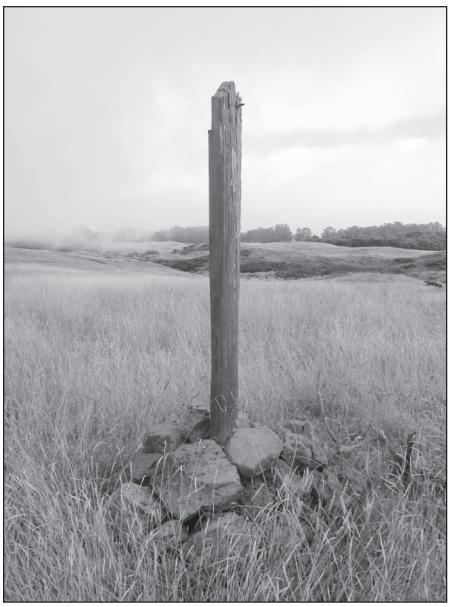

PHOTO: TOM PIERCE

One of the many rock cairns (ahu) and "finger posts" erected by the Territory of Hawai'i in 1905 to guide travelers to the top of Haleakala Crater from Makawao.

also doesn't benefit the state or the public, the report continues.

"It is not practical or economical to allow the public to use the trail without HRC's cooperation. Losing the ownership issue will remove any chance that the state and HRC could compromise as to use of the trail. Losing the ownership issue may set a bad precedent as to other possible ... trails," it stated.

With regard to PATH's attempt to force the state to open the trail within one year of a court order, "whether and how to open the trail to public use is up to the department and ultimately this board. The court cannot order the board to open the trail or spend the money and incur the liability to do so," it stated.

Conry told the Land Board his division has received testimony in favor of and opposed to the MOA.

"While your staff was negotiating the MOA, some folks got tired of waiting and sued the board and Haleakala Ranch," deputy attorney general William Wynhoff added. "Assuming it goes to fruition, ownership will be determined, even though that's not something staff wanted to push."

Trial has been set for January 2013.

PATH attorney Tom Pierce noted that the territory of Hawai'i had staked the trail from Makawao to the top of Haleakala crater and that the trail appeared on maps as early as the 1860s.

Several years ago, PATH tried to work with the ranch on a solution, but the ranch rejected its settlement offer and instead started working on an MOA with the DLNR, Pierce said.

"The DLNR is looking for something that is administratively simple. But is to basically rubber stamp what the ranch has submitted appropriate? We would argue that it's not," he said. Pierce asked that the Land Board table the MOA and launch its own investigation into the state's ownership of the trail. Approving the MOA would send the wrong message to other landowners who might have public trails across their properties.

"The BLNR does not have the authority to enter into an MOA for land that it owns," he said.

Board members Rob Pacheco and Jerry Edlao, on the other hand, didn't see any real downside to the MOA.

Board chair and DLNR director William Aila added that an MOA providing for controlled access was an interim solution pending resolution of the ownership dispute.

"If the state were in control, I don't know if I have the resources to make it safe. It's on a working ranch. ... The ranch will be able to chase the cows away. ... We're being sued every day for people falling off a mountain," Aila said.

To Haleakala president Don Young, unfettered public access was also out of the question given the surrounding livestock operation and the trail's difficult mauka section.

"It's important that whatever access is there is managed," Young said. "If it did become a 20-foot corridor owned by the state ... the reality is it would [need to] be a fully fenced corridor" to protect the public.

In the end, the Land Board voted unanimously to approve the MOA with additional language requiring the parties to allow as many trips as needed to reasonably meet demand. Pacheco also recommended guides could be from an agreed upon hiking organization and not be limited to ranch or DLNR personnel.

He added that providing unlimited access to a trail that is not well defined at the start, crosses a working ranch, and ends where there are no parking facilities is premature.

"I just hope the hiking community realizes this is giving us something," he said. If the lawsuit proves the state doesn't own the trail, the public would have no access. If it does own the trail, it would still take a long time for the DLNR to go through the process to open the trail, he said.

Nakula Trail

The Haleakala trail isn't the only source of friction between PATH and the DLNR. PATH executive director David Brown has alleged that government corruption is interfering with efforts to access the Nakula Natural Area Reserve.

At the March 21 meeting of the Na Ala Hele Maui advisory council, DOFAW access and acquisitions coordinator Jordan Jokiel announced that he had plans to meet with surrounding landowners, including the National Park Service, the Department of Hawaiian Home Lands, Haleakala Ranch Co., and state lessee Brendon Balthazar to discuss incentives, terms and conditions associated with establishing a route to the Nakula reserve. Jordan is also drafting an MOA.

"Support for access to Nakula is growing and DOFAW wants to move forward," the meeting minutes state.

One council member suggested that the best route might be through the historic access across DHHL's lands.

"The connection between Sen. [Clayton] Hee and Brendon Balthazar make it impractical to pursue access to the Nakula trail through the Balthazar leased land and it is best to look at the DHHL property for access," the minutes state.

In a May 14 letter to *Environment Hawai'i*, Brown alleged that Na Ala Hele administrator Nelson Ayers told the council that "Senator Hee would 'protect' Mr. Brendon Balthazar and his large Nakula lease (1,565 acres) and that the Hawai'i state public would never have legal access. ... On Maui, we call this GOVERNMENTAL CORRUPTION."

Hee, an O'ahu rancher, is chair of the state Senate Judiciary and Labor Committee. In 2000, he accompanied then Land Board chair Michael Wilson on a site visit of Balthazar's leased property to investigate unauthorized structures that had been built.

Balthazar, owner of Diamond B Ranch, leases 1,565 acres of state land near Hana. His lease expires in 2038.

Ayers told *Environment Hawai'i* that Clayton Hee has nothing to do with the Balthazar lease or efforts to establish an access to the reserve.

After Board Orders Seawall Removal, Landowner Agrees to Easement Terms

Four years after seeking an easement for encroachments on state property, California resident Tom McConnell seems ready to sign.

On May 25, the Land Division of the state Department of Land and Natural Resources recommended rescinding an April 27 Board of Land and Natural Resources decision to require McConnell to remove a seawall, a fence and filled land fronting a Niu beach property owned by his company, TLM Partners, or face stiff fines. The division also recommended dismissing or allowing for the withdrawal of TLM's request for a contested case hearing.

On May 11, through his attorney, McConnell agreed to four payment triggers proposed by the Land Division. If he signs it this time, McConnell will have a 55-year, non-exclusive easement for the encroachment, but will have, at most, ten years to pay for it.

Taking a Stand

"Personally, my feeling is we're being jerked around. I don't like being jerked around,"

Jerry Edlao said. And the Maui Land Board member wasn't alone.

Edlao's comments came as the board was meeting on April 27, when it voted, 6-1, to order the removal of the encroachment, which McConnell had discovered while preparing to rebuild his house.

Although the Land Board had approved TLM's easement request in 2008, McConnell later balked at its final terms and refused to sign it. In May 2010, he asked for his money back, roughly $135,000. In January, a majority of the Land Board agreed to return the money with a stipulation that should McConnell and the DLNR fail to perfect an easement document within 30 days, the DLNR would pursue an enforcement action.

Back then, Kaua'i board member Ron Agor had suggested that the DLNR grant TLM an easement and secure payment by means of a first mortgage on the property.

That suggestion became a point of contention over the ensuing negotiations between Land Division administrator Russell Tsuji and McConnell's attorney, Greg Kugle.

Kugle's position was that the Land Board had endorsed Agor's suggestion with no additional conditions. Tsuji disagreed, arguing that additional terms were necessary to ensure the DLNR would receive payment for the easement in a reasonable time frame. Tsuji had insisted on a deadline for payment in case TLM never sells its property. Kugle argued that the Land Board did not impose any deadline.

In March, Tsuji informed the Land Board that he and Kugle could not agree on easement terms and that he would be pursuing an enforcement action.

On April 27, Tsuji asked the Land Board to order TLM to remove the encroachments, which include the seawall, a wire fence, and the filled lands, within 180 days, and pay administrative costs of $4,295.

Should TLM fail to meet the deadline, Tsuji recommended that it be fined $1,000 a day per violation commencing on the date of the board's order.

"It's simply unprecedented to have an easement without actual payment," Tsuji said.

Tsuji said he had proposed various triggers for payment, which would need Land Board approval, but McConnell preferred to stall.

"I told him, 'You are no longer an easement holder. You are encroaching on state land. If you're not going to agree to an easement, you leave us no choice but to go to the board to remove,'" Tsuji said.

Tsuji had proposed that payment be required if the property is sold, 10 years pass, or if TLM gets either a shoreline certification or a building permit.

Devil's Advocate

At the April meeting, O'ahu board member John Morgan asked Tsuji to respond to several issues McConnell's attorneys had raised in recent correspondence.

First, there was the issue of fairness. The seawall fronting McConnell's property spans several lots in Niu Beach. So why was only McConnell's portion being targeted?

Tsuji said his division is aware of the encroachments along Niu beach lots and that applications for easements on some of them have been pending for years.

"We will be moving them," he said, "This is the first one we're bringing to the board where the owner is refusing to get an easement."

Morgan noted that there has been a lot of debate whether the encroaching land was filled or accreted. If it is accreted land, it belongs to McConnell.

Tsuji admitted that proving the land was filled will require experts and expensive borings that may not yield a definitive answer. Even so, the DLNR is prepared to litigate that point, he said, adding that all of the department's land and coastal experts believe the land was filled.

"The filled land is five feet above the submerged lands. There's no way it was accreted," Tsuji said.

Morgan then asked if there was any record of how these shoreline properties got expanded beyond their boundary lines.

"Each lot would need to be looked at and studied thoroughly," Tsuji said, noting that there have been many instances in last year and half where extra areas have been added to county Tax Map Key maps for shoreline properties without any legal justification. Kugle can't show McConnell legally acquired the land fronting his property, he added

"At the end of the day, there was no evidence. We honestly tried to find something [to prove] these property owners legally acquired the additional lands. We couldn't," Tsuji said.

Finally, he reminded the board that it was TLM's own consultant who applied for the easement. The board approved it, money changed hands, then, "lawyers got involved," he said, drawing a chuckle from the room.

Morgan asked about the due process concerns McConnell's attorney had raised. In an April 26 letter to the board, attorney Christi-Anne Kudo Chock pointed out that the DLNR had not served TLM with a notice of violation or any written notice or proof of the department's claims.

"Placement of a vague request on the Land Board agenda, with no personal service upon TLM, also constitutes a deprivation of due process," she wrote, adding that TLM is entitled to a contested case hearing.

Tsuji disagreed, noting that McConnell and his attorneys have known since January that the case could become an enforcement action if they failed to reach an agreement with the DLNR within 30 days. He added that he had been trying to coordinate a meeting with the Land Board for months, but had been continuously put off by McConnell.

Morgan noted that McConnell agreed to appear at the Land Board's May 11 meeting and suggested deferring the matter until then.

But Tsuji was clearly fed up.

"We didn't come to terms on an easement. We have to do an enforcement ... unless you, the board, tell me that these terms are unreasonable," he said, adding, "Nobody gets these kinds of terms. Why? Because he lives in Niu Beach lots and has a $5 million home?"

Big Island Land Board member Rob Pacheco, who had opposed returning TLM's money, also preferred to press on.

"At the January meeting, it was very clear, the cat was out of the bag [that there was an encroachment].... Four months later, we don't have an agreement. I wasn't interested in the lien concept. I'm not inclined to defer this," he said.

Edlao added that he had warned McConnell that if he didn't get an easement, there would be an enforcement action and that the only guys making money would be the lawyers.

Kudo Chock noted that McConnell has actually agreed to most of Tsuji's recommended payment triggers.

If that were true, Edlao said, "I suspect he would have been here to end this. ... I'm tired of this. I don't want to defer this. If you want to contest this, then fine."

In the end, the board members (except for Morgan) approved a motion by at-large member David Goode to accept staff's recommendation and ask it to continue easement negotiations up until a contested case hearing is granted.

Nothing regarding the easement was scheduled for the Land Board's May 11 meeting, although Kugle submitted a letter that day agreeing to the four triggers.

— Teresa Dawson

At Meeting of Fishery Council Leaders, Wespac Folks Let Down their Guard

What do fishery council members and executive directors talk about when the public isn't listening?

At a meeting of the federal Council Coordination Committee held last month in Hawai'i, at the Mauna Lani Bay Resort, it was possible to get a glimpse into the discussions that generally have few, if any, members of the public in attendance. The committee, established in a provision of the Magnuson-Stevens Act, is made up of the executive director, the chairman and one vice chairman from each of the eight regional fishery management councils. Also in attendance were dozens of staff from the national and regional offices of the National Marine Fisheries Service as well as staff from the fishery management councils and several interstate fisheries commissions. Altogether, the federal government paid for probably 60 or 70 people to attend the gathering at one of Hawai'i's premier resorts.

From the host council alone – this year, the Western Pacific Fishery Management Council (Wespac) – there were more than 20 representatives. In addition to the executive director (Kitty Simonds), chairman (Manny Duenas), and one vice chairman were more than half a dozen council staff, at least five other council members, several council consultants, members of the council's Scientific and Statistical Committee, and a former council chairman.

According to a press release issued by Wespac, the CCC is convened annually to allow NMFS officials and others to exchange information with the regional fishery management councils.

While there are few reports available online from past CCC meetings, the agendas and presentations that are available convey the impression of serious discussion of such topics as catch limits, enforcement programs, marine spatial planning, and the like. Topics of discussion at the May meeting included both pending and passed legislation in Congress; current and projected federal budgets for the National Oceanic and Atmospheric Administration and its agencies, especially the NMFS; and an update on litigation against the service by both fishing groups and environmental organizations. But a large part of the May meeting seemed intended to give Wespac the chance to vent its complaints against the agency, Congress, and assorted non-governmental organizations, all of which, according to Duenas, are allied in a conspiracy to thwart the council and its fishing communities.

With two evening receptions (one on April 30, at the Mauna Lani; the second on May 2, at Hulihe'e Palace) and amid the plush resort setting, some may be tempted to view the meeting as little more than a junket. One of the presenters at the meeting, Kevin Stokes of New Zealand, alluded to this, observing that the hotel was "a rather nice place to come for a few days, especially since I'm participating for only a few minutes."

Turtles

Simonds, Duenas, and other council members and council staff have made no secret of their desire to have green sea turtles removed from the federal list of threatened and endangered species. More generally, turtles have been a burr in the saddle of Wespac for the last 12 years, ever since a lawsuit over turtle interactions resulted in the closure of the Honolulu-based longline swordfish fishery for three years.

Leading off a panel discussion on protected species, Paul Dalzell, Wespac senior scientist, recapped the long history of Hawai'i litigation over turtles.

Dalzell spoke of the dramatic fluctuations in the incidental takes of turtles allowed by NMFS over the last two decades. From a take limit of about 200 in 1991, the allowed take zoomed to nearly 1,000 in 1998 – and then came the lawsuits. In the wake of the litigation, allowable take levels were cut back dramatically. The 1998 biological opinion, on which take levels are based, "essentially said, about 500 loggerheads, 250 leatherbacks," Dalzell said. "It was a fairly qualitative opinion, but it had some quantitative underpinnings… Within three years, the jeopardy bar had been lowered by an order of magnitude adjustment. There was no real explanation as to why the jeopardy bar had been set so much lower…. It continues to this day to confound me."

At the same time that the jeopardy bar, as Dalzell put it, was lowered, turtle populations, especially that of loggerhead turtles, were "springing back," he said.

Sam Rauch, acting administrator of the NMFS, responded by noting that in the 1990s, the "presumption was that the … arguments were supportable – which is not what the judge found. He found that they were arbitrary. … So the assumption that you had a valid 1998 biological opinion … was just flat-out wrong. It was wrong. It was unsupportable, and we had to do something different because the judge invalidated it.

"There needs to be a reflection of that in the argument you're making," Rauch continued. "More fundamentally, it shows – and we have seen this across the country – in the 1990s, nobody was paying attention to what we were doing on turtles…. Across the country, we were allowing thousands and thousands of turtle takes, and you're not adding that up. Our rationales didn't withstand judicial scrutiny, and we had to take a more sophisticated approach, accounting for all turtle takes…. What we could get away with in the 1990s, we can't get away with today."

Dalzell was unbowed. He acknowledged that the turtle biological opinions were getting better, "but the service needs to do more work on developing an absolute index of turtle size…. Then we can really assess the impacts of the fishery on turtles. I've now come to believe that all the fishery impacts don't amount to a hill of beans in terms of impacts to turtles. Turtles are most vulnerable in their aggregating, nesting grounds."

And although the changes in the Hawai'i longline fishery were effected through litigation, Dalzell would have the fishery be regarded as a case study in responsible fishing. "I never get the sense that the true achievement with what happened out here, with this fishery, has been celebrated as strongly as it should be. We went from an almost hopeless situation, thinking we would never find a magic bullet, to reducing [turtle takes] by one order of magnitude…. The service should make more reference to the iconic status of this fishery, with its reduction in takes of turtles and seabirds."

Council chair Duenas (who was also chair of the CCC) seconded Dalzell's comments, noting that, for the environmental community, the Marine Mammal Protection Act and the Endangered Species Act were "always a silver bullet."

He went on to laud the fishery management councils for their transparency. "If anyone is transparent, it's the council. We're so transparent we should get a pass through the TSA machines. The councils are the only ones transparent in this whole issue of dealing with the ESA and MMPA," he said.

Dalzell's comments drew only a few critical remarks from the audience. Stokes, the fisheries management specialist from New Zealand who had been invited to speak on the same panel as Dalzell, said he was "concerned there's still too much focus on the agency's interaction with the councils, and not involving a wider public in the process." Another panelist, Keith Rizzardi, a lawyer who once

worked with the Department of Justice and who now chairs the federal Marine Fisheries Advisory Committee, suggested there needed to be "greater stakeholder engagement, greater engagement with the councils."

A Duenas Dynasty?

Duenas did not shy away from using his prerogative as meeting chair to vent at length against the NMFS and others who, in his words, keep "little brown men" such as himself from exercising their cultural traditions, including eating turtle.

"Everyone else in the Pacific takes green sea turtles," he said, "but we [in the Marianas] are penalized because we're Americans. But we still go to Palau and Yap, so we can eat turtles….

"The council has saved over 100,000 turtles in Papua New Guinea, in Baja [California[. But these aren't being pulled into the equation. They're not part of anything… [There are] 10,000 turtles nesting in Japan, up 1,000 percent from 10 years ago. You're not recognizing the fact that our fishing community is doing something right."

A couple of hours later, Duenas was again on a rant, this time at the NMFS alone. "I'm sick and tired of this agency promoting science that is inaccurate," he screamed during a discussion of stock assessments. "Don't get high and mighty with me," he warned, going on to denounce the agency and its scientists for another 10 minutes.

Duenas' third consecutive term on Wespac expires in June. By law, he cannot be reappointed. The governor of Guam, Eddie Calvo, has submitted to the Secretary of Commerce the names of three individuals to replace him – all well qualified, Calvo said in his letter, but one more qualified than the others: Michael P. Duenas, Manny's son. Duenas senior is president of the Guam Fisherman's Cooperative Association. Duenas junior is its general manager. (The secretary is to announce council appointments by the end of June.)

Kvetching

In addition to his discussion on endangered species interactions, Dalzell gave a presentation titled "Marginalization of fisheries through competing acts/authorities."

"Councils will always have to address consistency with other applicable laws and issues," Dalzell said, "but the burden is growing." The upshot was to "marginalize the council's role in fisheries management, with more feet under the management table and more council staff time working on issues," he continued. This last point, he argued, "was the more insidious aspect – increasing the amount of staff time working on issues."

Designated monuments and sanctuaries have put off-limits to fishing 15 percent of the Exclusive Economic Zone within the Western Pacific council's jurisdiction, he said. "Fifteen percent doesn't sound like much, but this is 15 percent of coastal habitat, shallow waters. In terms of non-pelagic stuff, it's very significant," Dalzell said.

"The Antiquities Act throttled any fisheries in the Northwestern Hawaiian Islands…. The [bottomfish] fishery died. The lobster fishery died in 1999. And there have been no tangible benefits to fisheries by closing two-thirds of the island chain to fishing."

What's more, he said, "the elimination of fishing hasn't stopped the decline of monk seals" in the "Papa and Mama monument" – which, Dalzell said, is what council staff calls the Papahanaumokuakea Marine National Monument that includes nearly the entire northwestern Hawaiian archipelago.

A petition to list several dozen different coral species as endangered was nothing more than "a Trojan horse for carbon emissions," he said, "yet it could affect fishermen fishing on coral reefs.

The Endangered Species Act and its Section 7 requirement for federal agencies to consult on actions affecting endangered species were again denounced by Dalzell. A proposal to expand critical habitat for monk seals "could include most of the coastal regions of the Main Hawaiian Islands, including Penguin Banks," an important fishing area, while "other potential ocean uses – cables, wind farms – these infringe on, or at least takes time away from council business, to deal with these things," he said.

As for the Migratory Bird Treaty Act, "we are the only fishery for which an MBTA permit has been developed," he noted. "We looked into the MBTA permitting process, which includes permits for taxidermy but not for fisheries. Now we have one for fisheries. What will happen to fisheries in other states?"

On and on went Dalzell's list of perceived insults to Western Pacific fisheries: development of a take reduction plan for false killer whales, establishment of the Marianas Trench National Marine Monument, expansion of the Fagatele Bay and Humpback Whale sanctuaries. The latter was ridiculed as "a mission in search of a purpose" by Dalzell. "Already protected by the Marine Mammal Protection Act and the Endangered Species Act," he said, "there was no rationale about establishing a sanctuary for humpback whales other than the federal dollars this may bring into the state of Hawai'i. The North Pacific humpback population has rebounded spectacularly at an average growth of 7 percent per year due to its not being hunted, not because areas of Hawai'i's coastal waters were designated as sanctuary. The National Marine Sanctuaries Program, flush from its non-success with the humpbacks, now proposes to expand the remit of this initiative to take in more species, namely green sea turtles and monk seals, and designate new sanctuary boundaries."

The NMFS was practically useless in defending fisheries against these onslaughts, Dalzell suggested. It "repeatedly fails to reject ESA listing petitions" that might be weak, it "will happily use unverified anecdotal information and agency discretion in management decisions," it refuses to delist recovered species, it won't let councils particulate fully in ESA Section 7 consultations, it is too cautious in its protected-species decisions, and it has marginalized the Magnuson-Stevens Act through the use of protected species statutes, he said.

"I came to the council 16 years ago," Dalzell concluded. "We have only lost fisheries since then. Precious corals? No precious corals are harvested apart from black corals, though there are still beds here in Hawai'i. The Northwestern Hawaiian Islands bottomfish and lobster fisheries are gone because of the monument. The swordfish fishery was closed for three years and is still not recovered back to pre-1999 levels. The longline fishing grounds in the Pacific Remote Island Areas are lost. Shark finning, which represented 20 percent of the income for crews, has been banned."

The discussion inspired another rant by Duenas. "I do believe in conspiracy theory," he said. The object of the conspirators were fishermen, particularly Pacific Islanders, and the chief fomenters were "an environmental group in New Mexico that lost its beaches a million years ago" (referring, apparently to the Center for Biological Diversity, which has sued the NMFS over endangered species issues). "They're doing the same thing the Nazis did in World War II," he said.

No one in the room registered an objection to Duenas' remarks or to his prolonged and repeated harangues against NMFS. Instead, at the close of the meeting, he was given a round of applause for his duties as chairman.

'These Groupies'

In preparation for the CCC meeting, Wespac executive director Simonds had asked NMFS staff to prepare a briefing on two executive orders signed by President Obama that had a bearing, she felt, on council activities – EO 13563 and EO 13575. The briefing was scheduled late in the second day, shortly before meeting participants were to board buses that would carry them to the Hulihe'e Palace in

Kona for an evening of food, drink, and music.

Alan Riesenhoover, NMFS deputy assistant administrator, was tasked with making the presentation. The discussion of EO 13563, which was to improve regulation and regulatory review, went quickly, with Riesenhoover noting that "there are not a lot of fisheries regulations that are stale. They don't hang around that long."

When he launched into a review of EO 13575, however – "establishment of the White House rural council" – Simonds interjected, "That's the wrong EO."

"The EO we're interested in is the one issued last month – Obama's charge to all departments about communities and jobs and those kinds of things," she said.

"Our interest in this has to do with reducing, avoiding redundancy in federal regulations. What is going on now in our part of the world is this review of the Humpback Whale Sanctuary. We're not going to debate whether humpbacks are recovered – we do think they are – but this review is asking all of us to respond to a request to expand that sanctuary around every island in Hawai'i and to include other species. This has been a one-species sanctuary, and some now want to take an ecosystem approach to the sanctuary, and want to have management authority for these new species. I'm talking about monk seals, the turtles that are recovered. So we already have Fish and Wildlife and NMFS and the state of Hawai'i, who have authority to manage these species that these groupies want to include in the sanctuary – so how does Obama's executive order affect this. That's what I want to ask you, Sam" – she pointed to Rauch – "because I'm thinking of using this in some letters I want to send."

Rauch did not immediately reply.

"Hey, are you here, Sam?" Simonds said. "You're not going to have any drinks tonight unless you answer my question."

Rauch said he had not consulted with the sanctuary program on that. "I encourage you to consult with them on that process," he said.

"We have participated in that process," Simonds replied. "We were one of two [sanctuary advisory] committee members who voted against it. You haven't answered my question as to how you all will look at this third agency having management authority. Hello?"

Rauch responded by noting that if Simonds wanted a response, "next time you might want to give us the right executive order."

That didn't quiet Simonds, who continued to badger Rauch for the next few minutes. When he remained silent, Simonds concluded by saying, "Okay, you can have two drinks."

The next day, Wespac staffer Charles Kaaiai gave a presentation on the EO 13602 – "Strong Cities, Strong Communities" – which was the one Simonds meant to ask for. The EO, Kaaiai said, establishes a council "with at least 25 agencies to improve the way federal government supports local communities and augment community planning." He went on to note the work that Wespac had done to develop Pacific Island communities and then concluded with an apparent pitch to have NMFS renew a grant program for community demonstration projects, dormant for the last five years.

Outcomes

Near the close of the third day, the CCC took action to approve recommendations that had been made during the course of the meeting. Language was not made available to the members of the public in attendance, but, according to the Wespac press release, these actions included:

- Establishing a working group involving the CCC, the NMFS, and the Marine Fisheries Advisory Council to address improving public confidence and trust in the science used in federal decision-making;
- Asking the service to enhance actions to identify nations that do not prevent illegal, unregulated, and unreported fishing and to work with the U.S. fishing industry to develop underutilized fisheries.
- Asking the NMFS to fund basic data collection programs, given current stock assessments are inadequate to cope with fishery management needs.

A Closed Session

The CCC meeting was duly noticed in the Federal Register of April 2. According to the notice, it was to begin at 1:30 p.m. on Tuesday, May 1. However, the agenda given to meeting participants noted that from 8 a.m. to noon that day a "council only" session would be held.

By law, the CCC consists only of council members and executive directors. A council-only meeting, presumably excluding NMFS personnel, still meets the definition of the CCC, which cannot hold closed meetings except under very limited circumstances set forth in the Magnuson-Stevens Act. According to the MSA, to properly close a meeting to the public, the CCC must "provide notice by any means that will result in wide publicity in the major fishing ports of the region." Furthermore, the agenda may not be changed (for example, the start time altered) within 14 days of the scheduled date of the meeting or without public notice, unless the change is to address an "emergency action."

Environment Hawai'i requested an explanation from the National Oceanic and Atmospheric Administration's Office of the General Counsel for the "council only" session. None had been received by press time. A response to a Freedom of Information Act request regarding the cost of the event was also pending.

The NMFS Office of Sustainable Fisheries website indicates that the CCC meets twice a year. The second meeting is generally in May and is hosted by the councils on a rotating basis. From 1977 to 2003, before it was enshrined in the Magnuson-Stevens Act, the committee was known as the Council Chairmen's meeting or the Council Chairs and Executive Directors' meeting. Past meetings in Hawai'i have been in Kailua-Kona village (1978 and 1992), Hilo (1985), Maui (1998), and Lihu'e (2004).

— Patricia Tummons

'Ohia foresst from page 1

The purchase did not go through, but the application did, with the Saxton Trust and Malama Investments running with the plan that Riehm had developed. On November 24, 2010, attorney Steve Lim, who had represented Lewis and Petty, asked that the Planning Department ignore his request to withdraw the application, made twelve days earlier, and that it substitute the landowners as the new applicants. (In one of the several unexplained aspects of this contested case, the letter of approval for the application, sent by Leithead-Todd on September 14, 2011, still identified Riehm as the applicant; in the contested case, the applicant is identified as the Saxton Trust and Malama Investments.)

As required for planned unit developments, the applicants notified surrounding property owners of the application in November 2010, informing them as well that a decision on the application would have to be made within 60 days of the application – by January 3, 2011 – or the application would be automatically denied. On December 29, Lim requested a 30-day extension, to February 3, followed by three more extension requests – to March 1, April 3, and then May 3. The PUD file does not show that the applicant requested additional extensions, nor does it contain written communications from the Planning Department acknowledging the time extension requests.

The Planning Department's rules state that "Within sixty days after the filing of a proper [PUD] application or within a longer period as may be agreed to by the petitioner, the director shall deny the application or approve it subject

Council Member Offers a 'Win-Win' Solution

Anybody who sees this would say, 'Oh, my God! What are we doing?"

That comment came from Hawai'i County Council member Brenda Ford, who represents the South Kona area where the Planned Unit Development proposed for the ahupua'a of Waikaku'u would be built.

At the county Board of Appeals hearing on the application in April, Ford described her impressions of the property after having walked through the area to be developed with 13 two-acre lots.

"I went into the property, I walked it. I saw old-growth 'ohi'a with a circumference of more than 20 feet. I understand from the Division of Forestry and Wildlife that these trees having a six-foot or more diameter will be 400 to 600 years old. One I saw was pushing 980 to 1,000 years old. These forests are in pristine condition and need to be maintained," she testified.

In addition, Ford told the appeals board that a deep ravine cut through the area proposed for development. "I don't know if anyone has discussed it, … but the cul de sac from which [the developer] wants to go in goes about 50 yards then hits a ravine, 100 to 150 feet across. You need a helicopter to get across it. It goes all the way up the mountain. It narrows at the top, but the only way the subdivision can be developed is to fill in the ravine."

"It's huge," she continued. "If you dam this thing up and create the subdivision, you'll dam waters uphill. If you do that, we'll have massive mud and rock flow down that hill, which potentially could reach the highway… This is really a major concern."

Ford then proposed what she called a "win-win" arrangement. "I was so impressed with this 'ohi'a forest, with the indigenous plants and animals, I'm willing to submit these parcels to the Open Space Commission and request that the county buy them…. I can't guarantee that this will pass the County Council or the Open Space Commission, but it is certainly worth a try."

In her testimony, Patricia Missler suggested other preservation options, such as a sale to the state through its Legacy Land program or to The Nature Conservancy of Hawai'i.

"Would you be willing to use your energy and time to support such an option?" Matsukawa asked her.

"Yes," she answered. ***— P.T.***

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to conditions." Should the director fail to act "within the prescribed period, the application shall be considered as having been denied."

In testimony to the Board of Appeals, Garrett Smith, the program manager for administrative permits within the Planning Department, stated that, "generally speaking, we try to process all applications in a timely manner… The staff's view of the situation is that, with various inquiries and concerns expressed, the extensions were done as a courtesy to the landowners, to provide ample opportunity for all parties to be heard."

Matsukawa pressed Smith on this point. "The last entry I see that comes from the applicant is dated May 3, 2011," he noted, referring to the fourth request for a time extension from the landowners. "After May 2011, to your recollection, what happened in May, June, July, August, September – five months. What was going on?"

Smith replied that, "in all truth, there were some internal issues going on with Planning Department staffing that contributed to the delay. It had to do in part with not having sufficient staff… It was nothing that the applicant had done, or the public had done. The applicant was accommodating ongoing discussions between the parties, but some of that time lapse was due to county processes."

A Forest Ignored

One of the most controversial aspects of the approval concerns the characterization of the property's vegetation in the letter of approval: "Vegetation within the Property area consists of a combination of kiawe, koa haole, and a variety of grass, shrubs, and weeds. The plants found on the Property are generally alien and introduced species, none being considered rare or endangered. No endemic species of animals were located nor were their habitats."

The description is at odds with many of the comment letters from adjoining or nearby property owners that the county received. Most of them noted that the development would carve up the existing forest. Several pointed out that the property was almost certainly habitat for the endangered Hawaiian hawk and hoary bat as well as numerous species of native birds.

Larry Nakayama, the planner (since resigned) who handled the PUD application, was questioned by Matsukawa about that description and the numerous comments that contradicted it.

"We routed the application to the different agencies and we were waiting for their comments, and we received no comments regarding that [the vegetation], so we proceeded with the application," Nakayama said.

As to the Misslers' letters commenting on the old-growth 'ohi'a forest on the property, Nakayama said he had no memory of it and asserted again his confidence that, if an old-growth 'ohi'a forest did exist on the property, one or another of the agencies consulted would have noted it.

"And if the different agencies didn't make a comment, does that mean that the statement of the neighboring person who offered a letter is not true?" Matsukawa asked.

"I'm not saying they're liars," Nakayama replied, "but I'm going to depend on what other agencies submit to me, and if they didn't submit any comments at that time, I'm going to assume or I'm going to realize that they have no objections."

(Although the Hilo office of the state Department of Land and Natural Resources' Division of Forestry and Wildlife was notified, as an adjoining landowner, of the PUD application, it made no comment. Not until February 2012, well into the contested case, did DOFAW administrator Paul Conry respond to a request – from Hawai'i County Council member Brittany Smart – to review the PUD application and investigate the natural resources found on the property. "[W]e note that the subject parcel is private land, is not within the Conservation District subzone, and therefore not under the direct management jurisdiction of the department and our watershed management program," Conry wrote. "We defer to the county on zoning issues related to development on the property."

(Conry concluded with a recommendation that biological surveys be conducted, "or that the applicant schedule a meeting with our staff to consult on any potential impacts of this project on protected resources.")

Cut and Paste

Leithead-Todd, who ultimately approved inclusion of the incorrect vegetation description, was asked about it when she testified to the Board of Appeals last month. Deputy corporation counsel Amy Self inquired of Leithead-Todd how the language came to be inserted into the approval document.

"Mr. Nakayama used a prior approval," Leithead-Todd replied. "You bring up a Word document, you go in and change things in it to be relevant to the current one. This is one he forgot to delete."

Self then suggested, "It was not done intentionally? Just something he failed to delete from a previous document?"

"Yes," Leithead-Todd answered. "It really was not relevant to the PUD application."

So, Self asked, "Even without that language… would you still have approved it?"

"Yes," Leithead-Todd said, "because it's consistent with provisions in the County Code on PUDs as well as consistent with the General Plan, and the overall density was consistent with the zoning of five acres."

Self then added, "Even employees in the Planning Department are human beings and they make mistakes."

"I make mistakes," Leithead-Todd said.

Matsukawa questioned Leithead-Todd further on this point. "You testified in response to Ms. Self's question as to the statement of vegetation, … that was a clerical error. Do you know what information [Nakayama] was supposed to put in there?"

Leithead-Todd answered that he would have simply included the information contained in the application itself.

"Would he have had to consider comments from neighbors that characterize Waikaku'u as old 'ohi'a forest?" Matsukawa asked.

"He could have considered it," Leithead-Todd replied, "but he's not required to put it in."

If the draft approval letter were coming through now, Leithead-Todd went on to say, "I'd tell him to submit a new one with that language taken out. I'm just saying it's an error, but it's there, and it's part of the record, and the board can determine what they want to do with that language or not."

Force and Effect of Kona CDP

Much of the focus in the contested case hearing has been on the force and effect of the Kona Community Development Plan. The plan, adopted by the County Council in September 2008 after a lengthy series of community meetings, is one of several such CDPs which, according to the Planning Department's website, are intended to "translate broad General Plan goals, policies, and standards into implementation actions as they apply to specific geographical regions around the island."

Such plans, the Planning Department goes on to say, "shall be adopted by the County Council as an 'ordinance,' giving the CDP the force of law."

In 2008, then planning director Chris Yuen addressed the question of the legal effect of the several CDPs being developed at that time, including that for Kona. In a letter to the steering committees for CDPs for Kona, Puna, North Kohala, and South Kohala, Yuen wrote: "The answer is not simple, and it depends upon the specific wording or the provisions of the CDP and upon the type of follow-up action. … A plan exists to create a long-range framework and direction for specific decisions. It is not self-implementing, and it is not the action itself. A CDP, for example, may direct that rezoning in the CDP area follow certain criteria, but it does not in itself rezone land."

The Misslers argue that the proposed PUD violated the Kona CDP in many respects, including the plan's guidelines for clustered rural subdivisions. In a January meeting with Planning Department staffer Deanne Bugado, however, Lim argued that the "legally binding policies of the Kona CDP are only applicable to new Change of Zone applications, time extensions on existing zoning requiring County Council action, State Land Use Boundary amendments, and SMA permits," quoting from an email memorializing the meeting. The CDP did not apply "directly to a PUD nor to a water variance with existing entitlements," Lim argued. "Regardless of the above, our clients have volunteered to incorporate elements of the Kona CDP, in order to create a responsible development that respects the intent of the Kona CDP." Specifically, the PUD "complies with the intent" of the clustered rural subdivision guidelines, Lim said, which is "to minimize grading, preserve the natural appearance of the land to the extent possible, ensure agricultural use in the state Land Use Agricultural District, and create a rural setting for residences."

Matsukawa raised the point that both the county General Plan and the Kona CDP set forth standards to protect ecosystems, watersheds, and native wildlife. He questioned Bugado, whose job deals, in part, with ensuring compliance with the Kona CDP, as to whether she reviewed the PUD application in that light.

Referring to the January meeting, Bugado stated that she "confirmed that the project was outside the Kona urban area, in a rural area – that this was a planned unit development application. We went over … what the CDP calls for regarding rural areas … but it was pointed out that this was not a clustered rural PUD application, which is what the CDP specifically calls out" for review by the Kona design center, which Bugado oversees. The application "was to follow what a clustered rural planned unit development would [be] layout-wise, but [would] not be a clustered rural planned unit development application."

So, Matsukawa asked, are there two types of cluster subdivisions?

Bugado explained that there were – a standard PUD development and then the specific type of PUD, called a "cluster rule PUD."

"Someone told you this application was not going to be following the specific provisions of the Kona CDP regarding planned unit developments in rural Kona?" Matsukawa then asked.

"Correct," Bugado replied.

Matsukawa: "Did you have any reason to question that?"

Bugado: "Not that I recall."

When asked what elements of the CDP the applicants were volunteering to incorporate, Bugado replied: "They were clustering the development of the homes, they were preserving as much agricultural area as possible, they were trying to create interconnectivity between roadways…."

After the January 2011 meeting, Bugado testified, she heard no more about the project. "When did you become aware that the application had been approved?" Matsukawa asked.

"When I got the subpoena" to testify, she said.

Under questioning from county attorney Self, Bugado testified that the Kona CDP did not override or invalidate existing zoning, and that the PUD application was not a rezoning request.

"So is it your understanding that, since this property already had its zoning, it wasn't required to come in to the … get an official decision by the Kona design center?" Self asked.

"Correct," Bugado said.

Access

One of the points raised by the Misslers and several of their neighbors who testified in the course of the hearings deals with legal access to the property. As proposed by the applicant, access would be over a private road running mauka-makai through the adjoining Ka'ohe Ranch subdivision, then cutting through a lot at the upper end of the subdivision to reach the Saxton Trust/Malama Investments property.

In the same letter commenting on the water variance, Van Pernis also objected to the proposed access. "Note that the property has its own access to and from Mamalahoa Highway," Van Pernis wrote. (The property has frontage along the highway at the makai end.) "The applicant's property has no recognized ownership interest in nor right to use the corporation's roads," he wrote. "Nor has the property …obtained the corporation's or homeowner's permission to use its roads nor join the corporation."

In May, Lim responded to Van Pernis's concerns in a letter to Leithead-Todd. His clients, he wrote, "entered into a letter agreement with Forest View, Inc., and Hawai'i Ranch Properties, LLC, to enter into a purchase contract to secure access rights over the Ka'ohe Ranch subdivision roadway system." Forest View and Hawai'i Ranch Properties were developers of the Ka'ohe Ranch subdivision and retained the right to grant others the right to use the road, Lim stated.

Shared Goals

Landowner Vince Saxton testified that he shared some of the same views as those who opposed the development."We're trying to accomplish really some of the same goals that they have," he stated. "I love the forest up there as well. The way that the PUD is mapped out, as Michael Riehm showed, it forces the preservation of the forest."

"When I go through Ka'ohe Ranch," he continued, "I'm amazed how much of the forest is gone. Each five-acre owner has the right to use it for agriculture, so there's no control over what they do with it. With our PUD plans, a portion is set aside for housing, and we've talked about limiting how much someone can clear."

During cross-examination, Lim suggested that the Misslers and other owners in the Ka'ohe Ranch subdivision had done much the same clearing that they wanted to now block on the Saxtons' property.

"How much of the forest was cleared when you did your house pad?" Lim asked Patricia Missler. "The least we could do for a house pad and the water tank," she replied.

"Is your lot similar to the Saxton's property?" he asked.

"Waikaku'u is way more pristine," Missler answered. "Our property had more invasive things growing on it. Directly on the border we have 'ohi'a trees that are similar, and kopiko and hau, but it is a very different forest. Theirs is a huge forest. We don't have trees that size on our property and never did to my knowledge."

Would Missler object to a five-acre subdivision on the adjoining property? Lim asked. "You've done the same thing on your property," he said.

"No, we haven't," Missler said. "We've hand cleared."

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A Water Variance At Odds with Rules

The planning director's approval of the proposed planned unit development is being challenged in the Board of Appeals hearing, but the water variance she granted last year was uncontested.

Water variances allow developments to move forward when the county subdivision code would otherwise require them to have common water systems installed. Rule 22 of the Planning Department's Rules of Practice and Procedure sets forth the conditions under which variances may be granted for subdivisions that will be relying on rain catchment for their water supply.

To qualify for a variance, the development has to be in an area where average rainfall is not less than 60 inches a year and in any case, for subdivisions where the average lot size is less than 20 acres, "no more than six lots shall be allowed in a catchment subdivision."

The clustering of the proposed lots in the Waikaku'u planned unit development was on the far mauka end of the property in order to meet the minimum rainfall requirements set in the rule.

But a letter commenting on the PUD proposal from Mark Van Pernis, representing the Kaohe Ranch Road Maintenance Corporation and the Kaohe Ranch Subdivision Homeowners' Association, noted that the line demarcating the 60-inch rainfall zone "does not conform with the GIS information used by the Hawai'i Planning Department. The submitted application shows the majority of the proposed lots to be within the 60-inch (catchment requirement) zone, when in fact the GIS shows only the three mauka parcels fully within the 60-inch of rain zone. According to longtime residents, this area has not seen 60 inches since 2004."

In the variance approval letter dated March 8, 2011, however, Leithead-Todd stated that the analysis of the applicant's submittals and GIS rainfall data maintained by Planning Department indicated the proposed subdivision "will receive at least 60+ inches of rainfall annually."

As for the six-lot limit, Lim argued that this should be disregarded, since the landowners could circumvent it by re-subdividing their property. And Leithead-Todd went along with the argument.

"Although Planning Department Rule 22-5 specifically limits the amount of lots that can be created in a rainwater catchment subdivision to six lots, in theory, the Applicant could process a Parcel Consolidation Resubdivision Action to revert the property back to the original configuration … to create the three rectangle lots, submit three separate PUD applications for these lots, along with three separate Water Variance applications, and create identical density as proposed under the applicant's Master Plan. As such, the proposed project satisfies the intent of Rule 22-5." (Under that scenario, however, at least one of the three lots, and more likely two, would not qualify for water variances since they would not receive 60 inches or more of rainfall a year.)

The variance approval letter, though written some six months after the Saxton Trust and Malama Investments had been substituted as applications, still identified the applicants as Richard Lewis and James Petty.

— Patricia Tummons

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Water Commission Wants to Beef Up Penalties; Fines Malama Solomon $50

The staff of the Commission on Water Resource Management is too nice. That was the general consensus of commissioners at a May 16 meeting where, in one violation case after another, fine recommendations were minimal, to say the least.

In the first case, involving unauthorized well construction and pump installation on the Big Island, staff recommended a fine of $400 for landowner John Pataye and $500 each for the contractors who drilled the well in 2007 and installed the pump in 2008.

Pataye discovered the violations as he was preparing to sell his Kona property and submitted an application in March 2011 for an after-the-fact permit.

Commission staff recommended that he be granted a permit after he pays his fine. Should the contractors fail to pay their fines, CWRM staff would not process any future permit applications until they were paid.

When it came time to vote, commissioner William Balfour said he was troubled by what had been proposed, given the fact that the commission has the ability to impose daily fines of up to $5,000 per violation. As far as he was concerned, the contractors should have known better.

"Somehow, with all these after-the-fact permits, we've got to stop saying, 'Oh, naughty, naughty,' and slap them on the wrist," he said.

Outgoing commissioner Lawrence Miike, attending his last meeting, agreed.

Despite an amendment to statutes increasing the possible maximum fine from $1,000 to $5,000 a day, "we're still with a $250 minimum a day and we never extend it for more than a day," he said. (Under the commission's internal penalty policy, $250 is the minimum fine, although mitigative factors — i.e., good faith efforts to remedy violations or self-reporting in a timely manner — can reduce the amount.)

Because the general contractor, Metzler Contracting, had informed Pataye that no permits were needed for the well, Miike didn't think Pataye should be fined a similar amount as the contractors.

"They're probably going to get a profit on this more than the fine," he said. Unless CWRM revises its guidelines for fines, "it's worth it to try to get away with it."

Craig Mickelson of Metzler Contracting, which installed the pump, said the company accepted responsibility for "this first and presumably only error of this nature on our part."

No one from Delima Drilling, which drilled the well without having a license, attended the meeting.

Miike suggested voting on Pataye's fine now and dealing with the contractors' fine at a later meeting.

During public testimony, independent consultant Jonathan Scheuer, who tracks water issues, pointed out that one of the reasons why the commission can't do more to meet its duties is a lack of funds.

Applying the maximum possible fine to the maximum number of days of potential violation in this case would net a fine of around $18 million, he said.

"A $900 fine is one 2,000th of the possible fine. The house is being sold for $15 million. It's not a not a question of whether you're going against a small grandma farmer who doesn't have the resources," he said.

In the end, the commission voted to approve a fine of $400 to Pataye and hold off on fining the contractors.

Later in the meeting, the commission approved two after-the-fact stream channel alteration permits (SCAP) and imposed fines of just $50 in each case.

The first related to an unauthorized rock retaining wall built along a branch of Ainako Stream in Hilo on property owned by state Sen. Malama Solomon. CWRM staff discovered the wall while conducting a field investigation for a contested case hearing over a stream diversion in the area.

With approval from the County of Hawai'i, the wall was built in 2008 to prevent flooding. Solomon, however, failed to get permission from the Water Commission.

Starting with a minimum fine of $250, CWRM recommended reducing the fine to $50 for two reasons: the wall was an insignificant impact on the resource and Solomon made a good faith effort to remedy the violation once it was discovered.

"My only issue is what we talked about at the very beginning. I agree with the analysis, but in the future, I'd like to see those fines being more. My problem is a generic one about the fine levels across the board," Miike said.

Balfour noted that Solomon had submitted and received a grading and building permit from the county for the work.

"It seems to me, if we're going to fine somebody, we should fine the County of Hawai'i. They approved everything. Quite frankly, the $50 fine should be waived," he said.

In the end, however, the commission approved staff's recommendation.

"Senator Solomon, you cannot have dinner one night at a nice restaurant," Miike joked.

The final violation case involved the installation of a 30-inch metal pipe across an unnamed Waioli Stream channel in Hanalei, Kaua'i, some 20 years ago. The commission applied the same fine structure as the one used in Solomon's case, coming up with a total fine of $50.

Ted Yamamura, the commission's newest member, again stressed the need to revisit the fine issue. "There's no teeth in this," he said.

"How about $50.50? ... These [fines] are not even a slap on the wrist," Miike added.

— T.D.