Volume 23, Number 12 June 2013

Environment Hawai'i
a monthly newsletter

Price: $5.00

Counties Count

Two court cases at either end of the island chain bring home one lesson: counties may not escape their constitutional duty to protect the public trust.

On Kaua'i, the issue before the Intermediate Court of Appeals was whether the county Planning Commission erred in denying the permits needed for a private water bottler to operate in the state Agriculture District. The ICA upheld the commission's right to do so, but faulted it for not doing enough to carry out its public trust duty. That's the subject of our cover story.

On the Big Island, the question before the 3rd Circuit Court was whether the county Planning Department had improperly permitted a planned unit development proposed for an old-growth 'ohi'a forest in South Kona. Judge Ronald Ibarra found that, indeed, it had.

Also in this issue, we report on the disputed decision of the Agribusiness Development Corporation to allow tobacco to be planted on its land; we update readers on the case of the Big Island developer who has run afoul of the Planning Department and the State Historic Preservation Division; and we wrap up the issue with our regular Board Talk column.

IN THIS ISSUE

Appellate Court Overturns Judge's Ruling Allowing Kaua'i Water Bottler to Operate

In a recent decision regarding the Kaua'i Planning Commission's denial of a Koloa water bottler's use and zoning permits, the Intermediate Court of Appeals has reaffirmed that county agencies are bound by the state Constitution to protect the public trust and that statements in general plans and zoning codes requiring the protection of water resources aren't just platitudes.

Kaua'i Springs bottles water diverted from a spring in Kahili mountain, pictured here. PHOTO: KAHII MOUNTAIN PARK FACEBOOK PAGE

On April 30, the ICA vacated a 2008 ruling by the 5th Circuit Court, which had found that two of the three permits Kaua'i Springs, Inc., sought from the Planning Commission should have been automatically approved. The higher court also vacated the lower court order that the third permit be issued, as well.

The issue was remanded back to the Planning Commission, with instructions that it make appropriate assessments and require reasonable measures to protect water resources.

"[B]ecause Kaua'i Springs seeks to use the water for economic gain, this case requires that the Planning Commission give the permit application a higher level of scrutiny and, although Kaua'i Springs' use of the water is not illegal or improper per se, Kaua'i Springs carries the burden to justify the use of the water in light of the purposes protected by the public trust," the court wrote.

The ICA had not finalized its ruling by press time. Once a final judgment is issued, Kaua'i Springs has 30 days to appeal to the Supreme Court. Attorney Robert Thomas, who represents the company, said it had not yet decided whether to appeal.

"We were obviously disappointed. We think the appeals court got it wrong," he told *Environment Hawai'i.*

In the meantime, Kaua'i Springs continues to operate under an injunction against the county imposed by the 5th Circuit Court, which the county did not oppose.

Big Plans

Kaua'i Springs owner James Satterfield first got the idea to bottle the island's water in 1992 after hurricane Iniki caused a massive power outage. He noticed a line of cars parked at Kahili mountain in Koloa, where a spring, tapped more than a century ago for sugar and now owned by Grove Farm, supplies about 50 to 60 customers with fresh water.

"They were loading up until pumps were back up. That's when I said, we gotta bottle this. We gotta be bottling our own water," says Satterfield, who once ran a water bottling company in Alaska.

In 2003, with a 15-year license from Makana Properties, LLC, for land with access to the

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NEW AND NOTEWORTHY

Humpback Delisting Petition: A newly formed association claiming to represent Hawai'i fishermen wants to remove the North Pacific population of humpback whales from the federal list of endangered species.

The group, calling itself Hawai'i Fishermen's Alliance for Conservation and Tradition, Inc. (HFACT), was formed just a few weeks before it filed the petition in April. Signing its corporation papers filed with the state were two individuals with strong ties to the Western Pacific Fishery Management Council: Roy Morioka, a former council member who has also served as a paid consultant to the council; and Ed Watamura, chairman of the council's advisory panel.

The president of HFACT, Phil Fernandez, vigorously denies any association with Wespac, however. He told *Environment Hawai'i* that the

PHOTO: NOAA

group coalesced over the course of several years as fishermen with common interests continued to meet at various hearings and conferences. Until recently, Fernandez represented fishing interests on the Hawai'i Humpback Whale National Marine Sanctuary's advisory council. Today, Fernandez still serves on that panel as an alternate.

Fernandez stated that he was aware that the National Marine Fisheries Service had already begun a global review of the status of humpback whales several years ago. "One of the reasons why we did this, was to require them to finish their global review," he said. "They've been dragging their feet; this [petition] is a legal way to put their feet to the fire."

John Calambokidis of the Cascadia Research Institute and principal author of a 2008 definitive study of Pacific humpback whales said he had looked over the petition. There are "good signs of recovery for humpback whales, especially those in the Central Eastern Pacific, those that breed in Hawai'i and some of their feeding areas," he noted. "If there was one area that concerned me, and where I think they missed an important aspect of our studies, it's that there is a very defined structure of populations in the North Pacific, not just one intermixing group.

"The petition would have been stronger if they had focused on recognizing as a distinct population segment the Hawai'i humpback whales, where there's the strongest evidence of recovery. They didn't do that. They talk about the North Pacific as a whole. Unfortunately, that's what would make it harder for me to view the petition as favorably as if they had focused on the segment of the population that we know is doing well."

The petition may be viewed online at *http://www.nmfs.noaa.gov/pr/species/petitions.htm.*

Quote of the Month

"[B]ecause Kaua'i Springs seeks to use the water for economic gain, this case requires that the Planning Commission give the permit application a higher level of scrutiny ..."

— Hawai'i Intermediate Court of Appeals

TMT Permit Is Appealed: At the 11th hour and practically the 59th minute, the petitioners in the contested case hearing over a Conservation District Use Permit for the Thirty-Meter Telescope appealed the award of the permit to the 3rd Circuit Court. The state Board of Land and Natural Resources had approved the findings of fact, conclusions of law, and decision and order of the hearing officer on April 12. On the final day in which an appeal could be filed — May 10 — and in the final hour — at 4:01 p.m. – the petitioners lodged their notice of appeal and the statement of their case.

The appeal rehashes many of the same claims that were put forward in the contested case hearing and dismissed by the hearing officer: that the telescope will harm underground aquifers and damage historic sites, that it entails an illegal subdivision of Conservation District land, that the construction of the telescope, practically at the summit of Mauna Kea, will violate the Coastal Zone Management Act by increasing the risk of water pollution, will lead to "multigenerational trauma upon the health of native Hawaiians," violates the religious freedoms of Native Hawaiians, and so on.

Representing the petitioners – KAHEA: the Hawaiian Environmental Alliance; Mauna Kea Anaina Hou; Clarence Kukauakahi Ching; the Flores-Case 'Ohana; Deborah J. Ward; and Paul K. Neves – is Richard Wurdeman, who once served as corporation counsel to Honolulu Mayor Frank Fasi and Big Island Mayor Steve Yamashiro.

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Hilo, Hawai'i 96720

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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.
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Twitter: 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

ISSN 1050-3285

Judge Invalidates Permit for Subdivision Planned for 'Ohi'a Forest in South Kona

An old-growth 'ohi'a forest in South Kona has been spared the developer's ax – for now, at least. Judge Ronald Ibarra of the 3rd Circuit Court has determined that the County of Hawai'i planning director, Bobby Jean Leithead-Todd, and the county's Board of Appeals erred when they approved a planned unit development calling for 14 house lots on just over 72 acres in the ahupua'a of Waikaku'u. The PUD called for 13 of the lots, each about two acres, to be built on the heavily forested upper slopes of the property, adjacent to a state forest reserve.

In his April 23 order invalidating the PUD permit, Ibarra found that Leithead-Todd and the appeals board violated the county general plan and the Kona Community Development Plan (CDP), that they "did not review the PUD application pursuant to their constitutional duties and responsibilities with regard to the public natural resources trust," and that the permit itself is not valid "because it does not contain specific measures that require project lots to be used for bona fide agricultural uses."

Ibarra remanded the issue "for further proceedings consistent with" his order. That means the Board of Appeals is to hear the case again and make a decision in line with Ibarra's findings.

Richard and Patricia Missler, who own land adjacent to the site of the proposed PUD, appealed Leithead-Todd's original approval to the BOA and, when the BOA affirmed the permit, they appealed to Circuit Court. They were represented by Mike Matsukawa. (*Environment Hawai'i* reported extensively on this case in our June 2012 edition.)

A 'Duty to Conserve and Protect'

Ibarra did not agree with Matsukawa that Leithead-Todd had improperly granted time extensions in her department's consideration of the PUD application. Nor did he accept the argument that the BOA decision should be voided because some members were absent during part of the administrative appeal hearing.

The judge did, however, strongly agree with Matsukawa on two points: that the county agencies had failed to carry out their duty to conserve and protect natural resources, and that both Leithead-Todd and the Board of Appeals had erred in their determination that the Kona CDP did not have the force of law.

Ibarra devoted nearly a quarter of his 36-page ruling to the county's evasion of its responsibilities under the public natural resources trust. The area to be developed, he noted, is designated by the state as a "Priority I" watershed and has been included for nearly two decades on county watershed maps.

Invoking a series of rulings by the Hawai'i Supreme Court, Ibarra wrote that governmental agencies, "[a]s guardian of the water quality in this state, … 'must not relegate [themselves] to the rule of a mere umpire ... but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process.'"

The attorneys for the Board of Appeals and Leithead-Todd argued that this responsibility does not fall to the Planning Department, but rather to the county Department of Public Works, whose comments were incorporated in the one of the conditions – Condition 10 – attached to the PUD permit.

Ibarra rejected that claim. "Appellees [the county] miss the mark with this argument in two crucial ways," he wrote. "First, … [the planning director] may not avoid [the] obligation to uphold the public natural resources trust doctrine and its 'affirmative duty to preserve and protect the state's water resources,' by arguing that another agency carries the responsibility. Second, Condition 10 of the PUD fails to meet the duty by deferring decision-making to a future time."

The "[a]ffirmative obligation to preserve the public natural resources trust according to law is among the responsibilities of the director as an officer of the county," Ibarra wrote. "… The county's duty to conserve and protect is clear. The director may not defer decision-making action with regard to the public natural resources trust to another agency nor to a future date. The director, as an officer of the county, has a constitutional duty to 'conserve and protect Hawai`i's natural beauty and all natural resources, including … water,' in her official decision-making. In deferring this responsibility, the director's decision violated constitutional provisions."

PHOTO: RICHARD AND PATRICIA MISSLER

Old 'ohi'a trees in the Waikaku'u forest.

Ibarra also noted that Leithead-Todd's decision to approve the PUD permit "improperly describes the land in question. The director described the vegetation on the property as 'a combination of kiawe, koa haole, and a variety of grass, shrubs and weeds…' When questioned about this portion of the decision letter during the May 11, 2012 appeals hearing, the director admitted that the language had been included in the decision letter in error, that it was taken from an unrelated decision letter that was being used as a sample, and that even without that language included, the director would have approved the PUD application." Leithead-Todd acknowledged that her staff "could have considered comments made by neighbors that characterized the property as including an old 'ohi'a forest, but that these would not be required to be included," Ibarra noted, but, he continued: "the geographical makeup of the property is relevant. … Accurate findings of fact are essential to protecting the rights of the parties and the public and to creating a record that may be effectively reviewed on appeal."

Residential vs. Ag

In its findings in favor of the planning director's decision, the Board of Appeals claimed that the Kona CDP was not an "ordinance" and was unenforceable if not outright illegal.

Matsukawa argued that the Board of Appeals had no basis for such a claim and Ibarra agreed. "The KCDP was adopted as an ordinance by the Hawai'i County Council on September 28, 2008," Ibarra noted, and the Board of Appeals "may not nullify an ordinance that it is charged to administer."

The BOA went on to determine that the Community Development Plan did not apply to PUDs and, in any event, the Waikaku'u PUD was "grandfathered" – that is, it had been entitled before the CDP was enacted. Ibarra rejected both claims.

Ibarra also noted that while the PUD application stated that the lots to be created would support a "farm dwelling" whose design would be governed by CC&Rs (covenants, conditions and restrictions) attached to the subdivi-

Hawai'i County Is Challenged in Court Over Ability to Determine Coastal Setbacks

A developer who has a history of flouting conditions of permits issued by the Hawai'i County Planning Department has now taken the county to court. At issue are the conditions of a Special Management Area permit governing a luxury, gated subdivision along the Hamakua Coast, about 10 miles north of Hilo.

In essence, Steven D. Strauss, attorney for builder Scott Watson, is challenging the county's very ability to establish setbacks for developments in coastal areas.

The origins of Watson's dispute with the county go back more than a year, when he began seeking approvals for plans to build a house he is calling the Pepe'ekeo Palace on a 1.8-acre lot near the old Pepe'ekeo sugar mill. When the mill was active, the site of his house was heavily used by its workers and the mill itself. A communal pig pen and several warehouses dotted the site now owned by Watson and a San Jose attorney, Gary L. Olimpia.

As part of receiving county approval for the house as well as a planned swimming pool and tennis court, Watson was required to get the blessing of the State Historic Preservation Division. In doing so, Watson agreed to avoid "all of the concrete foundations and structural remains, with the exception of the large storehouse foundation, which will be converted into a tennis court." He also agreed to document all of the foundations and concrete features with photographs, narrative descriptions, and measurements before beginning any construction work. A large storehouse and stairway was to be left intact.

The foundation of Watson's house encroaches into the setback, the Planning Department has determined.

Watson began work in mid-year without fulfilling SHPD's requirements. By late November, SHPD had received complaints about Watson's work. Theresa Donham, archaeology branch chief for SHPD, informed the county that Watson had not complied with the mitigation measures he had agreed to, asking the county to order him to stop work "so that we can determine the extent of damage … and recommend revised mitigation measures."

Separately, the Planning Department had already fined Watson for work he had done on the site that was contrary to other permit terms. No sooner had he paid the county $8,000 to settle those violations, in mid-November, than the Planning Department began to receive complaints from hikers over blocked public access on the pedestrian easement running along the makai (ocean) side of his lot.

On November 29, the Planning Department notified Watson and Olimpia that they were to cease all work on the site, survey the shoreline and the top of the pali (cliff) that fronted the property, obtain SHPD's approval of work done to comply with a historic site mitigation plan, and relocate all new construction to within county-approved setbacks. The Planning Department also imposed a $20,000 fine.

Through his attorney, Watson filed an appeal with the county Board of Appeals on December 31.

Moving Setbacks

As *Environment Hawai'i* reported in our December 2012 cover article, the Planning Department had allowed Watson to build up to 20 feet from the edge of his property, invoking the side-yard setback distance. The Special Management Area permit for the subdivision that includes Watson's lot calls for minimum 40-foot setbacks along the entire coast.

The November 29 notice of violation stated that the foundation for an exterior wall of Watson's house was 19 feet from the property boundary. The open-space requirement for side yards is 14 feet, the NOV stated. Watson had also encroached on this setback as well, the county claimed, with the grand lanai extending nine feet into the setback. The roof overhang was going to project three more feet, leaving just 8 feet of open space in the "side yard."

The county inspector also determined that the construction encroached into the 50-foot shoreline setback.

On February 3, the county planning director, Bobby Jean Leithead-Todd, amended those numbers on the basis of a December 10 inspection, increasing the setback encroachments by one foot. The county inspector had also noticed that an area south of Watson's lot had been filled and graded without approval from the county and without any silt fence to stop the fill from eroding into the ocean.

That wasn't the end of it, however. On April 5, Leithead-Todd wrote Strauss again: "After further research of our files, we realize that we inadvertently failed to take into consideration the conditions of approval of SMA No. 450" – the Special Management Area permit governing the entire subdivision — sion, such CC&Rs were missing from the application, contrary to county zoning code requirements. Neither did the application contain the required "agricultural plan." What's more, "the director's own September 14, 2011 decision letter described the project as a 'housing' project to be built as a 'residential community,'" Ibarra wrote.

Next Steps

The Board of Appeals must once more take up the matter of the Waikaku'u development and reconsider it in light of Ibarra's findings. According to Matsukawa, the BOA has little choice but to conclude that the PUD application should be sent back to the planning director, who, in turn, should conclude that her prior decision is void and that the application should be rejected.

"A prudent planning official should tell the applicant, 'I am denying your application for non-compliance with the law; you may resubmit if you wish, but you must meet the guidelines set forth in the law, backed up by the judge's decision as the law of the case," Matsukawa stated in an email to *Environment Hawai'i.*

Late last month, Matsukawa filed a motion seeking $141,000 in attorney fees and costs to be levied on the planning director, the landowners, and the Board of Appeals. He acknowledged that it was unusual to seek costs against a tribunal such as the appeals board. However, he told *Environment Hawai'i*, "we argue that the board's conduct is so egregious that an award of fees and costs against the board is proper."

— Patricia Tummons

when the county issued its permit for Watson's house.

Those conditions state that "no fence, wall, structure, or landscaping shall be installed that impedes usage of the public access easement," and that "no house or other substantial structure shall be built closer to the ocean than 40 feet from the top of the sea cliff."

The side-yard setback of 20 feet and the temporary blocking of public access that the Planning Department had earlier allowed "are both contrary" to the conditions of SMA No. 450, she stated. She closed by noting that Watson and the owners of the 10 other lots in the subdivision could ask the Planning Commission to revise the SMA conditions but that she lacked the authority to override those conditions.

Strauss did not respond directly to the county's April 5 letter. Instead, eight days before the Board of Appeals was scheduled to hear Watson's appeal, he filed a complaint in 3rd Circuit Court against Leithead-Todd, the Planning Department, the chairman of the Planning Commission, and the County of Hawai'i itself.

Usurped Authority

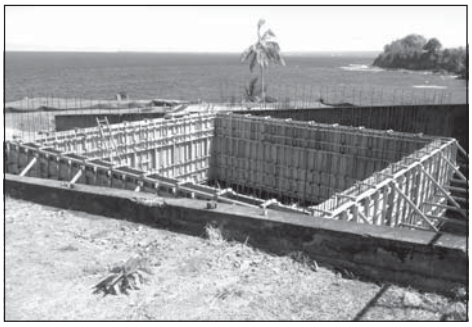
The complaint alleges a wide array of improper actions by the county, but the most critical is that the county usurped state authority by imposing a 40-foot setback on the makai boundary of the lot.

Strauss argues that only the state Department of Land and Natural Resources can establish and enforce shoreline setbacks. He cites the Hawai'i's Coastal Zone Management Act, Chapter 205A, which states that shoreline setbacks are to be no less than 20 feet and no more than 40 feet from the shoreline.

Legal definitions of shorelines, Strauss notes, do "not include 'top of cliff, 'top of sea cliff' or 'top of pali,' all terms that agencies of defendant County of Hawai'i have used in place of the statutory definition of 'shoreline.'"

In fact, the setback imposed on Watson was not a shoreline setback per se, but rather the setback from a property line, since there is another lot of record that lies between Watson's lot and the ocean. However, Strauss maintains that the long, skinny lot that lies between all the lots in the subdivision and the ocean is only a "remnant" lot and may not be used to trigger setbacks. By treating this lot as a parcel that can be used for setting setbacks, he states, the Planning Department "exceeded its authority."

In short, Strauss argues, the SMA permit for the subdivision "adopts a definition of shoreline, and certification thereof, contrary to that provided for [in the CZM law] and is thus void, unlawful, and unenforceable as presently written."



Watson had told SHPD he would build a tennis court inside the walls of this old warehouse. Instead, he has built forms inside the foundation walls that, according to statements on his Facebook page, are to support a swimming pool.

The complaint asks the court to provide "declaratory relief" by estopping the county from holding to the conditions in SMA No. 450 and to grant "temporary, preliminary and permanent injunctive relief" by prohibiting the county from applying definitions of shoreline and shoreline setback that are inconsistent with state law and from using the coastal lot as a trigger for setbacks.

On May 10, more than a week after the lawsuit was filed, the Board of Appeals met. Watson's petition was on the agenda. After a lunch-break discussion involving Strauss, Watson, Leithead-Todd and Amy Self, the county deputy corporation counsel representing the Planning Department, Strauss informed the board, "There has been an agreement reached between the landowner and the Planning Department.

"That agreement," he went on to say, "includes as a condition a continuance of the Board of Appeals appeals…. We'll keep the board apprised of developments in that case, because continuance is pending resolution by other agencies." Neither he nor anyone else mentioned the lawsuit.

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The Helipad And the Three Kitchens

In addition to the infractions the county found at Watson's Pepe'ekeo worksite, the county also cited him for unauthorized improvements at two other houses he has built on the Hamakua Coast.

In one case, Watson and his real estate agent had advertised a house in Pauka'a, just north of Hilo, as having three kitchens. It had been permitted as a single-family residence, with just one kitchen allowed. In a letter dated April 10, Leithead-Todd stated that the violation had been resolved to the county's satisfaction and the civil fine of $500 "has been waived due to full compliance."

The matter of a public access easement over that same property to a pool in Pauka'a Stream has not yet been resolved. The county has not issued any notice of violation in connection with Watson's failure to comply with that condition of his permit to develop the lot.

Then there is the case of the helipad atop a house that Watson finished building last year in Ninole, around 20 miles north of Hilo. The Planning Department sent a notice of violation to Watson and co-owner Laurie Robertson about the helipad on December 6.

Watson did not appeal the county's findings. On February 25, Leithead-Todd notified Watson and Robertson that their right to appeal had expired and that, as of that date, total fines came to $14,800, "based on initial fines of $500 for a zoning violation, $10,000 for a Special Management Area violation and daily fines of $4,300." The daily fines began to toll on January 9, the day following the deadline for appeal or resolution.

A schedule of fines included in the letter showed that for the first three months following a notice of violation, daily fines accrue at a rate of $100 a day. From the fourth to the sixth month, they rise to $200 a day, topping out at $500 a day the ninth month and thereafter.

Watson and Robertson were given until March 27 to pay the fine and cease the violation. Should that not happen, Leithead-Todd wrote, "the matter will be transferred from the Planning Department to Corporation Counsel for legal action."

That deadline passed without event.

On May 6, Leithead-Todd sent a "Follow-up Letter #1" to Watson and Robertson. She stated that the amount of fines due on that date came to $23,700.

But instead of following through on the threat to turn the case over to corporation counsel if the March 27 deadline for resolution was unmet, Leithead-Todd offered Watson yet another deal: "If you resolve this matter by the deadline date of May 23, we will consider reducing the fine to 10 percent of the amount due, otherwise, after this date, the matter will be transferred … to Corporation Counsel for legal action.

According to the Planning Department inspector, having heard nothing from Watson, he shipped the matter over to the county corporation counsel on May 23. Now into the fourth month of the infraction, fines are accumulating at a rate of $200 a day. By the end of the month, the total stood at more than $28,000.

— Patricia Tummons

Kaua'i Springs from page 1

eight-inch pipeline that taps the Kahili spring, Satterfield applied for and received a building permit and Class IV zoning permit from the county to build a 1,600-square-foot "watershed," which consisted mainly of two shipping containers connected by a roof.

The county planner who processed the applications testified later that the shed "looked ... like any other ag building at the time."

"However, the 'watershed' was actually a semi-automated water-bottling facility capable of filling at least 1,000 five-gallon bottles per day," the county wrote in its opening brief to the ICA.

> *"We gotta be bottling our own water."*
> ***— James Satterfield, Kaua'i Springs***

Once the state Department of Health issued Kaua'i Springs a permit to bottle water in July 2004, Satterfield, his wife, and their five sons began operations.

After they had been bottling water for about two years, the county received a complaint — allegedly from an employee from an O'ahu water bottler — that Kaua'i Springs was illegally operating an industrial facility on agricultural land. Satterfield argued to the county Planning Department that water bottling was an agricultural use. The county disagreed and required him to apply for a special use permit to operate a bottling facility in the Agriculture District. Because the property is zoned for agriculture and open space, he also had to apply for a county use permit and a Class IV zoning permit.

On May 15, 2006, the Planning Department issued a cease-and-desist letter to Makana Properties, stating that unpermitted industrial processing and packaging was occurring on the property.

Faced with being shut down, Kaua'i Springs eventually submitted the required permit applications on July 5, 2006. Satterfield later testified before the Planning Commission that he planned to increase his production substantially, from about 2,500 gallons a week to 35,000 gallons a week.

The commission first took up the matter of Kaua'i Springs' permits at its August 8, 2006, meeting. As it struggled to get some basic scope-of-operations information, as well as answers to complex water-related legal issues, the commission delayed decision-making meeting after meeting.

"At this point there is no limit on how much water I can extract that I know of in any document that we have written out," Satterfield told the commission at one point. He added that he did not plan to ship any water off Kaua'i "until we have saturated the island."

In written testimony opposing the permits, Maka'ala Ka'aumoana, vice chair of Hui Ho'omalu I Ka 'Aina, pointed out that Kaua'i Springs receives its water from Grove Farm, which is not authorized by the state Public Utilities Commission to purvey water.

In response to an inquiry from the Planning Department, the PUC stated that, given what little information it had on the case, it was unlikely that Kaua'i Springs would need PUC regulation, although Grove Farm, on the other hand, might.

Ka'aumoana also stated that the counties, as subdivisions of the state, have an obligation to conserve and protect Hawai'i's natural resources, including water. And her sentiments were supported by the Hawai'i Supreme Court. A little more than a week before the Planning Commission began deliberations on the permits, the Hawai'i Supreme Court ruled in *Kelly v. 1250 Oceanside Partners* that counties, as subdivisions of the state, have public trust duties with regard to water.

To determine what, if any, water-related permits Kaua'i Springs needed, the Planning Department consulted with the state Commission on Water Resource Management. The Water Commission is responsible for generating the state's Water Plan and allocating waters within designated management areas. Since Kaua'i has no such areas, Kaua'i Springs would not need a permit from the Water Commission unless the operation induced more water to flow from the spring or modified the source of the water, the commission's Dean Nakano stated in a letter to the Planning Department. Nakano also stated that "groundwater withdrawals from this project may affect stream flows, which may require an instream flow standard amendment."

To appease some of the concern over his expansion plans, Satterfield offered to limit his water use to 1,000 gallons a day, which would still allow him to more than double his output at the time.

Over the course of the Planning Commission's deliberations throughout the latter half of 2006, the deadlines to decide on two of the permits -- the county use permit and the Class IV zoning permit -- came and went. Without assent from Kaua'i Springs to extend those deadlines, the permits would have been automatically approved.

The automatic approval deadline for the special use permit was January 31, 2007.

With equivocal advice from the PUC and the Water Commission about Kaua'i Springs' operation, an automatic approval deadline looming, and little to no experience dealing with water issues, the Planning Commission voted on January 23, 2007 to deny all three permits.

In its Decision and Order, the commission wrote, "In view of comments received from CWRM and PUC, the land use permit process should insure that all applicable requirements and regulatory processes relating to water rights, usage, and sale are satisfactorily complied with prior to taking action on the subject permits. The applicant ... should also carry the burden of proof that the proposed use and sale of the water does not violate any applicable law administered by CWRM, the PUC or any other applicable regulatory agency.

"There is no substantive evidence that the applicant has any legal standing and authority to extract and sell the water on a commercial basis."

Satterfield asked the commission to reconsider its decision, but the commission denied his request at its February 15 meeting. He sought an appeal from the county and in March was again denied. So he turned to the 5th Circuit Court. On May 15, 2007, Circuit Judge Kathleen Watanabe granted him a preliminary injunction against the county.

The Appeal

"Under the pressure of a looming deadline when the last of three zoning permit applications submitted by Kaua'i Springs, Inc., would be automatically approved by operation of law, the Kaua'i Planning Commission cobbled together a hasty denial," wrote Thomas and Mark Murakami, attorneys for Kaua'i Springs, in their April 2008 appeal of the Planning Commission action to the 5th Circuit Court.

"[The Planning Commission] ... based its denial on criteria wholly outside of its jurisdiction and competence, and wrongly concluded it had the authority to deny the zoning permits because it believed Kaua'i Springs 'extracts and sells' water," they wrote. The commission should have limited its deliberations to whether or not Kaua'i Springs' operation was "in harmony with its neighbors on land zoned 'Agriculture' and 'Open,'" they argued.

In any case, they wrote, the county use permit and Class IV zoning permit were automatically approved on October 18, 2006, and November 2, 2006, respectively.

They also argued that the letters to the Planning Commission from the PUC and Water Commission proved that both agencies "disclaimed any interest in Kaua'i Springs."

Judge Watanabe agreed with them on all points.

With regard to automatic approvals, Kaua'i Springs' attendance and participation in all of the Planning Commission hearings did not constitute a waiver of any deadlines, she wrote in her September 17, 2008, order.

"[T]he record in this case is devoid of any evidence that Kaua'i Springs' existing or proposed uses might affect water resources subject to the public trust," she continued, adding that no evidence was presented that the company didn't carry its burden to show it was entitled to its permits.

She ordered the commission to issue all three permits immediately and made the preliminary injunction permanent.

ICA Appeal

On October 30, 2008, the Planning Commission filed a notice of appeal with the ICA.

"In this case, the court must decide whether a county agency may deny land-use permits for an activity involving the commercial exploitation of an unregulated ground-water resource, when the permit applicant fails to establish a legal right to remove and distribute waters subject to the public trust. Appellee, an ambitious water-bottling company with big aspirations to profit from Kaua'i's limited fresh-water resources, is attempting to circumvent the constitutional, statutory and common-law requirements standing in its way," the county's attorneys wrote in their opening brief. To assist in this case, the county retained David Minkin and Christopher Bayne from the firm of McCorriston Miller Mukai MacKinnon, LLP.

"The Planning Commission attempted to reconcile its duty to both evaluate appellee's land-use application and protect Hawai'i's water resources by seeking input from other state agencies tasked with water regulation. After carefully evaluating appellee's application, the Planning Commission concluded that appellee failed to meet its burden of proof that the use of water was legal," they wrote.

During the course of its deliberations, the Planning Commission was unable to get definitive answers from Kaua'i Springs or the Knudsen Trust, which owns the cave where the spring is located, on how much water is diverted. The scope of Kaua'i Springs' operation also remained unclear, with Satterfield twice amending his proposed operating capacity at the commission's meetings.

"As late as the November 14 and 28, 2006, hearings, commission members were still uncertain about the number of hours appellee intended to operate in its facility on a daily basis and whether the water used was subject to chlorination," the county's attorneys wrote.

With regard to Watanabe's conclusion that two of the permits Kaua'i Springs sought were automatically approved, they pointed out that language in the county code requires only assent from the applicant, not a waiver. And by its conduct at the Planning Commission meetings, Kaua'i Springs had, in fact, assented to an extension, they argued.

" 'Assent' is defined as 'verbal and nonverbal conduct reasonably interpreted as willingness," they wrote, citing Black's Law Dictionary.

Not only did Satterfield and his attorney attend and participate in all of the Planning Commission's hearings, they negotiated conditions for the county use permit more than a month after the approval deadline. Such action "could only be construed by the Planning Commission as a willingness on the part of appellee to delay a final decision on the matter," the county's legal team wrote.

Amicus Briefs

Given the public trust issues involved, the Office of Hawaiian Affairs and and two environmental groups -- Hawai'i's Thousand Friends and Malama Kaua'i -- filed amicus briefs in the case.

OHA's attorneys, Ernest Kimoto and John Van Dyke, argued that Kaua'i Springs was not entitled to the permits because the administrative process failed to evaluate the impact of the operation on traditional and customary native Hawaiian rights in accordance with the Hawai'i Supreme Court decision in *Ka Pa'akai O Ka'aina v. Land Use Commission.*

> *"I think it's significant in raising the bar for planning agencies across the state."* **— Isaac Moriwake**

Earthjustice attorney Isaac Moriwake, representing Hawai'i's Thousand Friends and Malama Kaua'i, added in his brief that simply consulting with other agencies does not fulfill the Planning Commission's public trust duty to protect water resources.

"Regardless of the statutory authority granted to other agencies, including CWRM and PUC, [the Kaua'i Planning Commission or KPC] remains subject to the constitutional public trust doctrine.

"Moreover, in this case, no other state or county agency besides KPC exercised jurisdiction over Kaua'i Springs. KPC sought input from both CWRM and PUC, and both declined to act at the time. Thus, even if Kelly did not already reject the notion that KPC could pass off its public trust duties to other agencies, no other agency was willing to take any responsibility. This compelled KPC all the more to fulfill, and not abandon, its trustee obligations," Moriwake wrote.

ICA Opinion

After hearing oral arguments on March 14, 2012, the ICA issued a 51-page opinion on April 30 largely in favor of the county.

With regard to the automatic approval issue, the ICA agreed with the county that Kaua'i Springs' actions could reasonably have been interpreted as assent.

The ICA noted that the parties in the case don't dispute that the county has public trust duties, but disagree on the scope of those duties and the applicable standards for the three permits.

To determine those, the ICA looked to the county zoning code, general plan, and state land use law. With regard to the zoning code, which governs county use and zoning permits, it states that the permits may be granted only if the Planning Commission finds that the permitted activity "will not cause any substantial harmful environmental consequences on the land of the applicant or on other lands or waters, and will not be inconsistent with the intent of the [zoning ordinance] and the General Plan," which contains some broad language in its vision statement about the county playing a role in protecting the island's waters.

The state's land use law, Chapter 205, governs special use permits. The purpose of Chapter 205 is, in part, to conserve natural resources, including water, the ICA noted.

"Therefore, the Planning Commission's public trust duty under [the state Constitution], coupled with the state's power to create and delegate duties to the counties, establishes that the Planning Commission had a duty to conserve and protect water resources in considering whether to issue the special permit to Kaua'i Springs," the ICA wrote.

Despite having clear standards, the Planning Commission failed to apply them, the ICA found.

"The Planning Commission essentially required Kaua'i Springs to prove that its water usage — and the sale of the water by the Knudsen Trust and Grove Farm's operation of the water system — were legal and met all potentially applicable regulatory requirements. No concerns are articulated in the Planning Commission Order related per se to Kaua'i Springs' water bottling operation or its particular use of the water," the ICA wrote.

Raising the Bar

Although the company hasn't decided whether to appeal the ICA decision to the state Supreme Court, for now, the ruling is seen by some as a victory for the state's water resources.

"I think it's significant in raising the bar for planning agencies across the state. Now everyone's on notice you can't put blinders on towards the effect of these planning agencies' actions on the environment, [and] in this particular case, water," Moriwake said of the decision.

"As far as water bottling goes, that's a large issue that remains unresolved. It seems like the issue of can a company stick a straw in the ground and start selling the water is problematic on various levels — the environmental protection aspect [and] ... selling a public resource as well. This case really didn't resolve that," he added.

For Satterfield, who says he is currently operating at his proposed capacity of 1,000 gallons per day, the case has been a waste of tax dollars, as well as his own.

"We've been operating the business for 10 years without complaint ... and no quantity-of-water issues," he says. Throughout the appeals process, he added, "we have been suppressed. If they [his competition] wanted to stifle us, they did a good job."

Kaua'i county officials did not respond to questions by press time.

Whether counties or the state will ever develop a policy on water bottling remains to be seen.

"The Water Commission itself has not faced this issue," says commission director William Tam.

In 2008, then-state Rep. Mina Morita introduced a bill that would have taxed water bottlers, with the proceeds going toward invasive species control. The bill morphed into one that instead would have funded water protection and planning efforts by the state and counties, but eventually died.

Last year, then-state Sen. Shan Tsutsui and six other senators introduced a bill to prevent taking and bottling water from any local source for export without a permit from the Water Commission. Currently, the commission only issues permits for withdrawals within designated water management areas.

The bill passed first reading, but went nowhere and received no written testimony.

That's just as well, says Tam.

"There wouldn't be a basis for a permit unless it was a designated area. It would be an awkward way to handle things," he told *Environment Hawai'i.* ***—Teresa Dawson***

Tobacco Project Wins ADC License Despite Board Member's Objections

Over the objections of an incensed William Tam, the Agribusiness Development Corporation board voted to approve a three-year license to LBD Coffee, LLC, to test its tobacco crops on three acres in Kekaha, Kaua'i.

A version of the project — for a two-year revocable permit —- first came to the board in January but failed to win enough votes because one board member had to recuse herself, Tam voted against the project, and a couple of board members were absent. (In our February issue, we incorrectly stated that Paula Hegele and board chair Marissa Sandblom had both recused themselves. Only Hegele, whose company wholesales LBD cigars, recused herself. Sandblom, whose employer, Grove Farm, leases land to LBD, did not.)

At that meeting, Tam argued that public lands should never be used to grow tobacco, especially when the state spends so much money trying to prevent people from smoking or to get them to quit. A lengthy debate ensued over whether cigars should be viewed in the same light as cigarettes, whether tobacco is any worse than other crops that could potentially cause cancer, and whether the board should be making moral judgments about crops on the ADC's land.

After a motion to approve a one-year permit to LBD failed, the matter was deferred without any motion or vote to do so.

On May 8, the board took the matter up again. This time, the proposal was for a three-year license. Tam argued that the board had already voted on the matter and that that should have been the end of it. But deputy attorney general Myra Kaichi countered that the agenda item presented in January — to approve a two-year revocable permit — was a mistake since such a thing is not allowed under state law. (Revocable permits are limited to one year.) The board didn't have enough members present to amend the agenda to correct the error, she said.

"I don't think its improper, the fact that it's on the agenda today," she said.

With no members of the public testifying on the matter, board member David Rietow made a motion to approve the license, which was seconded. Tam, however, vowed to fight the project.

"I will take it to the governor. This is not a neutral [project]. This is not acceptable. I am extremely unhappy. This is a moral issue with me and it's a policy issue for the state. This is not just another crop," Tam said, adding that he thought a vote on the matter would be illegal.

"I will take legal action if necessary, despite our counsel," he said, arguing again that once a matter is voted on, "it's finished."

As he did in January, Rietow said he felt the ADC board's purpose it to lease land to farmers, "not to pass judgment."

"These people [LBD] are talking about cigars, not cigarettes," he said, pointing out that people already object to some of the ADC's largest tenants for "moral" reasons. Referring to the controversy over transgenic crops, commonly referred to as GMOs (genetically modified organisms), Rietow said, "We've got [transgenic] corn in Kekaha. They say, 'It's bad for you. It's GMO.' They can't even define GMO."

> *"This is a moral issue with me and it's a policy issue for the state. This is not just another crop."* ***— Bill Tam, DLNR***

When it came time to vote, Tam again was alone in his opposition. This time the motion received the six votes necessary to pass.

In January, LBD owner Les Drent said that if the crop test in Kekaha proves successful, he will seek a license for 40 acres from the ADC.

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Former ADC Board Member Wins First Galbraith License

Kunia farmer Larry Jefts, one of the most productive farmers in the state, has become the first lessee of the ADC's newly acquired Galbraith Estate lands. Under an agreement with Ho'opili developer D.R. Horton, the ADC promised to give farmers displaced by the impending residential devel-

opment in Central O'ahu first crack at 500 of the 1,200 acres. Jefts leases 400 acres from Horton. On May 8, the ADC voted unanimously to issue Jefts a 10-year lease for 150 acres.

At first, Jefts will pay only $100/acre/year while he works on developing a water source and preps the land. During the latter half of the lease term, he'll pay $200/acre/year.


Larry Jefts

"Those are pretty tough lands to develop, $1,000 per acre to prepare and that's not including water," explained ADC executive director James Nakatani. In addition to giving Jefts a break on rent while he makes the land farmable, the ADC has also hired him through a competitive bidding process to prepare an additional 200 acres of Galbraith lands for other, smaller farmers to use.

So far, Jefts has removed trees from the area and once the rain subsides, he'll mow it, Nakatani said. He added that Jefts is having a hard time acquiring coral lime from the state Department of Transportation to prep the soil. (The state procurement office has rejected an ADC request to purchase lime for Jefts.)

"We have not gotten developmental funds from the Legislature," Nakatani continued. "By using the private sector partnership, we can develop these things [and] hopefully see some farming in 2014."

"This land is not good or bad land. It is what it is," Jefts told the board. But it does need help. He said farmable soil is usually around 6.5 pH. The Galbraith soils are more acidic, with a pH of around 4.

A pH of 4 is good for pineapple but little else, he said, adding that he plans to dump a semi-truck load of sand on every acre as soon as possible.

"Small farmers are not going to be able to do this on their own," he said.

Board member William Tam asked Jefts how he planned to water to his lease area and the 200 acres he's preparing for others.

The one well on the property can deliver about 3 million gallons a day. But with no drip irrigation, no main line, and no reservoir, it's going to take a lot of capital to make a system suitable for farming, Jefts said, adding that pumping the well is going to be more expensive than paying municipal water rates. Even so, it's "doable," he said.

Jefts also said he plans to use water from Lake Wilson, but did not describe how that would be done.

Board member Mary Alice Evans asked Nakatani whether he planned to limit other farmers' tenure to 10 years.

"Not necessarily," he said. "We wanted to give Jefts a longer tenure," he went on to say, but without knowing how productive the land would be, 10 years was thought to be a good test run.

Jefts predicted it would be four years before his lands yield a successful crop.

"You must begin to plant crops that will work there and be willing to accept smaller yields. If the sand and water is ready, we'll start planting as soon as possible," he said.

Aside from the D.R. Horton farmers with an option to lease the Galbraith land (which will likely include Aloun Farms and Ho Farms), Nakatani said his office has received requests from nearly 70 farmers to farm there.

> *"This land is not good or bad land. It is what it is."* ***— Larry Jefts***

"We'll learn a lot by getting him [Jefts] started," he said. "We have all of these challenges to bringing the land into production."

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PLP Squeaks By Financing Hurdle

After more than an hour in executive session, the Agribusiness Development Corporation announced to a nearly empty room last month that Pacific Light & Power (PLP) had met its license requirement to provide evidence of financing for its proposed renewable energy projects in Kekaha. Board member William Tam, who is also director of the state Commission on Water Resource Management, recused himself because of the water issues involved.

Now if only the company could get the island's utility, the Kaua'i Island Utility Cooperative (KIUC), to agree to buy its power. It's a goal that has eluded the company ever since KIUC filed applications in late 2010 with the Federal Energy Regulatory Commission to build two hydropower plants on the ADC's Kekaha and Koke'e ditches, the same ones PLP had planned to use. KIUC filed its FERC applications around the time PLP won preliminary approval for more than 1,000 acres of ADC land, beating out Pacific West Energy, LLC, which had an agreement with KIUC to provide 20 megawatts of biofuel-generated power.

In April 2011, the ADC finalized a 25-year license to PLP, which had proposed growing biofuels and building three hydropower plants and a bio-gas plant. The power generated — an estimated 11 megawatts — was expected to be used first by the Kekaha Agriculture Association, which includes all of the ADC's tenants in Kekaha. Any excess power would be sold to KIUC.

Under its license, PLP had to meet a number of benchmarks, including providing evidence of financing and completing the state environmental review process. PLP has recently begun an environmental assessment and late last year provided some evidence of financing. (Canada's Kreuger Energy has agreed to provide $10 million in equity financing for the $40 million project.)

Representatives from KIUC and/or its hydropower consultant, Free Flow Power Corporation, have been attending recent ADC board meetings to monitor the fate of PLP's project. With a handful of green energy projects under development, the utility expects renewables to supply more than 41 percent of its customers' electricity needs within a couple of years. KIUC has identified five hydropower projects — including those proposed for the Koke'e and Kekaha ditches — that could bring that total to 64 percent.

KIUC's goal is to generate 50 percent of its electricity by 2023. In late March, the KIUC board authorized CEO David Bissell to continue working with Free Flow Power on studying the feasibility of hydroelectric projects on the island.

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Former Kaua'i Commissioner Replaces Sandblom on Board

Gov. Neil Abercrombie chose not to nominate Marissa Sandblom for a second term on the ADC board. Sandblom, a vice president for Kaua'i's Grove Farm, currently serves as the board's chair.


HAWAI'I DEPT. OF AGRICULTURE
Marissa Sandblom


Sandi Kato-Klutke

Next month, former Kaua'i Aston hotel manager and planning commissioner Sandi Kato-Klutke will take Sanblom's seat on the board. Kato-Klutke has been an advocate for the Kaua'i Farm Bureau and received strong support from the Kaua'i farming community, as well as ADC executive director James Nakatani. ***— Teresa Dawson***

BOARD TALK

Use of Monk Seal Bait Sparks Debate Over Permit to Cull Sharks in NWHI

PHOTO: NOAA

About 20 Galapagos sharks have learned to prey on monk seal pups at French Frigate Shoals in the Northwestern Hawaiian Islands.

There's a big difference between taking an action to kill versus using the flesh of an animal already dead," said at-large Board of Land and Natural Resources member Sam Gon of the "warped argument" that some have made to board chair William Aila.

In discussing a proposal last month to use the meat of salvaged monk seal carcasses as bait to catch the 20 or so Galapagos sharks that have learned to prey on pups at French Frigate Shoals (FFS), Aila said, "The question asked of me is, 'You're going to put me in jail for killing a seal, but you're going to cut up and feed [the seals] to sharks?'"

Resentment by the fishing community against the seals has peaked in recent years following National Oceanic and Atmospheric Administration proposals to temporarily relocate seals from the Northwestern Hawaiian Islands to the Main Hawaiian Islands and to expand critical habitat for the animals. Although the relocation proposal has been withdrawn, it was not before a number of seals on Kaua'i, Moloka'i, and O'ahu had been intentionally killed or injured.

In the case of the recent permit application by NOAA's Frank Parrish and Alecia Van Atta to kill up to 18 sharks at FFS using salvaged seal meat (among other things) as bait, the seals are already dead, NOAA monk seal recovery coordinator Jeff Walters pointed out.

"We're trying to use their bodies in a respectful way, to keep their brothers and sisters alive," Walters said. He later added, "We're not talking about chumming. ... [T]here is going to be one piece of bait, no opportunity to train or habituate an animal to seal bait."

Aila, however, was concerned that NOAA had not discussed the issue enough with native Hawaiian cultural practitioners, especially those who have been taking a lot of heat for defending seal protection efforts.

For years, the Land Board has begrudgingly issued permits to NOAA to cull the sharks, which some native Hawaiians consider sacred. In recent years, the Office of Hawaiian Affairs and the Papahanaumokuakea Marine National Monument cultural advisory group have refused to support any of the shark culling permits. This year was no exception.

But to NOAA monk seal expert Charles Littnan, the predatory sharks at French Frigate Shoals need to be eradicated now more than ever. Juvenile survival in the NWHI has improved in recent years, and now shark predation is the main source of mortality in the NWHI. Making matters worse, fewer pups are being born.

"In the past, we had leeway. There used to be hundreds of pups at French Frigate Shoals. Last year there were 34," Littnan said.

Ever since the state established a reserve in the NWHI, NOAA has been using frozen tuna heads as bait, with little success. NOAA scientists have managed to catch just two sharks since the agency started getting permits from the Land Board for the work. Before the reserve was established, NOAA caught 12 sharks between 1999 and the early 2000s.

Back then, there were about twice as many sharks and they weren't as wary of humans as they are now, Littnan said. What's more, the scientists were able to use salvaged seal flesh as bait. Seal bait was used 15 times, with a total of three sharks captured as a result, Littnan said.

Even so, Aila seemed to want more discussion with cultural practitioners. He asked Littnan what would happen if the board required NOAA to take a year to do more community outreach. Littnan replied by saying he estimated 17 percent of the pups born this year at FFS could be lost. Sharks had already killed two pups at the time of the board meeting.

In the end, although some members were worried about backlash in the Main Hawaiian Islands, the board approved the permit on the condition that NOAA have more discussion with cultural practitioners about the use of seal meat.

"The seal meat is a resource for them to use to move through this issue," Big Island Land Board member Rob Pacheco said.

The permit covers activities from June 1 to May 31, 2014.

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A New Tradewinds Gets Timber License

Don Bryan's dream to build a timber mill on the island of Hawai'i has been given new life. On May 10, the Land Board approved the transfer of the timber license held by Hawaiian Island Hardwoods (HIH) to Bryan's Tradewinds Hawaiian Woods, LLC. The transfer provides him with about 1,000 acres of feedstock for a commercial-scale sawmill he plans to start building next summer.

More than a decade ago, the Land Board issued to Bryan's Tradewinds Forest Products, LLC, a timber license for 9,000 acres in the state's Waiakea Timber Management Area on Hawai'i island, near Hilo. The company's plans to log the area and build a veneer mill on the Hamakua coast sparked controversy, with many residents concerned about potential harm to native forest species and a host of other environmental impacts. But waylaid by years of permitting and financing troubles, the mill and logging operation never materialized. In the meantime, the company racked up more than $1 million in license fees and penalties. Finally, in July 2011, the Land Board approved Bryan's request to terminate the license.

Like Tradewinds, HIH also struggled to meet the construction and payment deadlines of its Department of Land and Natural Resources license, issued in 2007, for 1,095 acres in Waiakea. HIH was never able to build a commercial-scale mill, although it managed to harvest and mill some timber early on.

Rather than continue to accumulate fees and fall behind on its deadlines, HIH chose to sell its mill equipment to Tradewinds Hawaiian Woods, which Bryan formed in 2010. The sale, according to a March letter from HIH to the DLNR, would be contingent on the Land Board approving a transfer of the HIH license to Tradewinds.

At the Land Board's May 10 meeting, DLNR Division of Forestry and Wildlife administrator Roger Imoto recommended approval. The move would help the department meet its objective to promote the local forest industry and would provide a steady stream of revenue as well, he said.

The board received written testimony in opposition from Big Island resident Cory Harden, who pointed out that Bryan's earlier company had failed to comply with terms of

its license, was fined for various violations, and sparked community opposition, among other things.

When at-large board member David Goode asked what the difference was between Tradewinds Hawaiian Hardwoods and Tradewinds Forest Products, Imoto responded, "The main part is financial backing. One could make it happen. One could not," Imoto said.

Former Kamehameha Schools land manager Peter Simmons testified on behalf of the Hawai'i Forest Industry Association in support of the transfer.

"I just want to encourage you to do this. It's a milestone event," he said.

Simmons' testimony seemed to carry some weight with board member Sam Gon.

"I appreciate that you're present. Given some of the testimony that we've received speaking of historical disappointments ... your saying, 'yes, give this a chance,' is important," Gon said.

Bryan testified that his mill will initially provide 36 jobs and over the course of three years provide as many as 64.

"We now have an appropriately zoned, well-suited site for the operation," he said. Dan Fuller of Fuller Smith Capital Management added that his company is prepared to fund the project through an "equity capital structure" without any contingencies.

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Special Subzone Proposed For Kaua'i Ahupua'a

On May 10, the Land Board added an eighth special subzone to the Conservation District at the request of the National Tropical Botanical Garden (NTBG). The Lawa'i Kai subzone encompasses what's known as the Allerton Garden, a long narrow strip of about 110 acres in south Kaua'i fronting Lawa'i Bay. It also includes submerged lands.

The fast land is owned by the Allerton Garden Trust and managed by the NTBG as a center for public education and botanical research. The new subzone allows the NTBG to manage the garden without having to acquire a Conservation District Use Permit from the Land Board for every activity. Instead, the DLNR's Office of Conservation and Coastal Lands and other agencies would review any proposed activities to ensure they comply with the recently drafted Lawa'i Kai Management Plan and Master Plan.

Lawa'i Kai Bay

The plan seeks to establish the South Shore Kaua'i Ocean Recreation Management Area for all of Lawa'i Bay and unencumbered state lands as well. According to an OCCL staff report, to fully implement the portion of the plan dealing with Lawa'i Bay, NTBG may also need to seek amendments to rules relating to the DLNR's Land Division, its Division of Boating and Ocean Recreation (DOBOR), and its Division of Aquatic Resources (DAR).

"This is the first time someone has ever proposed creating a special subzone involving not only their own private land, but including adjacent submerged land. They're looking at an ahupua'a perspective," said OCCL administrator Sam Lemmo. "Everybody in the community seems to be on board with the actions," he added. Public hearings on the proposed rule change were held in May 2012.

NTBG director and CEO Chipper Wichman explained that the goal of the subzone is to try to reconnect the management of the ocean with management of the land.

"We're trying to create a holistic vision. ... Our community needs to step up and take responsibility for this," he said, noting that the property contains ancient burials and other cultural sites. The garden also contains more than 860 species and varieties of flowering plants.

Wichman said the establishment of the subzone is the first step in implementing the master plan. "[We'll be] working with DOBOR and DAR on what are the kapu we place in this area. That's what has taken seven years. If we were just trying to create an MLCD [Marine Life Conservation District], that would have been a different process," Wichman said.

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Fish Cage Project Gets Extension

The Land Board has chosen to ignore its previous recommendation that no further extensions of construction deadlines be given to Hawai'i Ocean Technology, Inc. (HOTI), which years ago proposed constructing floating open-ocean fish cages off the Kohala coast to grow tuna.

HOTI received a Conservation District Use Permit from the Land Board in October 2009. It was supposed to have deployed its first cage a year later. Permitting delays, however, led HOTI to ask the Land Board for an extension of its initiation and completion deadlines, which it received in March 2012 on the condition that no further extensions be granted.

At the Land Board's April 26 meeting, OCCL administrator Sam Lemmo said that aside from a major letter-writing campaign in opposition to the project, he could find no reason in the record why the Land Board voted in March 2012 to deny further extensions beyond the one granted then.

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"The 'no more extension' language has been reserved for entities where it's clear they're speculating or not pursuing the project," Lemmo said "I don't see that evidence in this case."

For years, HOTI has been waiting for the U.S. Army Corps of Engineers to issue a permit. Opponents say the delay has been self-induced because the company's project keeps changing.

HOTI CEO Bill Spencer testified that the project may, indeed, not be the same as initially proposed. He had originally proposed building 12 cages, but the Army Corps said it will only permit one.

What's more, he added, "There's been new inventions, new technologies to allow this project to be more effective and safer for the environment."

"I think it would be unwise to allow this application to become null and void at this time," Lemmo told the board. Last April, HOTI received its National Pollutant Discharge Elimination System permit from the state Department of Health. And its lease for the site was finalized in February.

"The Army Corps, they've been telling us 'two weeks' since May of 2010," Spencer said.

Although members of the North Kohala community submitted a petition with 1,700 signatures against open-ocean aquaculture, Big Island Land Board member Rob Pacheco said, "It's not my place as a board member to bring in opinions about what I think is right and wrong when I have legislation, food sovereignty mandates. ... We're here to make sure we're working through the process correctly."

Pacheco asked Lemmo whether HOTI was responsible for the delay.

"I can't say that I personally am cognizant," Lemmo said. "He may have done something that caused the delay with the Army Corps. ... I'm not going to make any speculation until I see what the Army produces."

In the end, the board chose to grant the extension.

Ship Grounding Funds To Help Control Seaweed

As much as $600,000 of the $8.5 million received for reef damages caused by the U.S. Navy's *USS Port Royal's* 2009 grounding off the Honolulu International Airport may be used to continue invasive seaweed control in Kane'ohe Bay. Specifically, the University of Hawai'i plans to use "super sucker" vacuums to clean Kappaphycus and Eucheuma algae from coral heads and put in place more native sea urchins to prevent further infestation.

The Land Board approved the expenditure at its April 26 meeting.

The work has been going on for about a decade with a hodgepodge of funding sources, but recently ran out of money. The *Port Royal* funds will provide the project some continuity until another source of funds is found, DLNR water deputy William Tam told the Land Board.

"Hopefully, we'll not use this whole amount," Tam said, adding that the department may, at some point, seek to fund the project with the $38,000 settlement from the *Cape Flattery* grounding in 2005.

Two New Board Members, One Still-Vacant Seat

The Land Board's Kaua'i seat will remain empty come July. No one was nominated to fill the vacancy left by Ron Agor in 2012.

Ulupalakua Ranch's James Gomes will replace outgoing Maui member Jerry Edlao. Contractor Reed Kishinami will take O'ahu member John Morgan's seat.

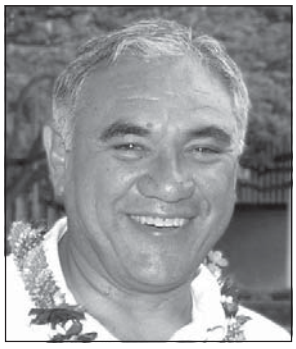
—Teresa Dawson

Save the Date: August 23.

On that date, William Aila will be the featured speaker at the annual fundraising dinner for *Environment Hawai'i*. Aila is the chairman of the Board of Land and Natural Resources.

The dinner and silent auction will be held at the 'Imiloa Astronomy Center in Hilo.

Tickets are $60 per person, which includes a $20 tax-deductible donation to *Environment Hawai'i*. A table of eight may be reserved for $500.


William Aila

To make reservations, call our office at 808 934-0115.
Seating is limited; please reserve early.