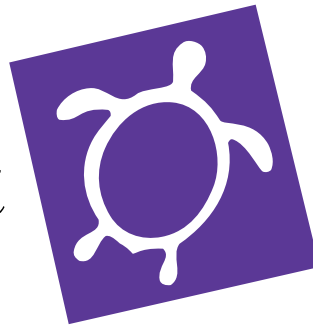


Environment



Hawai'i

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Power Struggle

The relative isolation in which tenants of state agricultural lands in Kekaha, Kaua'i have conducted business is coming to an end, as renewable energy developers elbow their way in.

And with water demands now coming from those developers, and possibly from the Department of Hawaiian Home Lands, taro farmers, and advocates for stream restoration, the state Agribusiness Development Corporation is struggling to find a way to allocate water, diverted from the Waimea River, among the various users. At the same time, it's fighting with the Federal Energy Regulatory Commission for its right to do so.

Also in this issue, we cover recent efforts before the state Land Use Commission to protect important agricultural land throughout the state.

Agribusiness Development Corporation Grapples With Conflicts Over Diverted Water in Kekaha

On April 7, the state Agribusiness Development Corporation board approved a 25-year license to Kaua'i's Pacific Light & Power (PLP) to build a biodigester and grow biofuels on lands in Kekaha and construct hydroelectric power plants along the Koke'e and Kekaha ditches.

Last September, the ADC's Kekaha Committee gave preliminary approval to PLP's proposals, in large part, because they included upgrades to the area's electricity and irrigation infrastructure. The hydropower projects alone would generate 11 megawatts of power, which would be sold first to tenants of the Kekaha Agriculture Association (KAA) — a tenant group that manages the infrastructure -- then to the island's utility.

But a month later, before the details of a license could be fleshed out and approved by the ADC board, Clean River Power 16, LLC, a.k.a. Free Flow Power, submitted an application for a Kitano Water Power Project that would use Pu'u Lua and Kitano reservoirs, which feed the ADC-controlled Koke'e Ditch. Then in March, Free Flow affiliate Kahawai Power 4, LLC, filed an application for a hydro on the Kekaha Ditch.

If approved, Free Flow, an agent for the Kaua'i Island Utility Cooperative (KIUC), would have three years to conduct feasibility studies and would be first in line to develop hydroelectric power on the ditches.

Although the license to PLP was for the land only, it was clear from the board's discussion that its future decisions regarding PLP's use of ditch water may affect all of its Kekaha tenants, as well as the Department of Hawaiian Home Lands (DHHL), Pacific West Energy, LLC, and the KIUC, not to mention kuleana landowners and native ecosystems.

Uncharted Territory

"We are looking at three competing entities:

PLP, Pac West, and Free Flow Power," ADC executive director Alfredo Lee told the board at its meeting last month in Honolulu. Pac West wants to make ethanol and generate electricity at the former Kekaha Sugar Mill using locally grown crops and has sought feedstock land from both the ADC and the Department of Hawaiian Home Lands.

After being given the brush-off by the Kekaha Committee last September, representatives from the Kaua'i County Council, the ILWU Local 142, and the KIUC all urged the committee to reconsider giving Pac West some land.

So on April 7, Lee proposed issuing a license to PLP for only 877 acres, roughly half of its available land in Kekaha. He suggested the remaining 750 acres could be offered to Pac West.

When ADC board member William Tam asked how KIUC's hydropower plants related to the discussion, PLP chief development officer Palo Luckett said that KIUC's project would divert water away from ADC lands, something KIUC representative Mike Yamane disputed. Yamane explained that the final plant design has not been completed.

Apparently concerned about how the water would be allocated, James Nakatani, deputy director of the state Department of Agriculture, asked Lee whether the ADC would be leasing just the land and whether PLP would get its water via a permit from the ADC. (An ADC staff report states that because Kaua'i has no designated water management areas and no new stream diversions are proposed, it's unlikely that PLP would need a permit from the state Commission on Water Resource Management.)

Currently, under a license with the ADC, the KAA controls the flow of water through the irrigation system at Kekaha. Tam, deputy
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Environment



Hawai'i

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NEW AND NOTEWORTHY



Hilo Forest Unsold:

The bankrupt company that owns 5,226 acres of mostly old-growth forest just west of Hilo failed last month in its efforts to sell the property at auction.

Arlie & Company, an Oregon company, has been in bankruptcy since January 2010 and has repeatedly referred to its Hawai'i holdings as one of its chief assets. In a list of its property holdings submitted to the federal bankruptcy judge in Eugene, Oregon, Arlie represented that the value of its Hawai'i land was \$62.7 million, which was practically equal to the \$65 million owed to its creditors at the time of the bankruptcy filing.

Arlie had put up a notice of the auction alongside the Saddle Road just west of Hilo. The deadline for submission of bids was March 16, and the auction itself was to be held April 1.

But when the time to open bids came, there were none. A "stalking horse bidder," a bidder chosen by the seller to submit the first bid and thus set the minimum sale price, withdrew its bid at the last minute, and, according to an attorney close to the process, "there were no other qualified bidders."

"We were all disappointed in the results of the auction," said Douglas Schultz, attorney representing the class of unsecured creditors.

A buyer may yet come forward, however. Cameron Healy, founder of Kettle Chips and the Kona Brewing Co., has reportedly expressed an interest in acquiring the land.

Requests for comment from a representative of Arlie went unanswered. Efforts to reach Cameron Healy were unsuccessful by press time.

Up in the Air: More than a decade after Congress passed the National Parks Air Tour Management Act, the National Park Service and the Federal Aviation Administration are finally getting serious about developing management schemes to control air tours over parks throughout the country, including Haleakala and Hawai'i Volcanoes national parks in Hawai'i.

In April, community meetings were held on Maui and the Big Island to gather input on several approaches to controlling tours in the air space over the parks. Comments from the public will be used in preparing an environmental impact statement for air tour management plans for each park.

Volpe National Transportation Systems Center is the federal contractor preparing the EIS documents for parks around the country. In describing the various alternatives being considered for inclusion in the EISes, it explains why there has been such a long delay between passage of the act and its implementation, attributing it to "differences in FAA and NPS policy and analysis of how to best integrate the environmental compliance guidance of both agencies into the air tour management planning process."

For more information on Hawai'i Volcanoes National Park's proposals, see: <http://www.nps.gov/havo/parkmgmt/loader.cfm?csModule=security/getfile&PageID=426225>.

For more information on Haleakala National Park's proposals, see: <http://www.nps.gov/hale/parkmgmt/atmp.htm>.

In both cases, the public is asked to submit any comments by June 6.

A Clarification and a correction: In our March story on storm water discharges from the Waimanalo Gulch Sanitary Landfill ("Managers Dispute State Assessment of Storm Water Discharges from Landfill"), we cited and based some of our chronology of events on a January 13 letter from the city Department of Environmental Services to the state Department of Health.

Our efforts to determine by press time when, exactly, the letter was written were unsuccessful. When first asked about the letter, city public information officer Markus Owens said department director Timothy Steinberger did not know what letter *Environment Hawai'i* was referring to. Owens later obtained a copy, but could not say for sure when it was written. According to the recent release of records by the DOH's Clean Water Branch, it appears the letter was written and emailed to the DOH on January 12, well before any waste from cell E6 left the landfill. A signed version was not mailed until the 13th.

Finally, we incorrectly identified attorney Wyeth Matsubara as Ben Matsubara.

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Quote of the Month

"We've learned to be very careful about promising too much."

— Alan Okamoto,
attorney for DW Aina Le'a

Castle & Cooke Land on O'ahu Wins IAL Status; Maha'ulepu Petition On Tap

Since the Legislature passed a measure giving landowners incentives to protect important agricultural lands in 2008, the state Land Use Commission has been presented with a total of five IAL petitions. In the first two years after passage of Act 233, just two petitions were brought seeking designation of IAL status for lands on Kaua'i and Maui. Both were brought by Alexander & Baldwin.

In the last six months, however, the pace has picked up. In November, the LUC received the third such petition, for designation as IAL of some 5,000 acres owned by Moloka'i Properties, Ltd. By the end of December, the fourth petition was filed, this time by Castle & Cooke, proposing to designate as IAL four discrete properties on O'ahu, having a combined area of 902 acres. In February, Maha'ulepu Farm, LLC, filed a petition seeking IAL status for 1,553 acres at Koloa, Kaua'i.

Why the rush? Under the law, private landowners have three years after Act 233 took effect – that is, until July 1 of this year – in which to petition for IAL status before counties are allowed to begin their own designation process. After that, landowners are free to petition for IAL status for their lands, but the county process kicks in as well. Once that happens, the lands identified and proposed for IAL designation by the counties may not be the same ones that the landowner would want to see so designated. Counties are allowed to recommend designation of up to 50 percent of a given landowner's holdings (not counting any lands in the Conservation District). Thus, some landowners, not trusting the county to act in their best interests, might wish to decide for themselves which of their lands to place in the IAL category.

Still, given the counties' general lack of progress in carrying out their statutory mandates, there would seem to be no reason for private landowners to rush in with petitions for IAL designation to the LUC. A poll of county planning departments shows only Kaua'i County will come close to having prepared IAL maps – and even there, the county is running behind schedule.

Castle & Cooke

In the first two IAL petitions before the LUC, approval was relatively straightforward. The tracts were large (3,773 acres

along Kaua'i's South Shore, 27,104 acres in West and Central Maui), contiguous, and there was little dispute about their agricultural productivity.

In the Castle & Cooke petition, however, some LUC members, as well as the state Office of Planning, the Department of Agriculture, and the City and County of Honolulu Department of Planning and Permitting, expressed reservations about the suitability of two of the four areas proposed as important agricultural lands.

The four parcels that were the subject of the petition totaled 902 acres – a figure that approximately equals the acreage proposed for redistricting into the Urban land use classification in Castle & Cooke's Koa Ridge petition. (Of the 900 acres proposed in that docket, 576 were approved.) As the LUC was considering that petition last fall, commissioners raised concerns over the loss of productive agricultural land. To allay those concerns, Castle & Cooke volunteered to prepare and deliver to the LUC a petition to designate as IAL a roughly equivalent area by the end of the year. The petition considered by the LUC at its March 23 meeting was in satisfaction of that commitment.

But it differed in several important ways from what the commission had seen in the two earlier IAL petitions. Rather than the proposed lands making up one large tract, the Castle & Cooke lands were broken up, with no parcel larger than 242 acres. They spanned the island, from Mililani in the south to Waiialua, on O'ahu's North Shore. In terms of their agricultural productivity, the parcels also reflected a wide diversity. Two are currently under intensive cultivation of diversified food crops (the Waiialua and Mililani properties), whereas the remaining two parcels (205 acres near Whitmore Village and 223 acres formerly part of the Dole Plantation) have little ongoing agricultural activity. The Dole site, in fact, is largely a gulch that has been dammed to create a reservoir, known variously as the Tanada, Tanaka, or Upper Helemano reservoir, with a capacity of roughly 158 million gallons. The Whitmore parcel used to be in pineapple cultivation but has no water supply at present and is fallow.

Ben Matsubara, attorney for Castle & Cooke, defended the inclusion of the Dole



and Whitmore parcels in the IAL package. The Whitmore land had been in active pineapple cultivation for 100 years, until 2001, he said, and while there is no irrigation line serving the tract, it does receive an average of 60 inches of rain a year. He also noted that nothing in the statute requires land to be in active cultivation as a condition of IAL status.

As to the Dole parcel, it was not true that it was entirely unproductive, Matsubara said, noting that some 31 acres in land around the reservoir are under cultivation at present. In addition, the reservoir serves 2,500 acres of ag lands in the area, he said, pointing out that one of the objectives of the IAL law is to promote maintenance of irrigation systems. IAL designation, he said, would make it possible for Castle & Cooke to receive tax credits for maintenance of the reservoir.

The City and County of Honolulu, represented by Dawn Takeuchi-Apuna, corporation counsel for the Department of Planning and Permitting, raised the point that the lands being proposed for IAL status might not be the highest quality ag lands held by Castle & Cooke. And, with the county facing a statutory limit on the IAL lands it proposes for designation of no more than 50 percent of land held by a given owner, the county was asking for Castle & Cooke to provide an inventory of all its ag lands to allow for prioritization.

Russell Kokubun, director of the Department of Agriculture, also expressed concern over inclusion of the Whitmore and Dole lands. It is fragmented by gulches, he noted, with no current production and questionable access to water. "We want to have a high standard for IAL," he said, suggesting strongly that the Whitmore and Dole parcels fell short.

The new director of the Office of Planning, Jesse Souki, echoed Kokubun's concerns over the quality of the Whitmore and Dole land. In the first IAL docket – that involving A&B lands on Kaua'i – "one of the findings was that of the more than 3,000 acres [proposed for designation], 80 percent was in active ag and 12 percent was reser-

Controversial Moloka'i Properties IAL Plan Is Withdrawn as Interest Shifts to Wind Farm

Last November 30, Moloka'i Properties Ltd., owner of almost all of the assets of the now defunct Moloka'i Ranch, petitioned the Land Use Commission to designate 4,919 (later amended to 5,203) acres of ranch land in West Moloka'i as important agricultural lands. Unlike the three IAL petitions preceding it, this one entered a contested case hearing, reflecting disagreement – if not outright controversy – over whether the lands should be qualified as such.

Nearly all the land – 4,661 acres – is currently occupied by two cattle ranches, Pohakuloa and Diamond B, both managed by James “Uncle Jimmy” Duvachelle. According to the petition for IAL designation, MPL’s agricultural plan for the property calls for the two ranches to be merged, granting the remaining ranch a 20-year lease, and encumbering the entire petition area with a 99-year agricultural easement in favor of the Moloka'i Land Trust.

The Department of Agriculture has nothing against ranch land being designated as important, said Russell Kokubun at a recent LUC meeting. However, in this case, the carrying capacity of the land for cattle is compromised by the presence of a large population of axis deer in western Moloka'i, estimated at around 10,000 head. In its petition, MPL stated it had no interest in culling the axis deer population,

despite the fact that this was estimated to reduce the carrying capacity for cattle by roughly 40 percent. Without the deer, MPL estimates the land could support a cow-calf unit on six acres. With the deer, the area required increases to nearly 10 acres. In other words, the presence of the deer reduces the carrying capacity of 5,000 acres from 833 units to 500. “The petition does not explain how IAL designation will improve the viability of the ranching operation for beef production,” Kokubun said in comments on the MPL proposal.

In any case, the concerns expressed by the DOA and the Office of Planning were mooted on March 31, when MPL withdrew the petition. In giving notice to the LUC, attorney Curtis T. Tabata of Matsubara-Kotake, recapped the basics of the petition, saying it would have contributed “towards a sustainable cattle industry on Moloka'i.”

“Fate has, however, dictated that the issue of sustainable energy and wind turbines on the island of Moloka'i be addressed at the same time our petition is being processed,” Tabata added.

The discussion with the state and community members on possible sites for wind turbines on the island “is ongoing,” he wrote, “and it is not expected that the issues relating to the location of the wind turbines will be resolved in a timeframe

that would be acceptable to the commission in relation to this application.”

Coincidentally, on the same day that the IAL petition was withdrawn, *Pacific Business News* reported that First Wind, based in Boston, had given up in its efforts to negotiate development of a wind farm on Moloka'i Properties land. Under a 2009 agreement with Hawaiian Electric, First Wind had until mid-March to work out an arrangement for land on Moloka'i where a 200-megawatt wind farm could be erected, providing half of the 400-MW “Big Wind” project the state is pushing to bring electricity to O'ahu from Moloka'i and Lana'i. According to the *PBN* report, under the agreement with Hawaiian Electric, it alone has the right to develop wind energy on Moloka'i to feed into the O'ahu project.

Even before the March 18 deadline for First Wind passed, Moloka'i Properties was engaged in discussions with another wind and cable transmission company called Pattern Energy, which participated in three community meetings in the first week of March. According to *The Moloka'i Dispatch*, MPL was considering leasing 11,000 acres for a wind farm, consisting of roughly 90 400-foot-high turbines in western Moloka'i. Maps reproduced by *The Moloka'i Dispatch* showed the proposed IAL land was central to the planned wind farm.

— Patricia Tummons

voirs, streams, and gulches,” Souki said. “Here we have the reverse,” he noted, referring to the Dole parcel. As for the lack of water on the Whitmore parcel, Souki said, under the statute, if an area deemed an IAL is without water for a length of time, the IAL designation can be removed from it. With no water for Whitmore, “you’re starting out on the wrong foot already,” he said.

Matsubara responded by asking, rhetorically, “What is there to lose if we are given IAL status? ... We’re not trying to develop a huge project in the middle of agricultural land. We’re trying to make it ag land.” He noted that Castle & Cooke was “fulfilling a promise we made to you” in the Koa Ridge case. And, he added, “we promise to go a step further in committing this land to IAL. Come what may, we’ll utilize it as best we can to fulfill the objectives of the IAL law.”

Designation of the Dole parcel, with the

reservoir, was especially important, Matsubara said, since Castle & Cooke could then seek tax credits for maintaining the reservoir. “Kaua'i had that horrible catastrophe where maintenance was overlooked,” he said, referring apparently to the breach at Kaloko reservoir in 2006.

At-large commissioner Charles Jencks moved to approve the petition, with a second by Thomas Contrades of Kaua'i. But commissioner Ronald Heller objected to a vote on all four parcels. “I think we kinda got two different questions,” he said. “The easy part is designation for Waialua and Mililani South. The harder one is for Whitmore and Dole Plantation. Maybe we ought to deal with them separately.” The motion of Jencks was then amended, calling for designation of just the two non-controversial parcels. It easily passed on a unanimous vote of the seven members present.

(Six votes are required for designation, a two-thirds majority of the commission’s nine members.)

Jencks and Contrades then moved for designation of the remaining two parcels. “I have more difficulty with this part of the petition because I’m not sure what distinguishes these parcels as important ag lands,” Heller said.

When the vote came, the motion failed, on a vote of five to two, with Jencks, Duane Kanuha, Lisa Judge, Contrades, and chairman Vladimir Devens voting in favor. Opposed were Heller and Kyle Chock.

Commissioner Judge then asked whether the commission could take a vote on the two parcels – Whitmore and Dole – separately. That threw the commission into uncharted territory.

After a brief consultation with the deputy attorney general advising the LUC, Devens

Counties Aren't Likely to Meet Statutory Deadline for IAL Maps

Alone among Hawai'i's four counties, Kaua'i is hard at work on developing maps indicating its most important agricultural lands. O'ahu, Maui, and Hawai'i have yet to leave the starting gate, when it comes to developing the "inclusive process for public involvement in the identification of potential lands and ... maps," to say nothing of having their respective councils actually adopt IAL maps to forward to the LUC.

According to Lea Kaiakamalie of Kaua'i County's Planning Department, "we're about halfway through the IAL process and we hope to wrap it up by September."

The county got a head start when, in 2005, the state Legislature appropriated \$75,000 to fund a pilot project to look at how the designation process would work in the Po'ipu-Koloa area. The University of Hawai'i's Department of Urban and Regional Planning was contracted to carry out that study. Later, the county appropriated about \$500,000 to

hire DURP to undertake the countywide process.

After dozens of meetings over nearly two years, an end is in sight. Says Kaiakamalie: "The process was tedious, but most people stayed through. People pulled their hair and yelled at each other, but I'm so proud of them for hanging in there." (To review the work of the county's Stakeholder-Technical Advisory Committee, go to: <http://sites.google.com/site/kauaiial/>.)

John Summers, Maui County Planning Department's head of long-range planning, said that his department has been addressing the issue of protection of important agricultural lands largely through the process of updating the county's general plan and community plans, which identify prime and productive agricultural lands.

"We're trying to get those mapped so we have a set of specific county policies to make sure those lands can be kept in active produc-

tion and protected for future generations," he told *Environment Hawai'i* in a telephone interview.

Still, he acknowledged, state law requires additional steps beyond the county's current planning process.

"Once we get clarity on that," he said, referring to the county plan, "we'll look at using the information and policy from that to inform and provide a starting point for the more formal HRS 205 process."

Larry Brown with the long-range planning division of Hawai'i County's Planning Department said his agency had not begun working on this issue.



Kaua'i Method

The question kept coming up: how much land do we need to set aside for the county's current and future needs? Karl Kim says about DURP's efforts to identify IAL for Kaua'i.

The short answer: about 13,000 acres, if it goes without beef.

Last month, Kim, a DURP professor and

said, "based on my reading of the law, we may not have the authority to do a revoke right now... I hate to keep commissioners from looking at this another way, but it seems I cannot do that right now."

Matsubara pointed out that the statutory deadline for consideration of the petition was less than a week away, not allowing for another scheduled meeting of the commission. However, he suggested, the commission could revisit the issue the next day – March 24 – if he were allowed to submit a motion for reconsideration before the day was out. (The LUC agenda typically provides for a two-day meeting.)

"Or," he continued, "is the commission willing to waive its rules requiring a written motion [for reconsideration], and allow me to make an oral motion now? If the commission waives that rule, I could make the oral motion now" for reconsideration of the Dole and Whitmore parcels.

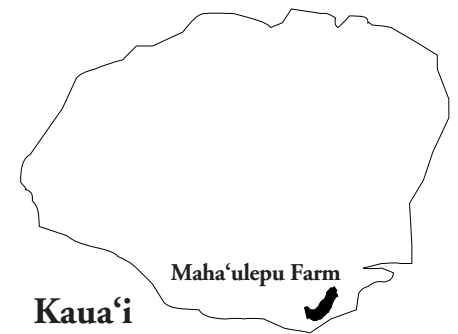
After a short executive session, the LUC reconvened, asking Matsubara for the oral motion. After accepting that, the commission voted on whether to approve designation of the Dole land, with the reservoir, as IAL. On a five-two vote, the motion failed. The Whitmore land, on the other hand, squeaked through to IAL status, with six affirmative votes. Heller was alone in his opposition.

The state Commission on Water Resource Management did not have a seat at the table during the LUC's deliberations on the Castle & Cooke IAL petition. However, it did submit comments, noting that Castle & Cooke had not submitted monthly water usage reports for the Waialua pump since 1997 and that the commission was reviewing the Waiahole Ditch allocation of 2.13 million gallons a day for the Mililani South parcel, in light of four years of non-use. According to a staffer at the Water Commission, a recommendation to revoke the Waiahole allocation will probably be taken up at CWRM's May meeting.



Maha'ulepu Petition

On February 23, attorney Ben Matsubara submitted to the LUC a petition seeking IAL designation of 1,533 acres of land at Maha'ulepu, Kaua'i. The area, once part of the Koloa sugar plantation, nestles into a valley on the southeastern part of the island. Since 2007, about 200 acres have been leased to W.T. Haraguchi for taro cultivation; according to the petition, Haraguchi will expand that to more than 400 acres, "which will nearly double the entire statewide production of



this culturally significant crop." Small ranches and a stable occupy most of the rest of the more mauka portions.

In the lower areas, seed corn is the predominant crop, with some 564 acres under lease to Pioneer. "The lease term extends to 2019 and the tenants have plans to expand the leased area up to 805 acres for future bio-energy crops and corn expansion," the petition states.

About 45 acres is under lease to Aque Engineers, Inc., which uses sewage sludge to grow forage for cattle.

The area is part of the Koloa-Po'ipu sector that was the subject of a University of Hawai'i pilot study, done with funds provided by the state when Act 183 was passed in 2005. Results of that work, plus an ongoing, diligent effort by Kaua'i County to identify all IALs on the island, suggest the

Statutory Deadlines from page 5

executive director of the National Disaster Preparedness Training Center, updated the Hawai'i Economic Development Task Force on his agency's progress so far.

Using input from an advisory committee of about 20 people, the group started by ranking the eight criteria identified in the state's IAL law, Act 183. Sufficient water, not surprisingly, turned out to be the most important factor, followed by soil quality and whether the land was currently in production. Consistency with county plans ranked last.

Using the weighted criteria, DURP then assigned scores to every parcel of agricultural land on the island, with a maximum possible score of 40, then created maps for varying thresholds (10, 20, and 30 points).

Based on a threshold of 36 points, an average consumption of 2,500 calories per person per day and a diet prescribed by the Cancer Research Center, Kim determined that about 12,297 acres, not including those needed for beef production, would be necessary to feed Kaua'i's 2010 population of 67,091 people. Nearly 21,000 acres would be needed if the population met its projected growth of 150,000 people by the year 2035. (The study determined that about 235,679 acres would be needed to meet the 2010 population needs for beef, and 287,788 for 2035's. Both far exceed Kaua'i's 136,552 acres of available agricultural land.)

Without beef production, according to Kim, there is enough land to grow food for all of the island's residents, as well as biofuels. The 20-point scenario would provide enough land to cover all of the island's transportation

needs, he said.

In 2007, Kaua'i consumed 62.8 million gallons of fuel. Using banagrass, oil palm, eucalyptus, and leucaena, Kaua'i could produce some 65.11 million gallons a year of biofuel on lands not needed for food production, DURP found.

Kim admitted to the commission that things like the cost of commercial production and the ability to properly harvest and process biofuel crops remain challenges to meeting that projection.

At the end of his presentation, Kim asked the task force, which directs how the state barrel tax is spent, to fund a \$300,000 study that would look closer at the food versus fuel dichotomy on Kaua'i.

"We would like it to be food AND fuel. This issue has come up about whether the biofuel industry will take away land to feed people," he said.

Sylvia Yuen of the University of Hawai'i's College of Tropical Agriculture and Human Resources added that a similar issue exists with the seed corn companies that occupy so much of the island's agricultural land. "It's not food you ingest," she said.

Kim also proposed a biofuels feasibility study that would cost less than \$1 million and would include looking at where the island's next landfill should be sited.

Think Bigger

"Who's going to fund infrastructure? Sustainability on an island-by-island basis is good, but from an economic perspective, you need scale," said Richard Lim, director of the state Department of Business, Economic Development and Tourism, after Kim's presentation.

Lim, a task force member, asked whether there was any plan to look at sustainability from a statewide perspective. When looking at biofuel production, he added, "you'd want to think of O'ahu."

Kim responded that a team of economists had addressed questions of scale and cost, but the project directive was to look at the land on Kaua'i first.

"A land perspective is different from economics," he said. If one were looking only for immediate financial returns, building houses would be the best use for the land, he said.

Kim added that he chose to look at Kaua'i first since there are really only two counties with enough land to be self-sufficient — Kaua'i and the island of Hawai'i. And with Kaua'i, "there is the leadership to make things happen," he said.

With regard to biofuels, Kim said his analysis did allow for some exports, but "it'll be hard to make \$12/gallon saleable."

State Department of Agriculture director Russell Kokubun agreed with Lim that although the statute directs each county to identify its own IAL, there was a need to look at things comprehensively. Lim suggested that the state could try to get some American Recovery and Reinvestment Act funds to do a similar assessment for the whole state. Kim, who said his agency had been approached by other counties, suggested it was unlikely a study of O'ahu's IAL would yield as good a result.

"On Kaua'i, there was a lot of public participation. ... I don't know on O'ahu if there would be interest to do this. Kaua'i still has a rural lifestyle," he said.

—**Patricia Tummons and Teresa Dawson**

Maha'ulepu from page 5

Maha'ulepu petition will sail through to approval by the Land Use Commission.

Yet as non-controversial as the Maha'ulepu petition may be, it raises an issue about the way in which the law may be used to advantage by landowners with designated IAL. Each year, under Act 233, the state Department of Taxation can issue up to \$7.5 million in tax credits against the cost of improvements made to enhance important agricultural lands. Landowners are allowed up to three years of tax credits. The maximum that may be claimed in the first year is 25 percent of actual costs incurred after July 1, 2008 or \$156,250, whichever is lower. In the second year, a landowner may claim the lesser of 15 percent of costs or \$37,500. The third year, the maxi-

mum is 10 percent of the costs or \$12,500, whichever is lower. The total over three years could reach as high as \$206,250. The credits do not have to be claimed in consecutive years. And, if the credits are more than what a landowner owes in taxes, the balance is paid outright to the taxpayer as a refund.

In January, the land that is the subject of the IAL petition was transferred to a newly created business entity, Maha'ulepu Farm, LLC, registered in Delaware. The previous owner was Visionary, LLC, registered in Virginia, an entity whose sole member is Ka Po'e Hana. All three companies are tied to Stephen Case, who purchased Grove Farm in 2000 and additional lands near Lihu'e a year later. Altogether, the Case holdings, collectively still known as Grove Farm, include some 40,000 acres on Kaua'i.

Does Grove Farm get one bite at the tax-credit apple, or can it receive as many nibbles as the different entities it establishes to hold various pieces of the 40,000 acres?

Act 233 states that the cost on which the tax credit is to be based "shall be determined at the entity level," and goes on to say for partnerships, estates, and the like, the "distribution and share of the credit shall be determined" under a section of the Hawai'i tax code, Section 235-110.7(a). But that section only repeats the same language: "The cost upon which the tax credit is computed shall be determined at the entity level," adding that "distribution and share of credit shall be determined by rule." The rule (18-235-110.7-11(e)) adds little, and neither the statute nor the rule speak to the issue of tax credits for subsidiaries of a larger entity.

—**P.T.**

Diverted Water from page 1

director of the Water Commission, noted that the system is fed from diversions on the Waimea River and that the DHHL has first claim on that water.

"If there were a petition to amend the interim instream flow standard of Waimea River, it could diminish the available water," he said, adding, "You need to have a conversation with DHHL."

Lee said that he had begun talking with the agency and agreed the ADC and DHHL needed to reach some kind of agreement on water allocation. Luckett said he was aware that "there is no project without discussion with DHHL."

Nakatani asked again whether the ADC needed to issue a water permit to PLP.

"That's a very good question. It's a big one," said Myra Kaichi, the deputy attorney general advising the board. Although she said the matter was too complex to discuss right then, she had talked with the state Department of Land and Natural Resources' Land Division and concluded that the ADC would probably issue a water lease.

ADC board chair Christine Daleiden said she wasn't comfortable approving the license, given the quagmire over water issues.

"If we go forward, what are we going forward with?" she asked.

Board member David Reitow countered that the ADC would not have answers to its water questions for a "very, very, very long time." In the meantime, time was slipping away for PLP to control the land surrounding its hydro facilities and be eligible for an exemption from the Federal Energy Regulatory Commission.

"We can stand in the quicksand or move forward," he said. "If we dilly dally, we could have a hydro that diverts water [away from our tenants]."

The board ultimately approved the license, although Tam abstained because the Water Commission, which sets stream flow standards, might become involved at some

point. The board voted with the understanding that when it decides on the water issue, whatever the board approves will have to go before the state Board of Agriculture. (Under the statute establishing the ADC, all "projects" approved by the ADC board must also get BOA approval. PLP's land license by itself, the ADC board decided, was not a project.)

Pac West's William Maloney says that after the ADC board's decision, his company re-affirmed with staff its interest in the 750 acres and will provide whatever updates or renewed application the ADC requires.

"Our position, and I believe what any objective observer's position would be, is that ADC's decision to provide both projects lands and therefore to facilitate more development, and potentially more employment and sustainable energy production, is a laudable decision. We are hopeful that ADC will subsequently make a positive decision to make the 750 acres available to our project, and we look forward to working with ADC, KAA and its members, including PL&P, in a cooperative manner should ADC decide to lease the remaining 750 acres to us," he wrote in an email to *Environment Hawai'i*.

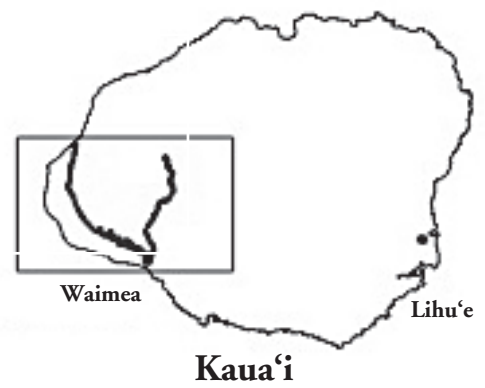
Turf War

At the April meeting, Tam at one point asked why KIUC chose to file its applications with the Federal Energy Regulatory Commission, since the allocation of stream water in Hawai'i normally falls under the jurisdiction of the Water Commission or the Board of Land and Natural Resources.

He said that decades ago, in response to proposals to develop hydropower on Kaua'i, the state opposed FERC jurisdiction over Hawai'i streams and prevailed, although efforts in the mid-1990s to get federal legislation passed that would once and for all exempt Hawai'i streams from FERC jurisdiction failed.

Even so, Tam said, "CWRM does not look favorably on FERC preemption of the state's instream instream flow standards."

Henry Curtis, executive director of the



non-profit Life of the Land, disagrees with Tam on this point. Although FERC jurisdiction is tied to interstate commerce, which doesn't seem to apply in Hawai'i, Curtis says under federal law, **any** hydro can be under the jurisdiction of FERC.

Gerald Sumida, the attorney representing PLP before FERC, believes that the issue of interstate commerce could arise in hydro-power cases in Hawai'i, but it depends on the nature of the project and whether navigable waters are involved.

"All of these things are really quite site-specific," he said.

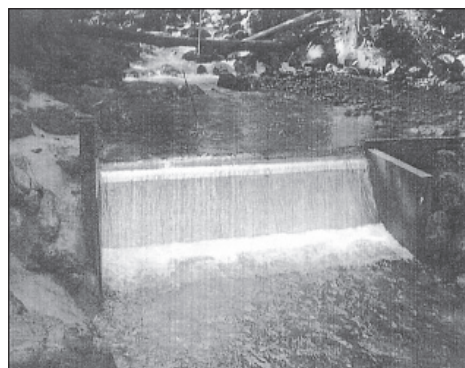
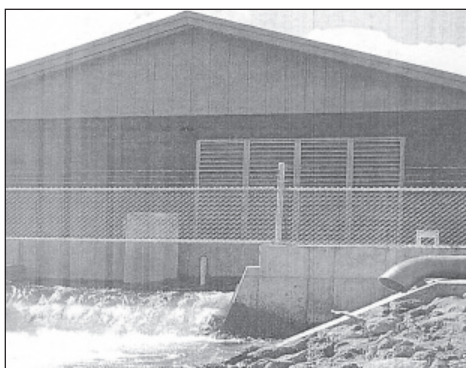
As of late April, the Water Commission had not chosen to intervene in any of KIUC's hydropower dockets with FERC. But according to Kaua'i resident Don Heacock, the DHHL and taro farmers who get their water from the Waimea River are looking to the Water Commission to make sure their needs are met by setting new flow standards.

"At a recent public meeting held by PLP, taro farmers made it abundantly clear they don't have adequate water right now. ... [The river] is seriously dewatered and it's affecting native o'opu (gobies) and 'opae (shrimp)," says Heacock, a biologist with the state Division of Aquatic Resources and one of some 250 people who have signed a petition asking KIUC to rescind its FERC applications.

"This is going to be precedent-setting at the state level," he continues. "The only two groups that have priority rights are kuleana landowners and [DHHL] beneficiaries. ... The broad question we need to address right away is: How can these public trust resources be managed and allocated to benefit Hawaiian beneficiaries and instream values of Waimea River?"

The DHHL did not respond by press time to inquiries about their future water needs. An agency representative at the ADC meeting did say he was glad discussions among the agencies were taking place.

With regard to water needed for agriculture in Kekaha, the ADC states in its motion to intervene in KIUC's docket for a hydro



PHOTOS: KIUC

KIUC examples of the kind of power house and diversion it plans to use for its proposed hydroelectric plants.

plant on the Kekaha ditch, "The priority status afforded to the holder of a preliminary permit could bind the hands of the ADC and interfere with its decisions on further development and improvement in Kekaha for no other reason than the fact that [KIUC] holds such a permit. This project proposes to take water 'not needed for irrigation' which flows through ADC's Kekaha Ditch, generate hydroelectric energy, then direct the used water away from the Kekaha Ditch to the Waimea River."

The question of how much of the water being diverted from the Waimea River is wasted by KAA tenants is a crucial one, Heacock says. "The vast majority of what's being diverted is not used. It flows right into the ditches and out to the ocean," he says.

According to one government official, only about a quarter of what's diverted is used for agriculture.

Environmental Concerns

KIUC's decision to use FERC has a lot to do with protecting the company's investment, president and CEO David Bissell told the Hawai'i Economic Development Task Force last month.

"People can't step in front of you and do the same project," he said.

The FERC process, which provides a "known" timeline and an independent per-

spective, is perhaps "the only avenue to actually getting a hydro project done," he added. The company's agent, Free Flow Power, also "knows FERC inside and out."

Once FERC issues a permit, Heacock says, "FERC law trumps all state and all county law. ... They [KIUC] can actually condemn land."

Currently, Kaua'i spends \$80 million a year on oil and KIUC is aggressively trying to develop more renewable energy. Bissell told the task force that in two years Kaua'i will have the highest concentration of solar panels in the world, but because of endangered species concerns, "wind is effectively off the table," Bissell said.

The company's goal to use 50 percent renewable energy in as few as five to seven years relies heavily on hydropower, which could generate as much as 25 megawatts of electricity. Even though the FERC process seems to place KIUC in a good position among competitors, Bissell is aware of the difficulties ahead.

"It's gonna be a real challenge to get them done. There's a lot of push-back on Kaua'i, people thinking we're going to build dams," he said.

The U.S. Fish and Wildlife Service also sees the potential for harmful environmental impacts. Paula Levin of the FWS's Ecological Services Division says her agency has provided FERC recently with some "pretty lengthy and explicit comments" regarding the protection of native species.

Levin, who likens the recent flurry of hydropower proposals to a feeding frenzy, says, "We want to make sure these [projects] avoid impacts as much as possible or mitigate them if impacts are unavoidable." The FWS has asked FERC to require all hydropower applicants to assess cumulative impacts not only in the affected watershed, but island-wide, including impacts of transmission lines on native seabirds.

"The workload is phenomenal that's produced by these applications. We're trying to make sure we don't miss anything, that threatened and endangered species are not harmed," she says.

Heacock also worries about the effects on native habitats. "Anything that is cement, crosses the river side-to-side and takes surface water has a negative impact on animals," he says.

In its comments to FERC on the Kitano project, the FWS states that the project "could cause significant alteration of substrate and increased stream sediment that could disrupt or deter fish spawning and other aquatic fauna reproduction, and impair aquatic habitat diversity."

Several candidate, threatened, and endangered species, including several waterbird and

seabird species, the Hawaiian hoary bat, and the Hawaiian goose, have been seen in or are likely to occur in the project area, the FWS states.

Levin adds in an email to *Environment Hawai'i*, "What we did not point out very strongly in the Kitano letter but will point out in the Kekaha letter (as in the proposal that will use the existing Koke'e ditch system) we are concerned that these projects where water is not being used for production of hydroelectric or being used for irrigation should be considered to be put back in the streams for survival of native species. Although this concern might be perceived as an overall water allocation issue that the state licensing should address, we are also concerned for the conservation of habitat needed for native stream species."



Green Energy Secures Kalepa Land License

After the vote, Green Energy Team, LLC president Eric Knutzen wanted to take a picture of the board members to commemorate the culmination of five years of sometimes difficult negotiations to get his biomass project off the ground.

On April 7, the ADC board approved a 22-year land license to Green Energy for 1,000 acres in Kalepa, Kaua'i. Under the terms of the license, Green Energy may negotiate a 10-year extension.

Ron Agor, the Kaua'i member of the state Board of Land and Natural Resources who had shepherded the collaboration between the land's existing tenants and Green Energy, sat by his side in support.

Green Energy, which plans to chip and burn albizia and eucalyptus to make electricity, signed a power purchase agreement with the Kaua'i Island Utility Cooperative in January to provide 7 megawatts of firm power. German boiler and power system manufacturer Standardkessel Baumgarte is a major equity partner in Green Energy.

The company had first sought a permit for its project from the Land Board in 2007, but was initially rejected because of its plans to use invasive albizia trees as its feedstock. After consulting with the state Division of Forestry and Wildlife, the company agreed to harvest the albizia already on the property and use a non-invasive species of eucalyptus as its biomass source.

In 2008, The Land Board voted to transfer its agricultural lands at Kalepa to the ADC.

— **Teresa Dawson**



For Further Reading

The following related articles are available at our website, www.environment-hawaii.org:

- ◆ "Board Defers on Plan to Grow Albizia for Fuel," BOARD TALK, January 2008;
- ◆ "Farmers Make Room for Green Energy," BOARD TALK, August 2008;
- ◆ "Agribusiness Subcommittee Approves Renewable Energy Project at Kekaha," October 2010;
- ◆ "Agribusiness Committee May Reconsider Rejected Biofuels Project at Kekaha," January 2011
- ◆ "Energy Projects Dominate Discussion Before State Agribusiness Board," March 2011.

Concerns Over Lack of Access Halt Efforts To Build Light Industrial Park in Nanakuli

Tropic Land, LLC has failed to persuade enough members of the state Land Use Commission to approve a boundary amendment allowing for the company's proposed light industrial park in Lualualei Valley in West O'ahu.

On April 21, the LUC voted 5-3 to approve Tropic Land's petition to change the district boundary of 96 acres in the valley from Agriculture to Urban. Six votes are needed for a boundary amendment.

The decision came a day after the Honolulu Planning Commission concluded its public hearings on proposed revisions to the Wai'anae Sustainable Communities Plan, including a recommendation by the city Department of Planning and Permitting to place the proposed industrial site in the urban zone. The commission promised to vote on the plan this month, after commissioners have had a chance to review all written testimony.

Tropic Land has not yet decided whether it will file a motion with the LUC for reconsideration, company attorney William Yuen said late last month.

Last Words

During final arguments to the LUC, Yuen stated that the company's proposal met the LUC's criteria for Urban designation and that the Leeward Coast's productivity would suffer without more industrial land.

With regard to cultural impacts on the area, which is held to be the birthplace of the Polynesian demigod Maui, Yuen noted that testimony by witnesses for the Concerned Elders of Wai'anae spoke mainly about the general landscape's cultural significance. Although the property was said to provide pathways to other significant cultural sites, none was ever identified.



Tropic Land, LLC project manager Arick Yanagihara (right), seated next to supporter Kimo Keli'i, listens to public testimony at the Honolulu Planning Commission meeting last month.

"We're not in a position where we know we have to set aside a certain path," Yuen said.

Whether or not the land is suitable for farming was a subject of great debate throughout the hearings. Tropic Land representatives argued that the land was too rocky and that the last farmers who cultivated the land produced mediocre crops and struggled to make money.

On April 8, Yuen reiterated, "This is not the greatest land in the valley." He later reminded the commission that the land is currently zoned for golf course development.

(Tropic Land has already agreed to provide a local non-profit organization with about eight acres of land in the valley — with similar soils — for an agricultural incubator that would provide training for homeless families in the area.)

Dawn Takeuchi-Apuna, corporation counsel for the Department of Planning and Permitting, offered only one recommendation to the commission should it decide to redistrict the land: before the city rezones the parcel, Tropic Land must have a signed agreement with the U.S. Navy for access along Lualualei Naval Access Road.

She also noted that there is no guarantee that the city council will approve the Wai'anae Sustainable Communities Plan as proposed.

Bryan Yee, the deputy attorney general representing the state Office of Planning, also had no objection to Tropic Land's proposal, but listed several outstanding issues that would need to be resolved for the project to proceed.

First was the issue of access. Yee noted that the narrow, winding Hakimo Road, which currently provides the only legal access to the parcel, is not suitable for the truck traffic that is expected to be generated by the baseyard. Although Tropic Land's Traffic Impact Assessment Report for the project is based on the assumption of access along Lualualei Naval Access Road, as of the LUC's April 8 meeting, the company was still negotiating with the Navy on a long-term easement.

The OP has suggested that the LUC approve the boundary amendment with the condition that Tropic Land secure a long-term easement for at least 30 years before applying to the city for a zone change and within five years of the LUC's decision.

The OP also recommended that, if a long-term easement is issued, the currently unimproved road be maintained to city or state standards, something Tropic Land has argued against.

With regard to the upgrading and maintenance of the road, Yee noted the OP's concern that Tropic Land had also failed to reach an agreement with other landowners that have access easements with the Navy.

"There are talks, but no agreement," Yee said. One possible sticking point is the cost. Yee noted that Tropic Land's estimated \$57,000 in annual maintenance costs is higher than the existing license fees paid by the road's tenants, which include the PVT construction and demolition landfill and waste recycler Pine Ridge Farms.

Yee continued that Tropic Land has also failed to agree with the state Department of Transportation on who should pay for road improvements at the intersection of Farrington Highway and the Navy road. Tropic Land has argued that since the DOT is already working on similar improvements along Farrington and because they're needed with or without the baseyard, the company should be required to pay only its fair share of costs. The DOT, however, has taken the position that Tropic Land is obliged to pay all costs for improvements at the intersection.

Finally, the OP recommended that Tropic Land's proposal be consistent with the Wai'anae Sustainable Communities Plan within five years of the commission's decision.

If Tropic Land failed to meet the deadlines proposed by the OP, "[r]eversion should remain a real option. The petitioner says they're close. If they are, great. These conditions shouldn't be a problem," Yee said.

A Rebuttal

The Concerned Elders of Wai'anae, which opposed the petition, feared that allowing the light industrial park to be built would encourage the urbanization of the surrounding area and be used to justify a landfill at Nanakuli B, according to their attorney Marti Townsend.

Townsend pointed out that the PVT landfill and Pine Ridge Farms — two industrial operations that Tropic Land, the city and the OP have used to justify the redistricting of the Tropic Land parcel — are similar examples of urban spot zoning.

Despite Yuen's argument that the project fits within the Urban designation, Townsend argued that property is not remotely "city like," since it's relatively isolated and surrounded by agricultural land.

She continued that the Tropic Land parcel is more than twice the size of PVT and Pine Ridge combined.

"[This] would be a significant addition of industrial land," she said, adding that increased industrialization would change the quality of stormwater runoff entering

Ulehawa Stream, possibly impacting those who gather fish and limu where the stream empties into the sea. She also argued that the project's cultural assessment was inadequate.

Finally, she suggested that Tropic Land's characterization of the farming that occurred on the land was inaccurate, referring to evidence that the last farmers there, the Arakis, were highly productive and would have continued farming had the rent not been raised and the land sold to a golf course developer.

Mixed Feelings

When it came time to deliberate, the commissioners seemed less concerned about the cultural, food sustainability, and urban-creep issues raised by the Concerned Elders and focused almost exclusively on access to the Navy road.

The lack of a long-term easement from the Navy and a maintenance agreement with the road's tenants, as well as a failure to resolve the DOT's traffic concerns had convinced commissioner and Maui developer Charles Jencks that a boundary amendment was not warranted.

"It seems to me this commission shouldn't be in the business of awarding boundary amendments to projects with issues like this," he said as he made a motion to deny the petition.

Ronald Heller, who seconded the motion, added, "It's premature to start defining all of the other conditions [of the boundary amendment] until the petitioner gets access. I'm not saying it should be denied forever, but they need access first."

Townsend told *Environment Hawai'i* that even if the LUC approves the Tropic Land petition with OP's recommended conditions, nothing prevents trucks from using Hakimo Road. One landowner in the area erected a gate to block vehicles from cutting through her property from Hakimo to the Navy road, but the gate has been repeatedly cut by trespassers. Building something that will drive more traffic to the Navy road will only make things worse, Townsend said.

While Jencks and Heller voted in favor of the motion, Nicholas Teves, Duane Kanuha, Kyle Chock, and chair Vladimir Devens opposed it. Commissioners Lisa Judge and Thomas Contrades did not attend the meeting. Commissioner Normand Lezy, who had expressed concern about access in previous meetings, did not arrive in time for the vote.

Given that a unanimous decision by all six commissioners present on April 8 was needed to decide on the petition, the commissioners made no further motions and decided to try again on April 21.

One Vote Shy

On April 21, when Teves asked what progress had been made toward acquiring access, Yuen reported that the Navy now wants to turn its road over to the city, if and when Tropic Land and other easement holders upgrade the road to city standards. City ownership of the road would provide permanent access, he said.

Takeuchi-Apuna said she could not comment on the city's position since this was the first she had heard of the Navy's new proposal. Townsend objected to the information being allowed into the record, since the evidentiary portion of the hearing had closed weeks ago.

In the end, after an executive session, Devens recommended that the commissioners not consider Yuen's statements that day in their deliberations.

Kanuha made a motion to approve the petition on the condition that, before rezoning by the city, Tropic Land secure a long-term agreement for use of the Navy road. He also included several other conditions regarding stormwater management, energy conservation, and access rights, among other things. Teves seconded the motion.

Lezy warned the commission that making something as fundamental as access a condition of approval could become a nightmare if it's not met and the commission decides to revert the property to the Agriculture District.

"I don't think we need to look any further than the next docket matter [the Villages of 'Aina Le'a] to understand the Pandora's box that's opened when the most viable option is to revert...," he said. "I would ask any commissioner inclined to support the motion as stated to provide me with some explanation why I should take comfort ... that this is going to work."

Jencks said he might support Kanuha's motion if the deadline to get access was cut to two years. Although Kanuha said he was not opposed to that, he did not amend his motion.

When it came time to vote, Kanuha, Devens, Chock, Contrades, and Teves voted in favor of the motion; Lezy, Jencks, and Heller opposed it. Commissioner Lisa Judge did not attend the meeting.



Lawsuits Fly Over 'Aina Le'a Reversion

If you don't [reverse your decision], you're going to leave half-built buildings on the hillside like tombstones," Kona real estate agent Gretchen Lambeth told the LUC on April 8.

Lambeth was one of several members of the public who testified that day in support of the

Villages of 'Aina Le'a housing project, which was in danger of losing for good its Urban land use designation because its developers had, among other things, failed to build 385 affordable units by November 17 of last year.

They argued that the project would generate construction jobs and provide much-needed homes and recreational space for families in the area. And with regard to missing deadlines, Lambeth, who helped build developments at Waikoloa and Hokuli'a, said, "That's the big joke in the construction industry."

But it wasn't a joke to the LUC, which voted in January to revert the 1,060-acre site to the Agriculture District and on March 11 accepted proposed Findings of Fact, Conclusions of Law and Decision and Order supporting that decision. The decisions came after years of broken promises by the project's various developers and more than 20 years after the land had been placed in the Urban District.

Landowners Bridge 'Aina Le'a and DW 'Aina Le'a Development, LLC immediately sought to stay that decision, filing objections with the LUC on March 24.

"Regardless of how much bad blood has been spilled in this proceeding, there remains one last opportunity to resolve this dispute amicably, in the best interests of the citizens of west Hawai'i," Bridge's attorneys wrote in their objections.

But on April 7, before the LUC had a chance to rule on their objections, the companies filed appeals in Circuit Court, Bridge in the First (Honolulu) and DW in Third (Hawai'i island). In addition to the LUC, the companies included each other and the state Office of Planning as defendants. DW also named the County of Hawai'i Planning Department.

On April 21, the LUC denied motions by DW 'Aina Le'a to amend conditions of its Urban designation and reconsider its decision to revert the property. It also voted to accept its final FOF, COL, and D&O.

We Object!

In their filings to the LUC and the courts, DW and Bridge made several similar arguments, mostly that the LUC made numerous procedural errors in its initiation of an Order to Show Cause why the land should not revert and in its eventual decision to place the land back in the Agriculture District. They challenged the commission's ability to set deadlines on the completion of the affordable units, as well as to revert the land with only five votes. (Six votes are normally required for a boundary amendment.)

Not only did the OSC proceeding hinder DW's ability to obtain financing, they continued, the LUC's decision to revert the property

will have an impact on construction financing on all future projects subject to LUC decisions.

Bridge added that the commission was treating the Villages of 'Aina Le'a differently from similar projects, pointing out that in at least seven other LUC dockets that required the construction of affordable housing, the petitioner has failed to build a single unit. They include developments at Kohanaiki, Royal Kunia Phase II, Kaloko Heights, Wailani, Honua'ula, Waikoloa Heights, and the Kuilima Resort expansion.

DW stated that it has spent more than \$26 million on construction and infrastructure, "including 40 affordable housing units, purchasing the wastewater treatment plant system, preparing necessary engineering plans, grading and grubbing ..."

Although the units lack basic infrastructure such as water and electricity, Bridge pointed out that, with regard to 16 units that had to be completed by March 2010, the LUC's condition did not define the term "complete."

Despite the arguments made, DW president Robert Wessels was apologetic at the LUC's meeting on April 8.

He noted that the LUC had allowed his company to try to meet its deadlines, even though some commissioners were skeptical. "We did not have enough control over the items to complete ... our commitments," he admitted.

His attorney, Alan Okamoto, added, "We've learned to be very careful about promising too much."

Bridge's attorney, Bruce Voss, on the other hand, began with a warning that the LUC's decision would stop construction financing. He later added that the decision would also place a huge liability on the state at a time when it can hardly afford it.

"The only question is what the final price tag will be," he said, adding that it would probably be in the eight-figure range.

Referring to the LUC's position that it did not need six votes because it was voting on an OSC, not a boundary amendment petition, Voss said, "If you call a pig a goat, that doesn't make it a goat. It's still a pig. ... Does the proposed Decision and Order comply with the statute? No. The plain truth is, it doesn't even try to."

Finally, he asked the commission to think about whether the point it was trying to make about the importance of following conditions was worth the "financial catastrophe" it would cause.

Conflict Accusation

On April 21, commissioner Duane Kanuha made a motion to amend the condition related to affordable housing so that the developer no

longer had to provide certificates of occupancy for its completed units. He noted that the county rezoned the land as urban in 1993 and argued that the county, and not the LUC, should take the lead in determining when and how affordable units should be built.

"This is clearly in the county's ballpark," he said.

Commissioner Ronald Heller, on the other hand, believed that it was the commission's responsibility to enforce conditions it places on boundary amendments.

"If we give it all to the county.. we [land use commissioners] should all go home," he said.

Kanuha's motion failed 3-5, with Kanuha, Charles Jencks, and Nicholas Teves the only members voting in support. A subsequent motion by Heller to deny DW's motion to reconsider passed, 5-3, with commissioners voting along the same lines.

When it came time to vote on whether to accept the final FOF, COL, and D&O, Voss interjected, requesting that chair Vladimir Devens recuse himself from voting because Devens' law firm - Meheula and Devens, LLC — had represented Hale Wailani Partners, LP, which sued Bridge 'Aina Le'a in 2001. Voss speculated that the litigation, which ended in 2003, probably resulted in some \$200,000 in fees for the firm.

"The chair received direct financial benefit," Voss said.

Lezy asked Voss to explain how Devens had a "personal pecuniary interest" in the reversion of the land for failure to meet a 2005 condition of the Urban designation.

"All of the dealings you discussed occurred prior to that," Lezy said.

When Voss suggested that it was a thin read of the state's ethics rules and statutes to make

a distinction between past and future benefits, Lezy said, "I guess I disagree on what a 'thin read' is."

After an executive session, Devens said it did not appear he needed to recuse himself. He said he had called his firm's office and it didn't appear that Hale Wailani is a current client. Devens added that Voss should have raised his concerns before the commission voted on the other motions.

"If I thought for a second that I could not remain impartial ... I would have recused myself," Devens said. Yee and Takeuchi-Apuna, as well as the rest of the commissioners, expressed no concern about Devens' participation.

Heller then made a motion to approve with several amendments reflecting the fact that the 385 affordable units were supposed to have been built in the petition area and that no offsite units were to have been credited against that total.

Conrades said he was supporting the motion because, from his very first meeting as a commissioner until now, members of the public repeatedly testify in support, citing job and housing opportunities, the commission gives the developer another chance to make good on its projections, and nothing happens.

"There comes a time when you have to decide when something is right and something is wrong. ... I personally cannot continue to say I support it," he said.

With Teves switching sides at the last moment, Heller's motion passed, 6-2.

After the vote, Hawai'i County planning director Bobby Jean Leithead-Todd said the property owners will likely be consulting with their attorneys. — T.D.



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Tsunami in Northwest Islands Highlights Need For Emergency, Climate Change Plans

I'm sure there will be a next time," said David Swatland of the Papahānaumokuākea Marine National Monument.

At last month's meeting of the Northwestern Hawaiian Islands (NWHI) Marine Ecosystem Reserve Advisory Council, Swatland described some of the lessons learned from the March 11 tsunami event that killed some 110,000 Laysan albatross chicks on Midway atoll alone.

For one thing, the modeling that determines the run-up of tsunami waves may need some improvement. The waves that hit Laysan atoll ran 20 feet up the beach, which was higher than expected, he said.

"There's a lot more information we can get on modeling impacts on atolls and islands. ... We were lucky this time. We had a little bit of time to prepare. If it happens off the Big Island, we're not going to have which was time to prepare at all," he told the council.

Swatland said there needs to be a monument emergency response plan and his office is looking to hire an outside contractor to develop one.

One area that may need special attention is communication. Swatland said that during the event, there was an information overload.

"There were a lot of extra communications that could have been avoided," he said. Cell phones were not very reliable and only one third of the monument staff has a land line. Although email helped, Swatland said the lines of communication weren't as direct as they should have been.

"I was getting updates from Washington DC about what's going on" in the Northwestern Hawaiian Islands, he said.

Reducing other stresses on the environment so that it can be more resilient is another goal, he said.

A number of researchers and managers have said that the effects in the NWHI seen from the tsunami are similar to what might be expected from climate change.

On Midway, planes could not land for a whole day because tsunami waves had inundated the runway with debris, said Ray Born of the U.S. Fish and Wildlife Service. He also said the atoll's breakwater and seawalls were breached and waves reached Midway's water and fuel tanks.

"Infrastructure protection at Midway is a big deal for the Fish and Wildlife Service," he said. "The run-up we're seeing from this event gives us an idea of the impacts of the three-to-five foot rise [in sea level] expected in the coming century," Born said.

Dan Polhemus, also with the FWS, pointed out that sea level at Midway is currently rising five millimeters a year, three times as fast as it is at O'ahu.

"We probably ought to plan for at least a three-foot scenario. A lot of our proposed translocation zones ended up being unin-



A group of albatross chicks on Eastern Island were spared.

dated. It was a good wakeup call of the potential vulnerability of those sites," he said.

The Intergovernmental Panel on Climate Change keeps revising its models, he added. Sea level rise was initially project to be three feet, but "we keep pushing the upper end of the carbon envelope. ... There is a school of thought that five feet might be more likely," he said.

Polhemus also noted that the tsunami inundation of the uncapped, PCB-contaminated dump on Kure could happen on Midway and French Frigate Shoals, which also have dumps.

Restoration costs from the March event are likely to be between 55 million and 60 million dollars, Born said.

At some point, climate change may make some Northwestern Hawaiian Islands too dangerous to host researchers.

"That's a risk management decision," Swatland said. "If these things [storms and high waves] become very frequent, we're going to have to decide if it's worth the danger to these folks."

On Midway, for example, if trees hadn't caught the debris swept in by the tsunami, it would have gone right through the FWS camp, Born said.

—T.D.



Short-tailed albatross chick survived the tsunami.

PHOTOS: PETE LEARY / USFW



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