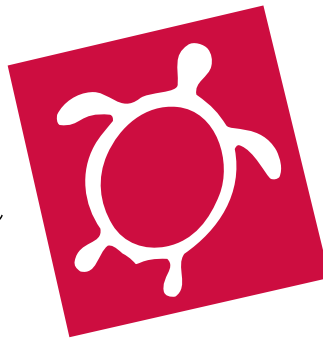


Environment



Hawai‘i

a monthly newsletter

Power Play

Was the Department of Land and Natural Resources played by a would-be energy entrepreneur?

The closer one looks at the circumstances surrounding the development agreement that the department entered into with several companies promising to build a renewable energy park in ‘Ewa, O‘ahu, the more that conclusion is hard to avoid. Our cover story examines closely the way in which plans for the development have morphed and the seemingly divergent representations made by the companies involved to the DLNR and Hawaiian Electric.

Also in this issue, we review recent actions of the Board of Land and Natural Resources and recap the Intermediate Court of Appeals’ decision upholding Kaua‘i County’s revocation of permits to the controversial Hanalei boatyard.

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Mahalo!

Developers, HECO Prepare To Battle Over 2013 Rejection of ‘Ewa Solar Farm

At worst, if the companies behind a proposed renewable energy park in ‘Ewa, O‘ahu, can’t pull it off, the state Department of Land and Natural Resources loses half a million dollars in delinquent and potential development fees.

Given the ongoing dispute between those companies — PSP III, LLC, Investricity, Ltd., and West Wind Works, LLC — and Hawaiian Electric Company over whether the project is eligible for a waiver from the utility’s competitive bidding process, it’s unlikely the DLNR will see that money any time soon, if ever.

On December 22, the companies filed a petition for a declaratory order with the state Public Utilities Commission seeking to overturn HECO’s refusal in 2013 to exempt their renewable energy proposal from the competitive bidding process.

The companies plan to build a large-scale solar farm on 110 acres of state land known as the former ‘Ewa feedlot and argue that HECO mistakenly determined that they lacked site control and were, therefore, ineligible for a waiver.

Their petition asks that the PUC order HECO to reconsider, “in good faith,” supporting a waiver for the project and to provide a status report to the PUC once a month.

In its motion to intervene filed last month, HECO counters that not only did the companies not have site control, they improperly changed the project’s size and scope.

Despite being heavily redacted, PSP’s petition exhibits, coupled with the DLNR records regarding the many modifications to the development agreement for the site, suggest that HECO may be right.

In the Beginning ...

When the DLNR and West Wind Works

(3W) first entered into a development agreement for the O‘ahu site in November 2010, the company agreed to pay \$345,000 a year in development fees. Any delinquent fees would accrue interest at a rate of 1 percent a month and incur a service charge of \$50 a month.

The agreement envisioned an O‘ahu Renewable Energy Park that consisted of a 5 megawatt (MW) wind to hydrogen facility, a 5 MW biomass plan, and a minimum 5 MW solar farm.

3W was to have a draft environmental assessment published by October 31, 2011, and obtain a Finding of No Significant Impact by August 31, 2012. The agreement also set deadlines for 3W to secure or apply for various government and utility approvals, including a deadline of July 31, 2012, to obtain power purchase agreements for the various park components, and a deadline of January 31, 2013, to get PUC approval of those agreements.

If and when 3W published a final EA and FONSI, obtained state approval of a final development plan, obtained all land use entitlements and other required approvals, agreed on a lease rental amount, and submitted evidence of adequate financing, then the DLNR would issue a lease to the company. The term of the lease would not exceed 65 years.

That development agreement was to expire on December 31, 2013.

By March 2011, 3W had already begun to fall behind on payment of its development fees. More than a year later, despite having paid some \$260,000 in fees, the company was \$385,000 in arrears and had also failed to meet several of its development benchmarks.

Threatened with termination of the
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Environment



Hawai'i

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NEW AND NOTEWORTHY

Cycle City: Honolulu's King Street now has a dedicated bicycle lane, and, if all goes according to plan, it will soon have its own bikeshare program, financed through the Department of Health's Healthy Hawai'i Initiative.

Last month, the Chronic Disease Prevention and Health Promotion Division of the DOH, which administers the Healthy Hawai'i Initiative, asked the state procurement officer to approve a bid exemption request for the program.

According to the bid exemption request, the agency had sought expressions of interest from bicycle vendors and organizations that encourage bicycle sharing, operate such share systems, or provide equipment for bicycle sharing.

"Only one response was received by the deadline," the DOH stated, and that was from



A bikeshare station in Paris.

Bikeshare Hawai'i, a tax-exempt organization formed early in 2014 to promote a bikeshare system in Hawai'i.

The request for bid exemption states that the system will follow the outlines of a plan developed by the City and County of Honolulu a couple of years ago. That plan, said to have been endorsed by then-Governor Neil Abercrombie and Mayor Kirk Caldwell, called for "a scalable public/private business model." A non-profit organization, the DOH stated, "would contract with a private operator for the bike share that would carry the liability, and the organization would rely on a combination of public, private, and grant funding."

News reports last year said Bikeshare Hawai'i was anticipating a system of around 1,700 bicycles at 180 stations around Honolulu.

A pilot bicycle-sharing program, Hawai'i B-cycle, was launched in Kailua, O'ahu, in 2011. It, too, was underwritten by the DOH Healthy Hawai'i Initiative. About a dozen bicycles were deployed at two stations in Kailua town.

Recently, the operation shut down. A statement posted on its now-defunct website notified readers that Hawai'i B-cycle "is temporarily closed as the program transitions to new management."

Dismissed! Charles Barker III, involved with several companies that are seeking to import biofuels to the Big Island, has had his federal court case against former business partners dismissed.

The lawsuit, filed in May 2013, alleged any number of illegal and unethical acts by companies and individuals with whom Barker was involved in an effort to develop a wood products facility near Honoka'a, on the Hamakua Coast of the Big Island.

Judge Leslie E. Kobayashi dismissed his case two times without prejudice, allowing Barker the opportunity to perfect his legal claims. Barker's third filing was rejected on October 24, with prejudice, when Kobayashi granted the defendants' motion to dismiss.

As *Environment Hawai'i* reported last month, Barker filed a request for reconsideration as well as a motion to have Judge Kobayashi be disqualified from the case.

In December, Kobayashi issued an order dismissing the request that she be disqualified, and on January 13, she signed the order denying Barker's motion for reconsideration of his third amended complaint.

Back in Business: Hu Honua Bioenergy, the company that is attempting to convert the old Pepe'ekeo Sugar mill into a state-of-the-art biomass-fueled power plant, has reached an agreement with Hawaiian Dredging Construction Co. Hawaiian Dredging, which had claimed in lawsuits to be owed some \$35 million in unpaid labor and equipment charges, reached an out-of-court settlement with Hu Honua in December.

In mid-January, work resumed at the site, just north of Hilo.

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Quote of the Month

*"[T]he rule of law, it had sharp edges.
... Part of our role here is not just to say,
'This is the law.'
Part of our role is
to smooth off the edges a bit."*

— Stanley Roebig,
Land Board

BOARD TALK

Land Board Approves Lease For Hawai'i County Wind Farm

The state Board of Land and Natural Resources has agreed to forgo nearly half a million dollars in rent over the next ten years so Hawai'i island residents can save money on their water bills and the county can reduce its reliance on fossil fuel.

On January 9, the Land Board adopted a recommendation from the Department of Land and Natural Resources' Land Division to grant the Hawai'i County Department of Water Supply a lease for about 84 acres in South Kohala and to approve a 20-year sub-lease for roughly half of the area to the Lalamilo Wind Company.

The company has an agreement with the county to build and operate a 3.3 megawatt, five-turbine wind farm on the site. The electricity produced will run pumps that serve the Lalamilo-Parker well system, which can produce up to 5 million gallons of water a day.

According to a June 2014 draft environmental assessment, the wind farm, called the Lalamilo Repowering Project, is expected to provide 75 to 80 percent of the system's pumping energy demands, "thereby saving the water customers approximately \$1 million per year at today's electrical rates."

"Additionally, the project would contribute to the state's Clean Energy Initiative goal that at least 40 percent of the state's energy be supplied by renewable resources by year 2030," it states.

The Land Board approved the project, in concept, in February 2011 and had originally planned to charge the county fair market rent. But when an appraisal determined it to be \$56,000 a year — far more than the \$6,600 the county had paid under a previous lease — the county asked the DLNR for a break.

Having obtained a letter of commitment

from the county that energy savings would be passed onto consumers, the Land Division recommended a reduced lease rent of \$6,600 a year.

At-large Land Board member Chris Yuen asked whether there was any chance the county or Lalamilo could sell excess power to the Hawaii Electric Light Company (HELCO).

Hawai'i DWS deputy director Keith Okamoto said his agency had no intention of selling excess power to HELCO. With the utility, renewable energy projects get placed on a queue and the wind farm would be at the bottom, he said. Given the number of projects ahead of it, "we would probably never make it through the queue," he said.

He added that the water department intended to use all of the power produced because all five turbines would probably not be operating all the time.

Although Land Division administrator Russell Tsuji said his division planned to require the county to post a bond, possibly up to \$500,000, to cover the cost of removal of the turbines at the end of the lease, Yuen convinced him that that might not be necessary with a public agency as the lessee.



Board Grants CDUP To O'ahu Moi Farm

On December 12, the Land Board granted a Conservation District Use Permit to Mamala Bay Seafood, LLC, which plans to grow moi in 10 mariculture cages off the Honolulu International Airport's reef runway. The cages will be located on 75 acres of

the runway's borrow pit.

The state Department of Transportation, which controls 60 acres of the site, initially expressed concern over the farm's potential to attract birds so close to the airport. The remainder of the acreage is under DLNR control.

As of the Land Board's meeting, DLNR Office of Conservation and Coastal Land administrator Sam Lemmo said he had not yet seen a final letter from the DOT indicating its support for the project.

In any case, the CDUP's conditions state that if and when Mamala Bay secures its 75-acre ocean lease for the area, it must have DOT approval, as well.

Regarding potential environmental impacts, Lemmo told the Land Board that avoiding entanglements with marine mammals and maintaining water quality won't be a problem for the farm.

"The currents are so powerful," he said.

The only real concern is the farm's effects on the ocean floor, because debris from the cages settles on the bottom and "creates an anaerobic type of situation, where it kind of changes the nature of benthic [community]," he said.

"Basically you've got some sandy bottom, got some worms in it. The sand turns a little darker," he said.

When Land Board member Chris Yuen asked whether the DOT's security concerns were overblown, Lemmo replied only that, "if the DOT doesn't want this to go, its not going to go. ... I didn't want to be the person to decide whether there was an avian issue or not."

MBS's Randy Cates explained that he knew his original concept for the farm, to use floating cages, would raise issues about birds and airports. After discussion the issue with airport and Federal Aviation Administration representatives, "they said if you can submerge it, the bird issue is gone," Cates said.

With the cages now to be submerged, "verbally they told us everything is okay," he said, adding that no letter has been forthcoming because the DOT has been waiting to see who Governor David Ige will appoint to head the department.

Because of the area's high water movement and its shelter against storms, "this is the best location hands down for aquaculture of this sort," Cates said. Cates, who established the state's first commercial open-ocean aquaculture farm, said he has been looking for a site since around 2005.

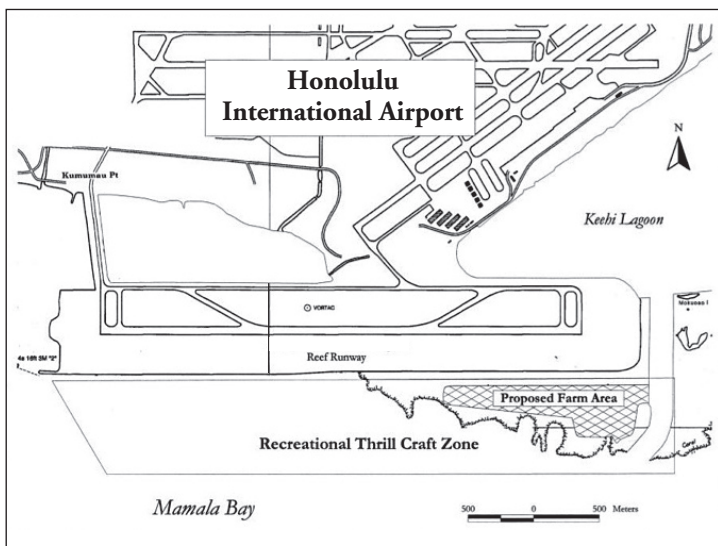
Despite the benthic effects, Cates suggested that the fish farms are actually good for corals.

"I do a lot of coral reef repair work," he



Site of the previous Lalamilo wind farm operations building.

PHOTO: FINAL ENVIRONMENTAL ASSESSMENT



said. "On our first lease [for the moi farm started by Cates International], corals were an unknown. We found over 10 years, fish farms were so good for corals, we were taking corals off the farm and using them to replant reefs."

For this farm, the National Oceanic and Atmospheric Administration and the state will have an opportunity to harvest corals," he said.

Yuen asked Cates about the use of antibiotics and hydrogen peroxide to treat the fish.

"I've never had to use antibiotics or hydrogen peroxide. If you raise a fish with big scales, it does far better than with small scales. With moi, there's no issue. Kahala, salmon, yes," he said. "The main reason I chose moi, it's so robust in the ocean."

He added that if he ever needs to treat his fish, he will have to obtain the proper approvals.

"I hope I never have to," he said. "The simplest answer is simply eradicate the fish if you have a problem."

In addition to obtaining Land Board and DOT approval of a lease, MBS also needs the Land Board to amend its rules to lift the "thrill craft recreation area" designation that encompasses the site. (For additional background on the MBS project, see the article in the August 2014 *Environment Hawai'i*, "Kona Mariculture Proposes Expansion, While Moi Operation Seeks O'ahu Permit.")



Maui Lay Net Violation Moves to Contested Case

Despite arguments from Hawai'i island Land Board member Stanley Roehrig that the case should be dropped altogether,

could not pursue a civil violation against Valdez because a Circuit Court judge had already found him innocent. (Valdez's son had testified in October that his father, who he said speaks little English, simply misunderstood the DLNR's rules as they were told to him and believed he was actually following the rules.)

Roehrig argued in October and, again, in December, that this was a case of double jeopardy.

At the December meeting, Roehrig, an attorney, cited a Supreme Court case supporting his position.

"The double jeopardy clause will bar the second sanction if both are deemed punishment," he said. And although he said he could not find a Hawai'i Supreme Court case that says a civil penalty is a punishment, he said he believed "a fine is just as much a punishment as confiscating someone's fish and cutting them up. You delay the time the guy has to sell it, the expense to pay to go into contested case."

Even though Valdez had asked for a contested case, Roehrig seemed to feel the case should simply end.

"In this particular instance, we should not proceed any further and we should dismiss this. I don't think it's in the public interest if it's questionable," he said.

Deputy attorney general Linda Chow, advising the Land Board that day, countered that double jeopardy only protects against multiple criminal convictions. With regard to civil fines, the court has said those fines may be equivalent to criminal punishment, but "there is a test you have to go through," she said.

"It has to be very clear the penalty being imposed is tantamount to criminal penalty," she said.

Roehrig argued, "The bigger the fine gets,

on December 12, the board granted a request for a contested case hearing by Elpie Valdez. The board had fined Valdez \$4,000 in October for illegal lay net fishing in waters off Maui's Kanaha Beach Park.

Before the vote to approve the contested case, Roehrig — the only board member to oppose the fine — expounded on his belief that the DLNR

the more it looks like punishment. ... My instincts are this Filipino gentleman from Maui should not have to go through this any further."

At-large Land Board member Chris Yuen also weighed in on whether the state could seek civil and criminal penalties for the same action.

"Didn't this come up with Kaloko, with Mr. Pflueger?" he asked, referring to the Kaloko Dam breach years ago that killed seven people.

"It did," then-Land Board chair William Aila said.

"He was represented by some of the toughest lawyers. ... If this was a viable defense for Mr. Pflueger, I don't think they would have missed it," Yuen said.

In the end, Roehrig voted with the rest of the board in approving the contested case.



Paiko Residents Contest DLNR Enforcement Case

Facing nearly \$40,000 in fines for violations of Conservation District and state wildlife sanctuary rules, Paiko Drive residents Garrett Saikley and Robert Carpenter requested a contested case hearing from the Land Board last month.

On January 9, the DLNR Office of Conservation and Coastal Lands had recommended that the Land Board fine the men \$36,000 for several violations surrounding apparent efforts to exclude the public from public areas in and around the Paiko Lagoon Wildlife Sanctuary, which abuts their property. The OCCL also recommended requiring them to pay \$2,500 in administrative costs. But because their attorney, Lisa Munger, had sent a written request for a contested case hearing ahead of the January meeting, the Land Board chose to defer the matter pending the resolution of the case. The board did, however, allow public testimony before it voted to defer. (Maui Land Board member Jimmy Gomes asked whether the Land Board could take testimony given the contested case hearing request. OCCL administrator Sam Lemmo said it was up to the Land Board's discretion.)

While Saikley and Carpenter have contested some of the allegations OCCL has made with regard to their activities in the area, Ann Marie Kirk of Livable Hawai'i Kai Community Hui pointed out that the placement of boulders along the beach is not an alleged violation.

"They said they did it," she told the board. The OCCL report to the board states that

Carpenter said they placed the rocks to prevent erosion.

Kirk also complained about the warning signs the couple had also admitted to placing.

"Signs that say 'no beach access' and look exactly like DLNR signs. ... What is the community supposed to do?" she said, suggesting that it was a "concerted effort" to confuse the public. "That's the power of signs like that," she said.

With regard to the OCCL's allegation that Saikley and Carpenter had illegally conducted commercial activity within the Conservation District, Kirk said they have a website advertising private weddings.

"I watched cars go up and down [the public easement] to their home. ... Cars were parked in the sanctuary," she said.

When it was Munger's turn to testify, she disputed many of the OCCL's assertions, which she felt should be discussed in a contested case.

At the meeting, however, she did comment on claims of illegal or improper work (i.e., the placement of rocks along the border) done in the public easement leading to the sanctuary.

"It's important to recognize how the sanctuary was created. This was not always state land. The area was owned privately. ... There were already homes on both sides," she said. When the easement was conveyed to the state, the surrounding landowners didn't just retain a right of access; they were burdened with participating in the maintenance and repair of the easement as well, she said.

"We are partners in maintenance of this. ... We need to work together," she told the board.

Following Munger, several area residents testified about what they saw as Saikley's and Carpenter's "escalating" attempts at discouraging the public from coming anywhere near their property.

"I have met people who have been told they cannot come out there because it's a turtle hatchery ... not true. A person with his daughters was yelled at to get out," claimed

Robert Littman, a neighbor who also lives on Paiko Drive. "He's [Saikley] saying he's trying to preserve the area and be a good neighbor. I don't believe either."

After an executive session, the Land Board voted to defer the matter and refer it to a contested case hearing. Board member Chris Yuen asked the Attorney General's office to look closely at the DLNR contested case hearing rules because he thought the deferral departed from the board's prior practice.

The Land Board needs to handle these matters consistently, he said.

Process

Before the board voted to defer the matter, Dan Purcell, a member of the public who often testifies on procedural matters, expressed concern over how this item was dealt with, taking issue with the board's suggestion that it was going to defer the matter before actually voting to do so. Also, he added, "it's not discretionary whether you can take public testimony. You have to," he said.

He suggested that given the Land Board's handling of contested cases — for example, the case on the Advanced Technology Solar Telescope (ATST) on Haleakala — there ought to be an audit. In the ATST case, the Hawai'i Supreme Court found that the Land Board improperly voted to approve a Conservation District Use Permit despite a pending request for a contested case hearing.

Purcell also argued that the Land Board mishandled former Public Utilities Commission chair Mina Morita's contested case hearing on her and her husband's \$30,000 Conservation District fine. On December 12, the Land Board signed a contested case decision and order reducing the fine to \$15,000.

Purcell first questioned whether board member Ulalia Woodside should have signed the order, since, she is a Kamehameha Schools employee and the school has applications pending before the PUC.

He also noted that the order's first paragraph states that the Land Board "after fully considering the hearing officer's recommen-

dations ... issues its decision and order."

"There was no hearing officer," he told the board. The terms of the order, in fact, grew out of a separate settlement agreement with Morita and her husband, Lance Laney.

"There was no hearing officer. There was nothing to review. Why all of you signed this, I have no idea. ... You signed off on something you didn't read," he said.

Board Approves Acquisition Of Easement in South Kona

The DLNR's Division of Forestry and Wildlife is a step closer to acquiring a conservation easement over 1,000 acres of Hokukano Ranch in South Kona. On December 12, the Land Board approved the acquisition, which will cost \$3,225,000 or the fair market value as determined by an independent appraiser, whichever is less.

The U.S. Forest Services' Forest Legacy program will provide the funds. Although the lands are zoned for agriculture, they include a robust koa and 'ohi'a forest. The easement will protect the property from non-forest uses, DOFAW administrator Lisa Hadway told the board.

"There is some eco-tourism and really nice stands of native forest," she said.

DOFAW's Sheri Mann added that the easement will allow the ranch to continue some "minimal" harvesting of dead and downed trees in accordance with an approved management plan. The plan will also require forest restoration, including efforts to restore threatened and endangered species.

Greg Hendrickson, a consultant for the ranch, explained that the "minimal harvest" amounts to about 175,000 board feet a year, 25,000 board feet of which can be koa. He said the Ka'awaloa tract, which the easement covers, contains several million board feet of timber. At most, the plan would allow the ranch to take no more than 3 percent a year of the total forest inventory, he said.

Land Board member Ulalia Woodside asked whether the DLNR was comfortable with the potential harvest of 150,000 board feet a year of 'ohi'a.

Hadway said that the management plan had received approval from DOFAW's Forest Stewardship Advisory Committee.

Hawai'i island Land Board member Stanley Roehrig wasn't comforted.

"The more I hear about it, the more I don't like it. Maybe I need more explanation," he said. Roehrig asked who would be allowed access to the easement area.

"How's about the different organizations



Left to right: One of the signs that residents complain discourage people from areas that are actually open to the public. Rocks placed on the beach allegedly to protect it from erosion,

that plant koa trees? ... How's about community groups? Are they going to get koa logs? You wanna buy a new koa canoe, it's \$160,000 or more. [Are] the canoe clubs gonna have access to go in this place to harvest koa or not?" he asked.

Hendrickson replied that a conservation easement is all about restricting uses of the property.

Hadway added that the Forest Legacy program is aimed at giving landowners who own forested property opportunities to keep that land in a working forest.

"Activities such as eco-tourism and well-managed sustainable forestry are a part of that program. This is not like putting land into forest reserve," she said.

The easement prevents the land from being subdivided, which is important considering there is no Conservation District land in South Kona, she said.

"This [allows] the landowner to keep it whole," she said.

Roehrig said he was still not satisfied and asked Hendrickson what the ranch planned to do with the koa it harvests.

Hendrickson explained that the ranch has a mill on the property, as well as a solar kiln to dry wood that can then be made into finished products.

Canoes? Roehrig asked.

"One canoe," which went to a school, Hendrickson said, adding later that the ranch also planned to sell logs on the open market.

Roehrig then asked why the easement doesn't have conditions that some eleemosynary groups are allowed take logs from the property.

"It's very scarce," he said. "Canoes get bus' up. We're always looking for them ... The Moku o Keawe Hawaiian Racing Association. Give them [the logs at] nominal cost."

When Mann started to say that the koa on the ranch are not the kind of trees needed to make a canoe, that they were too small, Roehrig said that he knows someone who makes canoes with any kind of koa.

Rather than hold the easement hostage to a condition that would require the ranch to provide cheap logs for canoe making, then-Land Board chair William Aila asked Hadway to explain to Roehrig what the DLNR is already doing to make logs available for that purpose.

Hadway said that her division is looking to work with canoe clubs to provide them with dead and downed koa trees free from state-owned forest reserve land. DOFAW planned to form a working group to consider prioritizing getting logs to the different clubs statewide, she said.

She added that DOFAW has been talking

with master canoe builders and working with neighboring landowners that have equipment to help remove the trees.

With regard to the ranch, Hendrickson added, "We've never refused a legitimate request from the head of a legitimate organization for access to the process."

"You're a great guy. Tomorrow there's another great guy who doesn't like that. ... We have to base it not on good will, but some kind of state policy. ... Maybe we need to have conditions on it," Roehrig said.

Shifting the discussion away from koa and canoes, Woodside focused again on the harvest of 'ohi'a. She noted that 'ohi'a is the foundation of the watershed in Kona and if easement's purpose is about protecting the watershed, "we'd like to understand how that primary resource is being restored."

Hendrickson tried to assure her that the management plan is focused on maintaining the high-quality 'ohi'a forest that dominates the area.

"We have well over 3 million board feet of 'ohi'a in the forest. Our intention is for that number to grow rather than be decreased," he said.

With all the talk of harvesting, Land Board member Chris Yuen asked Hadway to explain the Forest Legacy program a bit more.

"The term 'conservation easement' threw me a bit when I heard the level of timber harvest. It doesn't sound like a forest preservation program. ... Is it a program that allows for an economic level of forestry?" he asked.

Hadway replied that the easement doesn't create a forest preserve, but protects working forests while providing the landowner some for economic opportunities.

Mann added that what the landowners are selling are their rights to develop the land. "They cannot do that anymore. They cannot cut all the trees down," she said.

Hendrickson also noted later that the ranch is also required to erect fences and control feral ungulates.

In the end, the Land Board approved the easement, although Roehrig said he had some reservations. Before the vote, he urged DOFAW to draft a proposal in the next fiscal year for a program whereby canoe clubs that race with koa canoes will have an opportunity to access to koa logs at a nominal price "so that the Hawaiian canoe racing culture ... can continue."



Land Board Rejects Request For Ha'ena Rules Contested Case

What could exemplify area-based natural resource management — similar to

what's envisioned by the state's nascent Aha Moku system — more than the Ha'ena Community-Based Subsistence Fishing Area, adopted by the Land Board on October 24?

Despite the fact that the Aha Moku Advisory Committee expressed its support for the subsistence fishing area, it was the Aha Moku member from O'ahu, Makani Christensen, and a fellow commercial fisherman, Michael Sur, who formally opposed the board's decision and requested a contested case hearing.

The subsistence fishing area, the first-ever approved by the state, is aimed at protecting marine resources for subsistence use and prohibits the sale of any marine life taken (except for invasive seaweed), strictly limits the amount of what can be taken, and restricts the use of certain gear, among other things.

At the Land Board's meeting where members approved the rules for the area, hundreds of supporters turned out.

Despite the board's approval, however, the rules could not be signed until Christensen's and Sur's petition was dealt with. In their petition, they argued that the prohibition of activities under the area rules was an unfair deprivation of their continued use, that the proposed plans for the area were arbitrary and capricious, that their fishing in the area actually helps remove invasive species, and that the rules only benefit a select few.

On December 12, the DLNR's Division of Aquatic Resources recommended denial of their petition because rule-making, being a legislative function, is not subject to contested case hearings.

Christensen testified that the DLNR had failed to adequately reach out to fishermen throughout the island.

"All we ask is to try to put it back in the community," meaning the entire island, "[so] the entire community could be talked to," he said. "Basically, we're serving something to the governor that's really not vetted."

Sur added that he was interested in ridding Ha'ena of invasive fish species, noting that invasive seaweed is allowed to be harvested from the area and sold.

"The way they wrote the rules, the gear restrictions ... we cannot get the invasive species out of that area," he said. He asked that the Land Board rewrite the rules to allow commercial fishermen to fish invasive species.

"All we're trying to do is fix the area and make it a better place," he said.

Then-Land Board chair William Aila explained that he had directed DAR to find a way to allow the issuance of a special use permit for the control of invasive species within the subsistence fishing area.

"The challenge is going to be how to allow for the special use permit ... and have the community feel comfortable that only invasive species are being taken," he said.

Sur complained that obtaining a special use permit is as difficult as passing an act of Congress.

"I sign them all the time," Aila replied. And in any case, "today is about the contested case," he said.

A Kalalau fisherman who helped organize the public outreach on the establishment of the fishing area for the past several years said he had, in fact, tried to reach out to fishermen on Kaua'i's west side. He apologized for not reaching out to them as much, but he said studies showed that the majority of those who fished in Ha'ena were local.

He agreed with Sur that invasive species are a problem, but he took issue with Sur's and Christensen's complaints about the effects of the rules on their livelihoods.

"What we're talking about is sustainability, people who fish there to eat, to supplement their diet. ... I just want to make sure you ask yourself the question, is it a livelihood issue or a [sustainability] issue," he said.

Despite the purpose of the fishing area, Hawai'i island Land Board member Stanley Roehrig encouraged the commercial and subsistence fishers to work together.

Ha'ena's Kelii Alapai, who also supported the establishment of the fishing area, said that he can work with others, but insisted that outreach was sufficient and that the goals of the area are clear.

"This is about subsistence, sustainability that was taught to us. ... What's so hard about that?" he said.

Kaua'i Land Board member Tommy Oi asked about how a special use permit to take invasive fish from the area would work.

DAR's Ed Sakoda said that a special use permit could allow staff from his division or an agent of DAR to take invasive species. However, a permit could not be issued to a fisherman who planned to take the fish for sale. A rule change would be required to allow for such a permit, he said.

Should the rules change to permit the commercial take of invasive species from the area, Oi asked, could a commercial fisherman then bid on that permit?

Sakoda said he wasn't sure if the division would seek bids for such a thing.

To which Oi said he was just trying to make everybody comfortable with the Land Board's decision.

"Kaua'i is not a big island," Oi said.

Aila then reiterated that the matter before the board was only whether or not the contested case petition should be granted. Dis-

cussion about permits and rule changes could occur later, he said.

"I agree, except for one thing," Roehrig said. "In the common law system, we had the rule of law. It had sharp edges. ... Part of our role here is not to just say, 'This is the law.' Part of our role is to smooth off the edges a bit [so] there is greater public acceptance of what we do here."

After Sur insisted that he would only be satisfied with a rule change allowing commercial take of invasives, an exasperated Aila pointed out that if resource protection was the goal, "you could go in there right now with a special use permit and take all the invasive species—you just can't sell it. ... Could we please go back to the contested case?"

In the end, the board approved DAR's recommendation to deny the petition.



Board Approves Guidance For Community Subsistence Fishing Areas

Given that it's been 20 years since the Hawai'i Legislature authorized the DLNR to establish community-based subsistence fishing areas (CBSFA), and that it has taken about that long to get the first one done, the DLNR's Division of Aquatic Resources has prepared guidelines and a road map of sorts to help other communities wanting to establish their own areas. On December 12, the Land Board approved DAR's guidance documents.

Before the vote, Land Board member Chris Yuen expressed some concern that the proliferation of CBSFAs may result in so many different regulatory areas, "it's gonna get very confusing for the public and enforcement."

Although such differentiation was inherent in community-based management, Yuen encouraged the use of common definitions of things like "take" or "invasive," and asked staff to work with communities as much as possible to create consistency.

"Fully understood," said DAR's Erin Zanre, who heads the division's CBSFA program.

Land Board member Stanley Roehrig said he worried that the establishment of these areas would also fuel rivalry among users.

"There seems to be some belief in certain quarters, when you have these areas to fish, some people can go and some people can't go. ... We're gonna have warfare and we don't need that," he said. "We're trying to

do something to improve the sustainability of our aquatic resources for generations. If we're creating some kind of monster where you have neighbors fighting other people not from their street or subdivision ..."

John Crawford, executive director of the non-profit Kipahulu 'Ohana on Maui, spoke in support of the DAR's guidance documents on behalf of a group called the Maui Nui Makai Network, which represents six communities across Maui, Lana'i, and Moloka'i. He listed Mo'omomi on Moloka'i and Lahaina, Wailuku, and Kipahulu on Maui as some of the communities either interested in or already involved in the process of CBSFA designation.

"We're looking at the process Ha'ena went through. It was a very convoluted and delayed process that would be very intimidating for any other community to go through. Having a standard process ... is very helpful for the communities to know and to make it a reasonable time period," he said.

O'ahu's Wally Ito, who with limu expert Henry Chang Wo, tries to get people involved in the protection of limu, also supported the CBSFA guidelines.

"We need to realize our resources are diminishing. It's the job of DLNR to help us with our resources. It's a huge, huge task. If we can cut up the task into small pieces and have the community manage resources, that's a good thing," he said.

Zanre said that when it comes to enforcing CBSFA rules, citizen programs such as Makai Watch are helpful. But first, then-Land Board chair William Aila said, you have to have rules.

Unlike Roehrig, Aila seemed to see the CBSFA program as a way to help manage disputes over a particular area's marine resources. Two days before the board's meeting, four Moloka'i men were charged with terroristic threatening, harassment, robbery, and the unauthorized boarding of a boat in relation to a May incident in which they confronted divers from O'ahu who had come to Moloka'i to fish. For the last four years, Aila told the board, he had heard complaints from Moloka'i residents about outsiders coming over to take the island's marine resources.

"I have told them, we cannot discriminate. ... We've made the offer to work with them on [CBSFA]. Currently, there are no rules on Moloka'i other than statewide rules.

"The way to address the situation is for the community to come forward or ask for a fishery management area around the island [but] first, there has to be discussion on Moloka'i and a willingness," he said. — **T.D.**

PSP continued from page 1

agreement in May 2012, 3W presented to the Land Board its new funding partner, International Electric Power (IEP). IEP's Enzo Zoratto asked the board at its May 25 meeting to defer termination and allow the companies to negotiate new development agreement terms, which the board agreed to do that day, and again, on August 10.

In November 2012, 3W and IEP proposed assigning the development agreement to a new company, IEP-ORP, LLC, which would be a partnership between O'ahu Renewable Energy Park, LLC (ORP), a company managed by 3W's Keith Avery, IEP, and a company called Abacus.

Under their proposal, IEP-ORP would pay the delinquency, which by that time had grown to \$528,125, in four installments, the first to occur when the Land Board assigned the development agreement from 3W to IEP-ORP. The subsequent payments would be made if and when IEP-ORP was short-listed for HECO's request for renewable energy proposals, if and when the company signed a power purchase agreement, and if and when it secured financing and a lease.

In addition, IEP-ORP proposed reducing the project site from 110 acres to 17 acres and instead of building a variety of renewable energy facilities, it planned to build just two 5MW biomass plants. Based on the new, smaller footprint, the company proposed that the development agreement fees be reduced from \$345,000 a year to \$106,636, payable in two installments of \$53,318 – and only then if and when a PPA is approved and the company has secured financing.

The DLNR's Land Division found the proposal "unacceptable," according to a January 25, 2013, report to the Land Board. The division complained that under the proposal, the delinquencies and future development agreement fees would not be paid in a timely manner, if at all. The agency also expressed concern that the location where IEP-ORP planned to place its biomass plants would hamper development of the remaining 93 acres.

Should the Land Board choose to accept IEP-ORP's proposed terms, the Land Division recommended that the board also require IEP-ORP to:

- Relocate the biomass plant site to preserve the development potential of the remaining site;
- Provide a bond to cover all delinquencies and future development agreement fees;
- Publish a draft EA by August 1, 2013; and

- Submit a subdivision application for the 17 acres to the City and County of Honolulu by January 31, 2014.

The Land Board deferred the matter that day, at IEP-ORP's request. Attorney William McCorriston, representing IEP-ORP, had said his clients needed time to conduct some due diligence, adding that because HECO was expected to issue a request for proposals for renewable energy projects soon, development agreement terms needed to be resolved in the next 60 days.

"If we don't ... then we've missed the boat," he told the board.

Missing the Boat?

On February 22, 2013, HECO issued an invitation for low-cost, renewable energy projects on O'ahu that could be quickly put into place. For selected projects, HECO would seek a waiver from the PUC's competitive bidding framework. Projects had to be able to produce more than 5 MW and applicants had to provide proof of site control for the 20-25-year duration of a power purchase agreement. Proposals were due March 22, 2013.

On March 8, 3W returned to the Land Board seeking approval of the assignment of the development agreement to IEP-ORP and the modification of terms as it had proposed in November. The Land Division, again, asked the Land Board to reject those terms. However, should the board choose to accept them, the division asked that the recommendations it made in January be included. In addition, the division wanted to add two more conditions:

- "The final configuration of the project site ... shall be subject to DLNR approval and legally subdivided by IEP-ORP, LLC at IEP-ORP's expense," and
- "DLNR/BLNR is allowed to accept unsolicited or solicited proposals for the remaining lands."

The Land Board voted to accept the assignment and modifications proposed by both IEP-ORP and the Land Division.

While it would seem that the board's approval erased all private development rights for the 93 acres outside of IEP-ORP's project site, 3W apparently believed otherwise. On March 13, less than a week after the Land Board's approval of the transfer, 3W entered into an agreement with a company called Power Solar Partners, LLC, to develop the 93-acre portion of the park with solar photovoltaics. Power Solar Partners (PSP) had only registered with the state Department of Commerce and Consumer Affairs on March 7, one day before the Land Board meeting, according to the DCCA's

website. PSP's sole member is Mercury MO-Dyne, LLC, a company managed by Mercury Solar's James Sparkman. Petition-related filings to the PUC, however, claim that Investricity was the managing member of PSP, LLC.

The 3W/PSPIII/Investricity petition before the PUC states, "The binding agreement between Petitioner West Wind and PSP LLC was based upon the decision by the [Land Board] at its meeting on March 8, 2013, to allow a subdivision of or assignment of at least sufficient area (93.11 acres) as required for the construction of a 29.5 MW PV park." This despite the fact that there was no mention whatsoever at the Land Board's March 8 meeting of PSP or of any plans to build a solar park.

Even so, PSP submitted a waiver application to HECO on March 22, 2013, that identified three sites on which it would build PV solar projects that together would generate more than 26 MW. PSP also identified 93 acres of the 'Ewa feedlot as one of two expansion sites. The proposed generation capacity at the feedlot site was listed as 29.5 MW.

"PSP has identified a 93 acre property on the State of Hawai'i's 110.11 acre lot," the application states. "It has subsequently signed a letter of intent with West Wind Works to assist with the expansion of its solar PV portfolio on that property specifically toward the HECO Waiver process."

"West Wind Works along with its O'ahu Renewable Energy Park LLC and IEP-ORP LLC, received an award to develop qualified renewable energy systems on the above site. They subsequently received approval from the DLNR and its board to reduce its leaseable area by subdividing the TMK into 2 parcels; 17 acres and 93 acres. WWW & IEP-ORP must submit their subdivision application on or before January 31, 2014. Prior to that date, WWW will assist PSP with an introduction to the DLNR so that PSP may explore this site with the DLNR as an expansion option," the application states.

On March 27, HECO notified PSP that its proposal had been rejected because its electricity cost was outside the utility's target. But three months later, HECO gave the PSP and other rejected proposals another chance. On June 17, it invited them to "refresh" their proposed pricing. However, the offer stated, any updates were limited to energy pricing only and HECO would "not consider proposals in the Pricing Refresh that differ materially from the Project originally submitted in response to the invitation." The deadline for submissions was July 1.

On June 30, 2013, a company called PSP II, LLC — registered on June 24, 2013, and managed by Mercury MO-Dyne and Investricity — submitted a pricing refresh proposal that included all five original project sites. Investricity's Kevin Lynch wrote in a letter to HECO that PSP I had become PSP II and had the same managing partners.

The next day, however, HECO received a refreshed pricing proposal from another original PSP member (identified in PUC filings only as 'PSP 1 Member' for confidentiality reasons) that included only three of the five original sites.

To resolve the confusion, HECO informed both parties on July 3 that it wanted only one proposal for the project known as Oahu PV One and it also wanted evidence that PSP had transferred and assigned the entire, original project proposal, as well as development rights and site control, to the bidder submitting the refreshed proposal.

"To be clear, Hawaiian Electric is not accepting new bids and will only consider one proposal for the Oahu PV One project," HECO stated in a joint letter to the two entities.

On July 8, PSP II revised the scope of its proposal to include only a 29.5 MW solar park at the former 'Ewa feedlot, the one property of the five to which it claimed site control. The other former member of PSP resubmitted a proposal for the sites that it controlled.

A Second Rejection

On August 9, 2013, HECO advised Lynch that his updated proposal had been disqualified "due to failure to satisfy the site control threshold requirement."

Not long after HECO's second rejection, 3W finally decided to introduce its new development partners to the DLNR. According to a Land Division report to the Land Board, on October 18, 2013, IEP informed the department that it was no longer interested in being a party to the development agreement. 3W asked that a modified development agreement be assigned, instead, to Investricity, which planned to use the entire feedlot to develop a 30 MW solar park.

To HECO, the efforts to reassign the development agreement (if it was even aware of them at all) did nothing to change its position. On November 5, in an email to Lynch, the utility reiterated its disqualification, pointing out that all the refresh projects were supposed to have maintained their original size and scope and could not increase, reduce, or change the size or nature of the projects.

PSP II's revised proposal was reduced in

size and scope, and the project also did not have site control, the email stated.

"The entity that held the lease [sic] was not listed as a partner organization. ... Please note that this decision is final and no further requests for reconsideration of this matter will be entertained," it stated.

Even so, on November 8, 2013, 3W sought, and received, an assignment of the development agreement to Investricity and a modification reflecting the new project's size and scope. Although the project would use the entire site, the Land Board did not increase the development fees to reflect the increase in size from 17 acres to 110 acres. The proposed lease term, however, was limited to 25 years.

Since the November assignment, the project has changed at least twice. On April 11, 2014, the Land Board approved the assignment of the development agreement to PSP III, LLC, a subsidiary of Investricity and its partner, LJ Capital. The board also reduced the size of the proposed facility from 30 MW to 20 MW, increased the lease term from 25 years to 65, and extended payment and performance deadlines. The agreement is now set to expire at the end of 2016.

On June 27, 2014, at PSP II's request, the Land Board amended the development agreement again to allow the draft EA to be completed six months from the effective date rather than by August 1, 2014. The effective date is August 28, 2014, according to Land Division agent Kevin Moore. Should the draft EA fail to be completed by the end of this month, the DLNR has the right to terminate the development agreement.

Land Division administrator Russell Tsuji says he has not received any request from PSP III for an extension of that deadline, but that doesn't mean his division is going to rush to cancel. He says he has his own reasons for wanting to hold onto a party that's willing to do something good with the property — such as build a renewable energy facility. He said he'd rather have that than one with less-desirable plans or no one at all.

Although no new changes have been brought before the Land Board, PSP III's petition before the PUC states that if the commission reverses HECO's decisions, the park "now with up to 40 MWp (megawatts peak) per year of capacity, could be commissioned by the end of 2016."

HECO Response

Whether PSP III's project will ever receive a competitive bidding waiver remains to be

seen. In its filing with the PUC, HECO is clearly not thrilled with the attempt to force its decisions.

The utility argues that the PUC can only issue declaratory orders on the applicability of a statute, rule, or order. PSP III's petition seeking to compel HECO to keep the waiver invitation open and negotiate a power-purchase agreement with the petitioners is "inconsistent with the purpose of a petition for a declaratory order under Hawai'i law," HECO's motion states.

The utility also points out that none of the other four sites making up the original PV project are included in the petition, and adds that the sole document submitted as evidence of site control was the March 13, 2013, letter of intent between PSP I and 3W to develop a utility scale solar project on the former 'Ewa feedlot.

What's more, HECO argues that PSP III and 3W lack standing to assert any claims in the petition because they were not parties to PSP's original proposal or PSP II's 'Ewa feedlot proposal.

"While WWW purportedly entered into a development agreement with the State of Hawai'i for the 'Ewa feedlot and purportedly entered into Letters of Intent with PSP I and PSP II, it was never a party to the submissions involving [either project]. Similarly, PSP III was not a party to either submission and, in fact, was not registered with the DCCA until February 14, 2014 — well after the July 1, 2013, close of the Pricing Refresh Invitation," it states.

Finally, HECO states, in both the waiver and pricing refresh invitations, the utility "expressly reserved the right not to request a waiver on behalf of a developer for any reason."

A Rebuttal

Although the parties to the PUC petition had no objection to HECO's attempt to intervene, they disputed the utility's characterization of the situation.

In their January 22 response to HECO's motion to intervene, they accused the utility of piling on new reasons to dismiss PSP II's project after being presented with evidence which they believe proved that PSP II had site control (i.e., the March 2013 Letter of Intent between 3W and PSP, LLC to develop the solar farm, as well as the minutes of the March 8, 2013, Land Board meeting).

HECO improperly tried to broaden the basis for dismissal to include the change in scope and size and "issues related to the underlying lease [sic]," they argued.

They claimed that HECO "misleadingly" contends that PSP II revised the scope of its

Owner of Hanalei River Boatyard Loses Appeal of Permit Revocation

The Hanalei River boatyard operated by Mike Sheehan has for years been a thorn in the side of the Kaua'i County Planning Department, its Public Works Department, its Planning Commission, and environmental groups too numerous to count.

But last month, the Hawai'i Supreme Court dealt a blow to Sheehan's efforts to continue operations when it refused to hear Sheehan's appeal of the finding of the Intermediate Court of Appeals.

In denying Sheehan's application for a writ of certiorari, the court upheld the ICA's ruling last October. In turn, the ICA upheld the finding of the 5th Circuit Court, which itself upheld the county Planning Commission's determination that Sheehan was in violation of terms of four permits the commission issued nearly three decades ago 1987.

Sheehan's battle against the county now moves back into federal court. Three years ago, his attorney, Richard E. Wilson, brought a federal lawsuit on Sheehan's behalf against the county, the Planning Commission, six individual commissioners, Mayor Bernard Carvalho, the county's coastal zone management inspector, Leslie Milnes, and hearings officer Glen Kosaka.

A Short Synopsis

The controversy generated by tour boats launching from the Hanalei River goes back at least four decades, to the mid-1970s. (The September 1991 edition of *Environment Hawai'i* is devoted to a discussion of this issue,

for anyone wanting more background.)

Sheehan has sued the county and other entities several times over the last two decades. The case decided by the ICA last October addressed questions over the validity of the permits he claims give him the right to continue operating the Hanalei River boatyard.

Giving rise to the state lawsuit was a series of events beginning in 2007 that culminated in the 2010 decision of the Planning Commission to revoke those permits. A county planning inspector had determined, following a July site, that Sheehan was in violation of several permit terms.

On the inspector's recommendation, the Planning Commission issued an order to show cause to Sheehan, which was the subject of a contested case hearing in the spring of 2009. Not until April of the following year did the hearings officer issue his recommendation that the commission find Sheehan to be in violation of four permit terms and that the commission could revoke the permits. In June, the commission adopted the hearing officer's recommendations and revoked Sheehan's permits.

He appealed to the 5th Circuit Court within the month. As the ICA decision notes, "Besides challenging the Planning Commission's revocation of his permits, Sheehan argued that the decision to revoke the permits violated Sheehan's due process and equal protection rights, as well as the [Planning Commission's] own procedures, and the hearing officer's decision to allow [Hui Ho'omalua i ka 'Aina, a

citizens' group] to intervene" also violated the Planning Commission's Rules of Practice and Procedures.

It took another year, until May 2011, for the Circuit Court to reach its decision in the case. Sheehan had to convince the court that the commission's adoption of the hearings officer's recommendations, and its revocation of the permits, "was unjust and unreasonable," the court wrote – and he did not meet this "heavy burden," it found. "This Court is not left with a firm and definite conviction that a mistake has been made," it wrote.

As to the claims of constitutional violations, the court dismissed those as well.

A Flawed Appeal

Sheehan's appeal to the Intermediate Court of Appeals centered on the fact that there was some discrepancy in the contested case hearing between testimony given in a deposition by former Planning Director Ian Costa and testimony he made orally during the course of the hearing.

The lower court determined that Sheehan himself had "opened the door to potentially inconsistent deposition and hearing testimony by voluntarily calling Costa as a witness ... after he had deposed him prior to the [Order to Show Cause] hearing." What's more, "by failing to contest Costa's hearing testimony either during or after the OSC hearing, [Sheehan] waived any objection to and his right to challenge on appeal Costa's testimony at the OSC hearing that was at odds with Costa's deposition testimony," the lower court found.

The ICA considered whether the lower court was in error on this point – and found that it was not. What's more, Sheehan's argument that Costa's belief Sheehan was not in violation of permit terms was not supported by Costa himself. "[R]eview of the deposition reveals that Costa specifically denied that he concluded Sheehan was not in violation of the conditions of his permits, merely acknowledged that some of the evidence submitted appeared to show Sheehan complied with certain conditions..." the ICA found.

Sheehan also argued that one of the conditions he was found to have violated was not a condition enforceable by the Planning Department but, rather, by the county's Public Works Department. That condition required Sheehan to obtain building permits for structures on the boatyard, and Sheehan contends that because he was in the process of obtaining permits when the show-cause order was issued, it is not within the Planning Commission's power to find him in violation

proposal to include only the former 'Ewa feedlot. In fact, they argue, PSP II's proposal was meant to be taken into consideration together with the proposal submitted by the PSP 1 member.

"The intention was that the full set of project sites were resubmitted in a clear fashion, and HECO clearly accepted this resubmission at that time," their response states.

They also took issue with HECO's interpretation of the March 8, 2013 Land Board meeting's minutes.

"In the November 5, 2013, email, HECO erroneously referenced the BLNR minutes to show a lack of site control when, in fact, these minutes show just the opposite," their response states.

Finally, they argued that the PUC can

issue a declaratory order on a controversy over the applicability of its competitive bidding framework, and that the commission's rules allow it, on its own, to issue an order to "terminate a controversy or remove uncertainty."

What's more, they state, 3W does, indeed, have standing to file the petition because PSP and 3W had entered into a binding agreement in March 2013. PSP III also has standing, they state, because its parent company, Investricity, was the "managing member" of PSP, LLC.

"[B]oth petitioners West Wind and PSP III have contractual relationships with Investricity Ltd. that depend on the outcome of the development of the 'Ewa site and therefore have been directly impacted by HECO's disqualification," their response states.

— Teresa Dawson

of that condition. However, the ICA dispenses with this in a footnote: "Sheehan does not dispute that he was warned in 1993 that he needed to obtain building permits for some of the pertinent structures on the property, it was not until five years later that Sheehan applied for the proper permits from the PWD, he did not complete the process due to his failure to file sufficient information, and he did not renew pursuit of applicable permits until 2008, after issuance of the OSC."

Another condition required that limited the tour-boat operators able to use Sheehan's facilities to those that were originally permitted in 1988. None of the users in 2007 were the same as those at the time Sheehan received his permits, but Sheehan argued that because the county accepted a handwritten list of permittees that he had substituted for the original permittees back in the late 1980s, the county could not now find him in violation of this condition. "However," the ICA noted, "Sheehan cites no authority for an estoppel or waiver argument. Whether Sheehan's previous lists from nearly twenty years prior were compliant is irrelevant as the Planning Commission determined his current list was not. It is understandable that the Planning Commission would view a list that contains no original permittees as violative" of this condition.

The ICA makes short work of Sheehan's claims of a violation of his constitutional rights to due process and equal protection. He was afforded ample opportunity to argue his claims in the OSC hearing, the ICA found, and he made no cogent argument that his rights to equal protection had been violated.

As to the intervention of Hui Ho'omalu i ka 'Aina, the court determined that even if it had no interest in the matter that was clearly distinguishable from that of the general public, the Planning Commission's rules permit "[a]ll other persons" to apply for leave to intervene.

"Sheehan's contention is thus without merit," the court concluded.

Kaua'i County has begun condemnation proceedings against several of Sheehan's lots along the Hanalei River to be used in the expansion of the county's Black Pot Beach Park. According to a county press release last October, following the ICA ruling, three of Sheehan's lots have already been transferred to the county, including the parcel where the boatyard was operating. The process of developing a master plan for the park was to begin early this year.

— P.T.

After Rebuff by Planning Commission, 'Pepe'ekeo Palace' Builder Goes to Court

Scott Watson, builder of the "Pepe'ekeo Palace," just won't take "no" for an answer. Having twice tried, and twice failed, to get the Hawai'i County Windward Planning Commission to amend conditions of subdivision approval for the lot on which Watson and partner Gary Olimpia are building a mansion, Watson and Olimpia are once more taking their argument to 3rd Circuit Court.

It's not the first time.

In 2013, attorney Steve Strauss sued on behalf of the landowners, arguing that the state alone had the ability to set building setbacks at distances greater than 40 feet. For that reason, he argued, the county special management area for the subdivision, requiring all construction to be at least 40 feet from the top of the sea cliff, "violates state law."

That litigation is in limbo at the moment, but the last time a judge ruled in the case, in August 2013, it was to deny Strauss's motion for summary judgment. Back then, Judge Glenn Hara found that the county could indeed establish a setback of more than 40 feet during the subdivision approval process. The conditions established when in the 2004 SMA permit legally bound the lot owner, Hara found.

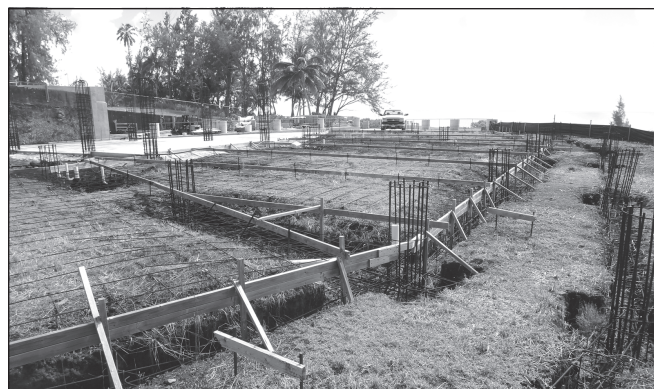
In the most recent case, Strauss makes the identical arguments concerning the county's ability to es-

tablish setbacks greater than the minimum established by state law, but also throws into the mix the Planning Commission's failures to provide findings of fact and conclusions of law to justify the decision to deny the SMA amendment.

The commission heard the application first on September 17. At that meeting, it took no vote to grant or deny the request and so the application was deemed denied. Strauss asked for a reconsideration, which was granted on November 20. The outcome was the same.

Strauss argues that both the original hearing and the hearing on the request to reconsider the application amounted to contested cases, and that therefore the commission was obligated to enter separate findings of fact and conclusions of law to justify the action – or non-action, in this case.

— P.T.



The line of rebar at the right of the photo marks the outer limit of the planned lanai area of the "Pepe'ekeo Palace." Without the public access route being changed, the lanai encroaches into the public access easement running in front of the house site.

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Isaac and Dana Naone Hall
Lea Hong
Ed Johnston and Helen Rogers
Diana and Keith Keffer
Randy Kennedy
Baine Kerr and Cindy Carlisle
Amy Kimura
Robert Kinzie
Mary Lou Kobayashi
Ken and Patty Kupchak
David Lassner
Henry Lawrence
Reese Liggett
Creighton Litton
Robin Loomis
Thomas Loudat
Donna Lum
Downey Manoukian
Martha Martin
Creighton and Cathy Mattoon
Holly McEldowney
Jeff Melrose
Paula and William Merwin

Ruth Moser
Ralston Nagata
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