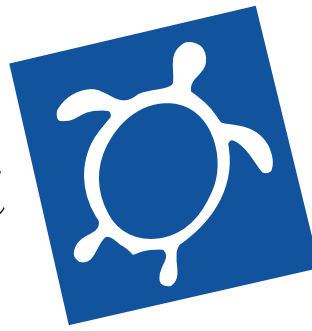


# Environment



# Hawai'i

a monthly newsletter

## *Turning Back the Clock*

Nothing is forever, it seems. And that may include the measures put in place over the last decade to protect the natural resources of the Northwestern Hawaiian Islands.

If the Western Pacific Fishery Management Council has its way, at least some of the restrictions on bottomfishing and longlining in the Papahānaumokuākea Marine National Monument would be rolled back as part of the Interior Department's review of all monuments established over the last two decades.

Teresa Dawson looks at this and other issues emerging from the council's most recent gathering, including the astonishing fact that the state forgot, apparently, to submit nominations for open council positions

## Fisheries Council Staff Envisions Return Of Commercial Bottomfishing to NWHI

Western Pacific Fishery Management Council (Wespac) executive director Kitty Simonds isn't just pushing for commercial longlining to return to the Papahānaumokuākea Marine National Monument expansion area established by President Barack Obama late last year. She's made it clear she's also hoping the Trump administration will open the door for bottomfish fishing to return to the waters within the original monument area, which extends 50 nautical miles around the Northwestern Hawaiian Islands.

Simonds and staffer Eric Kingma have suggested at recent meetings that such a

scenario is possible since the council never moved to repeal any of its fishing regulations affected by the monument's establishment and since President Donald Trump signed an executive order in April calling for the review of all large national monuments established in the last 20 years.

In 2010, the National Marine Fisheries Service paid more than \$2 million to seven NWHI bottomfish permit holders so they would leave the fishery, which was set to close in June 2011 under the terms of President George W. Bush's 2006 order establishing the monument.

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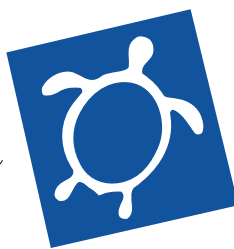
*Kahala Hotel Weddings  
Not Sanctioned by BLNR*



Western Pacific Fishery Management Council chair Ed Ebisui took this photo, which he said is of opaka on sale at Costco. He suggested that the price stickers had been strategically placed to mask how long ago the fish had been caught. Ebisui, a part-time bottomfish fisherman, regularly argues against regulations — such as the establishment of the Papahānaumokuākea Marine National Monument and expansion area — that impede local fishers from meeting local market needs.

# Environment

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# Hawai'i

July 2017

## NEW AND NOTEWORTHY



**Lehua Rat Project:** The Department of Land and Natural Resources has been given the green light to award a contract to Island Conservation of New Zealand for preparation of a plan to eradicate rats from Lehua Island, located a few miles off Ni'ihau.

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The work, for which the company will be paid \$191,500, includes development of "an implementation-ready operational plan and budget" for eradicating Polynesian rats from the island. The first phase will include monitoring of plant productivity and rat reproductive rates over the summer.

As the DLNR noted in its request for an exemption from the competitive

bidding process otherwise required, the new contract is for work that began in June 2016 and which has been supported with both state and private sources.

"Island Conservation will be the technical lead and will guide the implementation of the rat eradication from Lehua in partnership with the DLNR-[Division of Forestry and Wildlife]. Because IC has been an ongoing partner with DOFAW on the Lehua Island project for several years, and a \$470,000 grant from [the National Fish and Wildlife Foundation] has already been awarded to DOFAW naming IC as a necessary subcontractor, it would be detrimental to the Lehua Island Restoration project to require a competitive procurement process," the DLNR stated in its request for bid exemption.

The state procurement officer approved the request on June 13.

**On-Bill Repayment for GEMS:** The Hawai'i Green Infrastructure Authority, responsible for disbursing bond proceeds of \$142 million to further the state's clean-energy goals, recently issued two contracts intended to develop the means for Hawaiian Electric customers receiving Green Energy Market Securitization loans to repay them through their monthly electric bills.

The contracts are with Concord Servicing (\$156,000), the company that oversees GEMS loans to individuals, and Hawaiian Electric (\$91,000).

HGIA had also wanted to issue a \$50,000 contract with Leidos Engineering, which runs the Hawaii Energy program for the state. But, according to Gwen Yamamoto Lau, HGIA executive director, "The contract that was intended for Leidos is on hold because the programmer left Hawai'i Energy last month and is working for a different company."

Late April, the HGIA submitted requests to the state procurement officer for approval of these contracts as sole-source contracts. The requests were withdrawn in mid-June—because, says Yamamoto, "it was determined that these contracts qualify for procurement exemption provided by Act 211 (2013)." This is the legislation that established the GEMS program and allows contracts it makes to be exempt from statutes that otherwise would require competitive bidding.

The HGIA has long argued that on-bill repayment is vital to its stated mission of extending the benefits of energy-efficient technology to low-income households. As it noted in its most recent quarterly report to the Public Utilities Commission, it was hoping to build on work that had already been done for the PUC in its now-abandoned efforts to develop a means for on-bill repayment: "Through the work done ... by Hawai'i Energy and its working groups, the PUC has extensive information and data on the benefit of an on-bill repayment mechanism, the potential in Hawai'i's market for ... ratepayers, and its related cost benefit."

In 2014 and 2015, the PUC paid several hundred thousand dollars to a consultant to develop an on-bill repayment program for all customers, but when the consultant elected to do no further work, that effort was dropped and the PUC closed down the project.

### Quote of the Month

*"There are people that  
don't like the fireworks."*

— **Suzanne Case, Land Board**

## As Creditors Close in, 'Aina Le'a Files for Bankruptcy Court Protection

For 'Aina Le'a, Inc., the prospect that it will be able to carry out its planned development on 1,000-plus acres in South Kohala is growing ever dimmer, with the company facing multiple foreclosure actions, potential downzoning of its property by Hawai'i County, and with a major shareholder (DW 'Aina Le'a Development, LLC) recently losing its federal court case seeking \$200 million in damages.

In light of the mounting claims by creditors and with little prospect of receiving a windfall judgment in federal court, 'Aina Le'a ducked for cover. On June 22, it filed for protection from creditors under Chapter 11 of the federal bankruptcy code.

The claims in foreclosure litigation are around \$32 million. But, according to the bankruptcy petition, that's not the full story. The top 20 unsecured creditors have additional claims approaching \$4 million. The petition, signed by Robert Wessels, 'Aina Le'a's CEO, estimates the total number of creditors as somewhere between 50 and 99, with claims of up to \$50 million.

The company's estimated assets, on the other hand, are said to range from \$100 million to \$500 million.

### *An Untimely Claim*

In February of this year, DW 'Aina Le'a filed a complaint in federal court, alleging it was owed \$200 million following the vote of the state Land Use Commission in 2011 to revert around the area where the Villages of 'Aina Le'a was proposed to be built from the Urban to the Agricultural land use district. (In articles dating back to that time, *Environment Hawai'i* has exhaustively described the reasons for that reversion vote.)

The state immediately asked U.S. District Judge Susan Oki Mollway to dismiss the claim, stating that it was barred by the statute of limitations. DW 'Aina Le'a, on the other hand, argued it could make the claim under a "catch-all" law, Section 675-1(4) of Hawai'i Revised Statutes, that allows the state to be sued for a period of up to six years following the date on which the event leading to the alleged damages occurred. That law, Mollway noted, "applies to cases 'of any nature whatsoever not covered by the laws of the state.'"

Mollway wasn't buying that, however, and in her decision issued June 13, she agreed with the state's argument that two other sec-

tions of Hawai'i law did, in fact, deal with the very sort of claim DW 'Aina Le'a was making. "[T]his court rejects DW's contention that the six-year limitation in [HRS §657-7] applies to its state takings claim. Under either [HRS §661-5 or §657-7] DW's state takings claim is time-barred," Mollway concluded. "The motion to dismiss is granted."

DW 'Aina Le'a has appealed to the 9th U.S. Circuit. The law firm that has been representing the company in its action against the state – Nixon Peabody – is one of the top 20 unsecured creditors, with 'Aina Le'a acknowledging it owes the company \$253,685 for services rendered.

### *The Zhang Claim*

Chinese investor Ms. Libo Zhang loaned 'Aina Le'a, Inc., \$6 million back in November 2015, secured by a mortgage on a 23-acre parcel where 'Aina Le'a has said it plans to build a 70 single-family houses in a development it calls Ho'olei Village.

A year later, the loan was in default and, on December 30, 2016, Zhang filed a foreclosure action. The judgment, entered on June 13, calls for the parcel to be sold at auction, with Zhang able to submit a creditor's bid.

The assessed value of the lot, according to Hawai'i County's real property tax office, is \$2.5 million. Any winning bidder would also have to satisfy the property tax arrearage, which amounted to nearly \$33,000 at press time.

### *The Romspen Claim*

The Romspen Investmentment Corporation of Toronto loaned 'Aina Le'a, Inc., \$12 million back in July 2015, in what, like the Zhang loan, was to be a short-term obligation, payable within two years.

Again, as with the Zhang loan, 'Aina Le'a defaulted and Romspen filed a complaint to foreclose in May.

Romspen adopted what can only be described as a belt-and-two suspenders approach to securing its claim. Not only did it place a mortgage on the 23-acre parcel where 'Aina Le'a intends to meet its affordable housing requirement with the construction of 385 townhouse units, but it also filed a claim against future sales of units in that development, called Lulana Gardens and obtained a pledge from Wessels of stock collateral.

To top it off, the claims were filed with both Hawai'i's Bureau of Conveyances and the Delaware Department of State.

The loan agreement also included a provision calling for 'Aina Le'a to provide Romspen with a final subdivision map approved by Hawai'i County by January 16, 2016, and requiring completion of construction by a certain date – which, at the time of the foreclosure filing, had passed.

The foreclosure action had been set for an August hearing in 3rd Circuit Court, but in light of the bankruptcy petition, that is on hold.

### *The Bridge Claim*

Bridge 'Aina Le'a sold 1,011 acres in the Urban district to 'Aina Le'a in 2015 for around \$24 million. It financed a large part of that sales price by lending 'Aina Le'a \$14 million, at 12 percent interest. By July 2016, 'Aina Le'a was in default, triggering an interest rate of 24 percent.

In April, Bridge filed a foreclosure action in 3rd Circuit Court. If judgment were to be granted in Bridge's favor, 'Aina Le'a would lose the bulk of the property where its planned Villages of 'Aina Le'a is to be built and title to that acreage would likely revert to Bridge, which also owns around 1,900 acres of land surrounding the Urban district on three sides.

The case was scheduled to be heard by Judge Ronald Ibarra on June 26. However, Bridge's attorney Matthew Shannon, making an appearance by phone, informed Ibarra that he had been notified "late last week" that 'Aina Le'a had filed for bankruptcy protection.

Ibarra then did what he had to do – stay the proceeding until the bankruptcy case runs its course.

### *Meanwhile, in New York*

A New York law firm representing a broker that 'Aina Le'a retained to launch a public sale of stock in 2015 won a default judgment on June 16 for \$158,600. The law firm, Gusrae Kaplan Nusbaum, claimed, among other things, that 'Aina Le'a had violated federal securities law when it breached an agreement with the firm's client, Newbridge Securities, giving Newbridge exclusive rights to offer up to 2 million shares of common stock in 'Aina Le'a. A little more than a year later, 'Aina Le'a cancelled the agreement. Newbridge then assigned its claim against 'Aina Le'a to the law firm. In March, Gusrae Kaplan filed its complaint in federal court, alleging that, "throughout the offering period, ... Robert J. Wessels, president and chief executive officer of



‘Aina [Le’a], made misstatements of fact to Newbridge and the Plaintiff and failed to disclose ... the existence of a finder’s fee agreement with a ... broker dealer.”

On the list of creditors filed with the bankruptcy court, Gusrae Kaplan Nusbbaum’s claim is listed as \$146,000 and is described as disputed.

In an filed with the U.S. District Court for the Southern District of New York, Christopher Albanese, an attorney with Gusrae Kaplan, lists repeated efforts to notify attorneys for ‘Aina Le’a of the need to respond. “On April 28, 2017, counsel for defendant contacted this office and acknowledge the complaint and that defendant must answer the complaint. On June 7, 2017, I contacted counsel for the defendant [and] notified them of defendant’s default.... Defendant failed to respond. To date, the defendant has not answered the complaint and the time to do so has expired.”

### **EB-5 Investors**

In recent months, the efforts of Jared Kushner’s family to attract Chinese investors through the use of EB-5 visas has gained attention. In Hawai’i, ‘Aina Le’a has attempted to use the same program to raise capital for one of its projects called Whale’s Point.

In February, ‘Aina Le’a informed the Securities and Exchange Commission that it had closed “on a portion” of a \$34 million loan from Whales Point Fund, LLP, on December 31. The loan, to be paid back at 6 percent interest over five years, “will be funded by the EB-5 investor program,” ‘Aina Le’a stated.

At the time of that closing, it went on to say, “We were in violation of certain financial covenants of the Whales Point Fund loan agreement,” but by February, ‘Aina Le’a had “entered into waivers with the lender which waived certain financial covenants until the commencement of sales.”

The Whale’s Point investment opportunity is being marketed through Golden Pacific Ventures, which describes itself as “an EB-5 Regional Center in Hawai’i.”

According to Golden Pacific Ventures, “Whales Point is a luxury condominium-hotel project with 48 luxury villas on the Gold Coast of the Big Island of Hawai’i.”

Each villa, or “condotel,” includes a 3- or 4-bedroom suite, and access to a butler, maid service, spa, swimming pool, golf, and “everything the Big Island has to offer,” the company states.

Foreign nationals who invest \$500,000 in developments in rural or disadvantaged areas – and all Hawai’i counties except Honolulu qualify as rural – are eligible for visas allowing them to live in the United States and can qualify for expedited citizenship.

Golden Pacific Ventures, Inc., is based in Carson City, Nevada. The Whales Point Fund is a Delaware limited liability partnership.

— **Patricia Tummons**

### **Wespac from page 1**

Should U.S. Interior Secretary Ryan Zinke decide to roll back the commercial fishing prohibitions in both the monument and the expansion area, “it’s not like you would see an armada of fishing vessels to rape and pillage the Northwestern Hawaiian Islands,” Kingma told the NWHI Coral Reef Ecosystem Reserve Advisory Council (RAC) at its May meeting. He noted that the current fishing regulations retain protected species zones that would prohibit longlining within 50 nautical miles of the islands. To catch bottomfish, a permit would be required and harvesting of precious corals and lobsters would still be banned, he said.

“We’ve stated a position that we feel that the fishing provisions of the monument designations were unnecessary, inconsistent with best available science, inconsistent with Congress,” he told the RAC.

Given the current ongoing review of monuments by the Interior Department, Simonds last month suggested to Wespac’s Scientific and Statistical Committee that it hold off on making any recommendations for regulations for non-commercial fishing within the monument expansion area, which the council has been tasked with doing.

“We could wait two months to see what happens with the review of the monument,” she told the committee. “I’m sure a decision will be made in July. They’ve already made a decision on Bears Ears [a monument in

Utah, which the administration said it plans to shrink]. They didn’t do away with the monument. The council is not asking to do away with the monument. We’re asking to do away with the marine fishing regulations. ... We could have bottomfish fishing!”

The committee agreed to wait, as did the full council when it met a week later. Michael Tosatto, head of the National Marine Fisheries Service’s Pacific Islands Regional Office, said at the council’s meeting that his office would probably not evaluate any fishing regulations for the expansion area until after the Interior Department review was complete.

### **Customary Exchange**

Before the council voted to defer making any recommendations for non-commercial fishing regulations, it heard testimony from Keola Lindsey of the Office of Hawaiian Affairs (OHA). Lindsey expressed his agency’s opposition to any rules that would allow for cost recovery of fish caught in the expansion area that were distributed via a process called ‘customary exchange.’

Customary exchange is the term used to describe the cultural practice of sharing fish with family, friends, or the local community and being compensated for costs such as gas or ice. It’s allowed in marine national monuments established recently in American Samoa and the Marianas.

Lindsey said that OHA agreed with the idea that native Hawaiian practices could be covered by a non-commercial fishing

permit and supported the practice of customary exchange — with cost recovery — in other areas of the Pacific. However, it did not support it being applied in Hawai’i at this time.

“We have concerns about how it would actually be implemented here,” he said.

Simonds asked him, “The reason for y’all not agreeing with customary exchange is the possibility of sales that people would not be able to monitor?”

“That’s part of it,” Lindsey replied, adding, “Generally under federal and state law, the idea of perpetuating a practice comes with clear caveats that there be no commercial aspect to that. ... It’s unclear in our mind how that separation can be maintained.”

### **Nothing to See Here ...**

One of the main arguments for the expansion of the Papahānaumokuākea Marine National Monument last year was that pushing commercial longlining outside the 200-mile U.S. Exclusive Economic Zone around the Northwestern Hawaiian Islands would somehow benefit protected species.

But Wespac’s Scientific and Statistical Committee (SSC) remained skeptical. So at its March meeting, it asked the National Marine Fisheries Service’s Pacific Islands Fisheries Science Center (PIFSC) to look into the impacts the monument expansion is likely to have on protected species, given that commercial longliners will now have to fish on the high seas.

By June, PIFSC had its answer: First, according to a Wespac briefing report to the SSC, the center pointed out how difficult it is to analyze the effects of fishing vessels shifting their effort elsewhere, since it is impossible to predict where the shifted effort will occur and since there is no obvious scenario for modeling where that might be. And even if actual post-expansion fishing effort and bycatch data were available, “the causes for bycatch changes will remain uncertain because there is such huge annual variability in catch,” the report stated.

That said, PIFSC ultimately estimated that “if effort was displaced or even increased substantially and distributed uniformly throughout the fishing grounds, then albatross bycatch would decrease,” the report stated.

The center noted that an albatross study also showed significant increases in bycatch with effort closer to Northwestern Hawaiian Island nesting sites and “that the average albatross bycatch rate inside the area closed by the monument expansion is much higher than the average for the rest of the fishery, though perhaps not so for particular sub-areas in particular years.” Albatross are protected species under the Migratory Bird Treaty Act.

In its report, Wespac staff requested that the committee suggest potential scenarios for PIFSC to analyze, such as “all effort redistributes south of the Hawai'i Archipelago” or “all effort relocates to east of 150 degrees.”

When it came time to discuss the matter, however, committee chair Paul Callaghan announced that this wouldn't happen. He had been informed that there was “not enough data to provide a good presentation” and that the committee would revisit the matter at its next meeting.

### **'Less Productive'**

While bigeye tuna catches this year haven't matched the record-breaking rates seen by the Hawai'i longline fleet over the past two years, the fishery is still expected to exceed its international quota of about 3,100 metric tons and to require quota transfers from at least two other Pacific island territories to be able to keep fishing through the end of the year. (This despite being pushed out of the U.S. Exclusive Economic Zone surrounding the Northwestern Hawaiian Islands by last year's expansion of the Papahānaumokuākea Marine National Monument.)

While the fishing grounds still appear to be productive enough to sustain a robust local bigeye fishery, that may not be the case in the coming decades. An article published

in *Global Change Biology* last year suggests that within this century, climate change may significantly alter the habitat zone of the North Pacific where photosynthesis occurs, from the surface down to about 200 meters. The article's authors, Phoebe Woodworth-Jefcoats and Jeffrey Polovina of the Pacific Islands Fisheries Science Center and the University of Hawai'i's Jeffrey Drazen, conclude that climate change is projected to reduce carrying capacity and redistribute species richness in the North Pacific, where the Hawai'i longline fleet spends some of its time.

As reported in previous issues of *Environment Hawai'i*, Polovina (now retired from PIFSC) has predicted that zones of lower productivity, where there is less zooplankton (i.e., fish food), will grow because of warming waters. This will eventually lead to fewer large fish species in the Pacific. In the article published last year, he and his co-authors state that the North Pacific's potential carrying capacity, and in turn fishery yield, is projected to drop by about two to five percent per decade. (For more on this, see our April 2016 issue.)

“Additionally, based on changing thermal habitat alone, species richness across much of the subtropics is projected to decline by up to four tuna and billfish species by the end of the century,” they wrote. “Fishery managers can use these projections to place current yields and management actions in a broader climate-based context. For example, early warning thresholds for changing catch composition or yield could be based on projected climate impacts. Such strategic management plans would ensure that the ecosystem is not further stressed by unsustainable removals.”

Perhaps influenced by the work of Polovina and colleagues, the Western Pacific Fishery Management Council last month directed its staff to ask the Secretariat of the Pacific Community (SPC) — an organization that prepares the tropical tuna stock assessment for the Western and Central Pacific Fisheries Commission — how it is incorporating climate change information into tuna stock assessments. The council also encouraged Pacific island representatives at SPC meetings to request that climate change impacts be evaluated and incorporated into regional stock assessments and marine spatial planning efforts.

Wespac outreach specialist Sylvia Spalding noted that the annual mean chlorophyll concentration, an indicator of ocean productivity, in the Pacific reached a record low last year. The previous record was set in 2005.

“The ocean seems to be becoming less productive,” she said.

A 2008 study by Polovina found that the area of these less productive waters may be expanding in the North Pacific, and in 2015, that area was larger than in previous years, according to the council's 2015 Stock Assessment and Fishery Evaluation (SAFE) report. The council chose not to include an evaluation of this low-productivity zone in its 2016 SAFE report because, according to Spalding, cloud cover inhibited the collection of good data on chlorophyll levels.

Woodworth-Jefcoats, who sits on the council's Marine Planning and Climate Change Committee, told *Environment Hawai'i* that she hopes that by using better satellites or by combining satellite data, changes in lower-productivity zones in the Pacific will again be included in the council's annual evaluation of climate changes.

### **You Snooze, You Lose**

Having failed to meet two deadlines to submit a list of nominees for two expiring at-large seats on the Western Pacific Fishery Management Council, the state of Hawai'i will lose at least one of its four members who are not government officials.

The three-year terms of Hawai'i island charter fisherman Frederick “McGrew” Rice and O'ahu attorney and part-time commercial fisherman Edwin Ebisui end on August 10. Michael Goto, manager of the United Fishing Agency, Ltd., and Dean Sensui are Hawai'i's two obligatory regional members whose terms expire in 2018 and 2019, respectively.

Rice's and Ebisui's seats were the only at-large seats expiring this year. NOAA received timely nomination lists from American Samoa and the Commonwealth of the Northern Mariana Islands (CNMI). But Hawai'i's list of nominees did not arrive until after the extended deadline of April 28.

NOAA was to announce the appointments by June 27. It had not done so by press time.

Because CNMI included Ebisui in its list of at-large nominees, it's possible he could continue to serve on the council for a third and final consecutive term. Rice's seat, however, will be filled by someone from American Samoa or the CNMI.

At the council's meeting last month, Bruce Anderson, head of the state Division of Aquatic Resources, was unable to explain how the state had whiffed.

Had the state submitted its list on time, it seems Rice would still have been out. He asked Anderson why his name was taken

## BOARD TALK

## Kuka'iau Ranch Acquisition Wins Much of 2017's Legacy Land Funds

Breaking with a decade of past practice, the state Division of Forestry and Wildlife (DOFAW) in May supplanted funding recommendations from the Legacy Land Conservation Commission with its own.

At the state Board of Land and Natural Resources' May 26 meeting, DOFAW administrator David Smith recommended that it fully fund a request for \$738,346 to complete the agency's acquisition of nearly 4,500 acres at Kuka'iau Ranch, rather than provide \$838,346 to a project to protect lands surrounding the Ala Kahakai Trail in Waikapuna, which would have required more than a million dollars of additional funding.

DOFAW made the recommendation despite the fact that the Legacy Land Commission had ranked the 2,200-acre Waikapuna project above the DOFAW-proposed Kuka'iau Ranch project in its list of priorities. Both DOFAW and the commission, though, agreed on a recommendation to award \$1.5 million from the Land Conservation Fund to pay the ongoing debt service for the Turtle Bay acquisition approved last year.

"This is unusual. We generally don't

come up with an alternative to the commission [recommendations]," Smith admitted. He explained that a lack of staff led to a lapse of Legacy Land funding in fiscal year 2015-2016. As a result, about half the money was available this year for projects compared to past years.

The change in recommendation ranked several commission members, especially its chair, Theresa Cabrera Menard. At the commission's May 8 meeting, she stated, "Usually the commission's recommendation is what DOFAW backs in its submittal to the Land Board. But now DOFAW wants approximately \$700,000 to fund its own second-ranked project at Kuka'iau, thereby leaving only \$100,000 for the top-ranked Waikapuna. ...

"I have one question. And it's a very important one. Is this fair to the applicants? Applicants are expecting that this commission will select the awardees and that DOFAW will uphold that decision," she stated.

She noted that DOFAW had only once before diverged from the commission's funding recommendations, and in that case — involving the purchase of land along the

Ka'Iwi coast on O'ahu — it was because the applicant had changed details of the project midway through the approval process. (This is discussed in an article in the May 2015 issue of *Environment Hawai'i*.)

In the current case, "DOFAW just disagrees with the ranking order of the commission and is asking the Land Board to fund its own project first," she continued. "This sets a new bad precedent. It impacts DOFAW's relationship with the public who came out to testify, the applicants themselves, and this commission. Should we expect a competing recommendation every time DOFAW puts forth an application that doesn't receive funding?" she asked.

Smith defended his division's proposal. "I'm not trying to slip anything through. My recommendation is different from yours. We'll put them both on the table ... and let the board decide."

He stressed that he believed his recommendation was more logical, since it would allow one project — the acquisition of upper Kuka'iau — to be completed, while the commission's recommendation would still leave the group seeking to purchase lands at Waikapuna with inadequate funding. He added that the Kuka'iau purchase needed to happen as soon as possible. "If we don't do Kuka'iau [this year], we might lose the whole thing," he said.

Despite his explanation, a number of commissioners echoed Menard's concerns about the precedent being set, the apparent self-serving nature of DOFAW's recommendation, and the program's potential loss of credibility with the public.

When the matter came to the Land Board, DOFAW stood by its recommendation. However, to honor the commission's process and desire to protect Waikapuna, Smith told the board that his division intended to fully fund all of the top projects approved by the commission in fiscal year 2017, which ended on June 30.

"That would require we come back in July to roll back FY18 funding," Smith said.

DOFAW's Irene Sprecher explained that the use of FY18 funds to pay for the unfunded FY17 projects would reduce funds available to 2018 applicants to just around half a million dollars.

"We would strategize and communicate that before applications. For FY19, we would be able to have a full competitive year," she said.

The Land Board unanimously approved DOFAW's recommendation, with the understanding that the division would return in July with a proposal to use FY18 funds

off the nomination list forwarded to Gov. David Ige. Rice argued that he knows more about protected species "than most of the council members in this room and I don't think I've done anything wrong at the meetings."

Anderson said he did not know whose names were included in the state's list to NOAA. The governor's office had not responded by press time to a request for those names and also did not answer why it failed to submit the list in time. NOAA's Michael Tosatto stated that he had not seen the list, but also that he did not doubt Rice was absent from it.

"It was so annoying," said Wespac executive director Kitty Simonds. "Hawai'i is probably going to lose two at-large seats that they held from the very beginning, 40 years ago," she said.

"I'm not aware of the governor's process. I do think it was unfortunate that the deadlines were missed. It was not because they didn't have a draft. I don't know why there

were some delays," Anderson said.

"You and Ed have done a terrific job," Anderson told Rice. "I wholeheartedly support doing whatever we can to reinstate Hawai'i's representation on the council."

Sensui added, "The loss of McGrew, needless to say, it's a terrible loss. He's the only commercial fishermen in our small cadre. He's from a fishing family. That the state's administration would be so lax to miss something so important, to me it's mind boggling. ... We're not happy with it to say the least."

The council is made up of four designated federal officials (from the National Marine Fisheries Service, Fish and Wildlife Service, U.S. Coast Guard, and the State Department), four designated state officials (one each from Guam, CNMI, American Samoa, and Hawai'i), and four appointed members representing each region. The final four at-large members can be from any region.

— **Teresa Dawson**



to support the commission's top-ranked FY17 projects. That includes the \$2 million Waikapuna project proposed by the Trust for Public Land and the Ala Kahakai Trail Association, as well as a request for \$210,000 for a conservation easement to the Hawaiian Island Land Trust over 6.12 acres of taro lands in Ke'anae, Maui.



## Board Slashes Proposed Lava Tour Boat Fine

On June 9, the Land Board voted to fine a lava tour boat company \$15,000 for running three tours out of Pohoiki in East Hawai'i without a commercial use permit from the Division of Boating and Ocean Recreation (DOBOR).

DOBOR had proposed a much larger fine of \$80,000 for eight illegal trips. That amount reflected the maximum per-violation fine of \$5,000, assessed against both the vessel owner, Shane Turpin, dba Kohala Tours, as well as the captains involved in the illegal trips.

Turpin does hold one of the four available commercial use permits for Pohoiki, but for a few days in early February, he ran two vessels there. At the Land Board meeting, he claimed that he had run two boats out of Pohoiki because he had mistakenly believed that DOBOR rules allowed him to use a vessel permitted for one harbor for up to ten days in another harbor, despite the four-permit cap at Pohoiki. What's more, he argued that should the board choose to fine him, it should be for three trips, not eight. While the non-Pohoiki-permitted vessel (Lava Kai 2) is the one that made eight trips, Turpin explained that DOBOR was in the process of transferring his permit to that vessel at the time of the violations. The vessel that was actually permitted at the time (Lava 1) only made three trips during that time.

DOBOR administrator Ed Underwood, however, suggested that Turpin intentionally committed the violation. "He told me on the phone the reason why he ran the second boat was to bring issues to a head" regarding the insufficient number of commercial permits at Pohoiki.

"I told him we're open to increasing the number of commercial permits. We need to engage in rule-making. Staff is beginning that process now. It takes a while," Underwood said.

Regardless of whether Turpin intentionally committed the violations, Land Board member Stanley Roehrig seemed concerned



PHOTO: DEPARTMENT OF LAND AND NATURAL RESOURCES

With increased demand for lava flow tours, operators have been calling on the Division of Boating and Ocean Recreation to lift the commercial use permit cap at Pohoiki.

about DOBOR's decision to fine the captains, as well.

"If the company is the permittee, why are we charging all the captains? If five people take turns being the captain, you gonna charge all five? Are we overcharging? ... We need to decide if everybody who grabs the wheel is gonna get charged," he said.

Deputy attorney general William Wynn, representing DOBOR, replied that the division's rules say no person shall engage in commercial activities without board permission, and that a captain who goes out and is knowingly engaging in commercial activities should be charged.

Chris McGuire, an attorney representing Turpin, argued that an \$80,000 fine was excessive. "The board has bigger fish to fry. ... My client did go over the line in a few instances, but not in a manner that would justify lowering the boom," he said, suggesting a fine of no more than \$5,000.

Land Board member Chris Yuen agreed, in part. He made a motion to approve a fine against Turpin for just the three trips that the Lava 1 made. At the maximum allowable fine of \$5,000, that worked out to a total of \$15,000. Yuen estimated that the three trips generated about that much in revenue.

"I don't think \$5,000 per violation is excessive," Yuen said, adding that he didn't quite understand Turpin's explanation of why he ran the two boats, which allowed him to collect so many more people.

"It's pretty clear we're giving them the benefit of the doubt by saying let's act as if you swapped the Lava Kai 2 for the Lava 1. Then they would have had only 26 people

... but they had another 23, perhaps more. At \$150 to 200 per passenger, the math doesn't work out that differently than \$5,000 per violation. If somebody makes a deliberate violation, it's not excessive to charge them what they earned from the violation," Yuen said.

### *Carrying Capacity*

Before DOBOR imposed a commercial vessel cap of four at Pohoiki in 2014, Turpin had two boats permitted there. When the cap was imposed, the lava had stopped flowing into the ocean, so Turpin didn't really need to run more than one vessel there. But in 2016, the lava returned, as did demands from people to see it. Whether he'll ever be able to regain a second permit is an open question. While DOBOR is considering reviewing the cap, Underwood said the area is heavily congested with both public and commercial users.

"Turpin has the largest vessel. If the other three would increase in size [to match his vessel], there would be a 200 percent increase in people. The county says there is such a demand down there they want DLNR to help pay for upkeep," Underwood said.

Land Board chair and DLNR director Suzanne Case added, "There is tension. It's hard for boats to get in and out when there's people in the water. ... The volcano is erupting and there's a lot of popularity and people want to take these lava tours."

She said the permit cap was established to address safety issues. "The push to open that is the popularity of the lava tours. [Pohoiki is much closer to the flows than Hilo harbor.]

Even if you opened up the question, there would be no guarantee the result would be an increase ... because of the safety issues," she said.

Roehrig asked Underwood if his division was planning to place traffic cops at Pohoiki.

"It's dangerous. The kids go right down the ramp. The surfers are there. ... It's a very nasty area right now. What plans do we have for that?" he asked.

Underwood replied that the Division of Conservation and Resources Enforcement has been policing the area.

"I'm talking about DOBOR," Roehrig said.

"DOBOR has no staff in Hilo. We could go to the Legislature and ask for additional staff," Underwood said.

"I'm not talking about having someone there every day. I'm talking about having a community meeting to familiarize yourselves with problems. That's a hotspot," Roehrig said. Underwood replied that he was "willing to reach out to the community."



## Board Raises Rent On Hilton Fireworks

The Friday night fireworks show that the Hilton Hawaiian Village has been putting on for the public for more than two decades is now subject to rent closer to that imposed on all other fireworks shows for the portion of the public beach designated as a safety zone around the launch area.

In the past, Hilton representatives had successfully argued that the hotel's Friday shows should not be subject to the standard \$500 in rent for a right-of-entry permit because they provide such a benefit to the public and nearby businesses. But in an effort to be fair to those that pay the full rent for their safety zones, the DLNR's Land Division proposed last month to increase the rent for the Hilton shows from \$50 to \$250. Hawai'i Explosives & Pyrotechnics, Inc., which runs the show for the Hilton, would be the actual permittee.

While the rent hike would increase the Hilton's annual costs for the shows by about \$10,000, some Land Board members suggested that the hotel can afford it and, in any event, businesses that benefit from the show could help pitch in toward that increased cost.

At the Land Board's June 9 meeting, Hilton representatives again stressed the community benefit of the Friday shows, which regularly draw hundreds of spectators.

"We recognize your argument that there is a community benefit, but there is also a commercial and business benefit to Hilton," board chair Suzanne Case said. "Arguably, anybody else that does this could argue that it is a community benefit. ... Other fireworks, everybody gets to see them."

"I don't think anybody else does it 52 times a year," replied Hilton vice president Jerry Gibson.

"There are people that don't like the fireworks," Case noted — a point many pet owners might agree with.

Rick Egged of the Waikiki Improvement Association urged the Land Board to consider the fact that the weekly fireworks shows cost Hilton \$446,000 a year, which the hotel has to constantly justify.

"It's difficult. It's always a question of whether they're going to get it approved. ... I would really request the board consider not increasing the rate," he said.

Board member Sam Gon suggested a further compromise: raising the rent to just \$100, rather than \$250. While member Chris Yuen seconded his motion, it ultimately failed.

Even so, Yuen argued to keep the rent as it is. "We have a beneficial relationship [given] the increased spending that in some way makes its way back to the state. I think Hilton doesn't want to come here and say, 'If we pay more, we'll yank the show.' ... When somebody does something that's really nice, even if we can charge them more, should we charge them more?" he asked.

But given that the annual permit covering the shows was expiring that day, a Friday, and a new one was needed to cover the show that night and through June 2018, Gon made a motion to pass the Land Division's recommendation.

"I think it's a good compromise, not perfect. We value your operation and all you folks do at Waikiki. If this doesn't work, you could come back. Maybe we'll revisit it and change it," Roehrig said. "We get the heat from both sides. Heat comes every day. We get it on the social media, too. We have to be transparent," he added.

With that, the board approved Gon's motion.



## Seawall Easement Costs Vex Land Board, Landowners

Manuel Madeira patiently waited hours for his item to be heard and to speak his piece on what he saw as the unfairness of the DLNR's Land Division proposal.

But even though the division director and Land Board members agreed that it wasn't fair, the board voted to charge his company, West Coast Roofing, Inc., thousands of dollars for an easement covering his legally built seawall in Makaha, O'ahu — for the second time since 2013.

In January 2013, the Land Board authorized a 55-year non-exclusive easement for a 131-square-foot portion of the company's seawall that was found to be encroaching on the public beach. The company paid \$3,000 for the easement in September 2013.

That month, however, a state surveyor conducting a shoreline certification discovered that an additional 190 square feet of seawall was encroaching on the beach. The area had been previously buried under sand.

On June 9, the Land Division proposed that the company pay \$4,351 to extend the easement so that it covers the additional area.

Madeira testified that in addition to already paying \$3,000 for an easement and another \$3,000 for a survey of the area, "they want me to pay an additional \$4,000."

"I looked at the wall yesterday. Now only 106 square feet of the wall is exposed. The sand shifts on this shoreline. We don't have any real loss of shoreline. To make matters worse, I was required to get \$1 million liability insurance of part of my land outside the seawall. It's land I cannot protect, yet I have to have liability insurance. ... When it was brought to my attention I would be incurring another cost ... I don't feel it's fair," he said.

"We agree it is a challenging situation," Land Board chair Suzanne Case said, noting that legislation had been proposed to minimize costs for easements covering legally built seawalls. Those bills, however, have consistently failed, year after year.

Land Division administrator Russell Tsuji informed Madeira, "So you're aware, the shoreline certification is good only for one year. If it [the shoreline] is determined again to be further in, you could need another easement."

When it came time to vote on the matter, board members hesitated.

"Aaugh!" member Keone Downing exclaimed.

"I feel for landowners, too," Case said, while Tsuji complained, "I can't even get a hearing on that bill" on shoreline easements.

"I think I'm gonna vote no. Hopefully, we'll send a message to the Legislature. They can't put all this on top of us," member Stanley Roehrig said.



Tsuji explained that those who have opposed the proposed legislation to allow the DLNR to receive less than market rent for easements for legally built seawalls view it as encouraging shoreline construction at a time when sea level is expected to rise. The state Office of Planning is one agency that has consistently expressed concern about the bills.

"Whatever the law is, we need to apply it fairly across the board," Case said. "We agree it's challenging. We're going to continue to try to fix it. I don't see we can avoid our responsibility to follow that law."

In the end, the board, except for Roehrig, voted in favor of the Land Division's recommendation.

(For more on this, read "Bills Facilitating Shoreline Easements Fail For Fifth Year at Legislature," in our March 2017 issue.)



## New Royal Hawaiian Groin Gets Permit, With Conditions

On June 9, the Land Board approved a Conservation District Use Permit for the construction of sand-retention groin fronting the Royal Hawaiian and Sheraton Waikiki hotels. But it may be months, or longer, before the permit is actually issued.

That's because some board members had serious doubts about whether the design prepared by the DLNR's contractor, Sea Engineering, will achieve the department's goal of rebuilding and maintaining the beach fronting the hotels. As a result, the board made a third-party review a condition of its approval.

Sea Engineering has proposed building a T-head groin that would extend 160 feet from the Sheraton's seawall. Built in 1927, the existing 370-foot-long groin is dilapidated in parts but serves to prevent sand from being swept away by ocean currents. A portion of the groin is submerged and broken apart and "[c]ollapse of the structure would cause the sand that is impounded on the eastern side of the groin to be released," according to a report by the DLNR's Office of Conservation and Coastal Lands.

In 2012, the DLNR, with Sea Engineering's help, replenished the Royal Hawaiian-Moana Surfrider section of Waikiki beach with up to 27,000 cubic yards of sand, but three years later, the beach had lost about 30 percent of the new sand, the report states. As a result, the department is now proposing to repair or replace the Royal Hawaiian groin with a more stable structure to maintain

the beach.

In April, the Land Board deferred the OCCL's permit request because some members wanted more information on how the new groin would help matters. For one thing, they wanted to know whether the existing groin could simply be repaired. Sea Engineering's Scott Sullivan returned to the board last month to explain things further.

Sullivan noted that the first 100 feet of the existing groin are somewhat intact and functional, but then the groin becomes submerged and progressively more broken, making it "pretty ineffective."

Should the groin fail, it could potentially undo the benefits of the 2012 beach maintenance project, he said.

"You asked, could we repair the existing groin? It cannot withstand a hurricane type event," he continued.

Big Island board member Stan Roehrig remained skeptical. "We've had a number of tidal waves hit over the last umpteen years and the groin is still there. How is it that this new engineer [at Sea Engineering] said it can't withstand a tidal wave if it has? Did he go out and look at the history? ... It sounds like he just made that up in his office," he said.

Sullivan tried to assure Roehrig that his colleague's conclusions were based on sound calculations. "From an engineering standpoint, we have a responsibility to design these correctly. It's standing there, I admit. Why? I don't know. We're lucky. We can continue to be lucky if that's the way we want to go. I can't tell you why it's still standing. I can tell you that it shouldn't be," he said.

Roehrig still wanted to know if something could be installed that was substantially the same shape as the existing groin.

Sullivan suggested that the DLNR could just make a big wide concrete wall there, but the problem is that it would only be about 100 feet long, which he believed was not long enough to maintain the beach to the width that the department wants.

"It won't be very much more efficient than what we've got. The wall will be stable. It's not going to be sufficient to save the beach," Sullivan said.

"How do you know? You don't know!" Roehrig argued.

Sullivan reminded board that he was simply designing the groin for the DLNR.

"I'm working for you. This is not my wall. ... We should not be adversarial here. We're on the same team. We're trying to do what's best for you," he said, noting that a T-head groin would help prevent rip

currents during high surf, which can move sand offshore.

Addressing the Land Board's concern expressed in April about the new groin becoming a hazardous attraction to people, Sullivan recounted his observations during a recent king tide.

"I walked from Queen's surf groin up to the Moana hotel. We had a fairly dangerous situation. Half the island was jumping off the Kapahulu drain. ... Waves would knock them down. People are going to do what they're going to do. I don't think there's any solution. Everywhere I looked, people were climbing any structure," he said. With regard to the new groin, if built, he said, "Yes, they're going to be all over it."

Roehrig said his concern about a T-groin is that he believed it would be put in a place where he learned how to surf as a kid.

"I want the place for the keiki to learn how to surf," he said.

"I think we decided that spot is a bit east of the proposed T-groin," board chair Suzanne Case said.

There was some debate over whether the removal in 2012 of two groins that had been deemed to be ineffective and safety hazards changed the makeup of the beach thereafter.

Land Board member Keone Downing seemed convinced that the removal had increased erosion, especially in front of the old Waikiki Tavern. Sullivan, on the other hand, said whether or not their removal caused erosion, he didn't think they were effective.

The bigger issue was that a bunch of sand the DLNR put there in 2012 washed away, Case said. "Do we need a big picture here? Is this [groin] a first step in a series of improvements?" she asked.

"Yes," OCCL planner Tiger Mills replied.

Sullivan added that the department had recently contracted Sea Engineering to look at Waikiki from the Natatorium to the Hilton Hawaiian Village. "It's time to take a look at the big picture and come up with a long term strategy. We've been asked to look at short term, five years, and long term. The Royal Hawaiian groin replacement is the first project. ... It really needs help," he said.

Case asked Sullivan whether there were designs other than the T-groin that would solve the erosion problem. "Are there other opinions about how best to hold sand in?" she asked. "Is this something reasonable professionals can differ on? ... We're making a big investment in this. How do we know this is the right one?" she asked.

## Kahala Hotel Beach Weddings Not Sanctioned by DLNR Permit

If it weren't for us, you wouldn't even have a beach and you promised use we could use it, so cut us a break.

That appears to have been the attitude of representatives for the Kahala Hotel & Resort over the past several years, and the state Department of Land and Natural Resources' Land Division appears to have pretty much acquiesced.

In other beach areas that are not adjacent to a hotel, the division has pursued and won hefty fines for unpermitted commercial activities, such as kayak tours. But not for the beach fronting the Kahala (or a number of other Waikiki hotels, for that matter).

"Prior to the development of the Kahala Hilton Hotel in 1963-1964, there was no beach available for public use in the area

between the Waialae Golf Course and Waialae Beach Park," wrote attorney Kenneth Marcus, representing the hotel, in a June 12, 2012, memo sent to the DLNR. The hotel's developer had sought approval from the state Board of Land and Natural Resources to improve the beach at Waialae by dredging and filling the area, importing sand, and constructing two small islets and two groins.

"The developer expressly agreed to permit the newly created beach to 'be used by the public for public beach' and was described as 'similar to the Outrigger Canoe Club agreement with a few changes.' The most significant change ... expressly provided that '[t]he no-structure clause in the Outrigger Canoe Club agreement is deleted

from this agreement,'" Marcus wrote.

He noted that since that 1963 agreement, the hotel had been paying the state a monthly fee to maintain the beach "pursuant to a license permitting the use for recreation and maintenance purposes."

"As contemplated in the minutes [of the Land Board meeting where the agreement was approved] ... the hotel has continuously since the creation of the beach (i) pre-set its beach furniture in portions of the beach thus created ... and (ii) permitted its functions on the lawn of the hotel to spill over into the grassy area outside the hotel's property line although off the beach thus created. Until March 2009, there were no material complaints, by the state or the hotel's neighbors, with regard to such activities," he wrote.

"It is clear from the language of the Board minutes, as well as the uninterrupted use by the hotel for fifty years, that the parties intended and understood that the hotel could place its equipment and structures in

Sullivan first defended his company's work. "Our firm has great engineers. I think we do as good a job as you'll find," he said. With regard to a possible alternative, he said that whatever the design, it would have to meet the objective, which in this case is to keep the 2012 beach position. To do that, "we need to dissipate wave energy before it reaches the hotels," he said.

Whatever design is ultimately decided upon, Sea Grant's Dolan Eversole suggested in testimony that something needs to be done quickly. "I want to leave you with a simple message: The current groin is in a very poor state. The last three winters, we had to close the Royal Hawaiian beach stairs," he said. "The existing condition of the groin is dysfunctional."

Land Board member Sam Gon moved to approve the permit. In seconding the motion, member Chris Yuen offered an amendment.

"I don't mean any criticism of the engineer, but we have heard skepticism from board members," he said. Yuen and Case recommended that the board seek a second opinion on whether a T-head groin meets the goals of the project. He left it up to the board chair to execute a contract to evaluate the design.

Gon said he liked the idea of an independent corroborator. "It's an important project in an important spot. It is my expectation that a second opinion will corroborate [the T-head design]. If it doesn't,

we should know about it," he said.

With that amendment, the board unanimously approved the permit.



## Health Hazards Force Old Uncle Billy's to Close

On June 9, the Land Board voted unanimously to renew a revocable permit to Savio HBH Development Company LLC, for one month — to July 14 — with the understanding that the company would not book any more guests at the Pagoda Hilo Bay Hotel (formerly known as Uncle Billy's Hilo Bay Resort) on Hilo's Banyan Drive and would work to close the place immediately. The permit extension would give Savio time to remove any personal property, as well.

Board member Chris Yuen added that Hawai'i County inspectors would be evaluating the hotel property in the coming days and if they found any emergency situation that required guests and employees to be removed immediately, the Land Board chair would be authorized to close it earlier.

Peter Savio of Savio HBH supported the board's decision, noting that he was basically babysitting the hotel for the department and was not really interested in holding onto the property. As a Land Division report to the board stated, "The revocable permit was intended as an interim



PHOTO: PATRICIA THUMMONS

The Land Board chair Suzanne Case ordered the immediate closure of the Hilo Bay Hotel last month due to health hazards. Leftover furnishings were carted away late last month.

measure to keep the hotel in operation until such time that the Banyan Drive Hawai'i Redevelopment Agency, organized under the supervision of the County of Hawai'i, Planning Department, develops a long-term conceptual plan for the future of the Banyan Drive resort area."

Last year, Erskine Architects, Inc., a consultant for the state, found that the hotel "contains numerous life safety issues." Those included an unsafe stair tower in the West Wing, insufficient escape routes in case of fire, termite infestations, and large quantities of hazardous materials.

The DLNR announced on June 17 that the hotel was to close immediately.

—T.D.





The dotted yellow line shows the approximate project area. The pink lines delineate tax map key parcels.

the beach area. ... [I]n reliance on that understanding the hotel expended substantial sums," he wrote. "The state is therefore estopped from requesting the hotel to remove the equipment under Hawai'i's judicial doctrine of equitable estoppel."

While he repeatedly cited the minutes of the Land Board meeting held back in the 1960s, the actual agreement contains no provision granting rights to the hotel to use of the property. The agreement simply states: "Title to and ownership of all filled and reclaimed lands and improvements seaward of the makai boundaries of Land Court Applications Nos. 828 and 665 shall remain in and vest in the state of Hawaii and shall be used as a public beach." It mentions nothing about the hotel being allowed to conduct activities or build structures.

### Public or Private Beach?

Marcus's memo was apparently prompted by Land Division efforts to get the hotel to apply for a permit to cover its pre-setting of chairs on the beach. On the same date as Marcus's memo, the City and County of Honolulu's Department of Parks and Recreation had referred to the division a complaint by Council member Stanley Chang about the hotel's treatment of his constituents.

"Constituent reports the Kahala Hotel has filled the public beachfront with blue beach chairs for its guests with no space for the general public to sit. Also observes there is No-Trespassing signage positioned on the 'Ewa side of the beach leading to the hotel, and weddings are being held in the beach area fronting the hotel," a county report states.

In a September 4, 2012, memo, Marcus

reported that the "Private Property, No Trespassing" sign had been removed and a gazebo that was within the city's 40-foot shoreline setback area was relocated. With regard to the chairs, he stated that they "may now be used by Kahala guests and the public on a 'first-come, first-served' basis, free of charge." The number of chairs to be set would also be tailored to the anticipated usage "so as to keep out only so many as are necessary."

Cabanas, however, would not be free, although they would be made available to the public, he wrote. "Kahala is willing to offer to pay to the state eight percent of revenues from such rentals, exclusive of GET," he wrote.

As to the weddings, he wrote, "Kahala is willing to pay a per-event fee similar to that now payable by the public for wedding licenses from DLNR or, in the alternative, will simply no longer hold weddings or other events on state land."

He noted that the hotel would prefer to obtain a long-term easement over the area to justify the cost of maintaining the state's property. At the time, the hotel was paying the state about \$1,244 per month.

By the next day, however, he had changed his mind about the beach equipment, having been convinced by Land Division staff of the visual impact of pre-set equipment on the beach. In a follow-up memo, he wrote, "All chairs, cabanas and other beach equipment will be removed from the sand nightly, and shall not be brought back unless and until requested for use by Kahala guests."

"Hopefully this ... will make it unnecessary to get into elaborate and costly valuation discussions," wrote attorney Ivan Lui-Kwan in a September 5, 2012, letter to Land Division administrator Russell Tsuji.

### Honeymoon's Over

Six months after agreeing to stop pre-setting equipment on the beach, Marcus wrote Tsuji a letter on March 18, 2013, arguing why it should resume. He attached a survey of other beachfront hotel properties. "You'll observe that just about every other one we surveyed not only pre-set their beach equipment, but also stores substantially all of it in the sand and other public areas.

"When the management of these hotels



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were asked how this came about, just about everyone that was willing to respond answered that it was part of an understanding they had with the state, an understanding that mirrored the situation at Kahala before complaints were received by the DLNR from Kahala's neighbors: we (the Kahala) maintain the beachfront for the public, at substantial expense to the hotel, and the state accepts that the hotel fronting the beach may make use of the area in a way that is both tasteful and beneficial to the public's right to use," he wrote.

to a March 29, 2017, draft environmental assessment for a perpetual easement, the hotel wants to create paved paths and place tiki torches and gas lines along the shorefront and expand its wedding sites from two to three. It wants to continue pre-setting and storing equipment on the beach (including 40 to 50 cabana loungers and about 100 beach lounge chairs), maintain its existing wedding gazebo and open-air hut, and conduct outdoor wedding ceremonies. It also plans to improve lateral access and replenish the sand, among other things.

The Kahala hotel — and even the Land Division — seemed to have taken the Land Board's omission of any ban on weddings as permission to conduct them on state property. In a June 30, 2016, letter to Tsuji, Tim Lui-Kwan wrote, "Consistent with our earlier discussions on weddings conducted on the state parcel occupied pursuant to R.P. No. 7849, ... the Kahala Hotel and Resort [owned by Resorttrust Hawai'i, LLC] will commence on July 1, 2016 the collection of a site fee of \$100.00 for each wedding held. The site fee collected for these wedding events shall be in addition to the monthly rent of \$1,244 paid by Resorttrust for occupancy and use of the land under R.P. No. 7849."

Within two weeks, Land Board chair Suzanne Case wrote Tim Lui-Kwan informing him that weddings aren't actually allowed under the permit, which was for recreational and maintenance purposes only. "No other commercial activities shall be conducted thereon without authorization from the Land Board," she wrote.

"We understand wedding ceremonies on the premise are an activity that is intended by both sides to be covered in a long term disposition. However, weddings are not currently authorized under the subject revocable permit," she wrote. She then asked the hotel to cease conducting any wedding ceremonies planned for the premises immediately and until Land Board authorization is obtained.

When asked whether he was aware of whether the hotel was still holding weddings on the state land, Tsuji said he didn't know and that he wasn't aware of the letter Case sent to Lui-Kwan.

The Kahala hotel did not indicate by press time whether or not the oceanfront wedding ceremonies it holds are on the state property. Nothing in the files at the Land Division suggest staff has ever followed up on Case's letter or pursued any enforcement action for weddings held on state land in the past year. — **T.D.**



PHOTO: MARINE RESEARCH CONSULTANTS, INC.

Some of the pre-set lounge equipment on the beach fronting the Kahala Hotel & Resort.

He said the equipment that the hotel has had to pull off the beach is now an "eyesore for both guests and public users," and has also increased workers' compensation claims, "as someone needs to pull the extremely heavy furniture off the beach nightly."

Given the hotel's insistence on using the beach it had created, the Land Division began working to help the hotel secure an easement over a large swath of the beach as well as some fast land that would cover all of the hotel's desired uses.

Back in 2014, attorney Tim Lui-Kwan (Ivan's brother) stated that the hotel was seeking a term easement and had no plans to build any new structures on the state land. But now three years later, according

### ***A Violation?***

The Kahala hotel has been conducting weddings on the public beach fronting its property for years. According to its website, an oceanfront ceremony can cost from \$3,600 to \$7,100.

Under a right-of-entry permit for recreation and maintenance activities approved by the Land Board on October 21, 2014, the hotel may only conduct surf lessons or place beach equipment or improvements on the beach with prior written approval from the DLNR. The Land Division's original recommendation on the permit was to include wedding ceremonies in that list of activities that need approval, but the Land Board chose to leave it out.