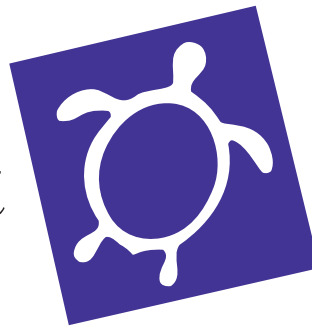


Environment



Hawai'i

a monthly newsletter

Commercreation? Recremmercial?

How should the Board of Land and Natural Resources categorize – and therefore assess – the many uses of state land enjoyed by guests of the Kahala resort?

Consider: A clamshell lounge or cabana positioned on state land has recreational value to the person occupying it, but to the hotel, which charges as much as \$200 a day for the cabana, the furniture is a commercial investment.

For years, the resort has been able to make millions off commercial uses of the state land, which it occupies under a revocable permit allowing only for maintenance and for recreational uses and for which the resort pays a pittance in monthly rent. Attorneys for the resort argue that many of the activities for which their client is paid are recreational and therefore compliant with terms of the occupancy permit.

Now that the terms of its occupancy have been challenged, it will be interesting to see how the Land Board resolves the issue.

Contested Case Request Halts Attempt To Condone Commercial Use at Kahala



An empty Kahala beach and permit area in August 1995.

The Kahala Resort & Hotel's revocable permit area is in red.

In February 1967, officers with the Kahala Hilton Hotel Company signed an agreement with the state that allowed for the hotel's creation of a public beach and swimming area fronting what is now the Kahala Hotel & Resort in south O'ahu, about four miles east of Waikiki.

The hotel used material dredged from the swimming area to fill sections of the coastline immediately seaward of the adjacent private properties, which included the hotel site. Regarding these filled areas, which have been largely grassed over, the agreement had this to say:

"Title to and ownership of all filled and reclaimed lands and improvements seaward of the makai boundaries of Land Court Applications Nos. 828 and 685" — the private lands upon which the hotel and other buildings sit — "shall remain in and vest in the state of Hawai'i and shall be used as a public beach."

At the September 14 meeting of the state Board of Land and Natural Resources, this language seemed to have been largely overlooked in the hours-long debate over

whether the board should grant the hotel a new revocable permit for dozens of "recreational" uses, some of which have the potential to generate hundreds of thousands, if not millions, of dollars for the hotel every year (and perhaps already have been doing so).

A contested case hearing request by attorney David Frankel prevented the Land Board from voting on a motion by member Chris Yuen to approve the permit. While Yuen said he shared Frankel's concerns about authorizing commercial uses on the property, he seemed comfortable letting the hotel continue some of those uses for a while, so long as the department got a cut of gross revenues. "It can be looked at in a year," he said before making his motion.

To Frankel, however, those uses needed to stop immediately, especially since they were never subject to an environmental review.

"You cannot grant an RP for the uses that they envision," he told the board, adding that the Department of Land and Natural

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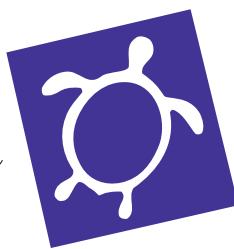
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Environment

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Hawai'i

October 2018

NEW AND NOTEWORTHY

NELHA Tenant Exits: Cellana, the company that wanted to produce biofuel from algae, has abandoned its six-acre facility at the Natural Energy Laboratory of Hawai'i Authority (NELHA) in Kona. To get out from under its debt of roughly \$280,000 in back rent, interest, and late fees owed to NELHA, it agreed to sell its buildings and equipment to neighboring Cyanotech and asked NELHA to approve a request that its sublease of land be transferred to Cyanotech as well.

At the NELHA board's September 18 meeting, executive director Greg Barbour indicated that Cellana had paid off \$100,000 of its outstanding arrearage in early September, reflecting Cyanotech's initial payment to Cellana in anticipation of NELHA board approval of the sublease transfer. A condition of the sale of Cellana assets to Cyanotech is Cyanotech satisfying the remaining arrearage as well.

The NELHA board approved the agree-

ment. Although Cellana's rent was more than \$11,000 a month (6.216 acres at \$1,800 per acre), Cyanotech will be paying just \$3,108 a month (\$500 per acre). That's because Cellana was charged NELHA's rate for energy use as opposed to the productive-use rate that Cyanotech pays.

And Baby Luaus? NELHA executive director Greg Barbour could hardly contain his glee. After lava overran a NELHA site in Puna, where the first geothermal well had been installed and which had been rented to Puna Geothermal Venture, it seems as though NELHA may be eligible for a payout from the Federal Emergency Management Agency (FEMA).

FEMA, Barbour said, would likely pay for the three buildings destroyed in the Puna lava flow to be replaced by buildings on NELHA land in Kona.

"This is fortunate for us," he told the NELHA directors at their meeting in September. "We had been talking about leasing our visitor center to the University of Washington," he said, referring to the landmark building near Queen Ka'ahumanu Highway at the entrance to NELHA. Getting FEMA funds "would allow us to build a visitor center elsewhere in the park that could be used by Friends of NELHA. It's fantastic for them. And

it could also be used for luaus, baby showers, wedding showers. It's really a nice thing that happened. If we can get these funds, it will be something. It's a long road, but we're going to try our best."

NELHA was established to provide land for innovative approaches to alternative energy and, as a spinoff from that, aquaculture enterprises. There is nothing in its mandate or in any of the covering environmental disclosure documents that suggests baby luaus are an acceptable use.

Hu Honua Hearing: On October 25, at 8:45, the Hawai'i Supreme Court will hear oral arguments in the non-profit Life of the Land's appeal of the Public Utilities Commission's 2017 decision to approve a power purchase agreement between the Hawai'i Electric Light Company, the utility for Hawai'i island, and Hu Honua Bioenergy, LLC, which plans to generate 30 megawatts mainly by burning trees.

The courtroom is located on the second floor of Aliiolani Hale at 417 South King Street in Honolulu.

According to the court's website, the issues being considered are: 1) "Whether the PUC reversibly erred by failing to consider the effect of the Amended PPA on greenhouse gas emissions; 2) Whether the PUC denied LOL's due process right to protect its right to a clean and healthful environment by restricting LOL's participation in the proceedings; and 3) Whether the PUC erred by denying LOL's Motion to Upgrade Status from 'participant' to 'intervenor.'"

Hu Honua has been trying to win the necessary approvals to burn biofuels at an old coal-fired power plant in Pepe'ekeo for a decade, but has faltered for various reasons, including community opposition and a lack of funds. (*Environment Hawai'i* has written extensively on these matters. See our web archive at www.environment-hawaii.org for more.)

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Quote of the Month

*"What's the estimated high tide
line going to look like in
10 years, 15 years? ...*

*We're going to be losing a lot of
beach in 50 years. ... We need to
be having a policy of retreat."*

— state Sen. Laura Thielen

DHHL Expands Water Reservations, Seeks Help With Implementing Them

On September 18, the state Commission on Water Resource Management approved groundwater reservations for the Department of Hawaiian Home Lands (DHHL) totaling more than 13 million gallons a day (mgd) and spanning 20 aquifers across the islands of Lana'i, Kaua'i, Maui, and Hawai'i. The action brought the total amount of water reserved for the department statewide to about 27 mgd.

The additional reservations reflect the agency's mid-range water need projections through 2031 that were identified last year in the State Water Projects Plan. Due to funding constraints, the plan focused solely on the DHHL, the largest landowner among the various state agencies whose needs were inventoried in the plan. The agency was singled out also because its water needs "are an identified public trust purpose and have priority under the State Constitution and Water Code," a Water Commission staff report states.

In his testimony supporting the additional reservations, DHHL acting planning program manager Kaleo Manuel told the commission that the agency's requirements would increase once its projects are fully built out. He added that while he appreciated the commission's work in helping establish the reservations, he lamented the fact that they don't necessarily result in the actual delivery of water.

"One of the things we struggle with is, we have this reservation, but it's paper water. How do you get into wet water [and] ensuring that counties honor reservations? ... That's where the rubber hits the road," he said.

Some county water departments, "they treat us like a developer, which we're not. ... We're training them to treat us like a customer," he said, adding that often times, counties will resist developing a well to meet the agency's needs because they believe it's not their responsibility.

"It shouldn't be on the backs of DHHL," he said. DHHL water reservations are considered by the Water Commission and by counties in their calculation of authorized planned use. And according to the Water Commission report, the Honolulu Board of Water Supply has verbally committed to providing water service to DHHL tracts in the Wai'anae, Waipahu-Waiawa and Waimanalo areas.

But in some cases, Manuel said, counties aren't rejecting their obligations outright, but they simply don't share the DHHL's priorities. A clear example is Ka'u on the island of Hawai'i, he said. "It's not a priority for them, but it's a priority for us. We've been trying to get them to make it a priority CIP [capital improvement project] ... We've been trying to get them to partner with us. Historically, the [DHHL] pays for everything," he said.

With the DHHL's outreach to the counties, Manuel said, "the climate is changing. It is better, but there are still historic issues we're trying to fix."

He recommended that when the Water Commission reviews the Water Use and Development Plans (WUDPs) developed by each county as part of the state Water Plan, it should make sure that the DHHL's needs are reflected in them.

"Don't forget about us, basically," he said.

He said that the DHHL spends about \$1.3 million a year maintaining its existing water use systems. The largest system, on Moloka'i, has 600 customers; the smallest has 49. With regard to the latter, Manuel said developing a water system for such a small number of people is not fiscally responsible, "but it's an obligation, so we do it at an extreme cost."

"Don't forget about us."

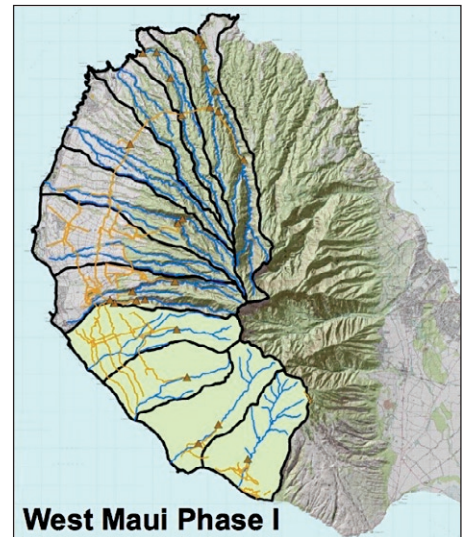
— Kaleo Manuel, DHHL

acting planning program manager

In addition to ensuring the DHHL's needs are reflected in county WUDPs, Manuel said he has asked commission staff to consider including a condition in well construction permits (in aquifers not designated as water management areas) that would require some of the well water to be used to meet the DHHL's needs.

To this, commission geologist Roy Hardy said he thought adding such a condition would probably need approval from the full commission. "I'm sure we would get a lot of pushback if we did it ministerially," he said.

(For background on the DHHL's recent water struggles, see, "Board Directs Land Division To Help Permittees, DHHL Meet Water Needs," in our February 2018 issue.)



West Maui Phase I



Water Meters Critical In Implementing West Maui IIFS

Despite worries from the Launiupoko Irrigation Company, Inc. (LIC) and its customers that interim instream flow standards set (IIFS) on March 20 by the Water Commission for streams in West Maui would leave them wanting, stream and ditch flow data collected over the past several months suggest otherwise, according to a presentation last month by Aryon Strauch of the commission's stream protection and management branch.

The IIFS of 3.36 million gallons a day (mgd) for Kaua'ula Stream concerned the

LIC and its customers the most, as that is their main source of water. (The company also has the ability to divert water from Launiupoko Stream). To allay some of those concerns, the commission decided to implement the IIFS incrementally, initially restoring only 1 mgd to the stream at LIC's diversion and 0.8 mgd at a siphon.

LIC started the controlled release of 1 mgd on March 28 and immediately claimed it left insufficient water in the ditch system. LIC project manager Heidi Bigelow wrote in emails to commission staff shortly after the release that the reservoir level had dropped by two feet.

In an April 4 letter to its customers, the LIC stated that the release should have left the company with 2.6 mgd to distribute, but, in fact, left it with "substantially less

Continued on next page

PHOTO: CWRM



Kaua'ula Stream, West Maui



Kawa Ditch, Kane'ohe, O'ahu

than 1 mgd."

"If the new IIFS are implemented before alternative solutions are put in place, LIC will be allowed to divert an insufficient supply of water, and must invoke its PUC Tariff no. 1, RULE III Conservation Measures and Interruption of Water Supply requiring ALL customers of LIC within its service area to immediately reduce their water usage by 80 percent," it warned.

The company then appealed to commission staff to hold off fully implementing the IIFS for six months.

Initially, Strauch balked, arguing in an April 12 email to Bigelow that even if only 3.5 mgd flowed in Kaua'ula Stream above the initial diversion — a conservative estimate, he wrote — there should be more than enough water to meet the needs reported by LIC.

After returning 1 mgd to the stream and sending 1 mgd to users who aren't LIC customers, LIC would still have access to 1.5 mgd, "plus water diverted from Launiupoko Stream (0.4 mgd)," he wrote. Given that, he continued, the LIC should be able to meet the 1.3 mgd in distribution needs identified in its Public Utilities Commission (PUC) permit, even with a system loss of 20 percent. "[T]here should be plenty of water. Where is the problem?" he asked.

The commission ultimately agreed to wait until late September to increase the amount of water released to the stream to 2 mgd. The delay would provide for "a reasonable time period for both LIC and the Water Commission to measure and assess added flows in the stream, allowing us to work together for both good stream health and adequate water for LIC needs," wrote commission deputy director Jeffrey Pearson in a May 7 letter to LIC.

At the Water Commission's September 18 meeting, Strauch reported that measurements taken over the past several months at LIC's ditch intake and the stream below the

diversion showed that an average of 2.44 mgd would be available from Kaua'ula Stream for offstream use if the 3.36 mgd IIFS was fully implemented and 0.47 mgd would be available from Launiupoko Stream, for a total of 2.91 mgd.

"This is definitely meeting their stated needs," Strauch said. Even so, he reported that nearly 100 LIC customers have sought to connect their non-potable water systems to the area's potable water system to ensure their water needs are met.

In June, the Mahanalua Nui Homeowners Association, Inc., Makila Plantations Homeowners Association, Inc., and Pu'unoa Homeowners Association, Inc., Steve Strombeck and the Strombeck Family Revocable Trust sought a contested case hearing on the IIFS, claiming that they would be left without sufficient water. The commission rejected those requests at its June 19 meeting, but not before the Office of Hawaiian Affairs' Wayne Tanaka questioned the petitioners' claim that they needed 1.8 mgd for small farms spanning 88 acres.

"When Launiupoko Irrigation Company petitioned the Public Utilities Commission to become a public utility, they said they would need 1.3 mgd for a fully developed 6,000-acre service area. Somehow this 88-acre area of agriculture is exceeding by 500,000 gpd what Launiupoko said they would need for 6,000 acres for fully developed ag lots," he said, adding that if 1.8 mgd really was being used, "the Commission should look into potential water waste that is going on."

Maui resident Tiare Lawrence also testified that Launiupoko was filled with "gentleman estates, million dollar mansions, fancy pools ... Barely any real sustainable diversified farming takes place in Launiupoko," she said.

At the commission's September meeting, Strauch said that of the 98 LIC customers seeking crossover connections, 50 were ready

to have theirs installed and the rest were at various stages in the inspection process. One application was not processed because the customer lacked access to a potable connection.

He also reported that the U.S. Geological Survey is expected to install its own gages in the stream and ditch, which will provide the commission with real-time data.

"The operator of the system has accepted this as the way forward. They're still evaluating non-potable needs. It's clear there was a lot of use that wasn't in compliance with the PUC permit," he said, adding that he understood the company was in discussions with the county regarding its development plans and zoning requirements.



Kawa Stream Awaits Healing

Last month, the Water Commission granted the City and County of Honolulu a stream channel alteration permit (SCAP) for maintenance and erosion control work along Kawa Stream in Windward O'ahu to protect private properties along the stream banks.

About 88 cubic yards of material will be excavated from several sections of the stream/ditch. Concrete and rubble will be used to repair and patch weak spots.

While he didn't object to the permit, the fact that the city wasn't doing more to protect the stream itself seemed to rankle David Penn, a former Department of Health (DOH) official who years ago was tasked with establishing the total maximum daily loads (TMDL) of contaminants in Hawai'i streams. Now he is head of the state Department of Land and Natural Resources' Legacy Land conservation program. Penn, testifying as a private citizen, expressed his impatience with the pace of the city's efforts to remedy some of the harm done to the stream over the decades.

A perennial stream that empties into Kane'ohe Bay, Kawa was heavily channelized with concrete in the 1960s and 70s and is considered impaired by the DOH and the Environmental Protection Agency with regard to its water quality.

"When I started as TMDL coordinator for DOH, this was my first assignment, Kawa Stream. It was meant to be a drainage superhighway. Unfortunately, back in those days, we didn't have the foresight to put conservation districting around the state's 365 perennial streams," Penn said. The result: People were allowed to build their homes right up to the bank of the stream.

"The first time I went up there, I thought

Continued on next page



It's not that I don't like Resorttrust. You just got the potato at the end of the game," Board of Land and Natural Resources member Keone Downing told the company's representatives on September 14.

"One potato, two potato, three potato, four. You're the fourth," added fellow member Stanley Roehrig.

That day, in an attempt to resolve long-standing disputes over the hotel's use of a 1.28-acre beachfront parcel, the Department of Land and Natural Resources' Land Division proposed issuing a new permit to the Resorttrust Hawai'i, LLC, which took ownership of the Kahala Hotel & Resort in 2014, to officially authorize a variety of existing uses, including some that would be commercial. (See our cover story for more on this.)



Land Board members Stanley Roehrig (left) and Keone Downing (right).

Downing and Roehrig were two of the more skeptical board members during discussion of the permit, which was ultimately deferred due to a contested case hearing request. But Downing noted that Resorttrust

Sen. Thielen: Use of Kahala Land Needs an Environmental Review

wasn't as bad as the hotel's previous owner, which he said kicked him and his friends off the public beach several years ago. He even commended the company for trying to be responsive to the public's concerns. "They tried to post signs ... They could have done nothing. They've taken chairs off the beach part," he said.

During public testimony on the matter, state Senator Laura Thielen, who headed the DLNR several years ago, warned that the decent tenant it has right now may not be there years from now. And by simply issuing or renewing revocable permits for the property fronting the hotel, the department was failing to do what was best for the area, she argued.

"When it comes to access to our beaches and public lands, it's an issue near and dear to my heart and my constituents," said Thielen, who represents Kailua, Waimanalo, and Hawai'i Kai.

She said that the hotel and its predecessors have had revocable permits for the property since 1968 and "they're looking to continue management authority for the next 50 years."

Because the parcel is beachfront property, subject to erosion and sea level rise, she recommended that the board consider what's going to be occurring on the property over that period.

"What's the estimated high tide line going to look like in 10 years, 15 years? ... We're going to be losing a lot of beach in 50 years. ... We need to be having a policy of retreat. How is this property going to play into that when that beach area is going to become smaller and smaller? You don't wrestle with those issues that you don't have

data on in an RP process," she said, adding that such questions could only be answered in an environmental assessment.

She said that she appreciated that Resorttrust was trying to be a good neighbor, but said the state could have three successive owners over the next several decades and recommended that the Land Division scrap the permit proposal and instead restart efforts to put the land under a long-term disposition.

Board chair Suzanne Case reminded Thielen that when the company tried to obtain an easement a couple of years ago, it was met with opposition by some members of the public. Downing noted that complaints about the hotel's use of the area erupted when it sought the easement, and Resorttrust's own attorney Jennifer Lim admitted, "it probably wasn't the best idea."

Even so, Thielen suggested that by keeping the property under a revocable permit, the board won't ever discuss what should be done with it in the long term.

"Mr. Downing mentioned [Resorttrust] got stuck with the potato. That game's not over. At some point the public wears out, the institutional knowledge gets lost. It may be as you wrestle with [a long-term lease or easement], you're going to come up with different types of requirements," she said.

David Kimo Frankel, who requested the contested case hearing on the permit, also argued that an environmental review needed to be done for the property to cover the uses proposed by the Land Division, but he did not echo Thielen's view that such a review could only accompany a long-term disposition such as an easement or a lease.

— T.D.

the best approach would be to rip everything out and start over," he said.

A few years ago, the city developed a plan to rehabilitate the stream that included "stabilizing, repairing, and/or reconstructing the stream bed and stream banks along most sections of the Kawa Ditch and Kawa Stream for the purpose of flood control, minimizing erosion, as well as enhancing the natural functions of the watercourse," a 2015 environmental assessment states. Completion of all phases of the plan depended on the funding available.

At the commission meeting, Penn asked when the latter phases were going to occur.

The work in those phases would alleviate pollutant impacts by "installing concrete and rock features along the channel bottom, replacing some concrete side slopes with permeable alternatives, and installing native vegetation mats on side slopes. Respectively, these installations would serve to reduce flow velocity, allow for percolation of ground water, and retain water within vegetation. All serve to limit the transfer of pollutants into the local fresh water and ocean systems while at the same time reducing the erosion of the stream bed and surrounding land," the EA states.

"I really wanna know, when is the good

stuff coming for stream health? Stream health is kinda like human health," Penn said, adding, "This poor little stream has been hammered."

One of the major "surgeries" Kawa Stream has undergone is the burying of the spring at its headwaters, he said.

Water Commissioner Neil Hannahs asked Penn if there might be a condition the commission could include in the SCAP the city was requesting that would help.

Penn replied that it could try to set a deadline for the city to do the rest of the work in the plan, "but I don't think you can do that." — T.D.

Kahala from page 1

Resources' Land Division recommendation that the previously unauthorized uses be exempt from the state's environmental review process exhibited a "failure to understand the law."

Given the discussion over the proposed revocable permit, that may not have been all the division failed to do.

Evolution

The Land Division's recommendation for a new permit to cover some 40 different pre-existing uses on the RP site stemmed largely from a June complaint letter to Land Board chair Suzanne Case from the Sierra Club of Hawai'i. In it, the group described, and documented with photos, a litany of alleged unauthorized commercial uses — weddings, restaurant operations, lounge and cabana rentals, among other things — occurring within the permit area, despite the fact that the hotel's permit allows for only recreational and maintenance uses.

The group claimed that during the day, the hotel's equipment and structures took up more than half of the 1.28-acre state parcel and noted that the hotel's website charges as much as \$7,100 for beachfront weddings and \$165 a day for the cabanas (it now charges \$200). The group asked Case to investigate its claims and "to take vigorous enforcement action."

In discussing the matter with the hotel's attorneys, Land Division staff agreed with them that the permit's requirement that uses be only recreational or maintenance-related was "too vague" and "creates ambiguity in terms of possible enforcement actions," the division's report states.

Attorneys Jennifer Lim and Jon Yamamura, representing hotel owner Resorttrust

Hawai'i, LLC (RTH) argued that while it does store and charge for use of its cabana tents and clamshell lounge chairs (\$200/day and \$100/a day, respectively) that occupy lands covered by its revocable permit with the DLNR, such uses could be considered recreational.

"The term 'recreational' in RP 7849 means something, but it is not defined within RP 7849. The Oxford

dictionary defines the word 'recreational' to mean 'relating to or denoting activity done for enjoyment when one is not working,'" they wrote in an August 6 letter to Case. They also cited county land use ordinances throughout the state. Honolulu's ordinance, for example, defines outdoor recreational facilities as "permanent facilities for active outdoor sports and recreation, other than golf courses. Typical uses include: parks, playgrounds, botanical gardens, golf driving ranges, tennis courts, riding stables..."

"While there may not be one uniform definition of the term 'recreational,' it is clear that in the context of permitted land uses, 'recreational' authorizes far more intensive use than mere access to property," they wrote.

"RTH, as did prior owners of the hotel, views the recreation and maintenance rights granted under RP 7849 as allowing recreational uses that would normally be associated with the operations of the hotel, such as the placement of clamshell lounge chairs and cabana tents for hotel guests, as well as storage of those items. These types of uses have been ongoing for decades," they wrote.

A previous revocable permit for the area held by the hotel's owner in the 1980s covered a surfboard rack, volleyball and badminton courts, and a walkway. That was all. But over the years, new uses crept into the area without ever coming to the attention of the Land Division or the Land Board. For example, Resorttrust's attorneys informed the division in the August 6 letter that nearly 2,000 square feet of the permit area had been used for open-air dining



A view of the lawn, cabana tents, lounges and chairs within the permit area.

since 2008. (The company acquired the hotel in 2014.)

Efforts by the hotel in recent years to transition from a revocable permit to a long-term or permanent easement and to vastly expand its use of the area backfired after members of the public became aware of the scope of the proposal.

The hotel has since scaled back its footprint, removing all Seaside Grill seating and shade cloths from the permit area and ending its practice of pre-setting chairs and lounges on the beach. Even so, the hotel has sought to maximize the uses of the property and has proposed establishing 40 different "use" areas spanning some 5,000 square feet. The Land Division supported the idea and recommended on September 14 that the Land Board approve a new permit for it.

If approved, the permit would allow the hotel to store beach equipment; set up tents, lounges, and chairs; and even establish an overflow seating area for its Seaside Grill, among other things. Rent, which for years had held steady at \$1,244 a month, would be set by appraisal. The division also proposed issuing right-of-entry permits for two corporate events to be held on the RP area this month.

Enforcement

In response to the Sierra Club's June letter to Case, Land Division staff inspected the site, and even seemed to corroborate one of the group's claims — that the cabanas and chairs for rent were set up on the parcel — but did not go so far as to call it a violation in its report to the Land Board. Rather than penalizing the hotel for weddings that had already been held, staff simply informed the hotel that the events were not allowed without prior approval.

When the Land Division's proposal for a new permit came to the board, however,

Continued on next page



Although the Kahala hotel has removed the restaurant seating and shading in the permit area, it has proposed using it for overflow seating during times of peak visitation.

members of the public and the Office of Hawaiian Affairs (OHA) suggested that the board should fine the hotel, as well.

OHA public policy manager Jocelyn Doane urged the board to determine what violations had occurred and said some of them should warrant financial penalties. "Weddings, the restaurant, cabanas, loungers ... other money-making activities [going on] for I don't know how long, we should be thinking about compensation," she said. Because the parcel is ceded land, OHA receives 20 percent of all revenue generated from it.

Community member Tyler Ralston, who said he's frequented the area for decades, testified to and showed photos of weddings being held within the permit area well after Case issued a letter in July 2016 ordering the hotel to cease and desist such events because they are not allowed under the permit.

"There were two weddings on the same day in June after chair Case sent a letter saying no more weddings. ... They've had many, many weddings," he said.

Frankel also attested that about a year ago, hotel staff tried to stop him from traversing the RP parcel during a wedding there.

Hotel manager Gerald Glennon told the Land Board that it had stopped taking reservations for events planned on state lands immediately after he learned in the middle of last year about the prohibition of such events and provided the department with a spreadsheet detailing its event commitments.

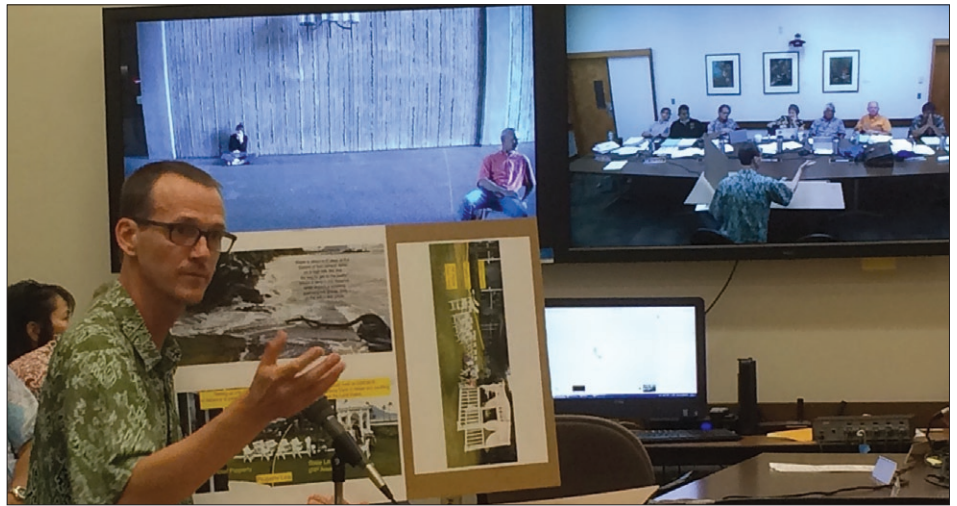
Wedding revenue aside, Ralston estimated that the hotel may have generated some \$2 million from food and alcohol sales and the rental of the tents and lounges on the property.

"Over the years, there was moderate commercial use. It ebbed and flowed. ... With the recent owners, there's not only been unprecedented use of the RP parcel [and] the end result is we're being squeezed out," he told the board.

In discussing whether or not to grant the new permit, Land Board member Stanley Roehrig argued that some effort be made to recover the restaurant income that was generated from the state parcel.

Glennon told him that because the restaurant serves food not just to Seaside Grill customers, but to the pool and beach area, it's hard to decipher how much money was generated from those seated on the state parcel.

"Waiters and waitresses have table numbers," board member Keone Down-



Tyler Ralston testifies to the Board of Land and Natural Resources about the weddings that have been held at the Kahala hotel.

ing noted.

"They have sections," Glennon replied, adding later that since the hotel has removed the seating from the permit area, the restaurant has taken "significant hits in revenue."

In any case, Roehrig wanted some accounting of any ill-gotten gains.

"Whatever we do is precedent. ... We try to treat everybody the same," he said, adding later that he didn't think it was in the public interest to ignore the matter.

Board member Yuen, however, seemed less inclined to dig up the past since he wasn't sure if the Land Division ever objected to the restaurant seating. He said he would defer to the Department of the Attorney General on that issue.

Blurred Lines

In addition to recommending that the Land Board pursue enforcement, OHA's Doane urged it to "take a step back" and consider whether a disposition of beachfront property that includes commercial uses was appropriate.

"With long-term dispositions, three decades in this case, often times lessees feel some vested ownership [and] when that's unchecked, we find ourselves in situations like this," she said.

"If you're going to allow commercial uses, you shouldn't lump them in with recreational uses. It could start a bad precedent and be confusing for other permittees," she continued.

Land Division administrator Russell Tsuji, however, said that this particular property fronting the hotel was different from a normal beach, where commercial uses are generally prohibited. "The reason I'm in support, I did the 'but for' analysis. But for Kahala creating the beach, you

would have what you have in the rest of the stretch" — a rocky shoreline and no good swimming areas. "I think there was a benefit, clearly," he said.

He then stressed that neither the 1960s agreement with the hotel, nor the subsequent RPs prohibited structures from being placed in the permit area. Therefore, he argued, the hotel's request to use 5,000 square feet for seating, showers, storage, etc., was reasonable.

"How about construction of a restaurant? How's about putting up a hotel right there? If you could put a restaurant, you could put a building," Roehrig said.

Tsuji started to explain that the permit was modeled after the leases of fast land issued by his division, when Roehrig continued, "This says 'recreation and maintenance,'" referring to the permit's proposed uses. "In order to have a restaurant and bar, that requires only 'recreation' or something different? If we have a building there two stories tall, is that recreation?" he asked.

Tsuji replied that the hotel argues that the lounges, cabana tents, and restaurant seating are consistent with recreational use. "It's a real broad category and can be subject to many interpretations. It's best to articulate what, exactly, is recreation and maintenance ... and to itemize," he said.

With regard to the proposal to set up chairs, lounges and cabanas within the permit area, board member Downing asked how the land fronting the Kahala hotel differed from the beaches in Waikiki or Ka'anapali, where the department has prohibited pre-setting of such things.

The department has also stopped the Kahala hotel's practice of presetting on the sandy beach and Downing suggested the permit area should be treated the same.

Continued on next page

"To me, it's the beach," he said of the permit area.

Board chair Case interjected that the public beach was below the shoreline and was not subject to the proposed permit. "This disposition is from the shoreline up. ... Although it's related, this disposition doesn't cover the beach," she said. (This despite the language in the 1960s agreement stating that the filled lands shall be used as a public beach.)

Even so, Downing told Tsuji, "This is my point to you: where the grass is now is probably reclaimed beach. It was not grass. Just because we grow these things or put a wall up doesn't mean it's correct. ... When they built that hotel, it was not on land that it looks like today. I'm trying to understand because I'm in a position where I've got to be fair."

To Tsuji, however, the land wasn't the beach. It was reclaimed land, not so different in terms of usability from Sand Island Industrial Park, he told Downing.

"Where are you trying to take me with this?" Downing asked.

"They're using it as *land*," Tsuji replied.

Regardless of how the parcel itself is defined, Frankel echoed points raised by Doane and others that some of the recreational uses being proposed were clearly commercial. He pointed out that Hawai'i Administrative Rules for unencumbered state land (including beaches) defines commercial activity as "the use of or activity ... for which compensation is received by any person for goods or services or both rendered to customers or participants in that use or activity."

Rent

In its June letter to Case, the Sierra Club argued that commercial use of beachfront property was inappropriate. But if the Land Board chose to allow the hotel's uses to continue, the group recommended that it should charge \$200,000 a month.

According to the Land Division's recommendation, an appraiser would determine fair market rent for the hotel's use of 5,153.5 square feet of the 1.28-acre parcel.

Tsuji told the board that if the parcel had been created without government approval, it would be valued as fast land, but because the state gave its approval, it would be valued as submerged land. Appraisers commonly set the value of submerged lands as a percentage of the value of adjacent fast lands. The more dependent the fast land uses are on the submerged lands, the higher that percentage is. If the uses are significantly dependent, an appraiser might value submerged lands as high as 50 percent of the value of the fast lands.

Downing pointed out that the hotel's estimate that it will need exclusive use of about 5,000 square feet was based on the measurements of each item it wants to keep there. "It had nothing to do about the use of the product," he said, noting that once all the clamshell lounges and cabanas are set up, there won't be much room for the public. "You've got to look at the totality of the uses, not the square footage of the chair. ... They should be charged for the area, not the equipment," he said.

Frankel argued that if the state can only charge Resorttrust rent based on submerged land values, "why let these guys lease it at all? There's so little money."

Whether or not the public was allowed to use the parcel would also factor into the permit's value as well. But in discussing whether or not the public could use the permit area, it again became clear that few understood that the area originally was to be used as a public beach.

"Does the public have the right to just go and sit on the RP right now? Is there any signage that explains that? I've seen the sign that says, 'public access,' which is different," Yuen asked Tsuji.

Tsuji replied that the permit does not

provide for exclusive use by the hotel.

Case said if the permit is going to be for non-exclusive use, "we should be clear," she said.

In his motion to approve the permit, Yuen proposed adding amendments to make it clear that public use is allowed except in areas authorized for the hotel's exclusive use and to establish a marked path with signage for public lateral access on the Diamond Head side of the parcel.

"The toughest issue is the request for commercial uses ... the rentals, the overflow [restaurant] seating," he said. He suggested that the covered chairs should be clustered and include gaps to ensure the public can maneuver around them.

"I agree with David Frankel's comments. Is it worth it what we get out of these uses? ... If the commercial uses paid for two to three schoolteachers or [conservation enforcement] officers, OK. But if it's \$1,200 a month? No," Yuen said.

Downing seemed to suggest that money wasn't the only issue to consider. "What about [uncovered] beach chairs? If they're free, do they get 200 of them?" he asked.

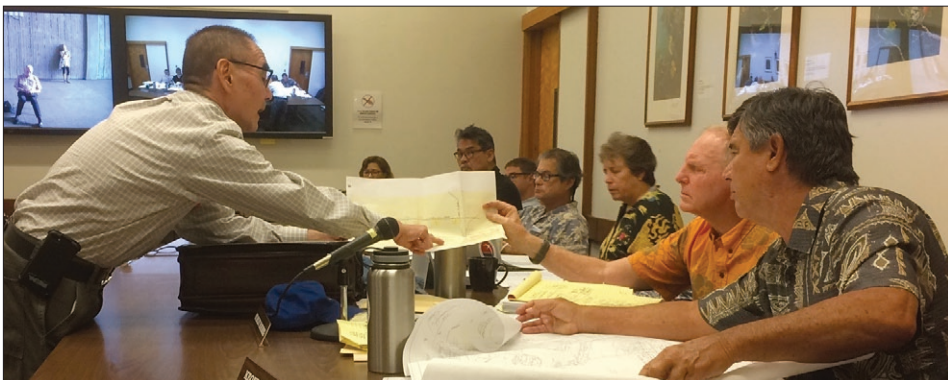
Yuen ultimately proposed charging the hotel 10 percent of its gross income from the parcel, pending the outcome of the appraisal, which he asked be brought to the board. Case added that charging a percentage rent — rather than something just based on a submerged land value — be considered in the appraisal.

When the hotel's attorney Jennifer Lim interjected that the hotel already spends \$250,000 to \$300,000 a year maintaining the property and infrastructure on the state parcel, Downing reminded her that the state wasn't the only beneficiary of that work. "You're doing it for yourself," he said.

Before the board could vote, Frankel asked for a contested case hearing, which prevented the board from taking action on the permit. In his follow-up written petition, Frankel stated that his "recreational, aesthetic and environmental interests would be adversely affected" by the hotel's use of the permit parcel, as well as the beach and ocean areas, if the permit were renewed or a new one is issued under the conditions proposed by the Land Division.

(For more background on this, see, "Kahala Hotel Beach Weddings Not Sanctioned by DLNR Permit," from our July 2017 issue and our September 2018 "BOARD TALK" column. Both are available at www.environment-hawaii.org)

— Teresa Dawson



Land Division administrator Russell Tsuji (left) tries to explain to Land Board members Stanley Roehrig (right) and Keone Downing (far right) the boundaries involved in the proposed revocable permit for the Kahala Hotel & Resort.

BOARD TALK

BLNR Moves to Buy Dole Land At Helemano, 'Warts and All'

On September 14, the state Board of Land and Natural Resources approved the purchase of 2,800 acres of conservation and agricultural lands in Wahiawa from Dole Food Company, Inc., for \$15 million. The lands are slated for a variety of uses, including camping, forestry, and habitat restoration for the endangered Hawaiian hoary bat. The Department of Land and Natural Resources' Division of Forestry and Wildlife (DOFAW) will now hold public hearings on adding them to the 'Ewa forest reserve.

"This has been a very heavy lift," DOFAW administrator Dave Smith told the board. Smith said his division had been

encroached onto the properties, as well as an unauthorized shooting range that had been operated by a former Dole tenant.

The Navy is responsible for remediation and maintenance of the two landfill sites, a DOFAW report states. The more significant hazard the report continues, is the former firing range, which spanned about an acre, but has a potential affected area of about 2.5 acres.

"To the best of our knowledge, the pistol range was probably active for two years. DOH [the Department of Health] had some complaints from hunters who said,

"We think the public benefits far outweigh the risk." — Dave Smith, DOFAW

working for years to acquire the lands that include a crucial access road to the Poamoho section of the forest reserve, but had found it difficult to pull the funding together, given the history of the four parcels to be acquired.

It's relatively easy to buy pristine forest or lands flush with endangered species, but that's not the case for areas that have been cleared, used for agriculture, and contain a couple of landfills and a former firing range, he said.

Despite the properties' checkered past, DOFAW, with the help of the Trust for Public Land (TPL), was able to meet Dole's purchase price with funds from the federal Forest Legacy program, the state's Legacy Land conservation program, the U.S. Fish and Wildlife Service, the U.S. Navy, and the Kawaihoa wind farm, which, with its high level of bat take, has been under pressure to expand its mitigation program. Once the lands have been acquired, DOFAW says it will develop a community-based plan for their use.

The Warts

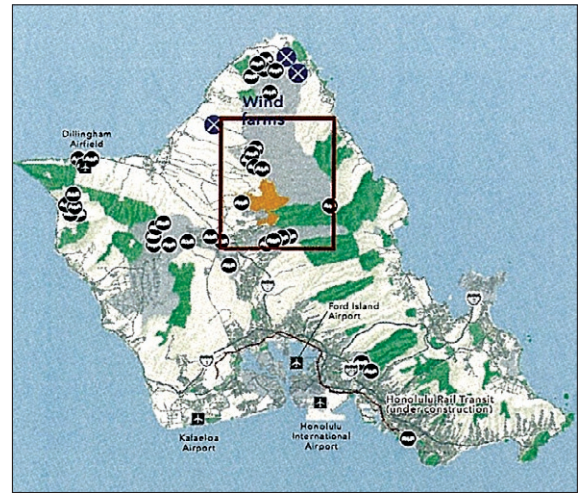
When DOFAW's request to acquire the lands and hold public hearings to add them to the forest reserve came to the Land Board, Smith was prepared to field a lot of questions about the contaminants there. A Phase I environmental site assessment had identified two former Navy dumpsites that may have

"Hey, you should check this out," Dole operations director Daniel Nellis told the board. "The tenants were primarily former enforcement officers. [The shooting range was] part of their recreation. That's how they explained it to us. They liked to hunt and do target practice. ... We never should have allowed so much freedom to our tenant. They scared off poachers and illegal trespassing hunters [but] the trespassers did us a favor by reporting," he said.

Soil testing revealed significant lead contamination at the site, "with some samples as high as 24 times the DOH Tier 1 Unrestricted Environmental Action Levels (EALs)," DOFAW stated in its report to the Land Board. Antimony was also detected at lower levels, with the highest concentration being 3.5 times the DOH's Tier 1 EALs.

Normally, when the Land Board approves the acquisition of private lands such as these, the seller would have to complete a Phase 2 site assessment and remediation to state and federal health standards before the deal closed. The seller would also indemnify the state from any damages or claims resulting from the release of hazardous materials. In this case, Dole refused to clean the site and indemnify the state. Instead, TPL assumed the cleanup responsibilities and plans to hire Ford Cnty to do the job and secure a No Further Action (NFA) determination from the DOH.

"It is imperative that the unrestricted



The Helemano Wilderness Area (in orange) would secure access to the adjacent 'Ewa forest reserve (in green). This map also shows where endangered Hawaiian hoary bats have been detected in relation to wind farms on the island.

NFA be obtained, as the fair market value determined by the appraisal did not consider the effects of contamination," DOFAW's report stated.

With regard to indemnifying the state, Dole proposed that its liability extend to just the 2.5-acre affected area and be capped at \$425,800, which is twice the estimated cost of obtaining the NFA. The state's attorneys agreed that Dole's liability would end once the NFA is issued or five years from the date of the warranty deed.

"Land Division and the Attorney General have concerns about the risk the state would incur by 1) acquiring the property prior to obtaining the unrestricted NFA from DOH ... and 2) significantly limiting the indemnification provision in the warranty deed, and have advised DOFAW accordingly," the report states.

Satisfied that TPL would secure an NFA, DOFAW stated that it believed the risk to the state was minimal and recommended board approval.

"We think the public benefits far outweigh the risk. ... We feel that we can manage this property. It doesn't represent anything out of the norm," Smith told the board, noting that at Kanaio, Maui, DOFAW manages thousands of acres of former military firing ranges that contain unexploded ordinance.

DOFAW O'ahu branch manager Mari-gold Zoll added that the Poamoho section is the most actively managed forest reserve on the island and provides access to its most beautiful hiking trail.

"Helemano contains such a varied topography ... it really provides an opportunity

Continued on next page

to encompass every facet that we do, from timber management, to camping, ADA [Americans with Disabilities Act] camping, biking, hiking. It's been in the works for five years. We've had a lot of time to look at the place and dream about what we'd do with it," she said.

Once her agency acquires the lands, she said it will continue managing access the way it has been under its access agreement with Dole — public access on weekends and holidays and permitted access to the upper forest reserve.

'Frosting Over the Dirt'

While DOFAW had accepted Dole's terms, Land Board member Keone Downing wasn't such a quick sell. "If it cannot be cleaned up, we're stuck with this property. We don't know what's on there other than the samples [taken in Phase 1] ... Why do we feel we're in a rush before it gets cleaned up?" he asked. He suggested that the department could forgo buying the parcel that has the firing range on it and just buy the three others.

Irene Sprecher, head of DOFAW's Forest Legacy program, admitted that the agency was trying to meet Dole's deadline to sell the lands, which are the last parcels in a large portfolio of O'ahu lands the company put up for sale years ago.

"They would like to move on," she told Downing.

She added that the type of lead at the firing range can't leach into the groundwater.

Board member Stanley Roehrig also expressed concern over the state's potential liability if remediation isn't successful. "If the cost of remediation is greater than \$450,000, the state is going to have the risk of loss on our shoulders [and] there's nobody to indemnify us," he said.

Sprecher replied that consultants have estimated that the maximum cost for remediation would be about \$200,000 and that amount will be put in escrow.

Roehrig was not satisfied, pointing out that a Phase 2 site assessment hasn't been done yet. "There has not been any drilling into the groundwater. ... That occurs in the ESA 2. Nobody knows at the present time what's in there. This was an unlicensed firing range ... We don't know what they fired. ... Antimony (found in bullets) is highly toxic. It's a wonderful project, but we can't put frosting over the dirt," he said. (Roehrig is referring to a Phase 2 Environmental Site Assessment, or ESA.)

TPL-Hawai'i executive director Lea Hong tried to assure Downing and Roehrig

that its contractor, Ford Canty, was actually obliged to fully remediate the site. "They will, for \$200,000, get an NFA. They are contractually obligated to clean it up to an NFA level. There is someone on the hook. We negotiated a very tight contract with Ford Canty," she said.

"So you're not going to pay them until you get an NFA?" Downing asked.

"Basically," TPL project manager Steve Rafferty replied.

To this, Downing said, "A lot of people start with good intentions ... then they leave."

When Roehrig started speculating on what would happen if Ford Canty ran out of money before securing an NFA, board member Chris Yuen, who supported the acquisition, said that this was not the first time the company had undertaken such a project and reminded the board that Dole would be providing backup funding amounting to double the contract price.

Rafferty also explained that the remediation would be relatively straightforward. The dirt berms that had been used as targets along the 70-foot-long range would be razed and trucked to the West O'ahu's PVT landfill, which accepts construction and demolition waste.

Closing the Deal

Nellis told the board that the firing range area occupied less than one percent of the total area DOFAW was seeking to buy and isn't near the public hiking trail.

When Roehrig asked why the board shouldn't excise the firing range from the deal, Nellis said that would require Dole to go through another subdivision process, when it already did that to make the parcels available for sale.

"What if we help you with subdivision process?" Roehrig asked.

"That's a couple more years. ... If we can't close the deal, then they're [Dole] gonna say no deal and open it up for sale," despite the fact that DOFAW is the best steward for the lands, Nellis replied.

"It's only my opinion, but it's highly unlikely that cleanup is going to cost three times the original quote," he added.

Downing said he was glad Dole wanted DOFAW to have the lands, but questioned the rush to hand them off.

In short, Nellis said that the company, anticipating the sale of its Hawai'i portfolio, has already spent the money to be gained from it this year.

If the deal with DOFAW falls through, he said the U.S. Army would be the likely buyer for the conservation lands and the ag-

ricultural lands would be sold to farmers.

Yuen moved to approve DOFAW's recommendations; member Sam Gon seconded the motion. "This is a wonderful project. It's a very important piece of land for the state to acquire. ... They've been negotiating for several years and sometimes you don't get everything you want," Yuen said earlier in the meeting.

In discussing Yuen's motion, Roehrig said he was heartened by the fact that more than \$600,000 dollars was available for remediation, but said buying the land before it was cleaned was not a good precedent. "If it's a small project, maybe we look the other way [but] it's got a lot of hairs on it," he said.

Gon agreed with Roehrig that the state was taking on a lot of risk buying the property at this stage, but said that the parties involved have tried to minimize the health risks and have made clear the nature and scope of those risks.

Deputy attorney general Julie China, who assisted DOFAW and the Land Division in negotiating the terms of the purchase, assured the board that her department was not opposed to the acquisition, despite an assertion by Roehrig that it was. "This was the best deal that I think we could make. We wanted to present the project to the board ... while disclosing warts and all," she said.

Downing echoed Roehrig's concerns about setting a bad precedent, but said he would vote in support of Yuen's motion. "But I just want to be clear that I don't believe that people should be able to come to us and say, 'I have all this set up to do it,' because there's no guarantees it's going to be done," he said.

"I'm sorry that Dole can't wait until this project is clean. If it's that small, it should be done fairly quickly. Fifteen million for a company like Dole is not very much money," he said.

Yuen pointed out that the lead in the berms can hurt people only if they are exposed to it, which he seemed to think was unlikely. "If a kid made mud cookies [from the dirt at the range] and ate them, it would be bad," he said.

In the end, the board approved DOFAW's request to acquire the land and hold public hearings on the forest reserve addition, among other things. Roehrig voted in opposition.

(For more background on this, see, "Data Gaps Confound Efforts to Limit Harm to Bats Posed by Wind Farms," from our February 2017 issue.)

— T.D.

Waikoloa Highlands Told to Defend Project At October LUC Meeting

The Waikoloa Highlands project you see today is unusual."

In this way did Steve Lim, attorney for the developer, prove himself master of the understatement.

Lim made the comment to the Land Use Commission at its meeting of September 6, when he was attempting to sell commissioners on the idea that his client, Waikoloa Highlands, Inc., should be given one more year to show that it was serious about moving forward on the project.

The commission had gathered in Kona to consider a show-cause order issued to the developer — an order, that is, that the developer give the commission good reason as to why the land proposed for development should not lose the entitlement bestowed on it by the LUC 10 years ago. That entitlement, needed to allow the company to develop 398 house lots on some 761 acres of land, shifted the designated land use category from Agricultural to Rural. Performance — defined by the LUC as installation of "backbone infrastructure" needed to allow the sale of the house lots — was to have occurred within 10 years of the redistricting. Nothing has been done on the land in that time.

It was only after the LUC had voted to approve the show-cause order at a status hearing in May that Lim came on board as the attorney for Waikoloa Highlands. "About June or so — June of this year — after my client missed the status conference in May, I was contacted by Mr. [Joel] LaPinta and together we discussed" approaches to the LUC's order, Lim told the commissioners. LaPinta, a planning consultant in Hilo, has been designated as the project manager.

"Until that time," Lim said, "I don't think my clients understood what they were facing. We've done our best to educate them."

"This was a project delayed by fraud [and] mismanagement, allegedly," Lim said, referring to the company's reliance upon a former director, Stefan Martirosian, to carry out the project. "Now the owners do understand the Land Use Commission entitlement process in Hawai'i much better."

What Lim was seeking on September 6 was a one-year continuance of the order to show cause, effectively giving Waikoloa Heights an opportunity to seek an amendment to the 2013 zoning ordinance (which expired in March), attempt to resurrect

past agreements with service providers and contractors whose last contact on the project dates back nine or more years, and figure out how to satisfy other conditions imposed by the LUC's 2008 decision.

Lim handed to the LUC's deputy attorney general a draft stipulation he was going to propose to the two other parties to the LUC proceeding: Hawai'i County and the state Office of Planning. Neither party had had a chance to review the stipulation; Lim acknowledged that the owner, in Moscow, had given Lim his approval to offer the draft stipulation barely 10 minutes before the meeting began.

Accompanying Lim at the meeting was, in addition to LaPinta, Natalia Batichtcheva, who was identified as a director of the company. No one at the table, however, could make a statement binding the company to any agreement, a fact that troubled several of the commissioners.

Commissioner Gary Okuda asked Lim for "the names of the specific individuals who are considered the decision-makers with respect to this project. ... You did reference that you had to seek the approval of decision-makers outside of Hawai'i. Nothing wrong with that. The law makes no distinction, but just for the record, we should know the specific names of specific people considered by you as decision-makers."

In addition to Batichtcheva, who seems to be merely the face of the company in the

United States, with no decision-making authority of her own, Lim named as shareholders of the company Ovashafyan Ayaks and Vitaly Grigorians.

Okuda continued with a line of questioning about ownership of the company, noting that Lim had stated that the present petitioner, Waikoloa Highlands, "is an entity separate from the original petitioner, Waikoloa Mauka, LLC."

Lim agreed: "a separate company."

Okuda: Did these companies at any time have identical shareholders?"

Waikoloa Mauka, the original petitioner, "was an LLC," Lim answered, "so they had membership interests. For the relevant time the commission is looking at this, they had the same control group, with the exception of Martirosian."

"So the group controlling Waikoloa Mauka is the same group that now controls Waikoloa Highlands?" Okuda asked.

"Essentially, yes," Lim responded. He went on to blame the problems with the project on Martirosian's "bad acts" — or, at least, allegations of bad acts, taking pains to point out that nothing had yet been proven in a court of law in any country.

Commissioner Dawn Chang also had questions about the company's ownership. "The gentleman — Martirosian — the gentleman in jail, he has no position in the company at all?" (Martirosian has been held in a Moscow jail since last fall, appealing an order to have him extradited to Armenia, to face charges of fraud brought by Grigorians.)

"None at all," Lim stated. "He was a director, running the company, but because

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of his fraudulent and criminal acts that were alleged, he was taken into prison."

At that point, LUC chairman Jonathan Scheuer noted that one of the exhibits that Lim himself had submitted showed that Martirosian still held a 20 percent ownership interest in the Waikoloa Highlands.

Lim conferred briefly with Batichtcheva. "Ms. Batichtcheva says they have something," he told the commission—apparently something to indicate that Martirosian is no longer in the picture. Whatever that is, it was not presented to the commission.

What his client was seeking, Lim said, was also something out of the ordinary, so far as commission proceedings were concerned. Normally, when the commission enters a show-cause order, the developer is not supposed to do any further work on the project while the order is pending.

In this case, however, the developer wants to move forward with the project, obtaining renewals of county permits and engaging with the Department of Transportation and other agencies to develop plans for the traffic improvements and other projects related to the development, Lim said.

"Essentially, what we've done, at the request of the Office of Planning originally, is try to find a middle ground where OP would be comfortable with no further groundwork at the project, and we would do certain things with respect to entitlement. In the meantime, we would process land use entitlements," Lim said, describing the terms of a proposed stipulation order.

With respect to things like the development of the promised traffic circle at the intersection of Paniolo Drive and Waikoloa Road and other improvements, "those are subdivision issues," Lim said. "That's why we suggest we go there [to the county] first and then come back to the Land Use Commission with a motion to amend" the conditions of the redistricting order the LUC approved a decade ago.

"Give us about a year, to go to the county and do rezoning. If we don't finish by that

time, we'll come back, on the order to show cause. If we have no progress, we'll proceed with the order to show cause."

The county deputy corporation counsel representing the Planning Department, Ron Kim, indicated that "generally speaking," the county was agreeable to Lim's stipulation.

The Office of Planning was hesitant, however. Its representative at the meeting, deputy attorney general Dawn Apuna, said that the OP didn't "oppose the motion for continuance, but we would like to ask the petitioner that they halt any development as well as entitlements until the order-to-show-cause hearing."

Lim then outlined for the commissioners what he called the "paradox" of the "order-to-show-cause box." "Once you get into the OSC box, it's paradoxical," he said. "Because here we are, with a new team, wanting to develop the project, and everybody is saying, 'don't develop.' We're ready to proceed. We have engineers, we hired an archaeologist. We submitted drainage plans and satisfied the affordable housing requirement. We have an agreement to satisfy the parks requirement—but we don't understand the deal on that. We may implement the park in another location, but there are things we want to do to proceed with the project. This was a project delayed by fraud and mismanagement, allegedly. Now the owners do understand what the LUC entitlement process is in Hawai'i much better."

(The agreement to provide land to the county for a public park involved a parcel of land on the opposite side of Waikoloa Road that is owned by a former associate of Martirosian, Michael Miroyan. After Miroyan and Martirosian fell out, the park agreement does indeed seem to be off the rails.)

Commissioner Okuda disagreed with Lim on the point of the "OSC paradox." "I don't believe there's a paradox," he said. Citing language in the Hawai'i Supreme Court's decision involving the 'Aina Le'a

case, reported on extensively in past issues of *Environment Hawai'i*, Okuda noted that "vacant land with appropriate state and county Land Use designation is often subject to speculation.... [It] inflates the value of the land, increases development costs, and frustrates federal, state, and county" interests.

"In other words," Okuda continued, "I believe the Supreme Court has stated that one of the legal reasons why the commission must strictly review and enforce these conditions is that in certain cases—and I'm not prejudging this case, but in certain cases—allowing developments to basically lie there without compliance to conditions and where these conditions aren't complied with sometimes for decades really does not give the benefit to the community" that was represented at the time the boundary amendment was approved. "It contributes to land speculation," he said, "driving up prices without concurrent benefit."

Commissioner Arnold Wong made a motion to have the LUC hear the order to show cause at an LUC meeting on October 24 and, if needed, the 25th. At that time, he stated, the LUC "would like the petitioner to give us more information to insure that we know who is running this.... And, also, if your representations are binding. If this gentleman, Martirosian—he's no longer a part of this petition at all? [We need] some kind of representation."

Lim indicated he understood the commissioners' concerns.

Before the vote, LUC chairman Scheuer explained why he would be voting in favor of the motion. "When we move land from ag or conservation into rural, we do so deliberately and thoughtfully with conditions that are put in place not to burden landowners but to make sure that substantial public interests are held up, and one of those conditions is that they proceed timely."

The motion passed without dissent.

— **Patricia Tummons**