

# Environment



# Hawai'i

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## Trail Mix-Ups

For more than a century, Hawai'i's pre-territorial system of highways and trails has been protected by law. That protection, however, is not ironclad. Time and again, it seems, state government has bowed to the will of private landowners, meekly ceding to them the right to determine when and under what circumstances the public will be allowed to access public trails – or, indeed, if they will be allowed to do so at all.

Also in this issue you'll find a report on the Agribusiness Development Corporation's re-do of its October meeting, a summary of recent actions of the Board of Land and Natural Resources, and last, but by no means least, our public thanks to so many of you who contributed generously to our fall fund-raising drive.



Lepeuli, North Kaua'i

## Impending Development Intensifies Effort To Designate Historic Coastal Trail on Kaua'i

A young tourist couple walks up the worn, sloping trail that Paradise Ranch, LLC, fenced off in 2011 to keep people out and its cattle off Lepeuli beach on Kaua'i's North Shore.

The two carefully slip over the top of the fence. The pronounced sag in the wire suggests many have done the same. And in fact, the couple says an old man told them that this was the way to go.

Later, a fisherman emerges from the steep, winding county easement everyone is supposed to use. Standing in the beaming afternoon sun, he says he's done for the day.

"I'm tired of walking up and down the trail," he says.

Still a bit later, two women come up the old way, the easy way, even though they say they know they're not supposed to.

But is that true? Are they really not supposed to?

Patricia Hanwright, Waioli Corporation, and Falko Partners, LLC — owners of lands in the adjacent ahupua'a of Ka'aka'aniu, Lepeuli, and Waipake, respectively — would say so.

The state might, also. Officials with the Department of Land and Natural Resources and the Department of the Attorney General have said an historic, coastal trail, sometimes referred to as the Ala Loa, runs across those ahupua'a. And under the Highways Act of 1892, it is a public trail owned by the state.

However, the state's attempts years ago to survey and officially document the trail were rebuffed by the landowners, and the DLNR has chosen not to pursue the matter without their consent.

But that "makes no sense," says Native Hawaiian Legal Corporation attorney David Kimo Frankel, explaining that if the state

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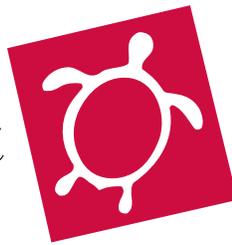
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*Mahalo!*

# Environment



# Hawai'i

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## NEW AND NOTEWORTHY

**Tuna Catch Limit:** The National Marine Fisheries Service is seeking comments on two proposed actions that would permanently increase the bigeye tuna quota for the Hawai'i-based longline fleet.

The combined effect of the actions is to set up a regulatory system that will let the governments of the U.S. Pacific territories (Guam, Commonwealth of the Northern Mariana Islands, and American Samoa) assign up to 1,000 metric tons of their bigeye allocation to the Hawai'i boats.

The first action would give each territory a 2,000 metric-ton limit on bigeye tuna caught with longline gear. The second would allow it to sell up to 1,000 metric tons of that quota to either a single vessel or several vessels under terms of an agreement that has to meet certain criteria, which are set forth in the proposed rule.

Lest anyone think there might be a justifica-

tion for the rule other than evading the Western and Central Pacific Fisheries Commission limit on catches of bigeye by Hawai'i longliners, the rule is clear: attribution of bigeye catches to the territorial allotment will not begin until one week before NMFS anticipates the longline fleet will reach its catch limit: "NMFS will attribute catch made by [vessels in the agreements] to the applicable U.S. participating territory starting seven days before the date NMFS projects the annual U.S. bigeye tuna limit to be reached."

The agency will be accepting comments on the proposed rule until February 24.

To view the *Federal Register* notice, go to <http://www.gpo.gov/fdsys/pkg/FR-2014-01-08/pdf/2013-31592.pdf>. To submit online comments, go to <http://www.regulations.gov> and indicate you wish to comment on docket NOAA-NMFS-2012-0178.

**Waikoloa Landowner in the News:** One of the largest landowners in the Waikoloa area of the Big Island was the subject of a long investigative article in the *LA Weekly*. Reporter Gene Maddaus interviewed Stefan Martirosian and his business partner, Remington Chase, asking pointed questions about their involvement in criminal activities including cocaine trafficking, diamond smuggling, Social Security fraud, and murder plots, among other things. Martirosian and Chase are partners in a production company, Envision Entertainment, that provided financial backing for *Lone Survivor* and several other less successful films.

The same day the article appeared, January 2, parcels owned by Martirosian's company, Waikoloa Mauka, appeared on the list of Big

Island lands for which property taxes had not been paid for at least three years. The total amount owed on 10 separate parcels came to \$1,275,870.30. Three days before the scheduled tax auction of these and other properties whose owners were in arrears, the full amount was paid.

Back in 2006, Waikoloa Mauka paid around \$60 million to purchase nearly 14,000 acres of land from Waikoloa Development Co. The properties sold included the stalled out Waikoloa Highlands subdivision, just mauka of Waikoloa Village.

Waikoloa Mauka petitioned the Land Use Commission to move the Waikoloa Highlands parcels into the Rural land use district, so as to avoid the problems associated with residential development of Agricultural District land. The LUC approved the petition with conditions, including that Waikoloa Mauka provide annual progress reports. According to the LUC, not one such report has been submitted since the petition was approved in 2008.

**He'eia Reserve:** When some people hear a place may become a reserve, they immediately think their use of the area will be prohibited or otherwise curtailed. That was an initial reaction at a January 9 public hearing to news that the He'eia estuary in East O'ahu is expected to be nominated this year to the National Oceanic and Atmospheric Administration as a National Estuarine Research Reserve.

Since then, the Coastal Zone Management Program, which is overseeing the designation process, has noted on its website that NERRs do not come with any new federal regulations. They do require local management agencies – most likely the state or a university – to prepare a management plan aimed at protecting the designated area.

As the CZM website points out, public access and use of NERRs is common. For example, the San Francisco NERR allows all traditional uses of the area, including commercial and recreational fishing, boating, horseback riding, hiking, and bicycling, it states.

Designation does allow the area's managers to receive federal research funds. Currently, of the nation's 28 NERRs, none are in the Pacific islands.

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### Quote of the Month

*"If not for the community bringing it up, we would have an easement that ends at a wall of rock."*

— Gary Hooser,  
*Kaua'i County Council*

## Agribusiness Development Board Revisits Votes Taken at Disputed October Meeting

With several important actions in limbo pending the outcome of a complaint *Environment Hawai'i* filed in November with the Office of Information Practices, the board of the state Agribusiness Development Corporation decided it was better to play it safe. So on January 14, it redid most of its October 30 agenda.

*Environment Hawai'i* filed the complaint after the ADC issued an agenda for its October 30 meeting that did not give members of the public – including our reporter – enough information to find the meeting location. In addition, the agency also failed to post the agenda on the Hawai'i Agricultural Research Center conference room in Kunia, the meeting site on that day.

At the October 30 meeting, the ADC board approved a number of items relating to the growth and development of the Whitmore Village area as an agricultural hub, including two new land licenses for more than a hundred acres of former Galbraith Estate land, a memorandum of agreement with the Wahiawa Community Based Development Organization (WCBDO), and a recommendation to support state Sen. Donovan Dela Cruz's Whitmore Village Agricultural Development Plan. (For more, see the article in our December 2013 issue.)

The OIP had not made a determination on the complaint by press time. But, on January 14, in an apparent abundance of caution, the ADC board revisited the votes it took on October 30.

In the meantime, ADC director James Nakatani reported, the ADC acquired 24 acres in Whitmore Village from Castle & Cooke, as well as the Tamura Warehouse in Wahiawa to

provide produce packing and processing facilities. Total cost of the properties was about \$8 million.

The ADC has already begun getting requests to use some of the buildings, he said, adding, "Senator Dela Cruz is making more and more partners for us."

What's more, the WCBDO has met twice with ADC staff and has begun the process of obtaining a grant from the City and County of Honolulu to conduct training for agricultural workers in the area and to buy farming equipment, Nakatani said.

"I do think it is a very strong economic development tool for the area," ADC board chair Letitia Uyehara said of the WCBDO, noting that there are "a lot of mid- to low-income folks living in the area" who will benefit from the training that's going to be offered.

Also at its January meeting, the ADC board approved a new license of more than 100 acres of former Galbraith land to Ohana Best, LLC, which currently farms some 50 acres in Hale'iwa.

"I gotta tell you that the farm [in Hale'iwa] is immaculate, one of the best farms I've seen in the state of Hawai'i. They've already harvested about 35,000 pounds of vegetables. It's something to see," Nakatani said.

The parcel Ohana will be licensing from the ADC is currently unimproved, covered with trees and grass, and does not yet have an adequate source of water.

Although a water pipe already crosses the property, "it's in kind of a limbo," Nakatani said, adding that ADC board member (and newly appointed state Department of Agriculture director) Scott Enright is trying to

resolve the water issue by getting an easement for the pipe across lands owned by the Office of Hawaiian Affairs.

The January meeting was held at the state Department of Agriculture's Plant Quarantine Division conference room and was attended by state Rep. Marcus Oshiro and two staff members. Oshiro, chair of the House Finance Committee, was a key figure in the state's acquisition of the Galbraith Estate lands, setting aside millions of dollars in general obligation bonds years ago for the purchase.



## Board Defers Setting Policy On Rent Increases at Galbraith

In 2012, the state, through the Trust for Public Land, acquired more than 1,700 acres from the Galbraith Estate. The state contributed \$13 million toward the \$25 million purchase price. Just over 1,200 acres went to the ADC; the remainder went to the Office of Hawaiian Affairs, which had contributed \$3 million.

While farmers are already starting to work on the ADC-controlled lands, the agency is still grappling with how much rent it should charge, given uncertainties over the area's productivity.

The few farms with licenses – Kelena Farms, Ohana Best, LLC, and Ho Farms – are large, successful farms that are expected to help develop the water resources needed to serve the entire 1,200 acres. Their initial rents have already been set, but the amount by which rents will increase over the 35-year term of the licenses has not been determined.

At its January meeting, the ADC board debated over whether or not rental reopening terms should be hammered out now or left for another time. A request to amend the Kelena Farms' first license (it has two) from a 10-year term to a 35-year term prompted the discussion. The amendment would make the license "consistent with all the other [licenses]," Nakatani told the board.

Board member William Tam argued that the ADC should agree on how rental reopenings will be dealt with *before* entering into any license agreement.

"It will be awkward to say, 'We'll deal with this when we get there,'" he said. "We're entering into a land [license] without the terms being fully worked out."

When pressed by board members to approve, or at least discuss, a policy for handling rent increases, Nakatani hesitated.

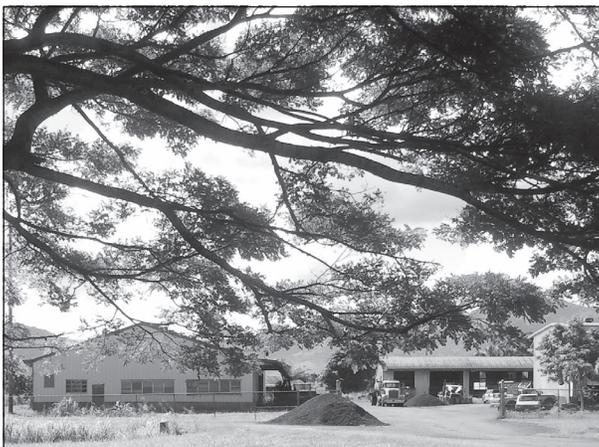
"I just want to see how Galbraith does as an agricultural area. I know it's good land. I'm not sure we can do it all year around," he said.

"The [license] rent looks low, but water is going to be expensive," he continued. "We've got to make sure that farmers can make a living [but] I don't want to make it so cheap it's unfair to the rest of the system."

"Let's run some numbers, talk to the farmers, see [what's] doable," Nakatani said.

While the board voted to approve extending the license term for Kelena Farms, the matter of how future rents for Galbraith lands will be determined remained unresolved.

— T.D.



Some of the buildings on the 24-acre site in Whitmore Village the ADC recently purchased from Castle & Cooke.

## BOARD TALK



## Enforcement Sting Nets First Violator Under New Permit System at Kealakekua

The Department of Land and Natural Resources wanted to send a message: It is done messing around when it comes to prosecuting illegal kayak vendors at Kealakekua Bay State Historic Park.

On January 10, the DLNR's Division of State Parks recommended that the state Board of Land and Natural Resources impose the maximum fine of \$2,500 plus \$735 in administrative costs in the case of Alex Aquino, an unpermitted vendor caught in a sting by enforcement officers late last year. Aquino runs Big Island Canoes, according to a State Parks report to the Land Board.

Aquino, who reportedly had a bench warrant out for his arrest on a separate matter, didn't attend the Land Board's meeting. Even so, the board unanimously approved the fines.

For more than 20 years, the DLNR has struggled to control illegal kayak operators at the park. One director after another failed, while damage to historic sites and harassment of dolphins in the bay grew, as did illicit drug dealing in the area.

With many residents clamoring for the state to shut the area down, DLNR director William Aila did just that in January 2013 when he prohibited all vessels – including stand-up paddle boards – from accessing the bay. The few kayak tour operators with commercial use permits were initially allowed back a few months later. Then after State Parks put a permitting system in place for all users of the park, both commercial and non-commercial, Aila reopened it to the public.

Now, anyone wishing to transit the bay's waters using a vessel must have a permit.

"Up until this point, these guys [illegal vendors] were phantoms. Now they have received permits [to transit the bay]. We know who they all are," assistant State Parks administrator Curt Cottrell told the Land Board on January 10.

Of the more than 400 permits issued covering more than 600 vessels in the bay, Cottrell says only seven of them are causing problems.

One of them, Aquino, was caught renting kayaks to an undercover DLNR Division of Conservation and Resources Enforcement officer on November 21.

State Parks chose, for the first time, to bring a violation case for civil penalties to the Land Board rather than to Circuit Court. Courts, said Cottrell, have consistently either tossed



Kealakekua Bay

PHOTO: DLNR

out violation cases brought by the agency, or imposed nominal fines of \$50 to \$100.

Such fines are not a deterrent, he argued. "There's so much money that is available to illicit vendors," he told the board. Aquino was charging \$60/day for double kayaks, \$80/day for triple kayaks, plus \$10 per person for snorkeling gear, according to the staff report.

Hawai'i island Land Board member Robert Pacheco asked whether the county or state is going after these vendors for taxes, given the amount of money that's being made.

He added that he supported imposing the maximum fine of \$2,500.

"Anything less would be the cost of doing business," he said. "For me, this isn't someone who doesn't know. ... These guys have been manipulating and skirting around ... It's a really chronic problem."

A question arose whether the agenda item title, which was to request "the issuance of administrative and civil penalties of \$2,500," capped the total fine to \$2,500 or allowed the board to impose additional administrative costs.

At-large board member Sam Gon noted that the recommended fines are merely that – recommendations – and that the Land Board can make its own decisions on the final amount.

"I'm willing to go for it and somebody can fight it if they want to. I don't think we're gonna get the money anyway," Pacheco said.

In the end, the board unanimously approved a motion to find that Aquino had violated DLNR rules and authorize a \$2,500 fine plus \$735 in administrative costs.

State law allows the Land Board to impose fines of up to \$5,000 for second offenses that occur within five years of a first offense, and up to \$10,000 for third and subsequent violations.

## USDA Studies Forest Recovery After 'Cataclysmic Man-Made Disturbance'

Over the next two years, the U.S. Department of Agriculture's Institute of Pacific Islands Forestry will be killing albizia trees on 900 acres of state land in Puna that were deforested 30 years ago by then-landowner Campbell Estate for pasture purposes and geothermal and biomass energy production.

On January 10, the Land Board granted the agency a right-of-entry to document the area's recovery and to apply herbicide to invasive albizia there. The institute will also document any effects albizia removal has on forest regeneration.

The work will "produce a better understanding of natural native forest recovery and succession," a DLNR Land Division report to the board states. It also is in line with legislation passed by the 2013 Legislature calling for interagency cooperation on the control of albizia, starting on Hawai'i island.



## Maui Kayak Company Gets 'Clean Slate'

The lawyers have worked it out and the contested case hearings initiated last year by Island Adventure Tours, LLC (dba Keli'i's Kayak Tours) and KRS Investments, LLC (dba South Pacific Kayaks & Outfitters and Tiki Team Adventures) have been withdrawn. In exchange, the violation the Land Board found against Island Adventure Tours for conducting unpermitted commercial activities at Maui's Olowalu Beach has been rescinded. No fines were ever imposed in that case.

The violation against KRS and the associated \$1,420 in fines and administrative costs stand.

Before the contested case hearings began, the Department of the Attorney General and Thomas Cole, representing both companies, reached an agreement.

"The basis for recommending rescinding the violation ... is that the violation occurred in 2008. In effect, this would provide Keli'i's Kayak Tours with a 'clean slate,' and if and when the board finds another violation, it would be considered a first offense," a Land Division report to the Land Board states.

On January 10, the board approved the deal. — T.D.

### *Ala Loa from page 1*

owns the trail, it doesn't need to get permission from the owners of the surrounding lands to access it.

It's a matter worth litigating, he says, but without a client, he can't do anything about it. In the meantime, Falko Partners is moving forward with developing some 80 agricultural lots at Waipake, causing panic among some community members that their chance to preserve the historic trail is slipping away.

Some have expressed hope they can secure Maui attorney Tom Pierce, whose client, Public Access Trails Hawai'i, recently sued the state and Haleakala Ranch Company to prove the state's ownership of the historic Bridle Trail. But so far, there's been no lawsuit for the coastal Ala Loa on Kaua'i.

"I'm waiting for it," says Nelson Ayers, manager of the DLNR's Na Ala Hele program, which manages the state's trail system.

### **The Spark**

It all started with Moloa'a, located immediately south of Ka'aka'aniu. In 1932, the territorial government relinquished ownership of the trail across the seaward portion of this ahupua'a, currently owned by Moloa'a Bay Ranch. However, a covenant in the ranch's deed allowed the DLNR in 2007 to establish a perpetual public easement using portions of what was believed to be the historic trail plus new segments.

The easement runs along Moloa'a Bay, ending at a fence at Ka'aka'aniu.

In a March 2007 letter to Hanwright, Curt Cottrell, then-head of Na Ala Hele, informed her that the historic trail crosses her property as well and that it is owned by the state.

"However, the exact location on the ground must be identified and requires re-

connaissance by qualified staff of DLNR and potentially previous traditional users from the area," he wrote.

He asked to meet with her and her counsel to discuss a number of issues:

- "The possibility of identifying the actual location of the historic trail delineated in the registered government survey maps in your parcel.

- "Determining the physical integrity of the trail if identified, and, in consultation with DLNR Historic Preservation Division, determine if it merits 'Preservation' status.

- "Reconciling the historic trail alignment with current topography and public safety issues.

- "Private property and liability issues associated with re-establishing public use along the historic trail – or a negotiated alternative alignment.

- "Upon determination of route, develop a trail management strategy that was inclusive of minimizing impact to the seasonally nesting [Laysan] albatross population."

She did not cooperate. In fact, her attorney, Laura Barzilai, has argued that the trail does not exist and threatened prosecution against anyone caught trespassing on Hanwright's property. Hanwright has erected fences along her property, in part, to protect the albatross that reportedly nest near the purported trail route.

### **Domino Effect**

Hanwright wasn't the only one disputing the DLNR's determination that the Ala Loa runs laterally along the coast. In August 2009, Paradise Ranch applied for a Conservation District Use Permit to build a fence, landscape, and raise cattle on land in the Conservation District it leased from Waioli Corporation at Lepeuli. The fence would cut off access to what many considered to be the northward continuation of the Ala Loa past Hanwright's property.

The ranch disagreed with their assessment. In an August 5, 2009 letter, ranch attorney Lorna Nishimitsu submitted a photo to Na Ala Hele program abstractor Doris Moana Rowland, suggesting that the Ala Loa was located along the Kaua'i Belt Road, not along the coast.

Rowland countered in a letter a day later that a 1932 reference to the trail ("in Liber 1174, Page 315") identifies the Ala Loa as being near the sea. But, in correspondence a month later, she concluded that the state for-

feited its right to the trail when the property was placed in the Land Court system without a description of the Ala Loa.

The DLNR then basically dropped its pursuit, but a handful of community members soon picked it up when, in February 2010, then-DLNR director Laura Thielen granted Paradise Ranch its CDUP.

Thielen granted the permit administratively and not at a full public hearing before the Board of Land and Natural Resources, despite pleas from community members who used the trail.

They quickly objected. In March 2010, longtime area resident Linda Sproat, the Surfrider Foundation, and Malama Moloa'a filed petitions for a contested case hearing.

Sproat's petition, filed by the NHLHC's Frankel, noted that she is a native Hawaiian who, with her father, grandfather, and other family members, "used and would like to continue to use a trail that parallels the shoreline and traverses through several ahupua'a in order to gather resources and to observe ocean conditions. They did not just gather from the sea. They also gathered plants on the land."

In a declaration appended to the petition, Sproat states the trail, which they called the "limu trail," stretched across the ahupua'a of Pila'a, Waipake, Lepeuli, Ka'aka'aniu, and Moloa'a.

"Depending on what we were looking to gather, we met and visited with many others who were exercising the same traditional and customary practices," she stated.

The petition noted that in the 1980s, Sproat and then Na Ala Hele staff member Deborah Chang (who now sits on *Environment Hawai'i's* board), recorded interviews with kupuna about their gathering activities in Lepeuli and their use of the trail.

It added that the DLNR's files "are replete with evidence that a historic trail ran through this ahupua'a," including pre-1900 maps showing a trail parallel to the shore.

Frankel argued that Rowland was wrong in her determination that the state no longer owned the trail, a position with which the Attorney General's office later concurred.

In any case, "[b]y failing to assert the public's ownership interest in this trail – and by failing to fully investigate the state's ownership interest – the chairperson violated her duties to protect the ceded lands trust," he wrote.

On May 13, 2010, the Land Board considered their appeals. Its staff had recommended denial, noting that the board was limited to determining whether its chair, Thielen, had acted arbitrarily or capriciously when she approved the CDUP.

At the meeting, ranch manager Bruce



Access to Ka'aka'aniu, pictured here, has been fenced off by landowner Patricia Hanwright.

Laymon explained that the fence was needed to prevent vagrancy, illegal dumping, and to keep its cattle from wandering down the hillside.

Waioli Corporation attorney Donald Wilson presented aerial photos from the 1970s and '80s suggesting that what people were calling a historic trail was actually created by Meadow Gold dairy in 1973. However, Sproat, her husband, and her daughter testified to their family's use of the trail long before then.

Wilson again referred to an old scaled map that suggested that the Ala Loa followed a road located 1,000 feet inland. At-large Land Board member Samuel Gon and Hawai'i island member Robert Pacheco countered that, in their experience, as a scientist/natural resource manager (Gon) and a naturalist/hiking guide (Pacheco), old maps don't always reflect what's on the ground.

Even so, because the board was limited to determining whether or not Thielen's decision was arbitrary and capricious, the board voted unanimously to deny the appeal.

Sproat appealed the board's decision in Circuit Court, but the case was eventually dismissed in January 2011. After Sproat filed her appeal, DLNR staff and the Attorney General's office eventually came to agree that she might be entitled to a contested case hearing. That change of heart led Paradise Ranch to abandon its CDUP, opting instead to put the fence in the Agriculture District.

"They basically decided it was too much trouble," said state deputy attorney general William Wynhoff told the Land Board on January 13, 2011.

By this time, the county had accepted an easement from Waioli for the steep, winding trail that the some members of public had begun to use.

### **Condition 6**

Although the CDUP was now void, a Special Management Area permit for the fence issued by Kaua'i County in September 2009 still required the fence to be approved by the DLNR and Na Ala Hele "to ensure public access to and along the lateral coastal trail." The permit also required the ranch to "[p]rovide the department a location map as approved by those agencies prior to the installation of the fence."

Because the fence in the Agriculture District would block the coastal trail, both Frankel and activist Richard Spacer raised this issue with Kaua'i Planning Director Michael Dahilig in early 2011. Spacer went so far as to submit a petition for an Order to Show Cause why the SMA permit should not be revoked.

But in a January 31, 2011, letter to Dahilig, Wilson and Nishimitsu argued that Paradise

Ranch had met Condition 6 of the SMA permit. They argued that Thielen's approval of the CDUP (despite being voided) and Na Ala Hele's September 2009 determination that the state was unable to claim an interest in the trail satisfied this condition.

Wilson and Nishimitsu continued that because the county required Condition 6 when the fence was to be in the Conservation District, "it is in that context that Condition 6 must be read. Now that the fence has been moved entirely out of the state Conservation District, and even if the existing responses of the two state agencies are in question (which we do not concede), Condition 6 is now moot."

They added that Waioli and Paradise Ranch have "no issue with qualified native Hawaiians who wish to reasonably exercise their customary and traditional rights on the Lepeuli property and access for those purposes will not be denied as long as reasonable procedures are in place that protect the legitimate interests of both parties."

Dahilig later approved the fence in the Agriculture District and indefinitely deferred Spacer's petition. This despite having received a letter from the DLNR clarifying that Na Ala Hele's September 2009 memo does not represent the state's position on trail ownership.

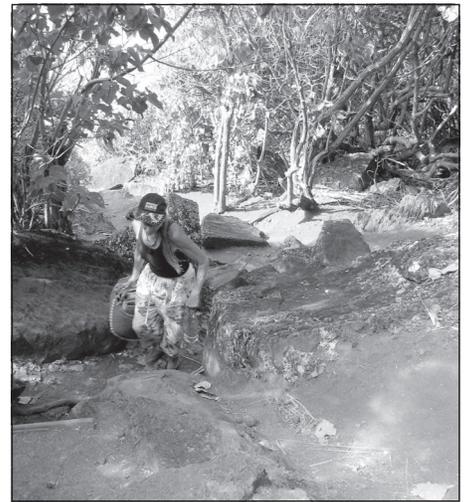
"The excuse by the planning director is the state has not moved on the Ala Loa. That is a non sequitur," Spacer says.

### **'We Tried'**

With the state again claiming it owns the historic coastal trail, in an August 2011 letter, Wilson asked DLNR director William Aila to notify Waioli Corporation if and when the DLNR undertook any "investigations, studies or actions" on Waioli's property, as well as when it received any claims or requests regarding alleged public access rights through the property.

Aila responded that it is the DLNR's policy to notify landowners of department actions, and that his staff is required to request permission to enter private property, except when public health and safety issues are involved. However, he added, he would not inform Wilson of every alleged claim or request for public access.

In November, then-DLNR land deputy Guy Kaulukukui visited the trailhead above Lepeuli to discuss access issues with activists Spacer and Peter Waldau, but not did not meet or speak with anyone from Waioli Corporation. The move rankled Wilson, and in a January 2012 letter, he asked Kaulukukui to confirm that before anyone from DLNR did anything regarding "the property" that Wilson or Waioli be contacted first "so that



Activist Hope Kallai hikes up the steep county easement to Lepeuli beach.

DLNR may have access not only to the property itself but also to all relevant and accurate information regarding the property."

"With all due respect to Mr. Spacer and Mr. Waldau, they are insistent on acquiring access rights through Waioli Corporation's private property which we do not believe are legally existent or justified based upon our extensive research into the history of the area. Listening only to one side of this issue will not provide any public official with a complete understanding of the situation," he wrote.

That summer, Na Ala Hele's Rowland had the DLNR's surveyor prepare a map showing the makai trail through Ka'aka'aniu, Lepeuli, and Waipake, but the investigation didn't appear to go much further. According to Ayers, the DLNR asked permission to access Waioli's property to determine the alignment of the Ala Loa and was denied.

"We tried to go and visit the site, but because the landowners were receiving a lot of public sentiment, they said we cannot go on the property. So that's where we are right now," he says.

### **The Last Stand?**

Since then, the state has issued a number of letters to various interested people stating that, yes, the DLNR believes it owns a coastal trail in the area under the Highways Act of 1892, but, no, it doesn't have plans to pursue it at this time.

That's been frustrating for not only activists, but for the Kaua'i County Council as well. For the past several months, the council's Planning Committee has been wrestling with whether or not to accept a proposed mauka-makai beach access easement at Waipake that Falko Partners has offered as a condition of its county subdivision approval. In addition to the fact that the beach access ends not at the beach but at a 12-foot vertical cliff, one of the

main sticking points has been how the existence of the Ala Loa might affect the easement.

At a Planning Committee meeting last August, county corporation counsel Ian Jung stated that should the county accept the easement, it would become an interested party and likely a defendant in any quiet title action brought either by Falko Partners or the state regarding the Ala Loa.

He noted that while the DLNR had no

“*[W]e tried, but the stars didn't align.*”

— **Nelson Ayers, Na Ala Hele**

plans to pursue the trail, the state in a 2008 Circuit Court stipulation reserved its “right, title, interest and claim” to a 10-foot wide section of the Ala Loa located on a .37-acre kuleana parcel located near the shore at Waipake.

“Wouldn't it be prudent for us to determine where that Ala Loa is before we do this type of agreement ... that may result in a lawsuit down the road?” asked committee member Mel Rapozo.

“Prudence is in the eye of the beholder,” Jung replied. Should the county accept the easement, it would need to apply for a CDUP for the portion that lies within the Conservation District and that would also trigger a review from the state Historic Preservation Division, he said. Members of the public have also said it would require review by the Office of Hawaiian Affairs, which supports the designation of the Ala Loa.

Jung added that the easement was originally proposed for the west side of Waipake, but the DLNR's Office of Conservation and Coastal Lands, which administers all CDUPs, had asked that it be moved to the east side, in part, to avoid disturbing Laysan albatross and the endangered Hawaiian monk seal in the area.

“Access is a double-edged sword,” especially on an island that attracts one million tourists a year, committee member JoAnn Yukimura said.

In September, Hope Kallai of Malama Moloa'a and Rayne Regush of the Kaua'i group of the Sierra Club wrote to Aila and Ayers, respectively, again asking the DLNR to establish the coastal Ala Loa before the area is fully developed.

“This is a new request to locate the Ala Loa in a different ahupua'a, with imminent development and sales-determined need for action by the state,” Kallai wrote.

In response, DLNR staff visited the area with Falko Partners manager (and former acting Land Board member for Kaua'i) Shawn Smith on October 9.

“We anticipate [the mauka-makai ease-

ment] will satisfy the public's concerns regarding access to the coastline. As a result, DLNR has no current plans to take action regarding this trail,” then-DLNR Division of Forestry and Wildlife administrator Roger Imoto wrote in a November 6 letter to Smith. DOFAW administers the Na Ala Hele program.

When the county Planning Committee met in December to discuss the easement,

some members continued see a need to establish the Ala Loa first and expressed frustration with the DLNR's position.

Committee member Tim Bynum argued that once people move onto the subdivided lots at Waipake, it will be more difficult for the state to establish a historic trail.

“There will be takings issues, compensation,” he said. “That's what will happen in the future if we try to get the lateral access.”

“Yes, sir,” attorney Dennis Lombardi, representing Falko Partners, replied.

Even so, committee member Ross Kagawa reminded the committee of the DLNR's decision not to take any action on the trail.

“It may be frustrating to us [but] what can we do? We're not their bosses,” Kagawa said.

Lombardi noted that Larry Bowman of Falko Partners was willing to extend the county easement a few dozen feet so it reaches an existing fishing trail to the beach. Given that, the committee decided to defer the matter until April, to allow time for the extended portion to be cleared and staked and for the county's and Falko's attorneys to prepare the documents needed for the county to accept the addition.

### ***The Way Forward***

The Highways Act of 1892 says the state owns the trail, Ayers says. But even though his program has in the past led much of the effort to establish the trail, the property is currently unencumbered state land, he said.

“For a trail to be adopted under the [Na Ala Hele] program, it has to go through Land Board procedure and environmental and cultural surveys. ... The Land Division they own vast state unencumbered lands. They're not doing anything,” he says. “We've tried. When Guy [Kaulukukui] was here, we tried, but the stars didn't align.”

With regard to the arguments that the state has admitted that at least a portion of the Ala Loa is located where the kuleana on

Parcel 10 used to be, Ayers says “that was just a 10-foot section that is on paper, but we have not recognized that on the ground.”

He also says he doesn't believe the proposed mauka-makai easement is going to cross the Ala Loa, nor does he see an urgent need to designate given the pending development.

“It's just people's claims,” he says.

In any case, “It doesn't make sense to fragment it, like a hallway,” Ayers says, referring to the resistance from the landowners at Ka'aka'aniu and Lepeuli.

“The only way this will work is if the three landowners agree with us working with them. That's the only way it will work,” he said.

More than once during the county Planning Committee's meetings on the easement, members of the public, including Regush and Waldau, mentioned that Maui attorney Tom Pierce has expressed his willingness to help negotiate the establishment of the historic trail.

Regush says community members have talked with Pierce but could not say whether a lawsuit is planned or, if so, whether it would address all three ahupua'a or just Waipake.

### ***Unpublished Inventory***

On January 23, Ayers delivered some disappointing news to members of the Na Ala Hele Kaua'i Advisory Council and the public who have been seeking a resolution to the apparent standoff over the Ala Loa.

That day, Ayers denied the council's November 2013 request for DLNR's surveys and historic maps of the Ala Loa at Ka'aka'aniu, Lepeuli, and Waipake, because the trail was what is part of the DLNR's “unpublished” trail inventory.

According to a 1992 opinion from the Office of Information Practices, amendments made by the 1990 Legislature to Hawai'i Revised Statutes Chapter 92 allow the DLNR to “withhold public access to the unpublished portions of the Inventory under section 92F-13(4).”

“The council was really upset and voted unanimously to get an AG's [Attorney General] opinion,” wrote Kallai, who attended the council meeting, in a broadcast email.

“Mr. Ayers was asked why he would deny document access. He said he had no opinion,” Kallai wrote.

“Our ancient cultural byway around the whole island of Kaua'i is now a private secret of O'ahu DLNR, not to be talked about. If this ancient cultural byway can become an 'Unpublished Trail,' no trail in Hawai'i Nei is safe from being taken, secretized and privatized,” she wrote. — **Teresa Dawson**

## Proposed County Easement at Waipake Falls Far Short of Beach, Expectations

We've negotiated lots of accesses. This is the worst I've ever seen," said Kaua'i County Council Planning Committee member Tim Bynum of the proposed mauka-makai easement in Waipake offered by Falko Partners, LLC, as part of its 357-acre Kahu'aina Plantation development.

The easement is a mile long, pedestrian-only (meaning no bikes or horses), and ends at a 12-foot high bluff above a field of rocks. Falko would also have no obligation to maintain the easement.

A website for the development celebrates the project's "extremely high barriers to entry."

The county Planning Commission approved Falko's subdivision request for the 80-lot luxury agricultural development years ago, but the easement, a condition of the approval, has only recently come to the County Council for acceptance.

The initial easement proposed on the western side of the ahupua'a was rejected by the state Department of Land and Natural Resources' Office of Conservation and Coastal Lands, in part, because it came too near to areas frequented by Laysan albatross and endangered Hawaiian monk seals. At OCCL's request, the easement was moved to the east side of the property. Also, an error in the file plan, which had the relocated easement ending 580 feet from the shore, caused some additional delay.

But even with that error corrected, the council's Planning Committee was not pleased. When county corporation counsel Ian Jung first brought the easement to the committee in August for approval, members criticized the Planning Commission for not negotiating something better.

Bynum asked why the proposed parking area and easement couldn't start at one of the development's internal roads closer to the ocean. Jung replied it was because Falko does not intend to dedicate those roads to the county and the law limits the county to accepting easements that connect to public roads. And the closest county road is a mile away.

Although not a committee member, council member Gary Hooser also lamented that the county has negotiated lateral beach access for other developments, but failed to do so in this case.

When asked what the council's options were, Jung said the committee could either

accept the easement or not, but would not discuss in public what leverage the council might have to amend or add conditions to that easement.

The committee twice deferred the matter. In the meantime, a number of committee members walked the easement themselves and agreed that the matter of the 12-foot cliff needed to be resolved.

"If not for the community bringing this up, we would have an easement that ends at a rock wall that is unacceptable," Hooser said when the committee took up the matter in November.

"Are we the county that incompetent that we would sign on something like this ... telling the people, 'Here is your gift?'" added committee member Mel Rapozo. "I am not asking for special favors of a gold plated 24 karat ... walkway to the beach with amenities, water fountains and restrooms. [I'm] asking for access. ... It is not access. We got duped," he said.

After again deferring the matter, Falko Partners attorney Dennis Lombardi offered a solution at the Planning Committee's December meeting.

Falko's Larry Bowman, after walking the proposed easement himself, committed to giving to the county an additional path that branches off the easement about 30 feet northward to "a set of natural stairs" and to a fishermen's trail to the beach, Lombardi told the committee.

Lombardi recommended that the committee defer any decision until its second meeting in April.

"We need some time to do the engineering, some time to survey and stake the additional path," he said. He added that the company planned to hand-clear the new portion, which may require DLNR approval. Lombardi said the addition would likely be a gift to the county rather than be included in the proposed easement.

Bynum asked Lombardi whether the new path was part of a commitment to

work with the DLNR on establishing the lateral access to this property, commonly known as the Ala Loa.

"Absolutely not, sir," Lombardi replied.

"I'm very disappointed to hear that," Bynum said.

In the end, the committee deferred action until April.

### *Surprising Scope*

When the easement matter was first brought to the council's Planning Committee, members believed that Kahu'aina Plantation was an 11-lot agricultural subdivision, because that's the description they had been presented with. They were wrong.

During the course of the committee's meeting last August, community member Tim Kallai provided council members with a printout from Kahu'aina Plantation's website which described it as an 80-lot luxury subdivision.

When confronted by council members with this new information, Jung replied that he was aware that some 62 residential lots and a number of agricultural CPR (condominium property regime) units were being proposed. The subdivision application was approved before the county amended an ordinance governing density in open space areas a few years ago.

Under the county's current ordinances, "a development like this would be completely different," he said.

"This is a full-on luxury, supposed agriculture subdivision which I think changes a lot in terms of what the people's benefits would be in terms of access, in terms of a lot of things," Hooser said.

Because the agenda item being discussed dealt only with the easement and parking issue, the committee agreed to deal with the subdivision scope in a separate item at a future meeting. — T.D.



Terminus of proposed easement at Waipake.

## Land Board Shuns Ranch's Offer To Privatize Haleakala Bridle Trail

More than a decade ago, the state Department of Land and Natural Resources asked Haleakala Ranch Company for permission to access the ranch's Makawao lands so it could determine the route of a historic, public trail to Haleakala, known as the Bridle Trail.

The ranch refused, claiming that it owned the trail.

Prompted by a lawsuit filed in January 2011 by the non-profit organization Public Access Trails Hawai'i, David Brown, Joe Bertram III, and Ken Schmitt, a trial date has finally been set in 2nd Circuit Court for March 17 to determine the trail's ownership. The state is a defendant in the case, along with Haleakala Ranch.

One final settlement conference was held on January 21, but no settlement was reached.

"I can say that public access is the most important thing to us," PATH attorney Peter Martin told *Environment Hawai'i* before the

settlement conference. The nine guided hikes organized over the past year and a half by the DLNR and the ranch to provide some public access have been "a complete failure," he added. "We want meaningful public access."

PATH's position was likely helped by the state Board of Land and Natural Resources' decision on January 10. That day, the board denied a request from the DLNR's Division of Forestry and Wildlife to authorize board chair and DLNR director William Aila to negotiate and execute a settlement agreement with the ranch that would allow the ownership of the portion of the trail that crosses the ranch's property to rest with the ranch. In exchange, the ranch would grant the DLNR an easement to the Kahikinui forest reserve and the Nakula Natural Area Reserve.

The Land Board did approve DOFAW's request to hire contractors to conduct an archaeological inventory survey (AIS) for the proposed land exchange and the alleged his-

toric trail, as well as an environmental assessment (EA) of the exchange and the proposed forest reserve road in Waiopai.

The board denied a request by PATH for a lease for the trail portion crossing the ranch's land.

To DOFAW, the guided hikes, established under a memorandum of agreement approved by the Land Board in May 2012, have provided reasonable public access that also address the ranch's concerns about im-



Photo: Bryan Berkowitz

Bridle Trail, Maui

PHOTO: BRYAN BERKOWITZ

pacts to its operations. And for years, the DLNR has been trying to establish an access to its remote Kahikinui forest reserve and Nakula NAR. So when the ranch's counsel approached the DLNR late last year with a proposal to settle the trail ownership issue via a land exchange, the department was open to the idea.

The proposal was an effort to keep the matter from being decided at trial.

PATH objected to the idea, especially since in December 2012, the state had entered into a joint prosecution agreement. Under the agreement, the state would join PATH's effort to prove that the state owns the trail. In recent correspondence, PATH attorney Tom Pierce warned Aila that DOFAW's proposal breached that prosecution agreement. Even so, the division brought the matter to the Land Board.

DOFAW administrator Lisa Hadway emphasized her division was not asking the board to approve the land exchange. Even so, under

the ranch's proposed settlement agreement, the state would relinquish ownership of the trail to the ranch.

"Public access would continue in perpetuity in levels reasonable and desirable ... [and] we would get access to Nakula and the forest reserve," she said. "This creates a new public access opportunity we otherwise would not have."

Don Young, Haleakala Ranch president, testified that the proposal was a reasonable resolution to the trail dispute.

Hawai'i island Land Board member Robert Pacheco asked if the board decided not to agree to relinquish title to the trail, how that would impact negotiations for the easement to the forest reserve and Nakula NAR.

"Is it quid pro quo?" he asked.

Young simply said that the exchange would settle the litigation. While the ranch had a strong enough case that the judge recently denied a motion by PATH for a partial summary judgment, "it would be better to settle this out of court than to litigate," he said. "This appeared to be the best way to resolve ownership, provide public benefit... and a new public benefit."

Young added that PATH is seeking unfettered public access, something that the ranch

is very much against.

"The trail goes across an area that is important to us," he said. "In times of drought ... those pastures are very important."

Several members of the public testified that exchanging a historic trail for an easement over private land might set a precedent for other swaps. They also asked that the easement to the state reserves be considered independently of the trail issue.

Wailuku resident Claire Apana said that while she supports the ranching activities, the guided hike system does not accommodate her traditional and cultural practices. In fact, she said, she's been barred by the ranch from gathering maile.

She said she shouldn't have to wait for enough people to sign up to go on a hike, to exercise her sometimes time-sensitive cultural practices.

Pierce tried to explain how the guided hikes were inadequate. First, he said, they only go in one direction, down. He also

decried the process required for people to join a hike. One must first call the DLNR to get on a waiting list. After a couple of months, when enough people have signed up, the DLNR provides a hiking date. Because the hikes only go one way, hikers must arrange for transportation at the end. And while hiking, says Peter Martin, the ranch guide uses it as a platform to explain why the trail should be closed.

What's more, Pierce argued that the proposal was counter to what state law requires for historic properties. The law requires the state to develop them.

"If you're trading it away, you're not developing it, your diminishing it," he said. He pointed out that the only reason the DLNR was being presented an option to settle the ownership issue and to gain access to its reserves is because PATH "put the heat on the ranch. The state wasn't really doing anything.

"That guided hike came about because we started putting this issue in front of people," Pierce said. "We said there will come a day when the MOA will be used against us and it is. They're saying, 'It's good enough.'"

Pierce tempered his criticism of the department by saying he believed it was under duress from Lieutenant Governor Shan Tsutsui and state Sen. Kalani English, whom Young had contacted to help resolve the matter. English and Tsutsui then met with Aila "to try to work the deal," Pierce said.

"The reason there is a [Land Board] is you are not subject to that," Pierce said.

Finally, he warned that should the Land Board accept DOFAW's recommendation to negotiate and enter into a settlement agreement, PATH would sue the agency for violating the state's environmental review and historic preservation laws. He argued that the DLNR needed to do an environmental review and archaeological inventory survey first.

Attorney David Kimo Frankel of the Native Hawaii Legal Corporation agreed with Pierce that the Land Board could not authorize its chair to sign a settlement agreement until an EA and AIS were completed.

He said the state Supreme Court has overturned a number of government agency decisions that were made before disclosure documents were completed.

"Why would you, given these decisions, challenge that?" he asked.

After an executive session to discuss legal matters with its attorney, O'ahu Land Board member Reed Kishinami asked Michael Gibson, an attorney representing Haleakala



PHOTO: PATH

One of the many trail markers along the bridle trail to Haleakala.

Ranch, whether he would be satisfied if the board chose not to approve the land exchange proposal, but just the two studies.

Gibson said he just wanted to be able to tell Judge Joseph Cardoza at an upcoming hearing that the ranch was in "serious negotiations to settle this thing," and ask for the trial to be postponed.

"We want to present a document [of] what a settlement might look like," Gibson said.

With regard to PATH's request for a lease across the trail, Pacheco said there's no way for the board to even consider "a lease to another entity on a property we may or may not own."

Pierce said PATH would gladly table that issue, but would like it to be considered an alternative in the EA.

Pacheco seemed torn. He was uncomfortable with the idea of giving away land, but he worried that the state may not own the trail.

"It's obviously not the original route," he said. (Pierce had given a presentation on the trail's evolution from a traditional Hawaiian footpath to an improved hiking trail.)

He asked Frankel and Pierce whether it would be sufficient if the Land Board authorized Aila to negotiate, but not execute, a settlement.

Frankel responded, "You don't need to pass anything to have discussion. If you do anything that indicates you've made a decision, everything after that is a post hoc rationalization."

Pierce also seemed baffled that the two defendants in the case were working on the settlement.

"The ranch had never reached out to us, the plaintiff in this case," he said. "The ranch is going to go back to the judge to deny us our day in court."

"The ranch recognizes they have a significant problem in proving their case. ... Otherwise they wouldn't be offering you other lands," he continued.

He told Pacheco that PATH would be asking the judge to proceed with a trial irrespective of the Land Board's decision, but would rather not have to fight the state at the same time on EA/AIS issues.

At-large member David Goode moved to approve DOFAW's recommendations except for the one regarding the settlement agreement.

Pacheco seemed hesitant to approve the studies. "I would rather let the court play out and find out if we own the land or not," he said, adding that he would hate for the DLNR to spend the money on the studies if the state doesn't own the trail.

Still, he voted with the rest of the board to approve Goode's motion.

Maui Land Board member Jimmy Gomes, who manages Ulupalakua Ranch, recused himself early on from the matter because his ranch has a joint interest with Haleakala Ranch in the Maui Cattle Company. At-large Land Board member Sam Gon, lead scientist for The Nature Conservancy, also recused himself at the beginning of the executive session.

(For more on this, see our June 2012 Board Talk, available at [www.environment-hawaii.org](http://www.environment-hawaii.org)) — T.D.



# Coastal Access for Public an Issue In North Kohala Luxury Subdivision

## Revisiting Papa'a

The relinquishment by the territorial government of a portion of a historic trail has come back to haunt residents of Hawai'i County. For centuries, the Ala Loa ran along the western coast of the Big Island. In 1938, however, a stretch of it that traversed an area that is now the site of a luxury subdivision was given up in exchange for land that would allow the Kohala Mountain road to be built.

The 63-acre subdivision, known as Kohala Kai, has been in the planning and permitting stages since 1999. Since it was first proposed, the land was purchased by a company owned by Ernest W. Moody, inventor of a video

of the required public parking lot that can accommodate three vehicles. To get from the parking lot to the trailhead involves walking along the shoulder of the busy Akoni Pule highway, where the speed limit (observed mainly in the breach) is 55 miles per hour.

Before the public can use the trail, the County Council must vote to accept it. After the council's Finance Committee deferred a vote on recommending the agreement to the full council last December, the developer and Planning Department staff tried to come up with a draft that would be more palatable. A draft agreement presented to the Finance

When somebody cuts off an access, you gotta jump on it," warns Kaua'i County Council member Tim Bynum.

In 2007, the county lost a federal lawsuit over what it had thought was a public road through a 174-acre property called Tara Plantation, which was then owned by movie producer Peter Guber's Mandalay Properties Hawai'i, LLC.

Because a previous landowner erected a gate in 1958 and the county failed to claim the road by 1978, it became a private road through adverse possession, the court found.

In December 2012, the county council passed a resolution Bynum introduced that called on the county's Public Access, Open Space, and Natural Resources Fund Commission to pursue gaining at least a public footpath to the bay.

Little has happened since the commission's first meeting of 2013, where Max Graham, an attorney representing current landowner Papa'a Bay Ranch, said a preliminary appraisal found that an easement through the property would cost between \$5 million and \$9 million. He also noted that the bay is accessible from Moloa'a to the north and Aliomanu from the south.

Some commission members "were taken aback" by Graham's estimate and more controversial matters have since kept the commission busy, Bynum says.

"I'm meeting with the county attorney to keep that process moving forward. ... It's in process. These things take time," he says, adding that he doesn't believe the access will cost anything near Graham's estimate.

"It's agland. It's not urban," he says. — *T.D.*



Left: The stretch of Akoni Pule highway that links the parking area for the Kohala Kai trail to the trailhead. Right: The three-vehicle public parking lot for the Kohala Kai pedestrian access.

poker game. Lateral pedestrian access along the coast was a requirement of subdivision permits, and last year, the county planning director at the time, B.J. Leithead-Todd, and Moody's attorney, Steven Lim, agreed to a plan to implement that condition.

Only last summer, after it had been submitted to and signed by Mayor Billy Kenoi, did the plan come up for discussion by the public access subcommittee of the North Kohala Community Development Plan Action Committee. Members of the subcommittee and other residents expressed their dismay at the final alignment of the path. Although for years a jeep trail had been used by residents that followed, more or less, the Ala Loa, under the plan agreed to by the county a paved golf-cart path would be laid over the trail's alignment. Lateral public access would be along a 10-foot-wide path much closer to the rocky coastal scarp than the old trail was. Access to what the community members claim is the old Ala Loa would be limited to just two segments of the pedestrian path that coincides with the golf-cart path, which otherwise is for the exclusive use of subdivision lot owners.

Adding insult to injury was the placement

Committee on January 21 expanded the pedestrian right-of-way to 20 feet, but did not address any other issue, including maintenance or restoration of the Ala Loa.

— *Patricia Tummons*



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