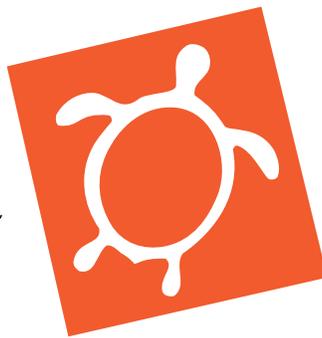


Environment



Hawai'i

a monthly newsletter

Price: \$5.00

Judgment Days

In this issue – the first in our 25th year of publishing! – we review some of the cases that illustrate the variety and complexity of recent environmental litigation. Our cover story discusses the critically important decision of a federal judge in a case involving the discharge of wastewater into injection wells near the Lahaina coast, while a sidebar looks at the potential consequences this could have for Hawai'i County.

Other articles examine litigation regarding the troubled 'Aina Le'a development on the Big Island (will it ever end?); Jimmy Pflueger's ongoing defiance of court orders; the planned construction of telescopes on Haleakala and Mauna Kea; the expansion of the Waimanalo Gulch landfill on O'ahu; and the dispute over a variance for a new wing of the Moana Surfrider hotel.

Federal Judge Is Unsparing of County In Finding Lahaina Plant Violates Law

Since the early 1990s, Maui County has been aware of a probable connection between the wastewater it injects into the ground below the Lahaina sewage treatment plant and the nearby coastal waters.

And for almost as long, it has clung to the position that despite growing evidence of the connection, it did not need to obtain the permit under the Clean Water Act that would allow it to legally discharge pollutants.

Federal Judge Susan Oki Mollway heard all of the county's excuses – that the connection between the wastewater and the coastal waters was not harmful; that the wastewater was not, in fact, a pollutant; that the link between the injection wells and the ocean was not something that could be regulated under the Clean Water Act. As a kind of hail-Mary pass, the county even applied for a National Pollutant Discharge Elimina-

tion System (NPDES) permit after the county was sued. It then argued to the judge that she should stay any decision in the case brought by four non-profit organizations that challenged the county's practice and instead await the state Department of Health's decision on the permit application.

Mollway didn't buy any of it.

On May 30, the judge handed down a 59-page order that tossed out every argument the county made, leaving it potentially liable for many millions of dollars in fines. David Henkin, the Earthjustice attorney who argued the case on behalf of the Hawai'i Wildlife Fund, the Sierra Club-Maui Group, the Surfrider Foundation, and the West Maui Preservation Association, said in a news release that the maximum penalties "already exceed \$100

to page 9

IN THIS ISSUE

2

New & Noteworthy: Aha Moku, Whales, and Sen. Solomon

3

Court Wrap-up: Telescopes, A Landfill, 'Aina Le'a, Pflueger

6

High Court to Hear Appeal Of Kyo-ya Expansion

7

Builder Appeals SMA Conditions On 'Pepe'ekeo Palace'

10

Big Island May Face Clean Water Act Lawsuit

11

Board Talk: Laney Violations, Maui Shoreline Protection



Dye is poured directly into an injection well at the Lahaina plant

PHOTO: UH SOEST

Environment Hawai'i



Volume 25, No. 1

July 2014

NEW AND NOTEWORTHY

A Rocky Road: What is going on with the Aha Moku Advisory Committee (AMAC), the state agency established two years ago by the Legislature to provide the Department of Land and Natural Resources with management advice from native Hawaiian cultural practitioners?

On O'ahu, at least, a rift appears to have formed over how the island's committee representative is selected. Committee members are supposed to be selected by practitioners from each island, according to AMAC executive director Leimana DaMate. But at a recent briefing before the Board of Land and Natural Resources, AMAC member Rocky Kaluhiwa described what she sees as an illegitimate attempt to replace her as the O'ahu representative. She said she was informed at an AMAC meeting held for some reason at the offices of the federal Western Pacific Fishery Manage-

ment Council that commercial fisherman Makani Christensen would be representing O'ahu instead.

"It was a surprise to me," she said.

Christensen hinted that the reason for the change was due to Kaluhiwa's lack of communication with O'ahu cultural practitioners.

"The flow up and down the chain... is not happening," he said.

DLNR director William Aila admitted that one of the challenges now with the AMAC is that the Legislature didn't say how the aha moku councils under the AMAC should be created.

"We have different groups saying they're the council," he said.

In any case, AMAC's future is murky. DaMate told the Land Board that the committee began its advisory work only last July. With the Legislature failing to appropriate any money for AMAC this past session, it's unclear how it will continue.

a recovery plan had been or would be developed, and that a take-reduction plan and monitoring program were in place.

Comments on the draft permit will be received through July 14. To view the proposed permit terms and background information, or to submit a comment, go to: <http://www.regulations.gov>. In the search field, enter 79 FR 33726.



PHOTO: NOAA

Humpback whale.

A Whale of a Permit: The National Marine Fisheries Service has disclosed that it intends to issue a three-year permit that will allow the Hawai'i longline fishing fleet to incidentally catch endangered humpback whales, sperm whales, and false killer whales belonging to the Main Hawaiian Islands insular stock. Before issuing the permit, NMFS had to determine that the fishing effort "will have a negligible impact on the affected stocks," that

Too Many Whales? A petition to remove the Central North Pacific (including Hawai'i) stock of humpback whales from the endangered species list is still pending a decision from NMFS. That did not stop Sen. Malama Solomon, however, from stating in a recent talk to constituents that there were in excess of 20,000 whales clogging up waters around the Main Hawaiian Islands. "Right now, ... you hit a whale, you're to blame," she said "The whale is blameless. Okay, I have a problem with that." She went on to urge delisting not only of the humpbacks, but also the green sea turtle, which enjoys protection as a threatened species.

Solomon ridiculed opponents of delisting the turtles. "No, don't delist them!," she mocked them as saying. "Well, you know what? It's costing you money, costing the taxpayer money—dollars that could be used in other areas" such as "the protection of other endangered species that our state may feel is a priority."

Solomon faces a challenge from former state Sen. Lorraine Inouye in the upcoming Democratic primary.

Environment Hawai'i

190 Keawe Street, Suite 29
Hilo, Hawai'i 96720

Patricia Tummons, *Editor*
Teresa Dawson, *Staff Writer*

Environment Hawai'i is published monthly by Environment Hawai'i, Inc., a 501(c)(3) non-profit corporation. Subscriptions are \$65 individual; \$100 non-profits, libraries; \$130 corporate. Send subscription inquiries, address changes, and all other correspondence to *Environment Hawai'i*, 190 Keawe Street, Suite 29, Hilo, Hawai'i 96720. Telephone: 808 934-0115. Toll-free: 877-934-0130. E-mail: ptummons@gmail.com
Web page: <http://www.environment-hawaii.org>
Twitter: [Envhawaii](https://twitter.com/Envhawaii)

Environment Hawai'i is available in microform through University Microfilms' Alternative Press collection (300 North Zeeb Road, Ann Arbor, Michigan 48106-1346).

Production: For Color Publishing

Copyright © 2014 Environment Hawai'i, Inc.
ISSN 1050-3285

*A publication of
Environment Hawai'i, Inc.*

Officers

Patricia Tummons
*President and
Treasurer*

Ron Terry
Vice President

Teresa Dawson
Secretary

Directors

Kathy Baldwin
Deborah Chang
Mary Evanson
Valerie Monson

Quote of the Month

"It is magical thinking that you can dump that much sewage down a lava tube and not have it move downslope."

— **Steve Holmes**

Maui Telescope Opponents Lose Appeal Of Haleakala Management Plan Study

Kilakila 'o Haleakala, the group that is opposed to the construction of the Advanced Technology Solar Telescope (ATST) near the summit of Haleakala, was dealt a setback when the Intermediate Court of Appeals, in a ruling issued June 9, upheld a lower court decision regarding the environmental documentation prepared for the University of Hawai'i's management of the Haleakala observatory area.

Kilakila had argued that the management plan necessitated preparation of a full environmental impact statement, pursuant to Chapter 343 of Hawai'i Revised Statutes — the Hawai'i Environmental Protection Act. The University of Hawai'i at Manoa, which manages the 18-acre site, had prepared only an environmental assessment and, on that basis, had determined in November 2010 that there would be no significant environmental impact related to the management plan *per se*. The EA did acknowledge that individual projects undertaken in the context of the plan might have such consequences, but for such projects, separate documents complying with Chapter 343 would be required. One such project was the ATST, for which the university had prepared an EIS in roughly the same time frame as the management plan.

The state Board of Land and Natural Resources approved the management plan on December 1, 2010. Later that month, Kilakila, which had earlier challenged the management plan EA in 1st Circuit Court, amended its complaint. Attorneys David Kimo Frankel and Camille Kalama with the Native Hawaiian Legal Corporation, representing Kilakila, now asked that the court not only find that the university violated Chapter

343, but also that it:

- Require the university to prepare a full-blown EIS for the management plan;
- Find that the university improperly accepted the plan's final EA;
- Declare that the management plan would in fact have a significant impact;
- Declare that the management plan itself is null and void; and
- Declare that all permits granted pursuant to the management plan, notably including the Conservation District Use Permit (CDUP) for the ATST, are also null and void.

At the same time, Kilakila was challenging the Land Board's refusal to grant it a contested case hearing before it issued a CDUP for the telescope's construction. Although the board appointed a hearing officer a few weeks later, and the contested case was held later that summer, it refused to prohibit the university from proceeding with work on the telescope pending the contested-case outcome. Kilakila eventually prevailed in that case, with the Hawai'i Supreme Court ruling last December that the Land Board erred in its action to award a final CDUP before even deciding whether a contested-case hearing should be conducted.

(Following the contested-case hearing in 2011, the Land Board voted once more on the CDUP application for the telescope. As before, on November 9, 2012, the board approved the permit. Once again, Kilakila appealed the decision. With a lower court upholding the board's action, the case is now before the Intermediate Court of Appeals. In June, the ICA denied Kilakila's request for an injunction while the appeal is pending.)

In the case that the ICA decided on June 9,

Kilakila had argued that the university failed to consider secondary and cumulative impacts resulting from the management plan. It also appealed the lower court's ruling that limited Kilakila's ability to obtain through discovery documents held by the university in association with the preparation of the management plan and the telescope EIS.

(Many of those documents were obtained, however, through filing of a document request pursuant to the state's Uniform Information Practices Act. For more on this, see the article in the April 2012 *Environment Hawai'i*, "Abercrombie, Inouye Offices Accused of Interfering with Hearing on Telescope.")

On the matter of limited discovery, the ICA deferred to the lower court. Expanding the record before the court by including university documents was not required, the judges stated. "Whether the Management Plan's EA and its Negative Declaration complied with HRS Chapter 343 is a question of law that does not require factual determinations beyond the administrative record," they found.

As to the management plan itself, the appeals judges wrote: "Much of Kilakila's challenge of the Management Plan's Final EA is founded not on the contention the Management Plan will likely have a significant impact on the environment, but is instead founded on the contention the Telescope Project [i.e., the ATST] has a significant impact on the environment." But, they go on to write, that project "had both a final EIS and supplemental cultural impact statement."

After quoting long passages from the management plan, the judges concluded: "This record does not show that the University failed to follow the proper procedures ... when it made the Negative Declaration for the Management Plan. As such, the circuit court did not err by granting summary judgment in favor of the university."

(Last December, the ATST was renamed the Daniel K. Inouye Solar Telescope.)



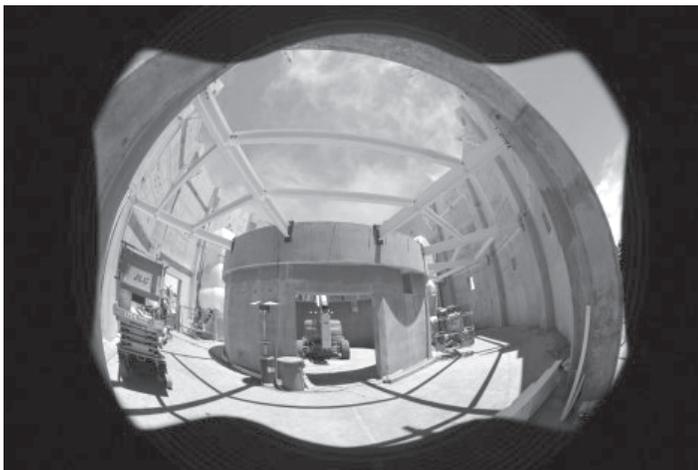
Groups Appeal Ruling On Thirty-Meter Telescope

On June 3, the six parties who challenged the award of a Conservation District Use Permit for construction of the Thirty-Meter Telescope on Mauna Kea filed notice of their intent to appeal a lower court ruling in the case to the Intermediate Court of Appeals.

Judge Greg K. Nakamura of the 3rd Circuit Court issued his final ruling in the administrative appeal of the Land Board's award of the CDUP. Nakamura upheld the board's decision.

The parties appealing the decision are Mauna Kea Ainana Hou, led by Kealoha Pisciotta; Clarence Kukauakahi Ching; the Flores-Case 'ohana; Deborah Ward; Paul K. Neves; and KAHEA: The Hawaiian-Environmental Alliance.

Attorney Richard Naiwieha Wurdeman,



Mezzanine view

representing the petitioners, had not filed a brief with the ICA by press time. However, Nakamura's order lists – and dismisses – the points the petitioners raised in their original appeal of the Land Board's award of the CDUP.

Wurdeman had argued at the outset that the December Supreme Court decision, which faulted the Land Board for issuing a CDUP before the contested-case hearing, applied to the TMT permit as well. Namakura found otherwise.

In contrast to the Kilakila case, Namakura wrote, "after preliminarily granting the CDUP, the BLNR immediately ordered that a contested case hearing be held, stayed the permit, and only entered its final decision and order after the contested case hearing had been concluded."

The petitioners also argued that, as Nakamura characterized it, "the use of Conservation District land for astronomy facilities inherently violates the eight criteria" that the Department of Land and Natural Resources' administrative rules set forth for permitted uses in that district. Yet another part of the same rule, he continued, "makes clear that astronomy facilities under an approved management plan are appropriate in the Resource subzone, which is where the project is to be located. Accordingly, the Court finds that Appellants' premise that use of Conservation District Land for astronomy facilities inherently violates [DLNR rules] lacks merit."

Nor was Nakamura going to second-guess the Land Board's determination that the TMT project satisfied the eight criteria in the rules. "Appellants have challenged the BLNR's findings on the eight criteria as being clearly erroneous.... [T]he Court finds that the BLNR's findings are amply supported by the reliable, probative, and substantial evidence, and are not clearly erroneous; the Court further finds that Appellants' challenges to the BLNR's [Findings of Fact and Conclusions of Law] with respect to the eight criteria are unfounded and that reversal of the Decision and Order under the standards set forth [by DLNR rule] is not warranted."

The petitioners claimed that their expertise in cultural practices of Hawaiians was disregarded and that therefore the permit should be denied. Here is Nakamura's take on that: "In the contested case hearing, at Appellants' request, the parties stipulated that Appellants Neves, Ching, Flores, Case, and Pisciotta would be recognized as expert witnesses on their cultural practices regarding Mauna Kea. Appellants now argue that this stipulation somehow resulted in their providing insufficient evidence of traditional and customary native Hawaiian cultural prac-

tices." After reviewing the record, Nakamura wrote, "the Court finds that Appellants were afforded the full opportunity to provide their written direct testimonies prior to the stipulation, and were also afforded an opportunity to provide oral summaries of their testimonies after the stipulation. Appellants also appear to argue that it was assumed, based on the stipulation, that certain expert opinion testimony would be deemed conclusive. However, clearly, the presentation of expert opinion testimony is not conclusive; as with any testimony, the factfinder may accept or reject it.... The Court, therefore, rejects Appellants' arguments."



Hanabusa Fails in Challenge Of Waimanalo Gulch EIS

The final environmental impact statement prepared for the expansion of Waimanalo Gulch landfill has once again withstood a court challenge from U.S. Rep. Colleen Hanabusa.

Hanabusa, who has a residence in the Ko Olina development makai of the landfill, has long objected to the operation of the landfill, which is the only facility permitted to receive municipal solid waste in the City and County of Honolulu. The landfill also takes in ash from the nearby HPOWER waste-to-energy plant, which burns most of the solid waste collected by county garbage trucks.

In late 2008, Hanabusa – at the time a state senator representing O'ahu's leeward coast – filed a complaint in 1st Circuit Court that claimed that the EIS prepared in connection with an application for the Special Use Permit needed for the city to expand the landfill by 92.5 acres was deficient in several key respects. Judge Rom Trader found in the city's favor in April 2010, and Hanabusa appealed.

On May 30, the Intermediate Court of Appeals upheld the lower court ruling. Among other things, Hanabusa had argued that the final EIS had not been prepared "in good faith" because the scope of the project it described differed from the project described in the SUP application. As the appellate court noted, "Hanabusa claims that the Final EIS only addressed the impacts of a 92.5 acre expansion ... and therefore could not be used to support SUP-2, which encompassed the use of the entire 200-acre property for landfill operations."

However, the ICA went on to note, "Hanabusa had fair notice that the [county's Department of Environmental Services]

was preparing the Final EIS to support the use of the entire 200-acre property."

The public was given ample notice, the ICA said, that the project for which approval was sought was an *expansion* of the landfill and its continued use beyond May 1, 2008. "Both the Draft and Final EIS ... refer to the area of the site as 200 acres.... In addition, both the Draft and Final EIS are replete with references to the entire 200-acre property and landfill operations relevant to the entire property, not just the proposed 92.5-acre expansion."

Hanabusa alone didn't get that message, apparently. "Comments received in response to the EIS preparation notice and draft EIS provide further proof of the general understanding that the proposed action encompassed the entire property," the ICA noted. "Viewed in context, we conclude that the Final EIS, and the other materials published by the DES during the EIS review process, adequately disclosed that the proposed project ... encompassed landfill operations on the entire 200-acre property."

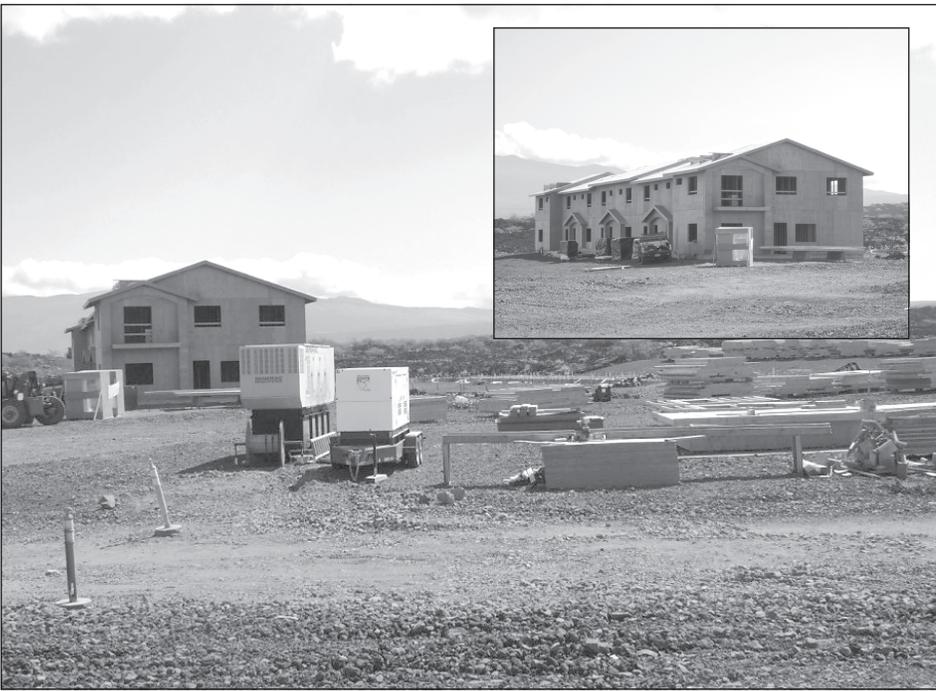
As to Hanabusa's argument that the EIS was inadequate in several important respects, the ICA dismissed those as well. "The Final EIS was thorough and comprehensive, consisting of three volumes and over 1,900 pages," the ICA wrote. It adequately discussed alternatives and described the setting and potential impacts, the court found. Other arguments she made concerning past landfill operations, impacts to Ko Olina, landfill stability, and the like, were dismissed with the statement that Hanabusa "does not provide significant details or argument with respect to these claims, or cite legal authority that persuades us."

The EIS, the ICA concluded, was indeed sufficient and, quoting Judge Trader's decision, "was compiled in good faith and sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives."



Federal Appeals Panel Hears 'Aina Le'a Arguments

Seven current and former Land Use Commission members will have to wait a while longer to learn whether they're individually



An unfinished building at the 'Aina Le'a site.

liable for damages incurred by the developer and landowner of the Villages of 'Aina Le'a project in Puako, Hawai'i.

In 2011, those commissioners killed – at least temporarily – the nascent development when they voted to revert about 1,060 acres there from the Urban District to the Agricultural District because the developer, DW 'Aina Le'a, had failed to meet the LUC's deadline to build affordable housing.

On behalf of the LUC, deputy attorney general William Wynhoff has argued that the commissioners are entitled to immunity because they were acting in their official, quasi-judicial capacity, not as individuals. Attorney Bruce Voss, representing landowner Bridge 'Aina Le'a, has countered that the commissioners were not only acting as judges, they were also enacting legislation and enforcing it, and, therefore, were not entitled to immunity.

On June 10, after hearing arguments from Voss and Wynhoff, the 9th U.S. Circuit Court of Appeals quickly decided to postpone deliberations until the Hawai'i Supreme Court decides on the broader appeal of the LUC decision by Bridge and DW 'Aina Le'a.

Wynhoff called it a \$30 million case, referring to the ballpark amount mentioned by Bridge and DWAL, but the actual damages, if any, won't be decided at least until the Hawai'i Supreme Court rules on whether the LUC erred in its decision.

The Hawai'i Supreme Court was scheduled to hear oral arguments in that case late last month and, given its recent activity, is

expected to issue a decision within about six months.

During the hearing before the federal appeals court, one of the judges asked Voss why the reversion wasn't simply a bad decision by the LUC (perhaps covered by immunity statutes), rather than a legislative act.

Voss suggested that different standards apply when an agency takes on multiple roles.

In any case, U.S. Circuit Judge William Fletcher concluded, "We can't decide whether there is a taking until we know what the state [Supreme Court] is going to do."

He, at least, seemed to think the Bridge was likely to prevail.

"As I read the [3rd Circuit Court] decision, you guys were right ten ways from Sunday. If you don't win, I'll be astounded," Fletcher told Voss.

Among other things, 3rd Circuit Judge Elizabeth Strance ruled in 2012 that the LUC had failed to win the six votes necessary for a reversion and that the reversion violated state law because it did not comply with the Hawai'i General Plan.

The state appealed her decision in both state and federal court, but U.S. District Judge Susan Oki Mollway chose to wait until the state case concluded.

In the meantime, Wynhoff said, one and perhaps even two individual commissioners have lost out on loans as a result of the pending litigation.

(For background on this case, read "State Supreme Court, Federal Appeals Court Schedule Hearings Over 'Aina Le'a Disputes," in our June 2014 issue.)

Pflueger Loses Again

James Pflueger does not give up without a long fight. It took more than a decade for the state to win a Hawai'i Supreme Court decision regarding a \$4 million fine against him for reef damages at Pila'a, Kaua'i. And a related case involving his neighbors in the area has only recently been resolved – that is, unless he decides to appeal, again, to the state Supreme Court.

Last month, the Intermediate Court of Appeals rejected Pflueger's "meritless" appeal of a 5th Circuit Court order requiring him to grant kuleana landowners Richard, Amy, and Nicholas Marvin a perpetual easement to their property.

The case stems from a 2001 mudslide. Previous court actions determined that Pflueger's company, Pila'a 400, LLC, had caused the slide, which smothered the Marvins' home and fouled the reef in Pila'a Bay. The Marvins sued for damages as well as an injunction against Pflueger, who had begun obstructing access to their home with fences, machinery and vehicles.

The 5th Circuit Court ruled in the Marvins' favor in 2007 and required Pflueger to grant the family an easement through his property. The ICA supported that decision and so did the Supreme Court.

But when presented with an easement document in 2012, Pflueger refused to sign it. The Marvins then sued to force him to and also sought per diem fines and attorneys' fees. The circuit court again found in their favor, with the judge stating that there was no question in her mind that the relief the Marvins were seeking was "fully warranted with the final decision by the [Hawai'i] Supreme Court."

Undeterred, Pflueger appealed the court's decision to the ICA last year, arguing, among other things, that the ICA and the Supreme Court decisions in the initial suit did not address the merits of the case.

To this, the ICA stated in its June 10 decision granting the Marvins' motion for a writ of assistance and execution that Pflueger's contention that the Hawai'i Supreme Court failed to affirm the Circuit Court's 2007 order was baseless.

What's more, "Pflueger essentially asks this court to review a decision of the Hawai'i Supreme Court. ... This, we cannot do," the ICA wrote. — *P.T and T.D.*

Opponents of Moana Surfrider Expansion Will Have Case Heard by Supreme Court

The Hawai'i Supreme Court will hear the appeal of a variance granted by the City and County of Honolulu to allow Kyo-ya Hotels & Resorts to build a high-rise wing of the Moana Surfrider hotel, a Waikiki icon.

The Surfrider Foundation, Hawai'i's Thousand Friends, Ka Iwi Coalition, and KAHEA: The Hawaiian-Environmental Alliance are the appellants contesting the decision of the Honolulu Zoning Board of Appeal (ZBA) to uphold a variance awarded by the director of the county Department of Planning and Permitting. The variance would allow Kyo-ya to build a 26-story, 308-foot-high Diamond Head wing with 60 hotel units and about 80 condos on the site of an existing eight-story wing, even though beginning at the 16th floor, all of the new construction would encroach into the coastal and building-height setbacks established for the Waikiki Special District. If the setbacks were to be enforced, construction could only rise about 170 feet.

Kyo-ya claims that a 1965 agreement should override any more recent setback requirements. Under that agreement with the state, the hotel's then-owners promised not to challenge a beach expansion project that the city anticipated would be undertaken by the Army Corps of Engineers. In return, the beach fronting the hotel would

be extended some 180 feet seaward of where it existed in the early 1960s. (Since 1965, the beach has been built up several times, but never to the extent anticipated in the agreement. Most recently, in May 2012, the Department of Land and Natural Resources completed a project to widen the beach in front of the Surfrider Hotel by not quite 40 feet.)

The unfulfilled agreement, then, was one of the bases for the "hardship" exception to the setback rule that Kyo-ya cited when it sought the variance from DPP director David Tanoue in 2010. "Had the beach been constructed by the state, as contemplated by the 1965 beach agreement," the company's attorneys stated in a memorandum supporting the variance application, "it is likely that the beach fronting the Diamond Head Tower site would be approximately 180 feet wider than it is today... Had this occurred, we believe that almost no portion of the proposed Diamond Head Tower would encroach into the coastal height setback." The "statutory test for locating the shoreline... is in many respects inappropriate and unfair in this particular instance," they claimed.

Tanoue went along with the argument. One of the conditions he attached to the variance requires the new tower to comply with the coastal height setback of one foot

height for one foot distance of setback from the shoreline contained in the Waikiki Special District rules. Ordinarily, that would mean that for each foot of setback from the certified shoreline, a building could rise a foot, so that a 300 foot building would need to be no closer than 300 feet from the shoreline. But in his conditions, Tanoue set as the "shoreline" a line 180 feet seaward of the existing concrete wall fronting

the hotel. In other words, he went along with the fiction that the beach-widening project anticipated in that unfulfilled agreement had established the baseline for measuring a setback nearly half a century later. As a result, the planned new construction will actually encroach 74.3 percent into the setback area, were it to be calculated on the basis of the current certified shoreline.

In August 2012, the county's Zoning Board of Appeals upheld Tanoue's decision against a challenge from the groups now appealing to the Supreme Court. According to an article by Andrew Gomes in the *Honolulu Star-Advertiser*, the board "noted that its role is not to second-guess merits of a discretionary decision" by the DPP director.

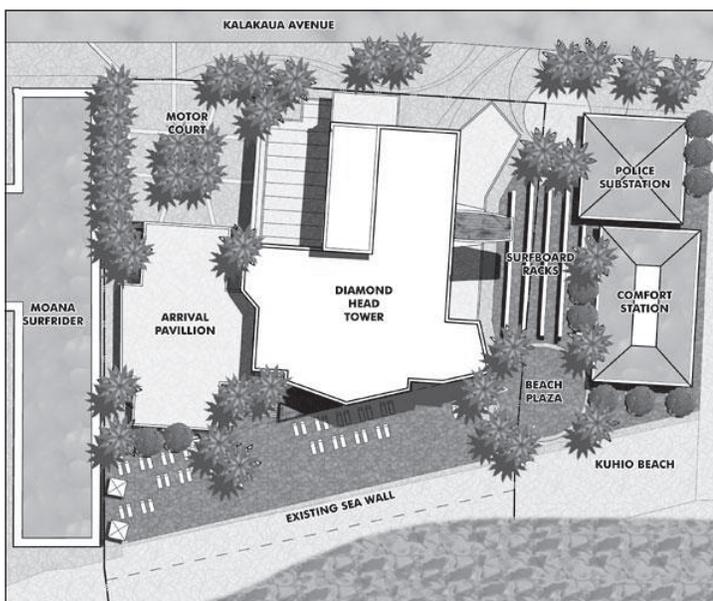
Attorneys' Fees

In its objection to the opponents' petition to transfer the case to the Supreme Court, attorneys for Kyo-ya raised the issue of their own appeal of a lower court's ruling denying their motion to recover attorneys' fees associated with their so-far successful defense of the ZBA's decision.

"[E]ven if there was some basis for discretionary transfer [to the Supreme Court], the Court should decline to do so here," wrote Lisa Woods Munger of Goodwill Anderson Quinn & Stifel, one of the attorneys working on the case. Apart from the burden of reviewing the record — which burden, she wrote, "the Legislature has made clear... should fall in the first instance to the ICA" — there was the further complication added by Kyo-ya's appeal on the matter of attorneys' fees. "That case is currently pending before the ICA," she wrote, "and transfer of this case to the Supreme Court could create substantial procedural issues if, for instance, the ICA and Supreme Court were to reach different conclusions regarding the facts of this case."

Should the Supreme Court decide to hear the case, she continued, "Kyo-ya intends to move to have the two cases consolidated."

The dispute over attorneys' fees signals just how nasty the dispute has become. After the Circuit Court found in favor of Kyo-ya, Kyo-ya sought attorneys' fees from the non-profit groups opposed to the new construction. Among other things, Kyo-ya argued that the opponents' claims were "predicated upon fabrication;" that the challenge to Circuit Court was based upon an "abuse of discretion standard" that the opponents themselves had waived; that the opponents had also waived their ability to claim that the DPP director was barred by ordinance from granting a variance — and that such a claim, in any case, was frivolous;



A layout of the planned Diamond Head tower shows the building is set back more than 40 feet from the certified shoreline — and more than 100 feet from what is claimed as the seaward boundary of Kyo-ya's property.

Builder Seeks SMA Amendment to Allow 'Pepe'ekeo Palace' to Be Built as Planned

He's back. Scott Watson, the bad boy of Big Island builders, is trying a new approach to gain Hawai'i County's approval of his planned "Pepe'ekeo Palace" on a coastal lot a few miles north of Hilo.

Watson and the partnership backing him, Hilo Project, LLC, want to build the residence much closer to the coastal cliff than the setback contained in the Special Management Area permit for the area allows. That permit, granted in 2006, set conditions for an 11-lot subdivision; Watson's construction is planned for the southernmost of those lots.

Construction of the house and ancillary improvements has been beset by problems practically since the work began two years ago. The lot itself is irregularly shaped. The buildable portion is reduced by a pedestrian easement that runs along much of the makai boundary. Also, Watson ran into trouble with the State Historic Preservation Division and the Planning Department when he began to build a swimming pool atop a historic foundation where his plans had called for a tennis court.

Watson took the county to court last year, seeking to have the setbacks associated with the SMA permit voided by a judge. As *Environment Hawai'i* reported, Judge Glenn S. Hara denied his motion for summary judgment. Under terms of the permit, "no house or other substantial structure shall be built closer to the ocean than 40 feet from the top of the sea cliff." In effect, Hara said, the permit terms effectively became a restrictive covenant on the property.

Hara also rejected the argument of Steve Strauss, Watson's attorney, that the county lacked statutory authority to establish a setback greater than the minimum established in state law.

With little apparent likelihood of prevailing in court, Watson earlier this year turned his attention back to the county Planning Department.

In February, he applied to the Planning Commission for an amendment to the setback condition. That was rejected by Planning Director Duane Kanuha on March 14.

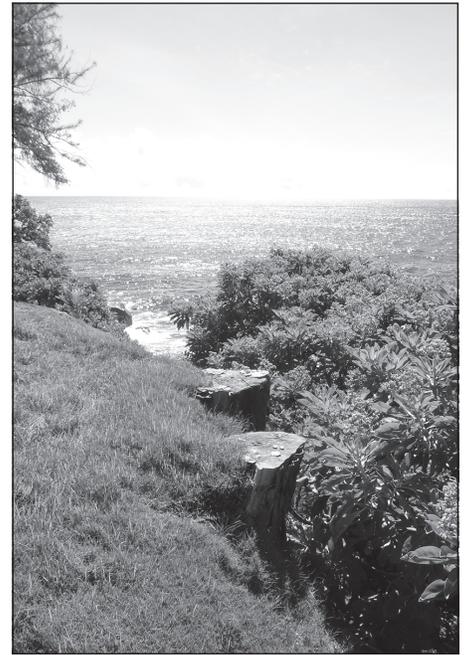
"You are requesting that the Planning Commission amend Condition 11 to allow a minimum 20-foot shoreline setback," Kanuha wrote. "The Planning Commission does not have the authority to establish a 'shoreline setback line' or 'shoreline setback area' less than 40 feet. This authority lies solely with the Planning Director... Furthermore, the only exception that affords a minimum shoreline setback line of 20 feet is for lots that were created prior to adoption of [Rule 11-5(b) of the department]. The subject lot does not qualify for this exception since it was created on March 24, 2006."

Kanuhawent on to suggest that the "proper procedure to accomplish" what Watson wants was to ask for an amendment to the SMA permit, seeking to have the 40-foot setback line be measured from a current certified shoreline. "Should the Planning Commission approve the amendment request, you would then need to apply, if necessary, for a shoreline setback variance."

On March 22, Watson again applied to the Planning Commission for an amendment to Condition 11 of the SMA permit for the subdivision.

And once more, Kanuha bounced it back to him. In a letter dated April 7, Kanuha copied and pasted many of the same paragraphs in his letter of March 14.

This time, however, he gave even more specific instructions to Watson as to what he



Although the SMA permit requires at least 50 percent of large trees to remain in place, Watson has cut nearly all of them, including hala trees. Here are the stumps of two large ironwoods.

should apply for. "The application should include a request to amend Condition No. 9 of SMA 450, since you have violated this condition by constructing the house and other improvements within the shoreline setback area referenced in the permit. Condition No. 9 states 'To retain the existing natural appearance of the shoreline, there shall be no grading or grubbing within the 40-foot setback from the certified shoreline, and no more than 50 percent of the large trees ... within the shoreline setback shall be removed on any of the lots.'" Watson, Kanuha went on to say, should also "provide the reasons you are requesting an amendment to Condition No. 9 as well as how the request is consistent with the 'Grounds for Approval of SMA Use Permits'" described in Planning Commission rules.

Watson's third try was the charm — at least so long as the Planning Department was concerned. On June 5, the department received his new, improved application to amend Condition 11 of the original SMA permit. (Kanuha's suggestion that he would need to address Condition 9 was apparently ignored.)

In describing the "problem," Watson writes that the condition "causes the shoreline setbacks to be measured from arbitrary points and not the true shoreline. Condition 11 incorporated a poor and inaccurate shoreline certification survey that misidentified the shoreline."

"This circumstance caused the Planning

and, finally, that the opponents "deceptively sought to litigate anew an 'abuse of discretion' allegedly committed by the Zoning Board and/or the director."

Circuit Judge Rhonda Nishimura found that although the opponents "failed to meet their burden ... to warrant a reversal," that in itself does not suggest that the appeal was, in the words of a prior Supreme Court ruling concerning attorneys' fees, "manifestly and palpably without merit, so as to indicate bad faith on the pleader's part." Nishimura did agree with Kyo-ya counsel

that the opponent's lawyer, Linda Paul, "had full and fair opportunity to present her appeal to the Zoning Board and voluntarily agreed to limit her appeal on the issue as to whether the director's conclusion ... was based on erroneous findings of material fact, not an abuse of discretion." Still, Nishimura wrote, Kyo-ya's contention that Paul had made "untrue and/or inaccurate statements" alone does not mean that the claims opponents made were so baseless as to warrant the award of attorneys' fees to Kyo-ya. — *P.T.*

Department to place public access easements in unsuitable and unusable locations,” he wrote. In addition, “the present public access cuts a wide swath through Applicant’s real property and does not provide lawful access to the true shoreline.”

The amendment Watson seeks would modify the SMA permit for just his one lot by having the setback be measured from a 2010 shoreline survey.

He lists several “benefits flowing from the grant of the proposed amendment” – benefits to parties other than himself and Hilo One, apparently. First, he says, with this, the Planning Department will “gain a realignment of the existing public access to an improved location.” That “improved location” would divert the access from where it now legally runs, virtually on top of the area where Watson plans to build a marble-paved lanai for the “palace,” to along the northern boundary of his property. (This relocation would be done in association with a lot consolidation and resubdivision that Watson has proposed with his neighbor to the north.) In addition, he writes, the amendment would be “consistent with the provisions and policies of the state Coastal Zone Management Act,” which promotes shoreline access opportunities.

Granting the amendment will also, he writes, “settle the present lawsuit against the



The top of the pali is marked by stakes on the left in this photo. The area dug for the house foundation is at the right. The public access set out in the SMA documents runs between the two, in an area where Watson intends to build the lanai. Vertical rebar indicates where he intends to erect support posts for the lanai roof.

Windward Planning Commission and Planning Department” – the same lawsuit in which Judge Hara’s ruling bodes ill for Watson’s prospects.

Kanuha informed Watson on June 12 that the Windward Planning Commission would hear his application at its scheduled July 3 meeting.



Meanwhile, in Ninole...

Up the coast a dozen or so miles from his “Pepe’ekeo Palace” sits Watson’s so-called “Water Falling Estate.” The super-luxury property – technically a “farm dwelling” — includes what Watson says is probably the largest residential swimming pool in the world, a small golf course, and a tennis stadium that seats 450 spectators. All this is on land in the state Agricultural District, part of what Watson told the Planning Department was a “sod farm” he would be operating in

what had been a productive macadamia orchard.

The property was placed on the market last year with an asking price of \$26.5 million. With no takers, Watson and his partner in this venture, Laurie Robertson, retained a luxury real-estate auction house to sell it in March, no minimum bid required.

When the hammer fell, the property was sold – for something south of \$6 million.

What will happen with respect to an ongoing violation of county zoning laws is unclear. As *Environment Hawai'i* first reported in December 2012, the Planning Department had issues with several aspects of Watson’s work on this site. These included grading violations, unpermitted construction work, and the operation of an unpermitted helipad atop the house itself.

The helipad violation remains unresolved. When the Planning Department said it turned the matter over to county Corporation Counsel for enforcement last year, fines had accumulated to nearly \$30,000. — *P.T.*



The posts anchoring Watson’s fence line are nearly four feet in diameter.



For Further Reading

Environment Hawai'i has reported extensively on Watson’s projects. See these articles, all available online at www.environment-hawaii.org. Click on the “Browse Our Archives” link on the upper right hand corner.

- “Shoreline Easement Lost as Builder Racks Up Repeated SMA Violations,” December 2012;
- “Builder Defies Planning Department with Helipad on ‘Sod Farm’ Dwelling,” December 2012;
- “Hawai’i County Sends Violation Notices to Builder over Construction at 2 Sites,” January 2013;
- “Hawai’i County Keeps Negotiating with SMA Violator, Despite Court Ruling,” March 2014.

Lahaina continued from page 1

million, and the meter is ticking at a rate of over \$100,000 per day.”

The civil penalties for the Clean Water Act violations won't be determined until after a hearing that's set for next March. Between now and then, the county is hoping to have the state Department of Health (DOH) issue it a permit that would legitimize the practice of injecting treated wastewater into the wells and perhaps mitigate its exposure to civil penalties.

Background

As early as 1991, Maui County's Department of Public Works stated in an environmental assessment that effluent from the Lahaina Wastewater Reclamation Facility (LWRF) flowed from the plant's injection wells into the ocean. Suspecting that the injectate might be behind several damaging algae blooms in the area, in 1992, the Department of Health held up processing the county's request to add new injection wells. That same year, the DOH and EPA discussed the possibility that the county might need to obtain an NPDES permit if it wanted to continue to use the injection wells at Lahaina.

In the end, the county was allowed new injection wells, but on the condition that it conduct a study of the potential hydrologic link between the wells and the nearshore waters.

In the late 1990s, the county and the EPA continued to have disagreements over the Lahaina facility and the county's efforts to obtain Underground Injection Control (UIC) permits for the injection wells under the Safe Drinking Water Act. The consent decree that emerged in 2001 required the county to obtain a water quality certification from the DOH, the first step in determining whether it would need to apply for an NPDES permit. (The county did not apply for the certification until 2010 and, as Judge Mollway noted in her order, “as of March 6, 2014, not even a preliminary determination had been made [by the DOH] as to whether the county will receive such certification.”)

In 2010, two studies confirmed suspicions that injectate from the sewage treatment plant was reaching coastal waters, but to make sure, a third study was undertaken in 2011. That one, which included dye tracer tests, demonstrated conclusively that a significant percent of the injectate from the two largest wells reached the coast.

Within months of the release of that last study, the county was taken to federal court by the four Maui groups.

Damage Control

Although the county had been given notice of the groups' intention to sue, it still did not apply for an NPDES permit. Judge Mollway took note of this: “Despite maintaining that such a permit is not required, the county submitted its application for the permit to the state's DOH on November 12, 2012, which was after this lawsuit was filed,” she wrote in her order. “As of March 6, 2014, the DOH had ‘not made a tentative or preliminary determination’ on the application. . . . However, after the hearing on the present motions, the county received a draft permit and was invited to comment on the draft by June 9, 2014.” Only on May 23 did the Department of Health notify the judge that it had issued a draft permit to the county the previous day.

The county had argued from the outset of the litigation that the lawsuit should be dismissed or stayed until the DOH acted on its permit application. As Mollway notes, “The county argues that the primary objective of this lawsuit is to compel the county to apply for an NPDES permit, and that, because that application has been made, this court should allow the DOH and the EPA to decide whether a permit is required.”

And, in what the judge apparently took as a slap against the court's competence, the county “further contends that this case involves ‘highly technical fact-specific inquiries’ that require ‘the specialized expertise typically possessed by the agencies.’”

Mollway was not moved by this argument. “The decision as to whether the county requires an NPDES permit is certainly within the competence of the DOH and the EPA,” she conceded. “However, . . . competence alone is not sufficient. . . . The citizen suit provision in the Clean Water Act was specifically designed to allow courts to ensure direct compliance with the Act's requirements.” Moreover, she added, “courts are plainly competent to address the types of questions raised by the present citizen suit, such as whether there is a hydrologic connection and significant nexus” between the underground aquifer that receives the injectate and the ocean.

All that was required of the court, she went on to say, “is a determination as to whether the county is discharging a pollutant from a point source into the navigable waters of the United States.”

The request that the court defer to the agencies was tantamount, she said, to “asking for the disfavored remedy of an ‘indefinite, and potentially lengthy’ stay for as long as administrative proceedings may continue.” She noted that more than a year and



Transfer of dye concentrate into injection well 3.

a half had passed since the county applied for an NPDES permit and that no firm deadline for issuance had been set. “The best the DOH can predict is the issuance of a final permit ‘a few months’ after it reacts to public comment,” she wrote.

“If a court were to grant an indefinite stay in circumstances such as those now before this court, a defendant would be able to buy itself potentially years of further pollution through last-minute applications for an NPDES permit. Indeed, a polluting entity would be able to spend years in litigation prior to even applying for an NPDES permit, then seek to stay proceedings for several more years during the pendency of a belatedly submitted application, all the while continuing to release pollutants in violation of the Clean Water Act.”

Mollway went on to dismiss the county's claims that the aquifer receiving the waste-

*For Further Reading*

The following articles provide more details on the troubled history of the Lahaina wastewater plant. All are available in our online archive at www.environment-hawaii.org.

- “At Lahaina, Algae Blooms Stall Approval of More Injection Wells,” October 1992;
- “Maui May Owe EPA Up to \$2 Million for Funds Misspent in Lahaina Plant,” March 1995;
- “Reports Show Maui County Sewage Plants Are Polluting Waters at Popular Beaches,” May 2010;
- “Lahaina Injection Wells Release Wastewater to Coast, Tests Find,” February 2012.

Hawai'i County Faces Lawsuit Threat Over Kealakehe Sewage Treatment Plant

Steve Holmes, once a member of the Honolulu City Council representing Windward O'ahu and now a resident of Kona, is threatening to take Hawai'i County to federal court over the operation of its Kealakehe sewage treatment plant.

Like the Lahaina plant in Maui, the Kealakehe plant was designed to have treated effluent be used for irrigation and landscaping. A golf course — planned but never built — was to act as a leach field for most of the treated wastewater, with the rest diverted onto an “artificial wetland.” Again as with the Lahaina plant, the county has yet to develop the plumbing needed to reuse any of the effluent, more than a quarter century after the plant was built.

Where the plants differ is in their method of effluent disposal. Lahaina uses injection wells. The Kealakehe plant releases its effluent into shallow, unlined ponds just south of Honokohau Harbor, seaward of Queen Ka'ahumanu Highway.

In the wake of the federal court decision finding that the Lahaina plant needed a National Pollutant Discharge Elimination System permit, Holmes complained about the Kealakehe plant to the Environmental Protection Agency, which he says is launching its own investigation.

A joint U.S. Geological Survey-state De-

partment of Health study from 2008 that took water samples from several monitoring wells and springs near the plant supports Holmes' claims that effluent from the Kealakehe plant is reaching the sea.

However, the director of the county's Department of Environmental Management, B.J. Leithead-Todd, told Erin Miller of *West Hawai'i Today* that a tracer dye test done a decade ago did not establish a link.

Holmes said he had not heard of the test she mentioned. He characterized it as an attempt at “misdirection, since Chip Hunt” — author of the USGS study — “used a number of valid indicators. It is magical thinking that you can dump that much sewage down a lava tube and not have it move downslope.”

Asked for details on the study mentioned by Leithead-Todd, Lyle Hirota, head of the Wastewater Division of the DEM, said the study had been done about a decade ago by the DOH Clean Water Branch. Watson Okubo, with the CWB, told *Environment Hawai'i* that the state had done a dye test. “We threw a couple bottles of dye” into the ponds and monitored the nearshore area “for about a week or so.” The experience at Lahaina has been instructive, he said, where it took at least 85

water wasn't a direct conduit to the ocean. She similarly rejected its argument that to prevail, the plaintiffs had to prove that the effluent somehow damaged corals or otherwise harmed the environment.

The county's efforts to persuade the judge that the discharges were insignificant in light of the diluting properties of the ocean were also to no avail: “To hold that an ‘effect’ is ‘insignificant’ merely because of such dispersion would license unfettered discharge into any body of water voluminous enough to rapidly diffuse the effects of the effluent.”

Relying heavily on the studies that the plaintiffs submitted, Mollway concluded that the effect of the effluent on the receiving water “is indisputably neither speculative nor insubstantial. The LWRF releases three to five million gallons of effluent a day; an independent EPA study has determined that at least 50 percent

of this effluent makes its way relatively rapidly into the ocean; this effluent has properties that can radically alter the properties of the water it is introduced into; and such radical effects have been observed and measured at the point of discharge into the ocean.”

As to the county's argument that coral is not being damaged, that, too, did not move Mollway. Even if true, she said, it “is irrelevant for determining a significant nexus. An ‘effect’ on the ocean is not coextensive with ‘harm’ to the ocean. ... The undisputed physical, chemical and biological changes observed in the water near the seeps are sufficient to establish that the aquifer and the ocean have the required nexus. ...

“Therefore, the county's discharge of pollutants into the aquifer beneath the LWRF without an NPDES permit is a violation of the Clean Water Act.”

— *Patricia Tummons*

days for the any of the dye placed in the injection wells to reach the coast.

Still, Okubo said, “there's a great difference between Kealakehe and Lahaina. There are a lot of package plants [septic systems] and cesspools near the harbor that still discharge.... It's premature to say there's a direct discharge” between the county's facility and the coast.

Asked if a dye test was being planned, Okubo said that would be up “to the experts at the University of Hawai'i,” adding that the DOH had no plans to conduct further tests there.

In the late 1980s, Holmes, then president of Kokua Hilo Bay, sued Hawai'i County over the operation of its Hilo sewage treatment plant. The county had been seeking a waiver from Clean Water Act requirements, but, Holmes says, “the plant didn't even meet the legal definition for primary treatment.” The county then built a new plant outside the tsunami inundation zone, on the far side of the Hilo airport.

The design capacity of the Kealakehe plant is 5.3 million gallons a day. However, accumulated sludge and other problems have limited it to the point it now treats about 1.5 mgd. Five years ago, the county received \$4 million to alleviate the sludge problem and \$6 million to install aeration equipment, both needed to help the plant regain capacity needed to handle the wastewater that used to go into closed-down gang cesspools. The work has yet to be completed and Leithead-Todd now says that repairing the plant will cost \$18 million.

The county, says Holmes, “really needs to hire a consulting engineering firm if, as Leithead-Todd claims, they have only two staff engineers and are too overwhelmed to get the job done.”

(Leithead-Todd, a lawyer by training, is not an engineer; although the county charter was amended several years ago to require the post to be filled by someone with experience in engineering or related field, Mayor Billy Kenoi appointed her to the position after her tenure as head of the Planning Department generated several serious controversies and lawsuits. She now is being sued in a *quo warranto* action by Hawai'i County Councilmember Brenda Ford, who claims Leithead-Todd should not be allowed to remain in her current job.)

“I am arguing,” Holmes said, “that the county should be moving ahead with planning, design, and preparation of an environmental impact statement concurrently, while fixing the old plant. They should be able to walk and chew gum at the same time.”

— *P.T.*

BOARD TALK

Laney, Morita Contest Land Board Ruling
On Their Vacation Rentals in Hanalei

When the state Board of Land and Natural Resources met May 24 to decide how to deal with the unauthorized construction of two cabins in the Conservation District that were illegally used as vacation rentals, a lot of numbers for potential fines got thrown around.

The Department of Land and Natural Resources' (DLNR) Office of Conservation and Coastal Lands (OCCL) recommended fines totaling \$30,000 plus \$1,000 in administrative costs and the removal of the structures within 120 days.

Attorney Harold Bronstein, representing landowners Lance Laney and Mina Morita, said he thought that was excessive and suggested a fine of \$5,000, including administrative costs.

Kaua'i Land Board member Tommy Oi offered a compromise, recommending a total fine of \$16,000.

At-large/conservation Land Board member Sam Gon, however, argued that Laney and Morita could, and perhaps should, be fined \$15,000 for the construction and \$15,000 for each illegal vacation rental, which would total \$45,000 plus administrative costs.

In the end, with Oi voting in opposition, the Land Board went with the OCCL's recommendation and Bronstein requested a contested case hearing.

In Laney's and Morita's defense, Bronstein noted that in 1993, the DLNR authorized them to rebuild their home that had been destroyed by Hurricane Iniki. When later confronted by the department with complaints of unauthorized construction, Laney explained that before the hurricane, the property had one house, a storage site and two smaller house buildings and that nothing beyond that was being built.

No response came from the DLNR, Bronstein said.

Twelve years later, on June 18, 2008, the DLNR wrote Laney again about a complaint of unauthorized construction. According to Bronstein, Laney again explained what had been on the property previously. The DLNR followed up with an inspection, but, once more, Laney never heard back from the department until December 2013, following another complaint.

"The failure to take any action during this time for approximately 18 years I find arbitrary

at best," Bronstein said, adding later that had the DLNR pursued a violation case early on, the maximum fine under its rules at the time would have been \$2,000 for each violation.

He also argued that the cabins were merely accessory uses to the single family residence, requiring only a site plan approval from the department and not a Conservation District Use Permit from the Land Board.

"If there is any violation, and I argue there isn't ... it is the failure to get a site plan approval for accessory structures," he said, adding that the DLNR penalty schedule calls for fines of \$1,000 to \$2,000 for such violations.

"The penalty does not match the crime, if there is a crime," he said, although he did admit that when confronted about the commercial use of the cabins, Laney stopped it.

"It's not going to happen again. ... I think it's undisputed that Laney's actions have been transparent," Bronstein said.

Oi, however, noted that Laney's property tax information does not show the cabins.

"During Iniki, you're allowed to rebuild, but you have to call the county so they can do an assessment of the property so that they could tax it accordingly," Oi said.

To assess whether the structures were accessory or vacation rentals, Gon asked Bronstein whether they included amenities such as bathrooms, kitchens, and hot and cold running water.

"They were not built for vacation rental,

[but] built for personal use, be it family or whatever," Bronstein said.

Given the significant expenses Laney and Morita were likely to incur removing the structures, Oi suggested that the Land Board waive the OCCL's proposed \$15,000 fine for the unauthorized construction but retain the \$15,000 fine for the illegal vacation rentals.

Dan Purcell, a member of the public, however, encouraged the Land Board "not go light on this" because of Morita's position as head of the state Public Utilities Commission.

"People look to you for guidance on this in terms of ethics," he said. "I just can't say enough that if you go light on this, you make exceptions, you set the tone for ethics in the state."

Still, Oi made a motion to delete the proposed fine for unauthorized construction of structures and fine Laney and Morita \$15,000 for the vacation rentals, plus \$1,000 in administrative costs.

Gon said he had a hard time with such a fine given that not one, but two vacation rentals were on the property.

"If one were to fine for each violation, it would still come out to \$30,000. ... Actually, it would be \$45,000. I can see removing the \$15,000 for the [structures] but I would tack on another \$15,000 for the other vacation rental," he said.

Maui Land Board member Jimmy Gomes agreed with Gon on maintaining a larger fine.

"If we slap 'em on the wrist, you're setting a precedent that is going to haunt the department further down the road," he said.

Just before the vote, at-large member David Goode also pointed at that an advertisement for one of the cabins stated that it had just been remodeled and now included a new kitchen and living room.



Sign me up for a new renewal subscription at the

individual (\$65) non-profits, libraries (\$100)

corporations (\$130) economic downturn (\$40)

I wish to make a donation of \$ _____ a month through my credit card account for 12 months.

(Fill out form below; minimum amount is \$10 a month)

To charge by phone, call toll free: 1-877-934-0130

For credit card payments: VISA or MC

Account No.: _____ Exp. Date: _____

Subscription Payment: \$ _____ One-time donation: \$ _____ Monthly authorization: \$ _____

Phone No.: _____ (expires after 12 months)

Signature of account holder _____

name _____

address _____

city, state, zip code _____

Mail form to:
Environment Hawai'i
190 Keawe Street, Suite 29
Hilo, HI 96720

We are a 501(c)(3) organization. All donations are tax-deductible to the extent allowed by law.

Address Service Requested

Printed on recycled paper 

“Reading that makes me wonder a little more about the construction side of the thing. I’m torn a little bit now, but I’m starting to get a feeling for a higher fine,” he said.

Oi’s motion ultimately failed, with Land Board chair William Aila being the only other member to support it.

A subsequent motion by Gomes to simply accept the OCCL’s recommendation passed, with Oi dissenting.



Board Approves Seawall To Protect a Maui Condo

On May 9, the Land Board unanimously approved yet another shoreline structure on Maui. This time it’s not to protect critical infrastructure, but to keep the Hololani Resort Condominiums (HRC), located just south of the Kapalua Resort, from becoming uninhabitable.

The University of Hawai’i has estimated erosion is eating away more than half a foot of beach every year in that area. And the history leading up to Hololani’s request for a seawall is a familiar one. The property just north of it, Pohailani Condominiums, is fronted by a seawall and little to no sand. Hololani and the Royal Kahana condos to the south have no such protection. Hololani is experiencing significant erosion, while the Royal Kahana still has a relatively stable sandy beach. For years, temporary structures (i.e., sandbags and erosion blankets) that were allowed to be put in place by the DLNR and Maui County have protected Hololani, but the condo now wants to install a 370-foot revetment along the 400-foot shoreline fronting its property.

In its report to the Land Board, the OCCL stated that it “does not believe that the effects of the HRC’s structure would rise to the level of ‘adverse.’ The area is already suffering from the adversities of a chronic sand deficit, as well as shoreline impacts from past armoring. . .

“Without massive sand nourishment

projects, it appears that the beaches along this stretch of coastline are in danger of continued narrowing and loss, especially when accelerated sea level rise . . . is considered. Thus, while the structure could represent an incremental adverse effect, staff does not believe that the project itself has a ‘substantial adverse impact.’”

Hololani consists of two eight-story towers. Without protection, Hololani’s north tower would likely be uninhabitable in the near future, the report stated.

OCCL administrator Sam Lemmo told the Land Board that the quality of the beach also factored into his recommendation to approve the structure.

“If this was a dune system, I would not be sitting here,” he said.

His report acknowledges that the structure will likely increase erosion fronting the condo and the Royal Kahana and includes a recommendation that should the Royal Kahana experience adverse effects from the new revetment, Hololani must place beach-grade sand in the area as mitigation. The OCCL also recommended that the structure be placed as far inland as possible to reduce the footprint within the Conservation District and to extend the life of the beach.



Land Board Must Include Hawaiian Cultural Expert

In addition to having a member with a background in conservation and natural resources, the Land Board must now also include an expert in native Hawaiian traditional and customary practices. On June 20, Gov. Neil Abercrombie signed House Bill 1618, introduced by Joe Souki, which added the new requirement.

The DLNR, the Office of Hawaiian Affairs, and the Association of Hawaiian Civic Clubs, among others, supported the bill.

“Nearly all of the boards and commissions under the [DLNR] require a member with a background in native Hawaiian traditional and customary practices. Last session, legislation was enacted requiring such expertise for the Natural Area Reserves System Commission,” DLNR director and Land Board chair William Aila stated in his testimony on the bill.

With the signing of the bill, the only other panel under DLNR without such a representative is the Endangered Species Recovery Committee, according to his testimony.

— *Teresa Dawson*

Help us celebrate the launch of our 25th year!

- When?** August 29, 6-9 p.m.
- Who?** Special guest speaker, Dr. Sam Gon
- Where?** Imiloa Astronomy Center, Hilo
- What?** Dinner, Music, Silent Auction, Good Company



Dr. Sam Gon

Tickets are \$65 a person (includes a \$20 donation).

Environment Hawai’i is marking the completion of 24 years of continuous investigative reporting. Call now to reserve your place: 808 934-0115. Email ptummons@gmail.com. Or send your check or credit card order to Environment Hawai’i, 190 Keawe Street, Hilo HI 96720

Reservations required by August 25.