



Price: \$5.00

## *A Case Of Misunderstanding?*

The Public Land Development Corporation may be the least popular game in town these days, if the public outrage displayed at recent hearings on its draft rules is any measure. But it's all misplaced, if its creator, Sen. Donovan Dela Cruz, is to be believed. In an interview with *Environment Hawai'i*, Dela Cruz provides his unique take on the rights, duties, and limits of the agency, on which he continues to ride herd, whipping and scolding it for not doing more faster.

One could be pardoned for thinking he's making it up as he goes along.

### IN THIS ISSUE

**2**

*New & Noteworthy*

**3**

*Nukoli'i Owner Brings Federal Suit  
Over Limit on New Hotel Units*

**4**

*A History of Bitter Controversy  
Over Nukoli'i Development*

**5**

*Honokohau Act Confuses DLNR, Angers Boaters*

**7**

*Stricter Review for Legacy Lands*

**8**

*Water Commission Pushed  
To Act on Moloka'i Case*

**9**

*Board Talk: 'Ewa Sand Berm; Kealakekua  
Kayak Tours; Ha'ena Vacation Rentals;  
Kahala Beach Armor*

**12**

*Mahalo!*

## Dela Cruz Downplays Development Role Of Public Land Development Corporation

The Public Land Development Corporation state Sen. Donovan Dela Cruz envisions may be more of a land manager than a land developer, at least with regard to properties owned by the Department of Land and Natural Resources.

Amid the recent calls by state legislators and activists for the Legislature to dissolve next session the nascent but highly controversial development arm of the DLNR, Dela Cruz, state Sen. Malama Solomon, and the governor's office have been working to correct what they see as misinformation about the agency they created in 2011.

"Part of the information that's not getting out there is that the PLDC can help with existing uses. ... That's going to be the majority of this thing," Dela Cruz says. "Quite a bit of the partnerships may not be construction. It could be management."

Although the PLDC has not yet drafted the Public Land Optimization Plan required by its enabling statute, Dela Cruz brims

with ideas of what he'd like to see the corporation do.

The DLNR doesn't have a whole lot of undeveloped — and developable — land. The department has provided the PLDC with a list of all of its properties, which the corporation is still combing through, looking for potential project sites, says DLNR Land Division administrator Russell Tsuji. Even so, the Legislature has already directed the DLNR to transfer development rights for lands at Honokohau and surrounding all of its small boat harbors to the PLDC. Dela Cruz says that transfer is mainly for management purposes.

As another example, he describes a project, not yet proposed by the PLDC, involving a non-profit group that wants access rights to and some management authority over lands owned by the DLNR and the Department of Hawaiian Home Lands in East O'ahu's Haiku Valley.

**to page 6**



The coast near Kona's Honokohau small boat harbor. Legislation passed earlier this year has directed the DLNR to transfer development rights of three parcels there to the PLDC.

# Environment Hawai'i

Volume 23, No. 4



Hawai'i

October 2012

## NEW AND NOTEWORTHY

**A Setback for Kihei Mega-Mall:** The Land Use Commission has voted unanimously in favor of a finding that there is reasonable cause to believe that the plan of three companies to develop 88 acres of land in Kihei, Maui, into two shopping centers and 250 units of worker housing for the Wailea 670 planned resort is not in keeping with what was approved when the LUC reclassified the land into the Urban land use district in 1995.

The decision, taken at its meeting on August 24, means that the landowners – Pi'ilani Promenade South, LLC, Pi'ilani Promenade North, LLC, and Honua'ula Partners, LLC – will need to show at a contested-case hearing how their proposal is, indeed, in compliance with the proposal before the LUC some 18 years ago, when the landowner was planning to develop the parcel for light-industry and commercial uses. Arguing to the contrary is the Maui Tomorrow Foundation, South Maui Citizens for Responsible Growth, and Daniel Kanahele.

Those three parties initiated the LUC's action with a motion last May asking the LUC to issue a show-cause order to the landowners.

The current plan has received the blessing of Maui County. In July, the county Board of Appeals rejected a challenge from Maui Tomorrow to the grading permits that the Department of Public Works had issued for the project. As of press time, the organization had not decided whether to appeal that decision.

In addition, Maui Tomorrow has appealed the county planning director's determination that the landowners are in compliance with the 1995 LUC order. A hearing officer is to be appointed later this month to consider the complaint.



**Ma'alaea Land For Sale:** For the last 18 years, the state has been paying dearly on a lease of an acre of land at Maui's Ma'alaea Harbor for which it has no use. Lease rent, paid to landowner Don Williams, comes out to roughly \$1,000 a day.

Now, Williams has put the land up for sale, with an asking price of \$9.75 million.

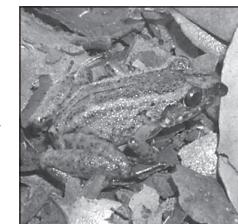
For years, the state has been trying to get out of the lease through condemnation of the land. In 2010, Ed Underwood, administrator of the Department of Land and Natural Resources' Division

of Boating and Ocean Recreation (the lessee), told *Environment Hawai'i* that the state was close to completing the work needed to begin condemnation proceedings. Last month, he said the condemnation process was awaiting a final report on property boundaries from Maui County.

In the meantime, the site, now wrapped in a black, 12-foot-high wind screen, is being used as a staging area for work on the new terminal for the ferry to Lanai and Molokai. In addition, a boat belonging to DOBOR is stored on the property.

**The Coqui's Quiet Cousin:** Coqui frogs have received a lot of attention, thanks largely to the obnoxiously noisy mating calls of the male of that species. Flying under the radar has been its quieter relative, the greenhouse frog, *Eleutherodactylus planirostris*, although it, too, is on the state list of injurious species and consumes prodigious amounts of invertebrates, including, in all likelihood, a number of native insects.

In a recent article in *Pacific Science*, Christina Olson and Karen Beard, of Utah State University, and William C. Pitt, with the U.S. Department of Agriculture's Wildlife Services Division in Hilo, turn the spotlight on the greenhouse frog and the advantages – at least from the frog's perspective – that come with its soft voice. For example, while both coqui and greenhouse frogs were introduced to Guam (in shipments of plants from Hawai'i), only the coqui was eradicated. Some people actually enjoy the greenhouse frog's calls and have deliberately moved them into their gardens, the authors report.

PHOTO: NWRCUSGS.GOV  
HARDIN WADDLE

The greenhouse frogs are distributed across a broad swath of the Hawaiian chain, with their presence having been reported on all islands except Molokai.

**Dept. of Corrections:** An item on this page last month discussed the latest developments in the disputed proposal for a subdivision in the South Kona ahupua'a of Waikaku'u. We misfired twice: the area involved is 72 acres (not 52, as we erroneously reported), and the site is on the slopes of Mauna Loa (not Mauna Kea).

We apologize for the errors.

### Environment Hawai'i

72 Kapi'olani Street  
Hilo, Hawai'i 96720

Patricia Tummons, *Editor*  
Teresa Dawson, *Staff Writer*  
Susie Yong, *Office Administrator*

*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*, 72 Kapi'olani Street, 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: Envihawaii

*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 © 2012 Environment Hawai'i, Inc.  
ISSN 1050-3285

*A publication of*  
**Environment Hawai'i, Inc.**  
**Officers**  
Patricia Tummons  
President and  
Treasurer  
Teresa Dawson  
Vice President and  
Secretary  
**Directors**  
Kathy Baldwin  
Mary Evanson  
Mina Morita  
Ron Terry

### Quote of the Month

*"It's not a one-way street [where] the landed, rich and powerful are the only ones that have a right to a contested case hearing."*

— David Frankel

# Nukoli'i Owner Brings Federal Suit Against Kaua'i Over Limit on Hotel Units

A county charter amendment approved by Kaua'i voters in 2008 is being challenged in federal court. Kaua'i Beach Villas – Phase II, LLC (KBV), alleges that the amendment and an implementing ordinance, passed by the County Council in 2011, interfere with the company's "distinct and reasonable investment-backed expectations," that they "substantially and negatively affect the value and use of the property," and that its "constitutionally protected property rights" have been abridged.

The charter amendment was put on the ballot as a consequence of a petition effort launched by a group called the Coalition for Responsible Government. The petition noted that between 2000 and 2007, the county Planning Commission had granted approvals for more than 4,000 units intended for tourists – and "if each of these approved units is constructed, the resulting growth rate would be more than 4 times the high end of the growth range in the November 2000 Kaua'i County General Plan."

It also stated that the rate of growth in transient accommodations on Kaua'i "has already surpassed the capability of the county's infrastructure." Growth beyond that contemplated in the General Plan, it continued, "would create detrimental impacts in areas" such as traffic congestion, police, fire, and emergency services, park use, potable water demand, and the like.

To curb such growth, the petition called for strict limits on future construction of transient accommodation units, or TAUs. They included requiring the County Council to enact a "rate of growth ordinance" limiting the increase in the number of TAUs to no more than 1.5 percent a year.

The charter amendment passed overwhelmingly, with nearly a two-to-one margin of victory.

It took nearly three years for the County Council to adopt an enabling ordinance. The resulting legislation, Ordinance 912, carves out an exception to the restrictions for "any resort projects which are under construction or where substantial sums have been expended on such projects in reliance on or pursuant to" earlier ordinances that may have authorized them. Apart from such projects, the ordinance limits the number of permits to be issued for new TAUs over the five-year period from 2012 to 2016 to 5.1 percent of the number of units included in the county's

inventory of visitor accommodations at the end of 2008 – or 252 units.

## *Nukoli'i Redux*

As described in another article that appears in this issue, the land that is proposed for this development has been the subject of heated dispute going back nearly four decades.

A hotel and condominiums (Kaua'i Beach Villas) were built in the 1980s on the northern half of the 58-acre parcel that was put into the Urban district in 1974. The remainder of the land was kept in an undeveloped state, with ownership retained by Pacific Standard Life Insurance Co., a subsidiary of the Southmark Corp. After Southmark filed for bankruptcy protection in 1989, Pacific Standard was essentially placed in receivership. In March 1990, its remaining 33.9 acres of land in Nukoli'i was sold to Haseko for \$5.1 million.

In 2005, Haseko sold the land to KBV for \$5.2 million. At the time, the county General Plan described the area as planned "for resort use," with a total allowable density of "680 multi-family units or 1,360 hotel units." The General Plan also noted, however, that the 34 acres, then owned by Haseko, "needs state Land Use Commission re-districting to Urban." Appropriate county zoning also needed to be obtained.

The land had been proposed (and approved) for inclusion in the Urban land use district during the 1975 state land use boundary review process. At that time, it was part of a larger 66-acre parcel, of which 58 acres were placed into the Urban district, with the remainder, along the coast, going into Conservation. The redistricting came with a caveat: at the recommendation of the Kaua'i Planning Commission, the approval called for "substantial completion of development to take place within 5 years... Non-performance shall be a basis for reversion to former classification."

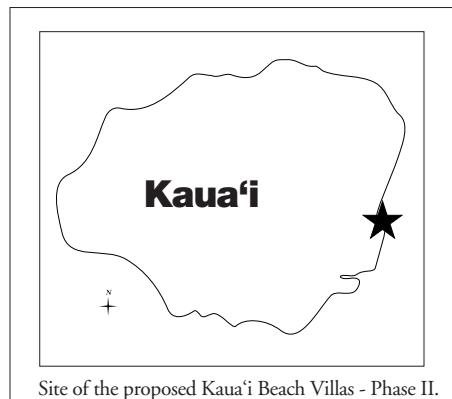
In the eyes of the county General Plan, at least, the undeveloped land had been reverted to its "former classification" of Agriculture. In the eyes of the LUC, however, and absent any petition for reversion, the land remained Urban. As of September, county zoning for the parcel was "open" and "agriculture." According to a Planning Department employee, the agency has not received any application to upzone the land.

(The federal complaint seems to put the cart before the horse on the question of

redistricting. "In accordance with the General Plan," it states, "the state Land Use Commission placed most of the property in the Urban district." The General Plan referred to in the complaint was drafted 25 years after the second state boundary review commission prepared its report, which was the basis for the Urban designation of the Nukoli'i land.)

## **Exactions**

In the complaint, Gregory K. Markham of Chee Markham & Feldman, attorneys for KBV, attempts to link the proposed development to the earlier one on the adjoining land at Nukoli'i. "The property," the complaint states, "was planned for the final phase of a development project comprising approximately 60 acres of contiguous land." But in the rezoning ordinance, adopted in 1979, just 25 acres were approved for inclusion in the county's resort district (RR-20).



Site of the proposed Kaua'i Beach Villas - Phase II.

The ordinance "also imposed several exactions," the complaint goes on to say, "including a \$500,000 in-lieu fee for recreational facilities and outright contribution for [the] first phase for the unrestricted use of the county." Other "exactions" related to traffic improvements, more than three miles of new water mains, and a pump in a county well.

Markham argues that the exactions imposed by the rezoning ordinance "were for the development of the complete 60-acre project. If the exactions had not been for the development of the complete 60-acre project, many of the exactions would have been unconstitutional." To date, he writes, KBV and previous owners "have expended substantial sums to complete the project, including approximately \$5 million in improvements for the county."

According to the complaint, the ballot question in the 2008 referendum did not accurately describe to voters the question put to them. "The county did not inform voters of the inconsistencies between the Charter Amendment and the General Plan," it states. "On the contrary, the county inaccurately

## Condo Development is Proposed for Site With a History of Bitter Controversy

One will search in vain to find the word Nukoli'i anywhere in the federal lawsuit challenging the Kaua'i charter amendment to limit new hotel rooms. In fact, however, the lawsuit is the latest chapter in a 40-year-long history of litigation and disputes involving powerful political forces over development rights to the coastal property. As early as 1984, a *Honolulu Advertiser* reporter called it "the most wrenching political issue in Kaua'i's history;" as recently as 2009, Bob Jones, writing in *Midweek*, described it as "one of the shadier land deals" in Hawai'i.

"For the few who knew the area in the years just before Nukoli'i became a political battleground, it was called the old Hanama'ulu or Nukoli'i Dairy, referring to an 11-acre operation that passed out of existence in the late 1960s," write George Cooper and Gavan Daws in *Land and Power in Hawai'i*. To the north was the county's Wailua Golf Course; to the south, Hanama'ulu, and just beyond that, Lihu'e, the county seat.

Since the passage of the state land use law (Chapter 205) in the 1960s, the area had been designated Agricultural, although, write Cooper and Daws, "farming would have been hampered by hard onshore winds that blew much of the year."

In 1973, Masaru "Pundy" Yokouchi, then-Gov. John Burns' chief aid on Maui, arranged to buy the land from Amfac for \$1.2 million "and then organized a hui that became the

owner." Other hui members included Tom Yagi, director of the ILWU's Maui division (and member of the state Board of Land and Natural Resources), immediate members of the family of Sen. Nadao Yoshinaga, two members of the Maui County Council, and a number of others "in or close to the top leadership of the state government," Cooper and Daws report.

The following year, the 66 acres purchased by Yokouchi and his friends were recommended for inclusion in the state Urban land use district in the course of the second five-year boundary review mandated by Chapter 205. In its "Report to the People" of 1975, the Land Use Commission advised that it had approved placing 58 acres into the Urban category, while the remainder (extending from the shore to about 150 feet inland) would be in Conservation. (The redistricting was done with the blessing of the Kaua'i Planning Commission – with the caveat that "substantial completion of development [was] to take place within 5 years... Non-performance shall be a basis for reversion to former classification.")

"[A]fter owning for only about two-thirds of a year, and before the jump in real property tax assessment," Cooper and Daws write, "the hui was able to resell, to a Hawai'i subsidiary of Pacific Standard Life Insurance Co." The sales price: \$5.25 million.

By 1977, the Nukoli'i parcel was proposed

for inclusion in the Lihu'e Development Plan as a resort area, despite initial opposition from the 15-member Citizens Advisory Committee, according to *Land and Power*. In what was apparently the first show of organized labor in support of a project, the landowner arranged to have "a force of carpenters" attend a County Council meeting where the development plan was to be considered. "This was the first time that construction workers had showed up *en masse* at a land use hearing on Kaua'i," Cooper and Daws write. "Their presence led Walton Hong [attorney for the developer] to say: 'I feel tonight is a turning point. This is the first time we have had the silent majority come out to speak for something.'... Their pension fund three weeks earlier had acquired a passive interest in the Nukoli'i land, though Carpenters Union officials later interviewed ... said that had nothing to do with union support for the project."

Following approval of the development plan, with the Nukoli'i resort designation, appropriate county zoning was proposed in 1978. The final development project approved by the council in 1979 was for a 350-room hotel and 150 condos on just 25 acres of the project.

Even though the development was considerably scaled back from the original proposal, opponents calling themselves the Committee to Save Nukoli'i (CSN) nevertheless successfully petitioned the county to have a referendum to repeal the zoning placed on the November 1980 general election ballot.

The day before the election, the county granted a permit to build the hotel to Hasegawa Komuten, which had purchased the upzoned 25 acres in August of that year.

### **Kaua'i Beach Villas from page 3**

titled the proposed amendment 'RELATING TO IMPLEMENTATION OF THE GENERAL PLAN' " and did not give voters an accurate description of the measure, in violation of charter language.

### **'Futile and Irrelevant'**

The charter amendment limiting new TAUs does provide for exceptions, if they meet the definition of already "permitted projects" or are deemed to be "eligible resort projects." Under Ordinance 912, "permitted projects" are those that received all necessary zoning, use permits, subdivision approvals, and variance permits before December 5, 2008." An "eligible resort project" is one that received zoning before December 5, 2008 and is in a zoning district approved before that same date.

On April 26, 2012, the complaint states, the developer applied for an exemption of 400 units to be built on the property. The application was denied by the planning director, Michael Dahilig, on June 1. He determined that the development "is not an Eligible Resort Project" and that an "exemption from the TAU Certificate process cannot be considered."

"Solely to forestall any misplaced argument that KBV was required to 'exhaust' administrative remedies or 'ripen' its claims," the complaint states, KBV appealed the director's decision to the Planning Commission. A hearing officer was appointed, but, according to the federal complaint, no hearing had been scheduled as of August 27, when the complaint was filed.

In any case, Markham writes, "the appeal is futile and irrelevant." The federal court, he continues, "should not wait for

the resolution of the appeal before deciding KBV's facial challenges" to the charter amendment and its implementing ordinance.

The company asks the court to find that both are "unconstitutional and invalid on their face," for an injunction against the county enforcing them – not only with respect to KBV's property but all other property owners in the county, and for the company's fees and costs.

(In early September, the county attorney's office had not been served with the complaint, and therefore had no comment. County Planning Director Michael Dahilig was off-island "for several weeks," according to his office staff. No one else was available to answer questions. A Uniform Information Practices Act request seeking documents filed by KBV was filed but still pending at press time.)

— Patricia Tummons

When the final ballot count came in on the rezoning referendum, however, it was two-to-one against the resort.

Because of the already issued building permit, Hasegawa considered itself to have a vested right to develop and continued to work on the site despite the successful referendum. The county immediately sought a determination from the 5<sup>th</sup> Circuit Court on the zoning questions raised by the vote, asking the court to uphold the county position. In February 1981, Judge Kei Hirano found in favor of the county and the developer.

It took another year and a half for the case to be decided by the Hawai'i Supreme Court, which overturned the lower court ruling. From the time that the county clerk certified the initiative petition up to the vote, the costs that the developer had sunk into the project had been at the developer's own risk, the justices found. "The building permits stand in the same shadow cast by certification of the referendum and do not create an irrevocable right to proceed with the Nukoli'i project," they wrote. "Simply stated, the official assurance upon which the developers would have a right to rely in the case could come only from the voters, and they chose to withhold it." The lower court was instructed to order the county to revoke the building permits and "to restrain any further construction on the Nukoli'i site."

With the condos completed and the hotel nearly a third built, Cooper and Daws write, "Gov. Ariyoshi's chief campaign organizer on Kaua'i [Turk Tokita], believing that public opinion was shifting in favor of construction of Nukoli'i, said he got the idea to do a second vote on Nukoli'i, in the form of an initiative."

Kauaians for Nukoli'i (KFN) got the signatures it needed on a petition to restore the zoning to the site through a referendum, to be voted on in a special election in 1984. "By almost any standard," *Land and Power* reports, "the money spent in the 1984 Nukoli'i initiative exceeded anything Kaua'i had ever seen. To take one measure – dollars spent by election winners per registered voter – KFN spent, as measured in 1980 dollars, \$7.62."

The referendum won approval, 58 to 42 percent. There were a few more minor skirmishes in state and federal court over the conduct of the election and costs, but when the dust settled, the buildings remained: a hotel, now the Aqua Kaua'i Beach Resort, and the 350 condominiums known as the Kaua'i Beach Villas. —*Patricia Tummons*

*For a much more thorough discussion of the Nukoli'i development up to 1984, see Gavan Daws and George Cooper, Land and Power in Hawai'i, especially Chapter II.*

## Honokohau Act Confuses DLNR, Angers West Hawai'i Boaters

West Hawai'i boaters simply wanted clean restrooms, garbage pick-up, a decent water system, lighting and other basic infrastructure at Honokohau small boat harbor.

The bill they initiated last legislative session (House Bill 2398) proposed establishing a Honokohau Marina Development District that would assume harbor management from the state Department of Land and Natural Resources' Division of Boating and Ocean Recreation.

Many boaters testified that under the current management regime the harbor is "in worse condition than many third world marinas, and has long been an embarrassment to West Hawai'i's marine community."

The National Park Service, native Hawaiian civic clubs, and environmentalists opposed the measure out of concern that the new district would encourage development incompatible with the area's rich natural and cultural resources.

In the end, however, the Legislature dismissed the boaters' proposal and instead took steps to put the DLNR's Honokohau lands into the hands of the Public Land Development Corporation, created by the Legislature in 2011 to help state lands generate more revenue for the DLNR.

DLNR administrator William Aila had submitted testimony on the bill, stating, "[D]ue to the current economic climate there is little if any interest in developing the surrounding fast lands within the harbor. The department would prefer that the Public Land Development Corporation, administratively attached to the department, develop the property surrounding the small boat harbor because eighty-five percent of the proceeds would be deposited into the Boating Special Fund."

The PLDC had expressed interest in developing the harbor, which operates at a yearly deficit of \$200,000, despite annual rental income of \$200,000, Aila testified.

A gutted and reworded bill eventually passed (Act 282) and was signed by Gov. Neil Abercrombie on April 6. The act directs the DLNR's Division of Boating and Ocean Recreation and Land Division to transfer to the PLDC development rights to three parcels totaling more than 200 acres surrounding the Honokohau small boat harbor.

The boaters were not pleased.

"None of the people interested in the

original bill were in support of the changes that were made. They were also not consulted. Basically, it got bushwacked in the closing hours of the session," says charter boat operator Rick Gaffney.

For critics who complain that the PLDC hasn't been transparent enough or that it will ignore community concerns, Act 282 is simply proof.

The boaters later met with PLDC co-creators Sen. Donovan Dela Cruz and Sen. Malama Solomon, as well as its executive director, Lloyd Haraguchi, "to find out in their minds exactly what this bill is going to do for Honokohau," Gaffney says.

"They essentially told us there is nothing the PLDC can do to support those basic needs. What we learned is the bushwacked bill does absolutely nothing for Honokohau harbor and the West Hawai'i boating and ocean communities," he says.

To him, the Legislature directed the DLNR to transfer rights to Honokohau because it was trying to "jump start the PLDC process ... by specifying a specific location to actually do something."

So what happens now?

It's been months since it was signed and DLNR officials, at least, are still unclear about what, if anything, they're supposed to do to implement the act.

DOBOR administrator Ed Underwood shrugs his shoulders when asked what a transfer of development rights might mean or accomplish.

"I don't know," he says, adding that under the 2011 law establishing the PLDC, it would seem that eventually all DOBOR lands will have to be transferred to the PLDC. He says he thinks that the PLDC will need a lease from the Land Board for the harbor lands at Honokohau, but that he doesn't know whether transferring development rights is something that would require Land Board approval.

"That's what we're trying to figure out, the process," he says.

Land Division administrator Russell Tsuji says he was not even aware his division's lands were a part of Act 282 and had assumed that the Honokohau lands were all under DOBOR.

Neither Underwood nor Tsuji was preparing anything to implement Act 282 as of press time.

According to a flow chart issued last

### **Honokohau Act from page 5**

month by the governor's office outlining the process that PLDC projects are to follow, as well as recent statements by Dela Cruz, the agency is still a long way from doing anything with the Honokohau lands, even if it had a proposal ready to launch right now.

To start, DOBOR and Land Division will have to transfer their development rights to the PLDC via a memorandum of agreement or memorandum of understanding that must be approved by both the Land Board and the PLDC board, says Dela Cruz.

Although the legislation was signed several months ago, no MOA or MOU is in the works.

"Too early," he says, noting that he and Solomon have asked that the PLDC adopt a strategic plan before undertaking projects. (The PLDC board was scheduled to receive a briefing on that request at its September 20 meeting.)

Addressing the confusion over what transferring development rights means in the context of the PLDC, Dela Cruz says the process differs from what is normally meant by the term in the private sector, where an agricultural landowner might sell development rights to an urban landowner seeking more density. In return, the agricultural land remains in ag.

In the case of the PLDC, though, "basically, it's a management right, the right to pursue projects," Dela Cruz says, adding, "What needs to be made clear is the title agency never loses title. It's always going to be in the title of DOBOR or DLNR."

Whatever projects the PLDC pursues at Honokohau, or anywhere for that matter, must be supported by the county, Dela

Cruz says.

Although the statutes that govern the PLDC exempt it from county zoning laws, Dela Cruz says development projects need to connect to infrastructure.

"If you're building a visitor center ... the LDC would have to approach the county and say, 'Do you have capacity?' We have to get permission from the county to connect. Once that conversation begins, the county can dictate conditions, no different from a unilateral agreement. The project is dead without the county and title agency," he says.

At Honokohau, it's unclear what development, if any, the county will allow the PLDC to undertake.

Nearly a decade ago, the DLNR sought to

also navigate a federal National Environmental Policy Act review.

Then in 2009, the Hawai'i County Council approved a recommendation by its Planning Department to downzone the DLNR lands at Honokohau, shifting them from Urban Expansion to Open. The move was primarily aimed at settling a lawsuit brought by a group of native Hawaiians seeking to protect their traditional and customary practices in the area, which is adjacent to Kaloko-Honokohau National Historic Park. It also reflected the preservation and development goals laid out in the Kona Community Development Plan, which the county adopted in September 2008.

Placing the area in the Open zone "will

*For critics who complain that the PLDC hasn't been transparent enough or that it will ignore community concerns, Act 282 is simply proof.*

develop what it saw as underused land surrounding the small boat harbor. The agency signed a development agreement with Jacoby Development, Inc., which proposed the 530-acre marina expansion/resort "Kona Kai Ola" project that spanned lands owned by the DLNR and the Department of Hawaiian Home Lands and included hundreds of hotel rooms, some 1,800 condos, and commercial space.

Jacoby later scaled back the proposed marina as well as the number of proposed hotel units in response to community and environmental concerns. But after slogging through the county zoning and state environmental review process, the developer eventually walked away from the project when faced with the possibility of having to

assure the coordinated development of the area, and protection of the significant natural and cultural resources in the amendment area and on surrounding lands will maintain the general welfare and prosperity of the people of Hawai'i island," the Planning Department stated before the council's decision.

At the PLDC board's July meeting, board member Robert Bunda asked Haraguchi whether any parties or developers were interested in the Honokohau lands. Haraguchi mentioned that Jacoby was once interested, but that current interest "has not been to the degree generated by the Kona Kai Ola plan," the minutes state. Haraguchi did not respond to questions about Honokohau by press time. — T.D.

### **LDC from page 1**

"They're not a developer. A lot of the land now is basically abandoned. The DLNR and DHHL don't manage. That's one partnership that I would like to see. DHHL and the DLNR would transfer management rights. Now, the Haiku non-profit could have a long-term lease, develop a plan to manage the area, and apply for grant money, with the state not having to commit as much resources to it," Dela Cruz says, adding, "We can put conditions on the transfer — provide public access, work with kids from the area."

A lot of the larger development projects may be on lands controlled by the Department of Education, for 21st century schools, "not so much DLNR," he says.

The PLDC could be an agency that ties other agencies together "to try to break silos of government to provide better service, jobs, and expand public benefits," he says. For now, the PLDC doesn't own anything. It's simply "an assistant to another agency," he says.

During public hearings in August on the PLDC's proposed administrative rules, former DLNR director Laura Thielen argued that the PLDC is likely to be a drain on the DLNR's finances, rather than an assistant.

"As the former chairperson of this department, I can tell you unequivocally the PLDC is and will take revenue away from DLNR. Under the law, the PLDC will take its own costs and a 15 percent cut out of any revenue it generates," she said.

Regarding PLDC executive director Lloyd

Haraguchi's statements to the press that his agency's objective is "to provide the alternative funding that will make programs self-sufficient," Thielen said, "It appears that the intention is to defund DLNR of all general fund revenue and replace it with the PLDC project-generated revenue. In that case, the PLDC development will not bring any new resources to DLNR, but instead place DLNR on more unstable footing."

"All this background begs the question: if one is purely interested in supporting DLNR, why create a new, redundant board that siphons revenue away from DLNR?" she asked.

Thielen also complained that the establishment of the PLDC "effectively severed any connection between the mission of resource

## Act 284 Establishes Stricter Review For Potential Legacy Land Projects

**S**tarting this year, applicants competing for the \$2.3 million available from the state's Legacy Land Conservation Program have a new hoop to jump through.

Before Act 284 became law earlier this year, the state Board of Land and Natural Resources had the option of requiring agencies receiving Legacy Land funds to provide a conservation easement, deed restriction, or covenant to "an appropriate land conservation organization, or a county, state, or federal natural resource conservation agency."

With the passage of Act 284, four state agencies — the Department of Land and Natural Resources, the Department of Agriculture, the Agribusiness Development Corporation, and the Public Land Development Corporation — have been added to that list.

What's more, Act 284 now requires the Land Board to require those seeking Legacy Land funds to provide a conservation easement, deed restriction or covenants to one of those agencies. (Exactly how the particular agency to receive the easement is to be chosen is not spelled out in the law. It states only that the Land Board must make its decision in consultation with the Senate president and

speaker of the House of Representatives.) However, should the Land Board or any of the agencies required to be provided an easement decide to opt out of the requirement, they may do so.

The point, says Sen. Donovan Dela Cruz, author of the legislation, is to have the agency affirmatively reject the easement if it does not wish to retain it.

"If someone has ag land and they used state money [to acquire it], if the DOA or ADC has an easement, they can't develop or use it for anything other than ag," he says.

An easement would only go to the PLDC if it's appropriate, he adds. The whole point of the Legacy Lands program is to purchase lands or conservation easements that will protect natural or agricultural areas from development. When asked what kind of Legacy Land project would be appropriate for the PLDC to hold an easement over, Dela Cruz told *Environment Hawai'i*, "You don't know what people are going to apply for. We included them [the PLDC] just to make sure it's there."

Act 284 allows the DLNR, ADC, PLDC, and DOA to get an easement to "any Legacy

Lands projects where they need to be involved," Dela Cruz told the ADC at its board meeting on July 11.

Legacy Lands program administrator Molly Schmidt, however, interprets Act 284 a little differently. The act requires Legacy Land applicants to consult with the DLNR, DOA, ADC, and PLDC regarding the maximization of public benefits of a proposed land acquisition project. It does not, however, require applicants to provide an easement to any of those organizations, she says.

The act merely, "sets forth what sorts of deed restrictions can be placed on each kind of project, and what entities can be holders of these restrictions," she wrote in an email to *Environment Hawai'i*.

This year's slate of potential Legacy Land applicants had to submit consultation forms to the four agencies in early August. Those completed forms had to accompany their applications, which were due last month. According to Schmidt, a dozen potential projects planned to apply.

The Hawai'i Islands Land Trust is proposing two conservation easement projects this year. Scott Fisher, the trust's conservation program manager, says that none of the consulting agencies indicated they want to hold an easement, deed restriction, or covenant and most of them had no comment at all.

He adds that it is too soon to speculate on how the new law will affect future projects.

— **T.D.**

conservation and the development of state land. ... [T]he PLDC's mission is to develop state land in a manner that maximizes revenue. The PLDC board has no obligation to balance the interest of resource conservation."

In response to Thielen's argument that the PLDC projects are going to cost the DLNR money, Dela Cruz says, "then the department doesn't have to do it."

He claimed that the 'Recreational Renaissance' program Thielen proposed in 2009 to upgrade the state's recreational facilities wouldn't have generated revenue. Thielen asked the Legislature to support the \$240 million project.

He added that given her support of telescope development on Mauna Kea, among other things, it would be "interesting to see someone go through her record" on resource protection.



### The 'LDC'

In his interview with *Environment Hawai'i*, Donovan often referred to the PLDC as the

LDC. And it's understandable. Under Act 282 of the 2012 Legislature, lands held by the PLDC are now exempt from the definition of public lands.

Normally, the disposition of public lands is strictly regulated. For example, public lands generally have to be disposed of via public auction, which involves a pre-qualification process. An applicant that has had a state lease, license or permit cancelled within the preceding five years for failing to satisfy terms and conditions is not eligible for a lease of public land. Leases are limited to 65-year terms; no one in arrears on taxes or state rents can receive one; and transfers need Land Board approval.

But lands held by a select few government agencies are exempt from these and other restrictions. The agencies include the Agribusiness Development Corporation, the Aloha Tower Development Corporation, the Hawai'i Community Development Authority, the Hawai'i Housing Finance and Development Corporation, and the University of Hawai'i.

With Act 282, lands set aside by the governor to the PLDC, lands leased to the PLDC by

any state department or agency, and lands to which the PLDC holds title in its corporate capacity are also exempt.

However, lands to which the PLDC holds only development rights would appear to still be considered public lands. (Act 282 also amended the definition of development rights to mean "*all of the rights related to the development of a property including but not limited to* the rights permitted under an ordinance or law relating to permitted uses of a property, the density or intensity of use, and the maximum height and size of improvements thereon.")

The only mention of development rights in a recent posting on the PLDC that appears on the website of the governor's office is with regard to whether or not the PLDC can sell public land. The office states, "The initial premise is that title will remain with the respective agency and only the development rights will transfer over to the PLDC; therefore, the PLDC cannot sell the fee title to any of the lands. If the respective title agency transfers the fee title to the PLDC, the PLDC may sell title, subject to the same restrictions as other state agencies." — **Teresa Dawson**

# Homesteaders Ask Water Commission To Restrict Moloka'i Ranch's Well Use

It's been five years since the Hawai'i Supreme Court struck down a state Commission on Water Resource Management decision to grant a water use permit to what is now Molokai Properties Ltd. (MPL). The court remanded the matter for further proceedings, but the commission has done nothing.

In the meantime, the company has pumped hundreds of thousands of gallons of groundwater a day unchecked.

So on August 30, the Native Hawaiian Legal Corporation filed a complaint with the Water Commission to end what it believes is the illegal use of groundwater by MPL, better known as Moloka'i Ranch, the island's largest landowner.

"We're not challenging the domestic use of water," says NHLC attorney Alan

*"We're not challenging the domestic use of water."*

— Alan Murakami, NHLC

Murakami. But his clients do oppose what they see as excessive use of water by the ranch's owners as well as its agricultural lessees that grow coffee and genetically modified crops.

The complaint, filed on behalf of Ho'olehua Hawaiian homesteaders Wayde Lee, Judy Caparida, and Georgina Kuahuia, argues that MPL's use of Well No. 17 "impacts the ground water, nearshore marine resources, and related ecosystems that complainants rely on and routinely use for traditional and customary practices. ... They are Native Hawaiians who rely on subsistence gathering from the shoreline area Well 17 impacts."

What's more, wells belonging to the Department of Hawaiian Home Lands that are near Well 17 show evidence of potential salt water intrusion, the complaint states. The DHHL currently has a reservation of 2.905 million gallons of water a day from the Kualapu'u aquifer, and it may need more in the future if it develops its other lands on the island. Kualapu'u has a maximum sustainable yield of about 5 mgd.

"MPL's unauthorized water use ... compromises the quality of the groundwater aquifer in the vicinity of wells on which the DHHL relies now and in the future, and interferes with complainants' superior rights to that groundwater," the complaint states.

Disputes over the ranch's use of Well 17 started in the early 1990s, when the Water

Commission designated the island of Moloka'i as a Water Management Area. In December 1993, Kukui Moloka'i Inc., MPL's predecessor, submitted an application for a water use permit for 2 million gallons of water a day from Well 17 for Kualapu'u town and the Kaluako'i resort. The company submitted the application roughly six months after the commission's deadline of July 15, 1993. Even so, the commission authorized an interim use of 871,420 gallons a day for existing uses.

Unsatisfied, KMI requested and received a contested case hearing in 1998. The DHHL, the Office of Hawaiian Affairs, Kuahuia, Caparida, and others joined the case as intervenors. In a December 2001 decision and order, the commission increased KMI's exist-

ing use allocation to 936,000 gpd. KMI also received a permit for new uses, giving it an additional 82,000 gpd.

From June 2010 to June 2011, MPL pumped as much as 1.04 mgd from Well 17 and an average of about 580,000 gpd, according to Water Commission records. The complaint notes that an environmental impact statement for the La'au Point development states that with the closure of the ranch's hotels and golf course several years ago, MPL requires, at most, only 270,000 gpd to serve Kualapu'u town.

"The fact that MPL is using double the amount of any plausible explanation for such excessive water use is clearly the basis for any punitive action the commission may and should take," the complaint states. Given that the Supreme Court issued its decision on December 26, 2007, the complaint adds, "Assuming that only one violation per day is imposed, 1,709 days of violations results in possible fines of \$8,345,000, as of August 30, 2012."

## Irrigation System Lease

In addition to MPL's use of Well 17, the NHLC and its clients have objected to the company's use of the state Department of Agriculture's Molokai Irrigation System to transport Well 17 water to the west end of Moloka'i. KMI's lease of space in the system expired years ago, and, according to Murakami, the DOA has not validly approved a new lease to MPL.

Under the previous lease, MPL would only be allowed to take as much water from the irrigation system as it pumped in from Well 17. But Murakami says things haven't always worked that way.

"They've had major pump breakdowns. For months [the DOA] has allowed major amounts of water to be taken from the system that was not put in the system. The DOA has overlooked it for those years," he says.

What's more, the Department of the Attorney General has determined that the DOA must conduct an environmental assessment, at the very least, before it renews a lease to MPL.

Says Murakami: "They [the DOA] have not done anything except hold a recent community forum to get input on the impacts of renewal. It's a major, major thorn in the side to Ho'olehua homestead farmers, who suffer when the ranch doesn't fix its pumps. ... It's a cancer in the side of the irrigation system."

As of press time, Murakami was preparing to file a lawsuit against to stop MPL's use of the irrigation system.

ing use allocation to 936,000 gpd. KMI also received a permit for new uses, giving it an additional 82,000 gpd.

The intervenors appealed the decision to the Supreme Court. In late 2007, the court found that the commission had erred when it considered KMI's untimely application. The commission had also failed to adequately consider alternative water sources, failed to take into account the fact that KMI's hotel and golf course had been closed for years, and improperly shifted the burden of proving the impact of KMI's withdrawals on traditional and customary practices from KMI to Kuahuia and Caparida, the court found.

After the court remanded the case, the NHLC followed up with motions asking the commission to dismiss all applications for water use permits except those necessary to supply "reasonable amounts of EXISTING domestic water to residential subscribers of the [Kaluako'i Land LLC/Moloka'i Public Utilities] private water system," the complaint states. The commission, however, has taken no action on the motions.

In its August complaint, the NHLC asks the commission to determine whether MPL is making unauthorized withdrawals within a Water Management Area, immediately order the company to cease withdrawals from Well 17 (except for reasonable domestic water uses by existing subscribers to its water sys-

## B O A R D T A L K

# Board Grants Contested Case On Kaloi Gulch Berm Project

**T**he Land Board has granted a contested case hearing to two O'ahu seaweed gatherers seeking to preserve a sand berm at the mouth of Kaloi Gulch in 'Ewa that they say filters stormwater runoff and protects the limu beds they rely on from pollutants.

Haseko 'Ewa, Inc., the Department of Hawaiian Home Lands, the University of Hawai'i, and the City and County of Honolulu have proposed lowering the berm to increase the gulch's drainage capacity, which will allow them to develop lands currently used or slated for retention basins. In March, the Land Board approved a Conservation District Use Permit for the project, despite testimony from native Hawaiian cultural practitioners Michael Kumukauoha Lee and Henry Chang Wo that losing even a portion of the berm could harm the famed native limu beds of 'Ewa. Chang Wo, represented by the Native Hawaiian Legal Corporation, and Lee requested a contested case hearing.

At the board's September 14 meeting, Department of Land and Natural Resources' Office of Conservation and Coastal Lands administrator Sam Lemmo first noted that in making its March decision, the Land Board failed to make specific findings regarding traditional and customary native Hawaiian rights as required by a 2000 Hawai'i Supreme Court decision, *Ka Pa'akai O Ka 'Aina v. Land Use Commission*.

Lemmo gave the board two options: either

deny the petitions, but reconsider the March decision and issue additional findings regarding traditional and customary native Hawaiian rights, or grant a discretionary hearing, with Chang Wo and Lee as parties, then decide whether or not the CDUP should stand. The hearing would be limited to identifying traditional and customary rights practiced in the permit area, the extent to which such rights may be affected by the permit, and what feasible, protective actions, if any, should be taken.

Lemmo recommended that the Land Board defer making a decision on the contested case hearing and hold a discretionary hearing.

Although Lee thought the idea of a discretionary hearing was brilliant, since it might save the department the expense of contested case and/or court hearings, he argued that there is no question he would have standing in a contested case hearing.

He pointed out that he was granted standing in a related contested case in 2008. "I've already done this dance," Lee said.

To NHLC attorney David Frankel, the deputy attorney general's advice to the OCCL that a contested case hearing was not required in this case was "a really radical, new position."

"It sets back law in the state 30 years," he said. "The agency is telling you when traditional and customary practices are involved.... no contested case hearing is required and the

authorized well use may be having on the quality of water in the DHHL's wells," Ice points out that the company is pumping far less than what was originally authorized. At the same time, the DHHL and the County of Maui are pumping more water than they are allowed by their water use permits.

Ice says neither is taking steps to spread out their pumping to prevent saltwater intrusion.

"Their own concerns have not been observed. Their wells are too close together. They've expressed concern about upconing [of salt water into the wells]," Ice says of the DHHL. "We've seen a little bit of rise with the salinity, but well within secondary EPA guidelines. We have put them on notice. We cannot entertain their request for additional water until they relieve pressure on the location."

— T.D.

only entities that have a right to [one] are landowners when talking about a CDUA [Conservation District Use Application]. That is wrong."

Frankel pointed to a case where Hawaiian Electric Company proposed building a dam on Honoli'i Stream on the Big Island.

"Honoli'i is the only real surf spot in the Hilo area," he said. Surfers asked for a contested case hearing then and won. "Under the AG's [attorney general's] analysis, they would not have had a right to a contested case hearing. We would have a dam there today."

Frankel said he was amazed how often in the last several years the Land Board has denied a contested case hearing "when the law clearly requires it."

"In this case, you have multiple practitioners engaged in traditional and customary practices. This board has conducted two contested case hearings already regarding discharges in this area; the first went to the Supreme Court," he said.

Frankel cited a peer-reviewed study on the harmful effects stormwater runoff has on 'Ewa Beach's native algae abundance and diversity.

"Your staff clearly hasn't read it. You need this kind of information before making a decision," he said.

Frankel also opposed holding a discretionary hearing, noting that the DLNR's rules establish no standards for such hearings. "They're unappealable," he complained.

Frankel, Haseko attorney Yvonne Izu, and the University of Hawai'i attorney Lisa Bail all said they thought the discretionary hearing could be a waste of time.

If, after the discretionary hearing, Lee and Chang Wo are still able to get a contested case hearing, "we might be duplicating some effort here," Izu told the board.

A discretionary hearing would take a minimum of six months to complete, Lemmo said.

"If you think the court's just going to laugh at you and say do a contested case hearing, that's fine. ... We're not necessarily going to agree there's a right [to one]," Lemmo told the board.

Big Island Land Board member Robert Pacheco said he was concerned about Lemmo's recommendation to give Chang Wo and Lee standing in a discretionary hearing, but not in a contested case hearing.

"What's the difference there, really?" he asked.

"[The discretionary hearing] is a fact-finding tool to gather information for the board to make findings regarding the *Ka Pa'akaianalysis*. The standing issue is a whole separate issue," said deputy attorney general Linda

### **Finally, Some Movement**

The Water Commission has refrained from taking action against MPL because some 30 residences rely on water from Well 17, says commission staffer Charley Ice.

"It's a public health issue," he says, adding that his office has informed the ranch that it needs to file a new water use permit.

Ice says the ranch's new CEO, Clay Rumbaoa, recently told him that the company has completed an environmental assessment to continue its use of the DOA's irrigation system. Rumbaoa also told Ice the company has hired a consultant to file a new water use permit application for Well 17.

"We're waiting with bated breath," Ice says.

With regard to the concerns the NHLC has raised about the potential effect MPL's unau-

Chow. (*Ka Pa'akai* strengthened the responsibilities of state agencies to protect cultural rights.)

"It sounds like the quickest way to decision making is to deny a contested case hearing," O'ahu Land Board member John Morgan said. But after discussing legal issues in executive session, the board unanimously approved a motion by Morgan to approve both contested case hearing requests.

### **Hapa Road**

Frankel's arguments that the Land Board must grant a contested case hearing to those whose rights to exercise their traditional and customary practices are affected by a project failed to sway the Land Board in a separate item on its decision in January to grant an easement to the Eric A. Knudsen Trust over a road in Poipu, Kaua'i.

The trust wanted the easement across the historic Hapa Road — a popular hiking trail — to provide highway access to its Villages at Po'ipu subdivision. Frankel's client, Theodore Blake, opposed the easement, claiming that providing vehicular access across the trail would adversely affect Blake's traditional and customary practices, as well as his recreational, historic preservation, and environmental interests. Blake testified to the Land Board that he had hoped to restore the trail's rock walls.

In a report to the Land Board, the DLNR's Land Division included an analysis provided by the Department of the Attorney General of why Blake was not entitled to a contested case hearing. The report stated that Blake had not identified any property interest that would rise to the level of an entitlement and that the easement did not affect his rights, duties or privileges.

DLNR Land Division administrator Russell Tsuji suggested that the recent Hawai'i Supreme Court decision that found that kuleana landowners and native Hawaiian cultural practitioners in West Maui were entitled to a contested case hearing on interim instream flow standards did not apply in this case.

"In the 'Iao water case, people were kuleana landowners, asserting kuleana water rights. That's separate and apart from native Hawaiians for traditional and customary uses. ... That's more similar to interest in aesthetics. ... It doesn't rise to a property interest," he said.

"We obviously disagree with your analysis," Frankel said, noting that the court's findings in the Maui water case did not rely solely on property ownership, but included people engaged in traditional and customary practices.

"It's not a one-way street [where] the landed, rich and powerful are the only ones

that have a right to a contested case hearing. Our system of government is not so one-sided as that," Frankel said. "Native Hawaiians practicing traditional and customary rights have a right to a contested case hearing."

After an executive session, the Land Board unanimously approved the Land Division's recommendation to deny Blake's contested case hearing request.

"The substantive issues are different," said board member John Morgan before the vote.



### **Kayak Company Loses Kealakekua Bay Permit**

**O**n September 14, the Land Board revoked the landing permit for Hawai'i Pack and Paddle, LLC. The action against the Big Island company follows an incident on July 4, when a teenager on a company tour was swept by waves into Kealakekua Bay. His body was never recovered.

The company was one of only four commercial kayak tour companies to receive a revocable permit in 2006 to land and launch tours at Ka'awaloa Flats in Kealakekua Bay Historical Park. The permits were an attempt to control overuse of the park and included several conditions to protect its sensitive cultural and natural resources, as well as public safety.

On the day of the incident, the company violated three of those permit conditions. Its tour group exceeded the number allowed on a single trip; the group spent more time at the flats than is allowed, and, most importantly, it strayed about a quarter mile from the designated hiking area.

Under the permits, guided tourists are allowed to land at Ali'i Point, traverse a trail to the Captain Cook monument, then leave. On July 4, however, some members of a mainland group of teens hiked to tide pools near the ocean's edge, where two boys were washed away by a strong south swell. A Pack and Paddle guide managed to rescue one of them. The other, Tyler Madoff, is presumed dead.

O'ahu Land Board member John Morgan asked whether flouting permit conditions is a regular occurrence among the Kealakekua Bay kayak operators, or was a "one-off kind of thing."

Because the parks division relies solely on the honor system at Kealakekua Bay, State Parks assistant administrator Curt Cottrell said he couldn't say.

Cottrell added that while some of the violations seemed minor, his division wanted to send a message:

"Our [revocable permit] holders need to

know, even though we cannot monitor, when we get knowledge, we need to take action. [Some feel] once they're in, they're in. ... That's something that's partially devastating this division," he said, adding that the division may allow the three other kayak permits to expire at the end of the year so the department can work on a comprehensive solution to overuse of the park.

Attorney Bob Frame, representing Hawai'i Pack and Paddle, asked for a deferral to "sort out all the factors surrounding this." The company's position is it had no choice but to deviate from the trail "because of the actions of their client," he said.

Leaving the designated area was "something out of the norm for this company and something they argued against," Frame said.

Big Island Land Board member Robert Pacheco asked how the teens knew the tide pools were worth seeing.

"I can't answer that," Frame said.

Pacheco moved to approve Cottrell's recommendation to terminate the permit, but offered Hawai'i Pack and Paddle the opportunity to request reconsideration no later than the Land Board's first meeting in October.

At-large board member David Goode added that it was important the company stop conducting tours immediately.

"Staff said they don't have the resources to enforce [and] we have to trust. It's clear that trust has been broken," he said.

The board unanimously approved Pacheco's motion.



### **Board Fines Owners Of Ha'ena Vacation Rentals**

**I**f you believe everything on the internet is true, Elvis is alive and Obama was born in Kenya," attorney Randy Vitousek told the Land Board at its September 14 meeting. That day, Vitousek disputed the DLNR Office of Conservation and Coastal Lands' use of internet site postings as proof that his clients are operating vacation rentals illegally in Ha'ena, Kaua'i.

Vitousek represents Gary, Paraluman, Ligaya and Apolonia Stice, who own a property advertised on the Vacation Rental by Owner website as "Kahelelani," and David Kuraoka, whose "Makana Lani" home is also advertised on the same site. The OCCL recommended fining the Stices \$15,000 and Kuraoka the same amount. \$15,000 is the maximum allowable penalty for a single Conservation District violation.

The Stices were part of a group who received cease and desist orders from the OCCL

in 2007 to stop using their homes in Ha'ena as vacation rentals because their Conservation District Use Permits include conditions prohibiting such use. The Stices, among others, sought a deviation from those permit conditions, but were denied. They then sought a contested case hearing, but later withdrew their request.

"Despite this, [Gary] Stice continues to use his single family residence as a vacation rental," OCCL administrator Sam Lemmo told the Land Board.

Kuraoka was not part of the group that sought permit deviations in 2007. However, Lemmo said, he received a CDUP in 2006 to build a single-family residence with the express condition against vacation rentals.

"His attorney said his client would comply with all of the conditions," Lemmo said. "My point is to highlight the willfulness."

In both cases, Lemmo said he had a lot of evidence, including Trip Advisor reviews, that the properties were being used as vacation rentals.

Vitousek requested a contested case hearing for both cases.

"Lemmo uses 'evidence' a little bit loosely. Printouts from internet? ... It proves somebody advertised something. ... You haven't authenticated who downloaded this, where it came from," Vitousek said.

"Are you denying they're renting it out," Big Island Land Board member Robert Pacheco asked.

"I'm denying it's a violation," Vitousek replied.

Pressing the issue, at-large board member David Goode warned Vitousek, "I'm going to make a reservation tonight when I get home."

Lemmo assured board members that his evidence consisted of more than just internet research and included interviews with people.

"We're not a court of law. I'm comfortable moving forward. I can't believe there are some hackers up there putting this on the internet to get somebody in trouble," Pacheco said.

"For whatever it's worth, I'm looking at it right here. I'm about to press send," Goode told Vitousek while holding up his smart phone's screen showing the reservation site for Kahelelani.

"Quite frankly I'm up for a maximum fine. And if you lose [the contested case], you cover our costs," Goode said.

The board unanimously approved Lemmo's recommendations, which included the fine, as well as a requirement that the Stices and Kuraoka submit proof within 60 days that they have ceased using their properties as vacation rentals.



## Kahala Erosion Control Must Be Removed

**A** Kahala beachfront corporate landowner has requested a contested case hearing over the Land Board's decision last month to require the removal of an erosion control structure fronting its property.

The sand-filled bags made of biodegradable coconut fiber were meant to be a temporary measure, but three years after installation, the landowner — 4615 Kahala Ave. Corp. — has made no attempt at a long-term solution, according to Sam Lemmo, administrator for the DLNR's Office of Conservation and Coastal Lands.

His office should never have approved a minor permit for the bags, which are now posing a hazard to the public and are impeding lateral access, he told the Land Board at its September 14 meeting. But because his office had forced the corporation in 2009 to remove hau and naupaka from the beach fronting its property, it allowed the bags to go in as a temporary stabilization measure until a long-term solution could be found.

But the office has received complaints about the bag pile, which, Lemmo contends, is being maintained by the landowner rather than being allowed to degrade. As a result, it's causing erosion, in addition to threatening public safety, he told the board.

"People have to walk over or at the base of

the structure. It's very dangerous from my perspective," he said.

Lemmo admitted that removing the bags will result in some erosion of the sand bank and landscaping on the property, but argued that the house, some 70-80 feet inland, will not be threatened.

"The property owner would likely suffer some loss of land, but everybody else in the state is suffering from the same problem, sand erosion. They don't have the right to armor the shoreline at the expense of public," he said.

Attorney Greg Kugle, representing 4615 Kahala Ave. Corp., argued that if the shoreline is allowed to erode, about a dozen 100-foot tall coconut trees and a hollow tile wall on the property's edge will end up on the beach. (4615 Kahala Ave. Corp. is a company owned by the Honolulu consulate of the Republic of San Marino, a tiny, landlocked country in northern Italy.)

Contrary to Lemmo's claim that the beach would eventually stabilize after some initial erosion, Kugle argued, "Our property will fall into the ocean significantly. [Erosion] doesn't yet jeopardize the house, but it will."

Kugle also argued that a nearby drainage pipe owned by the City and County of Honolulu is somehow taking sand from the beach and transporting it offshore.

Kugle said his client would be willing to contribute funds toward a beach nourishment project but not unless or until the impacts of the pipe were mitigated first.



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 onetime donation of \$ \_\_\_\_\_.

(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

72 Kapi'olani Street

Hilo, HI 96720

Give us your email address and we'll sign you up for online access to our extensive archive of past issues.

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

*Address Service Requested*

<i>Non-Profit Organization U.S. Postage <b>PAID</b></i>
<i>Permit No. 208 Honolulu, HI</i>

*Printed on recycled paper* 

# Mahalo!

## A Shout-Out to Our Many Friends

As many of you know, in August *Environment Hawai'i* held its first fund-raising event in many years. We want to thank everyone who made the evening such a brilliant success, as well as everyone else who has supported us with a donation (or two, or three, or more) over the last several months.

To our benefactors: We are keenly aware of the many worthy organizations that compete for your disposable income, and we are humbled by your election to support us. Thank you so very much to all of the following, as well as several donors who do not wish to be acknowledged publicly:

Doug Adams & Deb Lewis  
 Keary Adamson/  
 Coconut Island Massage  
 Aiona Island Realty  
 Paul & Tanya Alston  
 Eve Anderson  
 Denise Antolini  
 Apono Hawai'i  
 Paul Banko  
 Tony Barnhart/Far-Flung Agility  
 Big Island Candies  
 Big Island Delights  
 Leonard Bisel  
 Pam Bunn  
 George Cattermole  
 Debbie Chang  
 Lisa & Mac Cooper  
 Sandra Dawson  
 Teresa Dawson  
 Laurel Douglass  
 Kay & Leo Drey  
 Anne Earhart  
 David Frankel  
 Suzanne Frayser

Pam Frierson  
 Bill Gilmartin  
 Bill Graham  
 Gretchen Grove  
 Donald Hall  
 Kathleen Harrison  
 Pat Hart  
 Barbara Hastings &  
     Mike Middlesworth  
 Christina Heliker  
 Emily Herb/'Apapane Pottery  
 Steve Hess  
 Shannon Hickey/  
     High Fire Hawai'i  
 Stephen Hight  
 Kim Hoffman  
 Susan & Robert Irvine  
 Jack Jeffrey  
 Carol & Mark Johnson  
 Ed Johnston & Helen Rogers  
 Michael Jones  
 Beverly Keever  
 Vheissu Keffer  
 Amy Kimura

Robert Knourek  
 Anne Kobsa  
 Julie Leialoha  
 Thomas Loudat  
 Cathy Lowder  
 Amy Luersen  
 Donna Lum  
 Robert Masuda  
 Mike Matsukawa  
 Colbert Matsumoto  
 T.J. McAniff  
 Doug Meller  
 Paula & William Merwin  
 Patricia & Richard Missler  
 Art Mori  
 Stephanie Nagata  
 Jay Nelson  
 Susan O'Connor  
 Steve & Christina Olive  
 Becky Ostertag  
 Rob Pacheco/  
     Hawai'i Forest & Trail  
 Elliott Parsons  
 Steve Pickering

Thane Pratt  
 Peggy Ratliff  
 Bo & Mercia Reipurth  
 Ursula Retherford  
 Shaunagh Robbins  
 Noelie Rodrigues & Chris Yuen  
 Kayla Rosenfeld  
 Russell Ruderman/  
     Island Naturals  
 Gordon Russell  
 Dave Smith  
 Spencer Health & Fitness  
 Richard Spiegel/  
     Volcano Island Honey  
 Laura & John Suehr  
 Julia & Eugene Tao  
 Arlene & Ron Terry  
 Laura Thompson  
 Mabel Trafford & Steve Miller  
 Gordon Tribble  
 Patricia Tummons  
 Peter Uehara  
 W.A. Gerbode Foundation  
 Sally Wang  
 Rick Warshauer  
 Karen White  
 Carol Wilcox  
 Winning Orchids  
 Robert Wintner/Snorkel Bob  
 Susie Yong  
 Alan Young  
 Sharon Ziegler-Chong

"We have retained experts; we are studying the effects of the pipe," he said.

Lemmo disputed Kugle's claim that the pipe is causing erosion, telling the board earlier, "This is just not the case, flat out. If you look at shoreline recession maps by [coastal geologist Chip] Fletcher at UH, you would see some erosion signature. It's not there. It's a total red herring."

He also assured the board members that should erosion ever threaten the house, the company can apply for an emergency authorization to install erosion control measures.

In the end, the board ordered the removal of the erosion control measures within 60 days. Removal would basically involve digging the bags up and slicing them open.

— *Teresa Dawson*