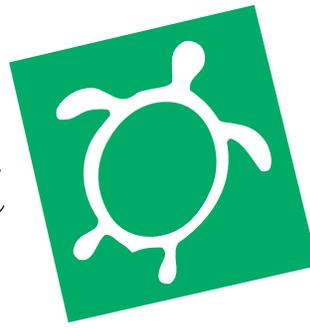


Environment



Hawai'i

a monthly newsletter

Hot Spot At Honokohau

The welding company that has operated for years at the Honokohau small boat harbor, on the Kona side of the Big Island, is there no more, and therein lies a tale: of broken promises, of personal feuds and grudges, of partners falling out. And, not least, of a state agency charged with managing the site that either did not know what was going on – a case of negligence, to put the best face on it – or knew and did not care enough to set things right.

Teresa Dawson's deep dive into l'affaire Hotspots shines a much needed light on just a few of the problems that have dogged the state Division of Boating and Ocean Recreation for years.

And that's not the only agency that demands a hard look from its overseers. As other articles in this issue show, the Department of Transportation's award of direct leases to so-called fixed-base operators raises serious questions about this practice.

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Strife Over Honokohau Boatyard Shift Lingers More Than 2 Years After Auction

Last month, *Environment Hawai'i* reported on a \$423,000 settlement the state Board of Land and Natural Resources approved to resolve several damage claims brought by its lessee, Pacific Marine Partners, LLC. The company had won a 10-year lease at public auction in the summer of 2018 for a nine-acre lot that was previously being used by Gentry's Kona Marina (GKM) as a boat storage yard at Honokohau small boat harbor.

PMP claimed, among other things, that it had lost revenue because equipment or other materials left on the property by GKM and its former tenant, Hotspots Welding and Fabrication, LLC, took up space that could have otherwise been rented out. PMP's attorneys claimed in May that PMP lost out on nearly \$90,000 in revenue because of Hotspots' occupation.

PMP also blamed the Department of Land and Natural Resources' Division of Boating and Ocean Recreation (DOBOR) for sticking it with the job of having to evict Hotspots, which had occupied the parcel

for decades.

The state denied any liability for the damages PMP alleged, but agreed to the settlement amount proposed by PMP's attorneys to avoid litigation and to allow for the continued payment of rent by PMP, which was much higher than what GKM had paid for more than a decade.

But as our report last month suggested, the drama is far from over.

Even though Hotspots was evicted from the property in 2019, it did not remove all of its equipment from the boat yard. For example, Hotspots former co-owner Stacie Horst says she was unable to retrieve a 12-foot brake used to slice sheet metal because it is so massive that it would require a forklift to move. Cameron Noftz, with whom she purchased the company in June 2018, also says that all of his heavy equipment, welding tables, metal stock material, and more, are also still at the boat yard. He claims to own the building that houses all the equipment, as well.

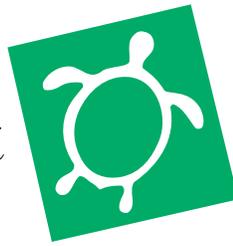
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PHOTO: PHASE 1 ENVIRONMENTAL SITE ASSESSMENT

Hotspots welding and fabrication shop at Honokohau boat storage yard.

Environment



Hawai'i

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NEW AND NOTEWORTHY

FKW Injury: Another false killer whale has been injured in an interaction with the Hawai'i longline fishery. This time, the interaction occurred when a shallow-set longliner targeting swordfish hooked the animal, making it an extremely unusual event. Interactions between false killer whales and longliners usually occur in the deep-set longline fishery, which targets tuna.

The interaction occurred on May 25 inside the Exclusive Economic Zone around Hawai'i. The on-board observer's report stated that the animal was as close as 3 to 4 feet from the vessel when "the whale pulled the entire line out of the crew's hands before they could attempt to release it." It swam away, trailing about 40 feet of monofilament line.

A preliminary review determined that the interaction was a serious injury.

While take limits are in place for the deep-set longliners, none exists for the shallow-set. Robin Baird of the Cascadia Research Col-

lective – perhaps the foremost expert on false killer whales – said that this interaction "will just count as one individual towards PBR," or potential biological removal, the number of individuals that can be removed – i.e., killed – without harming the population's chances of recovery.

"My biggest concerns (as they've been for a while) are biased estimates of bycatch, given that there are no observer programs in non-longline fisheries," Baird told *Environment Hawai'i* in an email exchange. Those fisheries include shortline and other hook-and-line fisheries. Also, he went on to say, there is likely "some unknown level of under-reporting by observers (either because they are sick in their bunks and not recording, or for other reasons), and the potential for an observer effect for how animals are handled when observers are onboard." (Observers are required on all shallow-set longliners, but on just 20 percent of the deep-set vessels.)

Finally, in addition to all that, there's "the uncounted non-U.S. bycatch outside the U.S. EEZ," he said.

"Whether combined these would push bycatch estimates above PBR is simply unknown."

SEZ Reopens: On August 26, Hawai'i-based tuna longliners were allowed to enter once more the Southern Exclusion Zone, a large swath of the U.S. EEZ that had been closed since February 2019 as a result of the deep-set longline fleet having exceeded the allowable

take of false killer whales.

The National Marine Fisheries Service notified the False Killer Whale Take Reduction Team of the reopening in a letter August 17. In it, Ann Garrett, assistant administrator (Protected Resources Division) of NMFS' Pacific Islands Regional Office, said that the service determined that the action could be taken since a condition of reopening had been met. That condition, set out in the False Killer Whale Take Reduction Plan, is met if "the average estimated level of false killer whale incidental M&SI [mortality and serious injury] in the deep-set longline fishery within the remaining open areas of the EEZ around Hawai'i for up to the five most recent years is below the PBR level for the Hawai'i Pelagic stock of false killer whales at that time."

Based on recent studies, Garrett continued, the PBR for the pelagic false killer whales in the EEZ was calculated to be 16, while the five-year average estimated M&SI take attributed to the deep-set longliners was calculated to be 9.8.

Relief Granted: Kaua'i vacation rental owners Elizabeth Kendrick and Joe Chaulkin have convinced the 5th Circuit Court that the county erred in December 2017 when it rejected their belated application to renew their non-conforming use permit.

Among other things, their attorneys argued that the owners were not given proper notice of a rule change. They pointed out that while the county Planning Commission's 2017 Interpretive Rules require late applications to automatically be denied, a final version of these rules was not posted to the county's website until early 2018. Under the previous version of the rules, applicants were allowed a 30-day grace period to renew their permits, so long as they paid twice the application fee.

At a hearing in July, the court found in their favor. On August 21, their attorneys submitted their proposed final order for the court's approval.

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Quote of the Month

"[O]ur customers were taken after 18 years of building our customer base and auctioned off. So much for private-public partnerships."

— Tina Prettyman, GKM, Inc.

Waikoloa Mauka Project Now Subject Of FBI Investigation, Developer Says

Danny Julkowski threw himself on the mercy of the Leeward Planning Commission of Hawai'i County last month. And as sympathetic as the commissioners were to his plight, their mercy was more limited.

Julkowski was asking the commissioners to recommend that the Hawai'i County Council approve zoning and boundary redistricting changes so he could develop commercial lots and housing on an oddly shaped 11.7-acre parcel he purchased in 2018 a short distance beyond the Urban District boundary of Waikoloa Village.

The parcel had once been part of a much larger development that was proposed decades ago as the Waikoloa Highlands golf estates. That development received county zoning approvals, but the owners never got much further than the construction of a rustic rail fence and a stone entry gate before state law changed and the type of residential subdivision on Ag land that was envisioned for Waikoloa Highlands was no longer an option.

That larger parcel was eventually sold to an entity called Waikoloa Mauka, LLC, which was required by the county to submit a redistricting petition to the state Land Use Commission, asking that the land be placed into the Rural land use district, a move that would allow the planned development of nearly 400 houses on some 760 acres to proceed.

In 2008, the LUC approved the boundary amendment with conditions, including one that required Waikoloa Mauka to comply with county regulations concerning affordable housing. In this case, that meant building, underwriting the construction of, or donating land to the county or a non-profit entity that would build 80 dwellings affordable to families earning less than the county's median income.

In 2017, Waikoloa Mauka subdivided off an 11.7-acre parcel on which it claimed the affordable housing units would be built. It is this parcel that Julkowski purchased in 2018 for \$1.5 million.

And in so doing, he unwittingly bought into a scheme that is now the subject of an FBI investigation.

Broken Promises

Between the time Julkowski's company, Pua Melia, LLC, purchased the property and now, the state Land Use Commission revoked the Rural designation owing to Waikoloa Mauka and its successor, Waikoloa Highlands, Inc., having failed to do much of anything in the 10 years since LUC had approved the boundary amendment petition. With all the acreage in the original petition – including what was now Julkowski's parcel – having reverted to Agricultural, Julkowski could no longer move forward with his plans absent County Council approval.

That set the stage for Julkowski to ask the Leeward Planning Commission to bless the approvals he needed to develop 32 units in four-plexes and duplexes, five commercial lots, and a larger lot where he was hoping to build a large hardware store.

"So, uh, what we have here is an interesting, challenging project," Julkowski's planning consultant, Zendo Kern, told the commissioners in their August 20 WebEx meeting, live-streamed on YouTube.

The formal advice of the county planning director, Michael Yee, was that the Planning Commission forward to the County Council a recommendation against approving the redistricting and zoning requests. The proposal involved "spot zoning," staff planner Alex Roy said, with no existing infrastructure and no sidewalks to allow future occupants of the residential units to walk to Waikoloa village, among other things.

"What we heard is a presentation from the Planning Department that talked about basic land use components," Kern said. "What we haven't talked about is how we got here."

Kern went on to say that he was approached about a year and a half ago by "a person who at that point in time worked for the county." This person, not named by Kern, told him that he "had a client who had a 201H application," referring to the state law that governs construction of affordable housing. To Kern, it seemed like a "simple, easy project."

"I said, sure, happy to assist ... and then talked with Mr. Julkowski," he continued.

The project "seemed to make sense," but then, on speaking with Planning Department staff, Kern discovered that the "Planning Department was not supporting the 201H application, as [the Office of Housing and Community Development] was ... Generally, when there's a conflict, it gets complicated."

(As *Environment Hawai'i* has reported, Julkowski was not the first party to purchase the 11.7-acre parcel designated for affordable housing. Shortly after the parcel was subdivided off from the larger Waikoloa Mauka parcel, and in an arrangement that seems to have been worked out by a former county housing office employee, Alan Rudo, a for-profit entity called Plumeria at Waikoloa, LLC, purchased it for \$55,000, despite Hawai'i County requirements that the land be donated either to the county or to a qualified non-profit. Plumeria at Waikoloa did not develop the affordable housing but instead sold it to Julkowski for \$1.5 million.)

The 201H process was dropped and Kern and Julkowski went with a more straightforward application for housing – which Julkowski said he intends to be affordable – the hardware store, and several commercial lots that Julkowski was hoping to sell.

From his home in Minnesota, Julkowski then related the history of his involvement with the project, which he said began in January 2018, when a county employee "contacted us and asked if we were interested in purchasing property."

"I had known this guy from the past because he was trying to get us to do affordable housing," he said, noting that at one time he had been a general contractor.

"We talked back and forth. He came up with a price, and we decided to go with it. Then he wanted a little bit more and I said I don't have that type of funds. I can work with this."

Julkowski had "multiple meetings at the Housing Department [sic]. I signed documents at your county buildings with lawyers to do the affordable housing.

"We invested quite a bit of money. They were telling us that they're going to help us. If we do the housing, they'll help through this whole project.

"Then one day I get a phone call from the FBI, saying, 'What do you know about this project?' ... Before that, I had threat-

Continued on next page

Panel Green-Lights Zoning Change For Hotel, Other Uses at Kona Airport

In July and August, both the Leeward and Windward Planning Commissions of Hawai'i County approved a recommendation that the County Council change the county's zoning ordinance and county code to allow for a range of activities at the county's two major airports, in Kona and Hilo.

The change involves adding a definition of "primary airport" to the zoning code that conforms to the Federal Aviation definition of an airport that receives 10,000 or more passenger boardings a year. The proposed definition also lists "standard accessory uses" at primary airports, including, but not limited to, retail and dining establishments, rental car offices, service businesses, and hotels and conference centers.

Planning director Michael Yee, who initiated the change, said the current zoning at airports – Limited Industrial (ML) and General Industrial (MG) – does not allow for a number of uses that are already occurring at the airports, such as retail businesses and automobile rental companies.

"One reason for this amendment is to bring these uses in line with the Zoning Code," Yee stated in his recommendation to the commissions.

"Another reason for this amendment," Yee wrote, "is the county has received a request from the Department of Transportation – Airports Division to allow for conference centers, and for overnight accommodations (hotel) to support airport operations ... mainly for the Kona International Airport."

This "Primary Airport" land use along with accessory uses, Yee wrote, will still require plan approval be obtained from the planning director. "This plan approval review will allow the planning director to approve the request, including requested accessory uses, as well as review and approve the associated elements of each use, such as height, amount of rooms, parking, setbacks, landscaping, etc."

There was little public objection when the matter came before the Windward Planning Commission in July. But last month,

when the proposed zoning changes were heard by the Leeward Planning Commission, several members of the public voiced concerns that the proposal was, as Janice Palma-Glennie put it, the "nose under the tent" that would unleash much more – and much more inappropriate – development, impairing nearby coastal waters.

Testifying in favor of the changes was Chauncey Wong Yuen, the Hawai'i District manager for the DOT's Airports Division. It was Wong Yuen who wrote Yee last December, requesting the changes be made. In justifying the request, especially the hotel, Wong Yuen noted that a hotel was already in the Kona airport master plan. It would "support the needs of business and government travelers" and would provide accommodations to travelers who might be stranded. "Also," he wrote, "we are targeting a hotel size of 150 rooms, which would accommodate a typical flight size in the event of a cancellation."

The hotel, he concluded, "will be a tremendous benefit to the Ellison Onizuka Kona International Airport at Keahole, and to the traveling public and community... The hotel would still be subject to RFP

Continued on next page

Waikoloa from Page 3

enign phone calls towards my family."

"The main thing is," Julkowski said, "the county employees came to us. We sat down with county employees. So I purchased that property based on county employees working with us. All of a sudden they get fired and they disappear. And then I'm standing alone."

'Something Really Funky'

Commissioners seemed mystified by the events Julkowski related. Planning deputy director Jeff Darrow filled them in on the problems that led ultimately to the Land Use Commission placing Waikoloa Mauka's property – and, with it, Julkowski's – back into the Agricultural District.

"Things happened that are under investigation right now, and we are where we are," Darrow said. "Currently, the state land use designation is ag for the property, county zoning is open and rural, and the general plan reflects the zoning.

"There's discussion as to the whole background of this, but as far as [the Planning Department] goes, Planning looks at it from the planning standpoint."

Kern tried again to win over the commissioners. "Something really funky happened between having that 80 units of affordable housing [and the property] being sold to my client. Really funky. ... It doesn't look well on the county level. ...

"I actually did speak to the original consultant. He didn't even know what happened. Something really funky happened in that transfer."

Commissioner Max Newberg made a motion to recommend against the rezoning and redistricting requests. "It's unfortunate," he said, "everything before us today." Still, he added, "I have a hard time looking at anything that would be anything other than unfavorable."

Commissioner Perry Kealoha concurred, saying that he suspected "fraud along the way. But this is not the place to litigate any fraud that may have taken place."

In the end, commissioners voted four to two against the rezoning and redistricting requests. Commissioner chair Nancy Carr Smith and commissioner Michael Vitousek were the two dissents.

— *Patricia Tummons*

For Further Reading

Environment Hawai'i has reported extensively on the Waikoloa Mauka development, including the irregularities surrounding the proposed satisfaction of the affordable housing requirement. See:

- "Hawai'i County Reverses Course on Affordable Housing Approvals," January 2019;
- "Editorial: Oversight Required for County Housing Office," January 2019;
- "Financing, Affordable Housing Take Center Stage at Waikoloa Hearing," November 2018;
- "Hawai'i County Spurned Developer's Offer to Donate Land for 80 Affordable Units," September 2018.

[request for proposal] requirements of [Hawai'i Revised Statutes Chapter] 102, and subject to approval by the Board of Land and Natural Resources.”

After Yee drafted the proposed changes, the DOT submitted further comments in April, this time from DOT Director Jade Butay. While DOT-Airports “appreciates and supports the ... action to address this zoning inconsistency,” Butay wrote, he objected to the language requiring plan approval from the county planning director.

The plan approval requirement remained.

A Done Deal?

Wong Yuen claimed in his letter that a competitive request for proposals would be issued before any hotel plan would be submitted. And in his testimony to the commissioners in August, Craig Biscard, the property manager for the Kona airport, said that he would “look for potential lessees to do the development.”

However, Melvin G. Mason Jr. seems to think he already has a lock on the hotel.

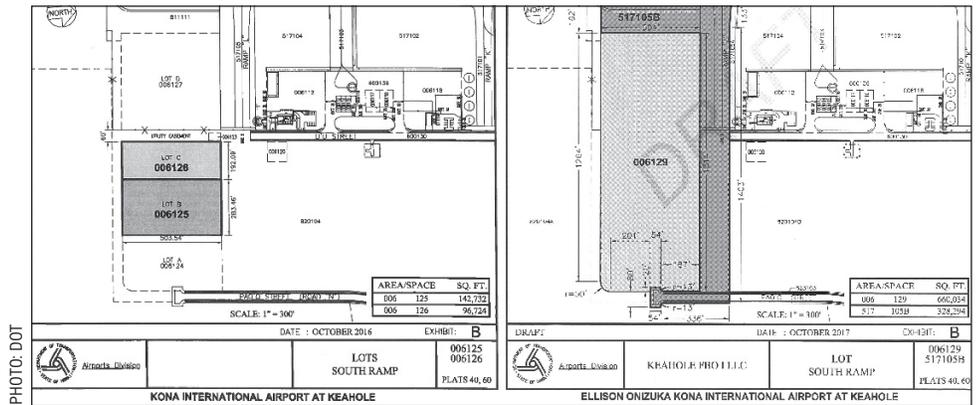
In his testimony before the commission, Mason said he was the CEO of Keahole Hotel & Suites, a business that, according to the Department of Commerce and Consumer Affairs, was organized in October 2019. He had already worked out an agreement with the neighboring Natural Energy Laboratory of Hawai'i Authority – NELHA – for delivery of seawater for a sea-water air conditioning system for the hotel. “It’s been in the works since 2006,” he said.

“I was the one who actually propositioned and proposed this to be built,” he added. In getting to this point, “honestly, I went through a lot of hoops, red tape, black tape, purple tape, blue tape, white tape. Everything. Even with the Ethics Board.” (He did not explain this further.)

Mason said he was the former CEO and president of Keahole FBO I, LLC, “which is actually the big development with the FBO at the end” – at the south end of the airport property, that is.

No one raised an eyebrow at that. It was one of many claims Mason made in his 10-minute testimony that day, celebrating his ali'i ancestors, his business acumen and experience at home and abroad, and his successes in developing inventive educational tools and curricula.

Right before the commissioners were



Maps submitted to the DLNR in 2016 and 2017 show the areas proposed for a direct lease for an FBO at the Kona airport. The area proposed in 2016 is included in the 2017 proposal.

set to vote on the issue, commissioner Max Newberg asked Mason, “Out of curiosity, are you a developer?”

Mason replied, “Yes, I’m going to be developing this.”

Connections

In fact, Mason was involved with not one but two businesses that received approval from the Board of Land and Natural Resources for no-bid leases to develop fixed-base operations – FBOs – on property at the Kona airport.

On the same property, in fact.

On December 9, 2016, the Land Board approved a Department of Transportation request that it be allowed to issue a 35-year direct lease (not competitively bid) of 239,456 square feet – about 5 and a half acres – of land at the southern end of the Kona airport to Keahole Enterprises, LLC. The leased land included land straddling both the state Urban and Conservation districts, although the map attached to the DOT’s submittal did not indicate state district boundaries. The DOT regularly claims in its submittals to the Land Board that such direct leases are authorized under Chapter 171 of Hawai'i Revised Statutes. The negotiated lease rent for the first five years was just under \$127,000 a year. Listed as the sole member of Keahole Enterprises, which had been registered with the Department of Commerce and Consumer Affairs just six months earlier, was Jon Riki Karamatsu, a former member of the state House of Representatives and a partner of Mason in a number of enterprises. The Land Board approved the request without discussion.

Less than a year later, the DOT was back before the Land Board, seeking its approval for a direct 35-year lease of land at the Kona airport. This time, the area

to be demised was the same as had been approved by the board earlier, but it also included an additional 17 acres, for a total of 22.7 acres.

The proposed lessee on this occasion was Keahole FBO I, LLC, an entity organized in August 2016. Again, the Land Board approved it and about thirteen other requests from the DOT in just one vote. And again, the sole member of the LLC was Karamatsu. Proposed rent was \$474,397 a year for the first five years, with increases thereafter.

As a condition of the lease, Keahole FBO I was required to invest at least \$5 million in improving the premises in the first two years of the lease. As before, the report submitted to the Land Board stated that no environmental assessment or environmental impact statement would be required for the anticipated development, since it was already covered in an environmental assessment of 2013 for the Kona airport master plan.

In January 2019, at the opening day of the Legislature, Karamatsu posted on his Facebook page a photo of legislators milling about on the floor of the House chamber. “My business partners and I are working to build facilities, infrastructure and services for private jets” at the Kona airport, he wrote in an accompanying post, “where we have over 15 acres of land. ... Further, our entities are helping the state on improvements they want in their KOA [Kona airport] master plan.”

That year, Senate Bill 652, and a companion bill in the House, called for authorization of up to \$50 million in special purpose revenue bonds to support the development proposed by Keahole FBO I. Among those supporting the bill was the Department of Transportation, which said the bonds would “provide a portion of

Airport from Page 5

the financing for the Kona Jet Center ... situated on a 16-acre development at the south end" of the Kona airport. The project would include "six acres of new ramp, a 6,500 square foot fixed base terminal, a 36,000-square-foot state of the art hangar, a 50,000 gallon above-ground fuel facility," in addition to roads, parking lots, and utilities, the DOT testimony stated.

Later in the 2019 session, the Senate bill was amended to delete the mention of \$50 million and instead leave the dollar amount of bonding blank. In testimony on this draft, Keahole FBO I asked that the original amount be restored, stating: "In addition to the lease fee for our premises and lease fee for the areas to be developed for the DOT, the DOT will receive \$7.5 million in in-kind donation of developed infrastructure and generate revenue from 2 percent of our gross profit, \$0.04/gallon of Jet A fuel we sell, and 30 percent of any of our subleases."

The bill did not make it out of conference committee. By that time, Keahole FBO I had hooked up with AV8 Partners, LP, whose principal, Matthew Clayton, identified himself in testimony to the Legislature as one of the founders of Keahole FBO. Today, AV8 Partners is listed in the DCCA registration as the sole manager of Keahole FBO I, LLC. Its mailing address is in care of one Kevin Allen in Phoenix, Arizona.

Meanwhile, it is unclear whether the DOT ever did execute a lease with either of the Mason-affiliated entities. A query was made to the DOT, but no response had been received by press time. A list of private companies occupying the Kona airport site appears on the Hawai'i County property tax website, but the name of Keahole FBO I or Keahole Enterprises is not among them.

On his website for Keahole Enterprises, however, Mason has a page devoted to Keahole Hotel & Suites. "Even if you don't travel a lot," the website states, "you're [sic] always enjoy the benefits of an VIP at our smoke-free Legacy of Keahole Hotel & Suites in Kailua-Kona, KEAHOLE, HAWAII, at the Kona International Airport."

"Our hotel also has a coffee shop, sundry shop, banquet rooms, and an airline ticket desk," the website says.

Photographs show the inviting lobby and bar – of the Hotel Plano – Frisco, in Plano, Texas. — *Patricia Tummons*

Following Investigation, DOT Commits To Auctioning All Future Airport Leases

Over the past several years, members of the state Board of Land and Natural Resources have questioned Ross Smith of the Department of Transportation's Airports Division about some of his requests for board approval of direct leases.

Why, they wondered, wasn't the department holding a public auction, instead, to be fair to potential bidders and perhaps get a higher rent for the state?

Smith would often claim the request was in accordance with Federal Aviation Administration (FAA) regulations. But that answer never really satisfied the board.

Finally, a request earlier this year to directly issue a 30-year, fixed-base operator (FBO) lease to Kaua'i helicopter company Airborne Aviation brought the issue to a head. The matter came to the board on February 14, but was withdrawn. Although the board did not discuss why the matter was withdrawn, it had received a letter from the owners of Island Helicopters Kaua'i objecting to the DOT's general practice of issuing direct leases to companies purporting to be FBOs, which are supposed to provide aeronautical services, such as fueling, flight instruction, and aircraft maintenance and rental, among other things.

In their letter, Bonnie and Curtis Lofstedt complained that a couple of helicopter companies that had obtained FBO leases at the Lihue Airport paid much lower rents and had longer lease terms than those — including Island Helicopters — that did not.

"Island Helicopters pays as much as \$2.24 versus their \$0.19 per square foot," they wrote. To receive the lower rent, the FBO companies must provide services to other companies or entities in the industry, but they do not, the couple alleged.

"They do not sell or provide any service to the industry and are not in business to provide any level of service at [Lihue Airport] other than tours and charters for their specific business. This is a guise for cheaper rent and longer leases and is a possible violation of FAA Grant Assurances No. 22c, which states each FBO operator at the airport shall be subject to the same or similar uses of such airport

to serve ANY air carrier at such airport," they wrote.

They stated that they did not object to issuing a lease to Airborne Aviation, but just wanted all of the leases treated equally.

"It is more than time for the BLNR to see the disparity and discrimination. ... The state knows (and the proof would be in the excise tax forms of these companies) that these companies are not by definition FBO operators and are actually helicopter tour and charter companies receiving a benefit in reduced rent and space not provided to similar or equal operators with the same respect," they wrote.

On March 13, the lease request returned to the Land Board and Island Helicopters re-submitted their testimony from February. Oddly, the DOT's report to the board supporting the request cites the same FAA Grant Assurances language cited by Island Helicopters as justification to NOT sell the lease at public auction. An auction, Smith told the board, would "likely cause disparate rental rates."

Before addressing the lease request, board member Chris Yuen asked Smith which FBO company or companies at the Lihue Airport were providing repairs and maintenance of aircraft.

Smith replied that he had not gone through his list of things at Lihue and did not have the names.

"You don't know who the two are?" Yuen asked.

"Not off the top of my head. I would be happy to get that to you as soon as I get back to the office," Smith replied.

Brandon and Delzelle Miranda from Airborne Aviation testified to the Land Board that they are mainly a utility company, not a tour company. With regard to their qualifications to be an FBO, they pointed out that the company has a contract with Kaua'i County to fix county aircraft.

Based on the Mirandas' testimony, the board approved the lease. (Board chair and Department of Land and Natural Resources director Suzanne Case recused herself because the company sometimes works for the department.)

Given the concerns raised by Island

Continued to page 7

Helicopters, the board also asked Smith to provide within 60 days a report on FBO operators at the Lihue airport and provide evidence that they qualified for their leases.

As Kaua'i Land Board member Tommy Oi said earlier in the meeting, there is tremendous competition on Kaua'i among tour helicopter companies. "It's dog eat dog," he said.

'A Big Loophole'

That report did not come until the board's August 14 meeting and it did not come from Smith. No written submittal was made available on the DLNR's website. But during the DOT staff's presentation, despite Zoom feedback echoes and muffling facemasks, it became clear that their internal investigation uncovered problems with the FBO leases.

DOT property manager Ethan Tomokio, who said he had been asked in July to complete the investigation, reported that there are three FBO leases at Lihue Airport. The first was issued in 2007 to Blue Hawaiian Holdings, LLC, known as Blue Hawaiian Helicopters. The company was issued a 30-year lease.

"The master file that we have here lacks evidence that it qualified as an FBO," Tomokio said.

The second FBO lease, also for 30 years, was issued in 2012 to Air Service Hawai'i Inc. "Again, the master file lacks evidence that it qualified as an FBO at the time," Tomokio continued.

The third FBO lease, for 15 years, was issued to Jack Harter Helicopters in 2016.

For that lease, Tomokio said, there was evidence in the master file that it qualified as an FBO. He held up two binders, each containing about 300 pages of supporting information.

"It's an application every FBO operator must complete before the airport approves it," he said.

Given that only one of the three current FBO lessees provided evidence in their applications that they were going to actually be FBOs, Yuen asked, what was the DOT planning to do about it?

The DOT's Mike Auerbach answered that in the future, all FBO lease applicants will go through a qualification process.



PHOTO: ELLIOTT PLACK

A helicopter at Lihue Airport.

But as far as the existing FBOs were concerned, "I'm not sure there are many options at this point," he said.

Tomokio explained that the way the DOT's FBO leases were written, the lessees are given the *right* to perform FBO services, but the leases don't say that if the lessees *don't* perform those services, they can lose their lease.

"That seems like a big loophole to me, though," said board chair Case. "If you say you're an FBO and you get a lease on that basis and you're not an FBO, you just skipped over a whole step that is all about competitive availability of spaces. ... People felt like there was favorable treatment [to FBOs]," she said.

Tomokio agreed and said that, going forward, the DOT will require the application process to be performed. "We are very careful about issuing any type of lease—FBO, hangar, fueling—because the application has to reflect what they intend to do," he said.

"Every lease from now on that the DOT is going to enter into, FBO or not, is going to come to the Land Board as a public auction request."

— Ethan Tomokio, DOT

Both Auerbach and a number of board members suggested that the Department of the Attorney General review the Lihue FBO leases and applications to determine whether the current lessees qualified and still qualify.

Tomokio noted that the FBO lease the Land Board had recently approved for Airborne Aviation had not been executed yet, and "we can absolutely request to add language that they have to perform these services."

Despite what was found or not found in the DOT's files, Yuen suggested that

the agency investigate whether any of the three FBO lessees that were part of the report are performing FBO services. "Maybe they are. I'm not going to jump to conclusions. Let's hope that they are, in fact, operating as FBOs. I do not believe the language of the lease restricts the ability of the DOT from continuing to insist that if you get a direct lease as an FBO that you're supposed to be an FBO. I cannot believe the FAA would be very happy. The FAA requires all FBOs be treated the same. That's the DOT's rationale for not going to public auction," Yuen said.

In reply, Tomokio revealed, "Every lease from now on that the DOT is going to enter into, FBO or not, is going to come to the Land Board as a public auction request. FBO or not ... rather than a direct lease. This is a directive from our management here at the airports."

Yuen said he was impressed. "I've been concerned in the past that DOT took too broad a reading of what qualifies for not going to public auction. ... I do wonder though about the FBOs, because DOT has said for several years that they cannot go to public auction [because] they would violate FAA's guidelines."

Tomokio and Auerbach replied with a long silence.

The board ultimately voted to require the DOT to investigate whether the FBO lessees at Lihue were, in fact, providing FBO services. It also voted to have the attorney general's office review the leases and the circumstances of their applications and approval and determine whether something needs to be done. The board asked that the results of those investigations be brought to the board in 90 days.

— Teresa Dawson

Honokohau from Page 1

They also allege that PMP has actually sold off some of its equipment and now employs one of their former workers to do the same kind of work they were doing, using their equipment.

And most recently, Nofzt says, he got into a physical altercation last month with someone who he believes was going to bulldoze what was left and injure Horst. Police were involved at some point.

PMP's Jason Ho'opai denies their allegations and counters with his own: He says the couple broke into the boat yard and damaged and stole property.

"There are charges. They are claiming some equipment, but have no sales or purchase receipts. It's not an enjoyable situation for anyone," he says.

In Limbo

Horst admits that she and Nofzt were aware of the risk they were taking when they purchased Hotspots, where Nofzt had worked since 2016. Their landlord, GKM, Inc., had occupied the property for nearly 20 years under a month-to-month revocable permit, but its manager, Tina Prettyman, advised the couple before the purchase that DOBOR would be holding an auction for a long-term lease of the nine-acre property.

Because Hotspots had been there for 20 years, "we went ahead with the purchase," Horst says. The company was well-established and had done work for Hawaiian Airlines, the airport, the county, and even DOBOR. And when the auction finally came, and a new company won the lease, "We were encouraged to stay, by all parties," she says.

Although no sublease between GKM (or its predecessor) and Hotspots was ever approved by the Land Board, even when Hotspots was located on GKM's adjacent lease parcel, Hotspots had been allowed to operate for some 40 years in the harbor. When it relocated to the boat yard and built a warehouse 25 years ago, it was to a spot that was highly visible from a road leading to a section of the harbor.

Horst says Ho'opai was at the auction, as were she and Nofzt. While Ho'opai initially said he had a problem with Hotspots being on the property, since, technically, it would be an illegal tenant, he changed his mind

after meeting them and recognizing the service they provided to the harbor, she says. "He's been to our home and eaten at our dinner table. ... He said, 'The state wants you to go. I want you to stay.'"

She adds that the state also seemed fine with them being where they were, at first.

"That's exactly how it was: Everyone wants you to stay, and then it was a big problem," she says.

Before PMP took control of the property in November 2018, GKM issued notices to all of its tenants — Hotspots, as well as everyone else storing boats on the property — that they had to vacate by mid-October to allow GKM some time to clear the property. As we reported last month, Prettyman testified to the Land Board that DOBOR undermined that effort by calling or emailing the tenants and posting a notice on the harbor office window telling boat storage tenants, "Regardless of what Gentry states, you do not need to remove-vacate your vessel. Please go to [PMP's] mahalo@honokohaustorage.com."

"The fact is GKM's revocable permit was cancelled and our customers were taken after 18 years of building our customer base and auctioned off. So much for private public partnerships," GKM stated in an email to *Environment Hawai'i*.

Included in that list of boat storage tenants was Hotspots, according to Nofzt. He says GKM rented 16 boat slips to Hotspots' previous owner.

How Hotspots' welding operation could have stayed on a lease that allowed for only boat storage and vehicle parking, however, is unclear. Also, an environmental site assessment conducted for PMP in December 2018 uncovered other potential problems that eventually factored into the Land Board's decision to approve the settlement in July. Most concerning to PMP was an unpermitted sewage system — what appeared to be a cesspool or septic system — at Hotspots.

Horst says she walked the property with state attorneys and representatives from the EPA, and tried to work toward resolving the matter. She says she was encouraged by them to continue to do so. Nofzt says he hired experts to inspect the system, which he believes is a septic tank, not a cesspool.

PMP made no coordinated move to evict Hotspots for months afterward. According to PMP's Jonas Ikaika Solliday, the company actually had Hotspots do some work for it and Nofzt even borrowed Solliday's commercial air compressor for several months.

Hotspots also issued Ho'opai an invoice in July 2019 for more than \$30,000 worth of work on utilities, security lighting, and the construction of a large barbecue/smoker. That invoice was never paid, according to Hotspots. The company also has invoices showing that it continued to do jobs for DOBOR harbor master Jeff Newton through early March 2019.

Turning Point

Whatever Hotspots' past relationship was with DOBOR, by mid-July of 2019, an attorney representing the state sent an eviction notice.

Hotspots stayed put for months afterward. In the meantime, the relationship between Ho'opai and Solliday deteriorated over their ownership interests, expenditures and individual management actions. The relationship between Horst and Nofzt faltered, as well. Lawsuits among all parties ensued and have not yet been resolved, although Horst and Nofzt, at least, seem to be working together to retrieve the last of Hotspots' property. As we reported last month, Ho'opai and Solliday will be entering arbitration in October.

In February, Nofzt filed a lawsuit against Horst, Ho'opai, and PMP, claiming that Horst had defrauded him out of his business interest. In the lawsuit, he doesn't allege any wrongdoing by Ho'opai or PMP. Nofzt does, however, say he believed Ho'opai wanted to buy Hotspots' assets and suggests that may have somehow influenced Horst's actions.

Ho'opai denies Nofzt's claims and told *Environment Hawai'i* that he believes the lawsuit is meritless and just an effort to drain PMP's finances.

There has been no movement in the case since mid-July, when the court set aside a default judgment against the defendants that was issued in March.

"Hotspots never had a lease, agreement or contract to operate in the warehouse and it was determined by the state that they were

Continued to page 8

illegal occupants,” Ho’opai says. “After I learned that the purchase of Hotspots’ business ... lacked the due diligence to know what they did and did not own, it was clear their business purchase was poorly contrived. I spent more than \$35,000 in legal efforts to find a state-allowed solution to save their butt. However, [the attorney general’s office] and DLNR were not able to find a solution for Hotspots.”

Correspondence between Noftz and Ho’opai indicate the two were still brainstorming ways to maintain some kind of working relationship in November. “When the state rejected their tenancy in totality, there was nothing I can do. Just trying to keep my relationship with DLNR was hard enough,” Ho’opai says. (Due to his own trials with Solliday, PMP fell behind on its rent and lost its lease earlier this year. It was later restored and back rent was paid as part of the settlement.)

Given that Horst and Noftz had been initially led to believe they could continue their business on the property, Ho’opai acknowledges that they felt violated when things turned out differently. “No hard feelings against either Stacie or Cameron. I just want them to move on,” he states.

He also says that he has not hired their former employee, Gene Maluyo, and nei-

ther he nor Maluyo ever used the equipment he says Hotspots abandoned when it finally moved out on February 13. Maluyo registered a welding and fabrication company, Gene’s Spot, on July 7 of this year, but the business address is a residence. Ho’opai says that he has allowed Maluyo to store some things on PMP’s property, but says no sublease has been issued for the business. “There are no subleases allowed on the property without BLNR approval. It was temporary storage to help someone in need. We only sell storage,” Ho’opai stated.

Hindsight

Could some of this mess have been avoided if DOBOR had enforced its lease and permit terms earlier, either decades ago or at least before the notice for public auction went out? It was required to conduct an appraisal of the property to determine the upset rent before the 2018 auction. Surely, a large, unauthorized business on the property would affect its value.

DOBOR now denies that it was ever aware of Hotspots’ occupation of the boat yard parcel and that it ever told Hotspots that it could stay.

The address on Hotspots’ invoices is not for the boat yard, but a space on GKM’s

adjacent property, also leased from the state.

When asked whether DOBOR was aware of Hotspots’ actual location at the boat yard before the 2018 auction, GKM responded, “DOBOR has had so many property managers that came and went over the years, it’s hard to say what they know.”

Although it allowed the company to operate for decades, GKM denies ever issuing a sublease to Hotspots, stating in an email that the company was already on the property when GKM took over the revocable permit for the boatyard years ago.

A June 2018 letter from GKM’s Prettyman to Horst and Noftz indicates that Hotspots was renting space at the boat yard on a month-to-month basis to store its assets.

In testimony to the Land Board in June of this year, Sylva Rivera, an associate of PMP’s Solliday, questioned why GKM and/or its predecessor never informed the DLNR or Land Board that there was a welding business located at the boat storage yard.

Whatever GKM did or didn’t do, Noftz says it’s insane that DOBOR now claims it never knew where Hotspots operated, especially given the amount of work Hotspots did for DOBOR, which often required the issuance of state “hot work” permits. “I replaced half the fence for the security gate at the Kailua pier,” he says. A person familiar with the harbor also calls DOBOR’s denial of Hotspots’ existence pre-auction “ludicrous,” given the operation’s prominent location and size.

“It has been an interesting two years,” Noftz says, adding that after he bought Hotspots, “DOBOR said it was all good; Gentry said it was all good.”

He and others have pointed out that DOBOR staff who were involved with management of the harbor around the time of the auction are no longer employed there. DOBOR says they were not forced out, but left voluntarily. “[DOBOR is] not going to comment. I was told that as soon as the auction took place, they pretty much tried to act like they didn’t know anything about Hotspots,” Noftz says, adding, “I know the state would have to answer a lot of fucken’ questions that they don’t want to answer.” — *T.D.*



An aerial view of Honokohau small boat harbor and the boat storage yard.

State Land Use Commission Bars Vacation Rentals in Farm Dwellings

On August 13, the state Land Use Commission unanimously approved a petition from Hawai'i County for a declaratory order confirming that short-term vacation rentals (STVR) are not acceptable uses of farm dwellings in the Agricultural District.

The commission also denied a petition by owners of STVRs in the island's Agricultural District to have the LUC find that such use is allowed under state law and the county's 2018 ordinance regulating STVRs. All of the owners had applied for non-conforming use certificates to continue using their dwellings as vacation rentals under the ordinance, but were denied by the county Planning Commission.

Their attorney, Cal Chipchase, argued that the ordinance prohibits only those rentals of less than 31 days outside permitted STVR zones and does not speak to how a dwelling is used. Given that, he argued, STVRs in the Agricultural District would not necessarily conflict with state statutes that require that farm dwellings be 1) where the dwelling is used in connection with a farm or 2) where agricultural activity provides income to the family occupying the dwelling.

"Who is using [the farm dwelling] and why it's being used is entirely irrelevant to the county. All that matters is 31 days. Even if the tenant was a farmer who was going to farm the property for less than 31 days, it would be considered a short-term vacation rental [under the ordinance]," he said.

"The problem I keep having is that it's the use that matters," Commissioner Nancy Cabral told Chipchase.

John Mukai, corporation counsel for Hawai'i County, later pointed out that in this case, all of the petitioners Chipchase represents have applied for a non-conforming use certificate to continue their STVRs. "So there is an admission by the petitioners that their activity falls within

the definition of your short-term rental," he said.

Several commissioners said they found arguments presented by Dawn Apuna, counsel for the state Office of Planning, particularly convincing. Apuna pointed out that STVRs are not a permitted use under Chapter 205 of Hawai'i Revised Statutes, which describes the uses allowed in the various state land use districts. "Importantly, if the use is not listed, it is prohibited," she said.

Apuna explained that purely residential use of dwellings has never been allowed in the Agricultural District, even before Ch. 205 was amended in 1976 to define the term "farm dwelling." In 1962, she said, the attorney general opined that a single-family residence could not be sustained if it subverted the agricultural intent of the Agricultural District. Otherwise, it would "render district boundaries meaningless," she said.

PHOTO: COURTESY OF STAR GAZING DOME (VIRGO) AIRBNB



The owner of this property in the Agricultural District recently attempted to get a special permit from the Hawai'i County Planning Commission to operate these vacation rental units (See story on opposite page). The county has said that owners of other short-term vacation rentals in the Agricultural District who have been denied non-conforming use certificates could seek such a permit.

"As controversial and time consuming as these distractions have been, they are ... irrelevant," Apuna said of the STVR owners' arguments.

Planning directors for Maui, Kaua'i, and Honolulu all submitted letters in support of Hawai'i County's petition, as well.

Kaua'i planning director Ka'aina Hull stated that his department had received applications for non-conforming use certificates for transient vacation rentals (TVR) in the Agricultural District and county ag zone "and none of them could meet the definition of a farm dwelling unit."

He added that some TVR owners, then sought special use permits, which allow for uses that are otherwise prohibited in the Agricultural District. Qualified applications were approved. "The special permit process under HRS 205-6 underscores the regulatory regime's process to entertain TVR uses on agricultural lands dependent upon each respective county's zoning regime; however, it also further underscores that TVRs are not farm dwellings, and TVRs are not an outright permissible use on agricultural lands," he wrote.

Commissioner Dan Giovanni asked Mukai whether Hawai'i County has a process similar to Kaua'i's, by which a landowner could apply for a special permit for its STVR.

"Yes. These petitioners could do the same thing," Mukai replied.

"You're saying they don't automatically get an STVR in a farm dwelling," Giovanni pressed.

"It would be a non-conforming use and we would require a special permit," Mukai replied.

Commissioner Gary Okuda made the motion to grant the county's petition and deny the STVR owners. He raised the fact that the commission, in a previous order, found that Chapter 205 does not authorize residential dwelling as a permissible use in the Agricultural District, unless it's related to an agricultural use or is a farm dwelling.

Commissioner Dawn Chang later added, "Clearly, other counties agreed with that. We received testimony from all other counties. This demonstrates the desire to have the LUC define farm dwelling and the intention of agricultural lands ... that the farm dwelling has to be related to agricultural activities." — *T.D.*

Application for 40-Unit Lodge in Kona Is Withdrawn Following LUC Ruling

On August 13, the state Land Use Commission voted to grant Hawai'i County's petition for a declaratory ruling that short-term vacation rentals are not allowed for dwellings in the state Agricultural District. In so doing, it agreed with the county's position that the state law on agricultural tourism allows short-term overnight stays only in a county "that includes at least three islands" (i.e., Maui County). And even then, the overnight activities must "co-exist with a bona fide agricultural activity."

Exactly one week later, the Hawai'i County Leeward Planning Commission was scheduled to consider an application for a Special Permit to operate a 40-unit lodge, plus a two-story central kitchen and lounge area, on 14.9 unsubdivided acres of a 294-acre parcel in the Hokukano area of Kona. The proposed accommodations were prefabricated dome structures to be erected on platforms to be served by a total of 10 septic systems.

County Planning Director Michael Yee was recommending against approval. In his report to the commission, he noted that while a permitted house had been built on the property in 1997, more recently, the landowner, Fairview Avenue Hawai'i, LLC, had put up three dome structures and two enclosed tents. These had been advertised for short-term stays on AirBnB and other internet sites. According to one landowner in the area who submitted comments, there were already "at least seven airbnb's on the applicant's property" that were advertised online. (In the permit application, the owner's planning consultant, Zendo Kern, stated that three "demonstration domes" had already been built. He said nothing about the additional accommodations nor did he address the complaint that they were already being rented. Yee informed *Environment Hawai'i* that the county was undertaking enforcement action in light of the unpermitted structures and use.)

Dan Orodener, the state LUC's executive officer, submitted comments,

noting that the state's land use law allows "for short-term agricultural tourism overnight accommodations only for the county of Maui, when other pre-conditions exist. For the other counties, bed and breakfast operations, lodges, and transient vacation rentals in properties within the state Agricultural District would be considered overnight accommodations. It should therefore be noted that while 'agricultural tourism' may be generally allowed on a property if there is an ordinance in place, overnight accommodations are not allowed even though they may be proposed in conjunction with 'agricultural tourism.'"

Mary Alice Evans, director of the state Office of Planning, cautioned that "approval should be based on whether the lodge use would be considered as an 'unusual and reasonable' use within the Agricultural Land Use District. ... A 40-unit lodge intended for short-term visitor accommodation is not consistent with the objectives of the Agricultural District."

A number of landowners in the Hokukano area also submitted comments; none was in favor of the proposal.

Just days before the Planning Commis-

sion was to hear the application, the landowners, based in Hayward, California, asked that the hearing be delayed until at least October, in order that the concerns of neighbors could be addressed.

On August 20, just moments before the Planning Commission began its meeting, the planning director was notified that the landowner was withdrawing the application.

Still, commissioner Mark Van Pernis, himself an attorney, had a question about the appropriateness of vacation lodgings in the Agricultural District.

"In light of the recent Hawai'i Supreme Court [sic] decision stating that the county can ban vacation rentals on agricultural land," he said, "my inquiry is, will this decision ... prohibit such applications in the future? And the corporation counsel can deliver his opinion when available."

Deputy corporation counsel J Yoshimoto replied: "Just to restate the question, so I understand it correctly, in light of the recent Hawai'i Supreme Court decision regarding [short-term vacation rentals] on Agricultural land, the question is whether this affects any applications moving forward. Is that correct, Mr. Van Pernis?"

On hearing Van Pernis agree to that characterization, Yoshimoto said, "I'll work on that and advise the commission accordingly." — *P.T.*



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Commission Approves Plan To Manage Water Shortages in Pearl Harbor Aquifer

On August 14, the state Commission on Water Resource Management approved a Pearl Harbor Water Shortage Plan, which dictates how the commission will determine when there is a water shortage and the actions various types of permitted users of the aquifer area must take to help protect the resource.

In addition to drought declarations by the USDA and the Honolulu Board of Water Supply, declines in water levels in the state's six deep monitoring wells on the island may also trigger whether the commission declares a shortage watch, alert, or warning.

If a warning is declared, permittees who draw water for municipal or military uses will have to reduce their water use by 15 percent of their last reported monthly pumpage before an alert was issued. Those with permits for industrial or golf course use will have to reduce their use by 20 percent. (Under the commission's administrative rules, permittees are required to submit monthly water use reports and violations are subject to a maximum fine of \$5,000 per violation per day.)

Domestic users and those with permits for habitat maintenance will simply have to follow the water use shortage plan that they prepared as a requirement of their permit approval.

A water shortage watch would not require any cutbacks, and an alert would simply require all permittees to follow their individual water shortage plans.

Commissioner Wayne Katayama asked the planning branch's Lenore Ohye if the commission had the ability to control the military's water use. Commissioner Kamana

Beamer mentioned that a recent water audit showed that the military was by far one of the largest water users on the island.

"According to the Navy, it's voluntary," Ohye said of its compliance with the water shortage plan. She said the commission has had a problem even getting the military to apply for the state water use permits. "We agreed to disagree. They submitted their applications," she said.



The Water Commission's six deep monitoring wells on O'ahu.

"They do have that trump card over the state," she said, adding that they did submit a water shortage plan. "We're very appreciative of their cooperation," she said.

"Congratulations," Katayama replied.

In approving the plan, the commission added a condition that staff must reach out to the public for further comments and report back in one year. The addition was in response to testimony that the public had not had ample time to review the plan.

Rising Waters

Currently, freshwater levels in all six of the deep monitoring wells in the Pearl Harbor Aquifer Sector have increased since 1995, when O'ahu Sugar Company ended its

sugarcane operations, according to Patrick Casey, a geologist with the Water Commission's survey branch. Levels have increased 0.21 to 3.7 feet, depending on the well.

The wells penetrate hundreds of feet through the freshwater basal aquifer into the underlying brackish water and then to the salt water below. Up until the COVID-19 epidemic, commission staff would visit the wells quarterly to collect measurements on water temperature, depth, and salinity.

All but one of the aquifers have a relatively thick freshwater section, with a smaller brackish transition zone. The well in Halawa near Red Hill is "a little unusual," Casey said. It has just 100 feet of freshwater over an unusually thick brackish zone.

"We have an up flow of brackish water from somewhere, we don't know where. It displaces the freshwater."

Commissioner Paul Meyer asked whether there is any geological reason why the brackish layer should be so thick.

"USGS has spent some time looking into this. It's a mystery that hasn't really been unravelled. ... In our studies at Red Hill, we're finding it's a very complex geologic setting. Things are not as simple as we thought it might be," Casey said.

"This might be a very local phenomenon because we don't see it anywhere else. ... USGS is very curious about this. Some thought and some energy being is put to trying to explain it," he continued.

Commissioner Mike Buck asked Casey what he thought will happen to water levels as the level of sea water rises.

Casey said whether influenced by climate change or overall pumpage, the aquifer area is huge and water levels do not change rapidly. Trends may develop, "but what causes them could be a number factors," he said.—*T. D.*