

Environment



Hawai‘i

a monthly newsletter

Homing In On the Homeless

In recent years, the problem of homeless encampments in urban and rural areas of Hawai‘i has grown, with efforts to address it by various county and state agencies often seeming fractured and uncoordinated.

In a recent briefing to the Board of Land and Natural Resources, however, the affected agencies of the Department of Land and Natural Resources explained just how intractable – and expensive – homeless encampments on state land have become.

As board chair Suzanne Case commented, her staff is to be commended – and especially homeless coordinator, Pua Aiu – for efforts to begin developing a coordinated approach to dealing with it. Just how far those efforts can go, with staff stretched thin and resources directed elsewhere, remains to be seen.

But getting a grasp on the scope of the problem is a much needed first step toward addressing it.

BOARD TALK

DLNR Steps Up Efforts to Manage Homelessness Across Public Lands

For the last five years, the state Division of Conservation and Resources Enforcement (DOCARE) has basically had to ignore its normal duties of protecting and helping manage Hawai‘i’s natural resources.

“Homelessness has taken away from all that,” DOCARE officer Gerard Villalobos told the Board of Land and Natural Resources at an October 23 briefing.

DOCARE, the enforcement arm of the Department of Land and Natural Resources, has been spending more and more time dealing with the homeless on state lands, and Villalobos expects things to worsen with the economic fallout from the COVID-19 epidemic.

“I don’t see any end in sight, really, because it just seems to have gotten worse,” especially on O‘ahu, he said.

DOCARE is not the only DLNR division grappling with increased home-

lessness. During the briefing, organized by agency homeless coordinator Pua Aiu, representatives from the Land Division, the Division of Boating and Ocean Recreation (DOBOR), the Division of Forestry and Wildlife (DOFAW), and the Division of State Parks detailed the challenges each of them are facing.

Some examples:

- The Land Division was cited by the state Department of Health for a wastewater violation stemming from an unauthorized village for the homeless that was hastily erected earlier this year on a vacant lot in Waimanalo by a local non-profit.

- Homeless people have begun to live in vacant boats at the state’s small boat harbors.

- Firefighters with DOFAW have encountered toxic fumes as fires pass

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PHOTO: DLNR

An illegal encampment on state land in Kapa‘a, Kaua‘i that was cleared out a few years ago.

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NEW AND NOTEWORTHY

Wait a Minute: On October 22, the Sierra Club of Hawai'i asked 1st Circuit Judge Jeffrey Crabtree to force the state Board of Land and Natural Resources to wait until its December 11 meeting to consider renewing four revocable permits to Alexander & Baldwin, Inc., and East Maui Irrigation.

Those permits, which would allow the companies to continue diverting tens of millions of gallons of water a day from East Maui streams, are the subject of a lawsuit the Sierra Club filed against the board last year. Among other things, the group has argued that the Land Board failed to ensure that the diverted water is not wasted or that the diversion structures are not harming stream life.

Parties to the case made their final arguments in September. (In our October issue, we erroneously stated that the arguments were heard in June.)

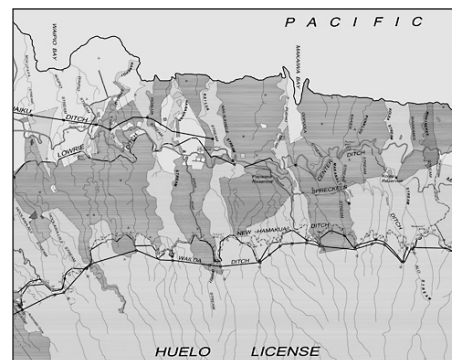
The Department of Land and Natural Resources planned to bring the permits to the Land Board for renewal at its November 13

meeting. In an October 15 letter, Sierra Club of Hawai'i executive director Marti Townsend asked Land Board chair and DLNR director Suzanne Case to give Judge Crabtree more time to rule on the case, but the state would not commit to a one-month delay.

The group then filed a motion for a limited preliminary injunction. "A BLNR vote on these permits before this court issues a ruling would prejudice the Sierra Club and undermine judicial economy," wrote the group's attorney, David Kimo Frankel. He added, "The defendants will argue that these claims would be rendered moot if BLNR votes on these permits before this court renders its trial decision. Moreover, a premature BLNR vote will unnecessarily spawn satellite litigation."

He argued that the Sierra Club is likely to prevail in its underlying claims, having showed that the Land Board failed to: "(1) protect the streamflow of 13 streams (in any way whatsoever); (2) address the harmful diversion structures on public land, (3) scrutinize A&B's request (including most of the water it takes from east Maui streams that is lost); and (4) ensure that A&B cleaned up all its trash that litters public land."

He continued that the Land Board's refusal to "admit even one iota of a shortcoming suggests that the BLNR Defendants are going to repeat the error of their ways – requiring another trial in another two years."



Huelo license area, East Maui

A hearing on the motion is scheduled for November 12.

Cell Tower Approved: After AT&T filed a federal lawsuit over the denial of a permit to erect a monopole in the Hawai'i County district of Puna, the county's Windward Planning Commission has reversed itself. On October 1, it granted the company the permit it sought, allowing AT&T to move forward with erecting a monopole tower, disguised as an evergreen tree, on a small portion of a 20-acre lot in the Hawaiian Paradise Park subdivision.

The reversal came after the county Corporation Counsel and attorneys for AT&T arrived at a stipulated agreement, approved by federal Judge Kenneth J. Mansfield. That agreement required the commission to reconsider AT&T's application within 90 days of September 8, the date when the stipulation was filed with the court.

When the commission re-heard the application, AT&T amended the proposal to move the monopole 13 feet to the northeast, pushing the fall radius even further from a parking lot, playground, and disused basketball hoop.

Several individuals testified against the application, but not nearly so many as voiced opposition when the commission rejected it in March. In the end, the commission voted to approve the application, 5-0.

(For background, see the "Cell Tower Challenge" item in the New & Noteworthy column of the August 2020 edition of *Environment Hawai'i*.)

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Quote of the Month

*"It may be, at some point,
we have to accept this as
a new reality and set up
semi-permanent camp sites,
instead of this random
whack-a-mole situation."*

— Land Board member Chris Yuen
on homeless camps on state lands

Guest Ranch in North Kohala Gets Approval to Continue Operations

Last month, the Hawai'i County Lee-ward Planning Commission voted unanimously to approve the application of Kupunakane Ranch, LLC, dba Puakea Ranch, to run a hotel on 14.9 acres of land in the state Agricultural District in North Kohala. Plans call for seven cottages, housing up to 38 overnight guests, and construction of a pavilion and parking lot. In addition to hosting tourists, weddings, and other large events, owner Christine Cash has said she wants to use the facilities for horseback riding, cooking classes, and yoga retreats, among other activities.

The land is part of a larger 32-acre parcel that Cash purchased in 2006 and where she has operated a multi-structure lodge for at least the last 11 years. The 14.9 acres where the permitted activities are to occur are just shy of the threshold of 15 acres that would require approval from the state Land Use Commission rather than the county-level Planning Commission.

Some of the structures used as guest accommodations are old houses dating to the early 1900s that once accommodated workers at the former Puakea Ranch. At least two of them were moved to Cash's property from an adjoining parcel. The relocations were permitted by the county, but came with requirements to obtain permits before they could be occupied.

Cash rehabilitated them with new kitchens and furnishings, dug private pools, installed Jacuzzis, and built bath-houses alongside them. Beginning in 2008, she and her partners – James H. Nelson IV and Livmar Enterprises, Inc., all of Beverly Hills, California – rented them out to guests for several hundred dollars a night. Other structures were entirely new builds. An Airstream trailer was brought onto the property as well and used to house paying guests.

In none of those cases, however, did Cash receive building permits or other approvals from either the county Planning Department or Public Works Department. On January 13, 2009, following publicity about the operation as well as complaints from neighbors, the Planning Department sent inspectors to the ranch.

At that time, an employee of the ranch informed the inspectors that there were

four dwellings on the site, but that Cash did not rent out any of them. He also told them that Cash was “fixing up the original house on the property known as Yoshi's house and will be moving into the house once it is finished,” that she “does not have any web sites promoting a guest ranch,” and that a second house “is for Ms. Cash's friends to use when they come to visit.”

But five structures were identified by the inspectors: three dwellings, a garage with tool room, and another vacant structure. In addition, there were two swimming pools and a “tent-like structure” being used as a residence. Online advertisements for the ranch listed yet another structure, a “Luxury Tree House,” that the inspectors had not noticed.

As for the statement that there were



Yoshi's house.

no websites promoting a guest ranch, planning inspectors found a listing on the VRBO (Vacation Rental by Owner) website, advertising at least three accommodations.

Then-Planning Director B.J. Leithead-Todd issued a Notice of Violation and Order to Cash and her co-owners on March 19, 2009. She noted that no occupancy permits had been issued for the two relocated structures. Furthermore, Real Property Tax Office records identified just one “salvaged building with a value of \$26,000” on Cash's property, with that same office having no records at all for either residences or commercial buildings on the lot. Finally, the Department of Public Works had not issued any of the required permits for the two swimming pools inspectors noted.

Leithead-Todd informed Cash that she was in violation of the Hawai'i County Zoning Code by operating a guest ranch

without a permit and by operating it “in structures for which no building permits have been issued and in structures for which no farm dwelling agreements have been executed.” Cash was ordered to “immediately cease and desist” the operation of the guest ranch, cease occupancy of any unpermitted dwellings, and remove all online advertising for Puakea Ranch. And she was ordered to do so by April 15, 2009.

The vacation rentals did not cease. The weddings did not cease. Instead, in 2011, Cash applied for the Special Permit needed to legally operate a guest ranch in the state Agricultural District. But the application languished with no follow-through while operations continued.

Another violation notice was issued in 2015, to no apparent effect. The county issued a stern warning letter in 2016. Again, there was no compliance.

In March 2017, and in response to a number of complaints from neighbors relating to noise from parties and celebrations held on Cash's property, the county once more issued a Notice of Violations, with each day of ongoing violation racking up a fine of \$100. Cash filed an appeal with the county Board of Appeals, but dropped it before it could be heard.

Nothing changed at Puakea Ranch. In July of that year, Planning Director Michael Yee reiterated the order for corrective actions listed in that March letter.

The order was ignored.

April 2018 brought yet another Notice of Violations, the fourth. This time, fines were levied at \$500 for each ongoing day of non-compliance.

Still nothing altered.

Finally, in November 2018, the county sued Cash and her co-owners. At that time, the county calculated the total fines and related costs at \$197,500. The complaint sought to enjoin the owners from using the property as a guest ranch, to enjoin further construction on the property without permits, and to enjoin the use of an open recreational pavilion that had been built without permits.

Facing harsher action than the Planning Department alone could impose, Cash and Co. agreed to submit an environmental assessment and apply for the Special Permit the county had been requesting for the past decade. At the same time, the county agreed to stay action on the complaint pending the processing of

Continued on next page

Cash's application for the permit.

At the time the stipulation was reached, last December, the county submitted to the court a declaration of Horace Yanagi, a Planning Department inspector. As of September 30, 2019, Yanagi stated, fines totaling \$358,000 remained unpaid.

'Throwing a Hammer' – Not

"I've stepped into violations more than previous directors," Michael Yee, the current planning director, told the commission as he began presenting his own recommendations. Yee is the third director to have dealt with Cash and the unpermitted activities at Puakea Ranch.

"This was clearly a case with a long history," he said. "But if you get mired into the past, it becomes difficult to see a way out of the woods."

Yee described how in early 2017, soon after he was named to his position by Mayor Harry Kim, he met with Cash. "I went to the site and tried to understand the issues."

In explaining what some have described as a too-lenient approach to dealing with the violations, Yee said, "throwing a hammer of violations and fees

to cure problems is not always the most successful approach. We have thousands of violations on the island and work with the owners to arrive at a solution. If you get mired into the county playing the enforcer, I'm not sure it gets the county to a better result."

In this case, he continued, "it has been trying to understand how we could get them to a Special Permit application. The violations eventually went into litigation and are off my desk. As those fines and fees have been accumulating over time, I want to say that there was a stipulation for Christie Cash to stop her operations—and that has occurred, in certain areas."

As far as the outstanding fines are concerned, "if we can find a resolution forward with a Special Permit, then we can address what will happen to the fines and fees."

Asked by commissioner Mark van Pernis whether any fines would ever be paid for past infractions, Yee explained that normally, he would have the ability to waive or reduce fines in connection

with violations being cured.

"I will say, typically, of a lot of violations that get cured, when they're still sitting in my court and haven't gone to corporation counsel," Yee said. "I have a lot more leeway to reduce fines. In this case, it's a little more complicated. I wouldn't say anything's been waived yet, but, again, I'm apprehensive to throw down a penalty so large on anybody that it becomes a hole they can't get out of."

Cash then made her own plea to the commissioners to grant the permit. When

figure mentioned by some people in their testimony opposed to the application. "It's completely wrong, completely fabricated," he said. "The only reference in court documents is something that accumulates to \$197,000 dollars."

(As noted above, as of September 30, 2019, the amount was \$358,000. In the time since that figure was calculated, 11 months have passed, with daily fines of \$500 a day. At roughly \$15,000 a month, that figure would have increased by \$195,000, for a total of \$553,000. The stipulation did not toll the accumulation of fines.)

Finally, Chin circled back to disparaging the neighbors who he seemed to blame for the problems his client was facing.

"There's a profound disconnect in terms of what people think is happening up there at Puakea Ranch. On the one hand, Christie Cash is a developer holding drunken hot-tub brawls up there on the ranch, with rock music that's going on past 1 a.m., accumulating a half million dollars in fines from the county and basically just causing havoc in everything that she does. That pilikea – which was very upsetting to listen to, frankly, because so much of it

was inaccurate, but also because it just sounded like people who are using this area as a retirement community to create gentleman ranches, that I'm not sure is really the ultimate policy of what Hawai'i County wants ... but it's also people who are essentially saying the exact same kind of picture of a neighbor that they said in their testimony to the Pasadena community association or to the Menlo Park association at their other properties when they didn't like what their neighbors were doing."

Cash, he concluded, "just wants to restore an existing guest ranch [that's been there] for more than a hundred years, long before any of the McMansions that have been built up in that area."

Commissioner Michael Vitousek also referred to the property as having "always been used as a guest ranch," saying that "its continued use as a guest ranch is important to its maintenance and survival as a historic site." He asked, however, that a condition be included requiring Historic

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Puakea Ranch.

PHOTO: ENVIRONMENTAL ASSESSMENT

she purchased the property in 2006, she said, the ranch "was in a state of neglect and disrepair. I did what I could to restore the buildings to their original condition." She obtained old records and interviewed former residents who shared some of their photographs with her.

Then her attorney, Doug Chin, the former state attorney general, made his arguments. Violations happen, he said, especially in what he called a "complaint-driven system." "By that I mean, ... if you have a small number of vocal people, such as certain neighbors of Ms. Cash, who consistently barrage the county with complaint after complaint after complaint, that will result in violations. As the department well knows, these are daily fines. So the number, or the quantity of fines we are talking about, certainly it's a high number, but also something that occurs because of the number of complaints from people who want to make complaints."

Chin disputed claims that the accumulated fines approached the \$500,000

False Killer Whale Take Reduction Team Fails to Agree on Meaningful Measures

At the virtual meeting last month of the False Killer Whale Take Reduction Team (TRT), it became clear, early on, that agreement on substantive recommendations the group is tasked with making to the National Marine Fisheries Service (NMFS) would be difficult, if not impossible.

"Lots of things have changed since the TRT was formed," noted Ryan Steen, an attorney and a member of the team representing the interests of the Hawai'i longline fishery,

A new abundance estimate from NMFS for the pelagic population "changes the fishery's view on this process and calls into question all the time, effort, and money spent on [it] since 2009," he said.

That year, NMFS was petitioned to list the insular population of false killer whales as endangered, given new and startling research suggesting a dramatic decline in that population corresponding to the rise over the previous two decades in the Hawai'i-based longline fishery.

In 2010, under the Marine Mammal Protection Act, NMFS established a Take Reduction Team to examine potential ways of mitigating the bycatch of the animals and rebuilding both the pelagic and insular populations, and to make recommendations to the agency, which will inform its Take Reduction Plan, adopted as a rule. Among other things, the plan, adopted in late 2012, calls for the reduction, within six months of its implementation, the number of animals harmed to less than the so-called potential biological removal (PBR) – the number of animals that can be taken out of the population as a result of human activity while still allowing the population to reach or maintain its optimal level. Within five years, bycatch levels should approach zero or, at least, fall below 10 percent of the PBR.

To facilitate the removal of gear from animals that are hooked, the fishery was to employ weaker hooks, allowing them to be straightened when tension is applied,

and stronger branch lines, which would resist breaking and possibly entangling the whale. Training of captains and crew is also an important part of the plan.

Finally, if the longliners kill or seriously injure two false killer whales within the EEZ in a calendar year, the waters in some 112,000 square miles of the EEZ south of the islands – an area known as the Southern Exclusion Zone (SEZ) – are placed off-limits to the fishery. In July 2018, the SEZ was closed and it remained closed until the end of that calendar year. Just two months later, with two FKW hooked inside the EEZ and determined to meet the mortality/serious injury criteria (M&SI), the SEZ was closed again and remained closed until August of this year.

For the last couple of years, the longliners were anticipating NMFS's release of the updated population estimate for the pelagic (open-ocean) stock, expecting that this would result in relaxed limits on the fishery and even allow the threat of the SEZ closure to be eliminated.

In fact, Michael Tosatto himself, administrator of NMFS's Pacific Islands Regional Office, suggested as much last

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Puakea from Page 4

Preservation Division review of proposed alterations to the 14.9 acres of the Special Permit area and that an architectural inventory survey be done.

Commissioner Faye Yates expressed her support for the ranch's operation, saying that many local people used it for baby parties and other celebrations. She asked that, if the permit was granted, provision be made for allowing such uses to continue.

When all was said and done, the commissioners voted to approve Yee's permit conditions, with amendments suggested by Vitousek plus three proposed by Chin just two days before the meeting.

Property Taxes

In Hawai'i County, as in other counties across the state, property taxes are based on the value of land and improvements. And when permits for improvements are issued, the Real Property Tax Office is notified and the value of those improvements are then folded into assessments it makes and on which real property taxes are levied.

In the case of Puakea Ranch, at the

time that Cash and others purchased the property in 2006, the only improvements that the Tax Office showed on the site were two utility sheds. Taxes for the entire 32.411-acre property were \$249.67. Even now, the only improvements shown on the tax records are those two utility sheds plus three gunnite pools installed in 2019.

For 2020, even with the 13 structures and improvements that Cash has made, the tax bill is just \$6,776.

Many of the individuals commenting on the draft environmental assessment that was prepared in connection with the Special Permit application noted the discrepancy between the obvious income-producing improvements Cash had made and the property tax bills she paid. The response letters stated only that Cash had fully paid all her legal tax bills.

Public Works Concerns

While the Planning Department's issues with Cash may have been addressed by the approval granted by the Planning Commission, there remains outstanding a Notice of Violation that was issued in July by the Department of Public Works.

The DPW sent inspectors to the property in October 2019 and found numerous violations. As stated in the Notice of Violation, the violations "include by are not limited to: unpermitted construction and/or modification of 13 structures, 2 hot tubs, and 2 pools."

A deadline of August 28, 2020, was set for corrective actions. Either Cash would have to obtain the required permits and allow inspections of the unpermitted work; or she would need to "submit a detailed corrective action plan and schedule for the necessary work, for review and approval" by the DPW; or "remove the violation."

Neal Tanaka, acting deputy chief for the DPW Building Division, said that in response to the notice of violation, he had heard from the owners and their attorney. In light of the then-pending decision of the Planning Commission, further action on the violations noted in the inspection report were placed on hold. Given Planning Commission approval of the Special Permit, he said, the applicants would then need to bring the structures noted in the violation into compliance with building regulations. — *Patricia Tummons*

spring. In comments to the Western Pacific Fishery Management Council, Tosatto suggested that in the event the new population estimates increased the PBR for the insular population, NMFS might “sort of walk away from a TRT wholly.”

Those New Estimates

When NMFS finally unveiled its new abundance estimate, which informed the discussion at the TRT meeting in October, it put the pelagic stock at 2,086 individuals, with a PBR set at 16 animals per year within the EEZ. NMFS determined that the five-year average of M&SI for this pelagic stock was 9.8 per year.

The most recent abundance estimate for the insular stock was made in 2015, at which time the population was pegged at 167, with a PBR of 0.3 animals per year, or about one animal every 3.3 years. The average annual M&SI for this stock for the 2014-2018 period was 0.03, or 10 percent of the PBR losses that NMFS believes the stock can support.

But while the estimates of mortality and serious injury among both populations of false killer whales fall below PBR, other objectives of the take reduction plan are unmet.

The goal that incidental takes of false killer whales be reduced to “insignificant levels approaching zero” – functionally, less than 10 percent of PBR – was not met in the 2014-2018 time frame.

Also, the goal of no increase in the M&SI of the pelagic stock taken on the high seas (outside the EEZ) was not achieved. At the time the plan was implemented, the annual M&SI for this population was 11.2 animals. But for the 2015-2019 period, the actual number was

28.8 a year. (For that same stock inside the EEZ, there was still substantial estimated take. For 2019, a six-year high of 25 animals were thought to have been killed or seriously injured in interactions with the deep-set longline fishery.)

Soon after the new figures were presented to the take reduction team, Robin Baird of the Cascadia Research Collective noted that the mortality and serious injury estimates are almost certainly lower than the actual number of animals harmed. “There are a lot of unobserved fisheries,” said Baird, who has extensively studied false killer whales and other more cryptic whales and dolphin species in Hawaiian waters. “For example, I know of depredation-type interactions occurring in unobserved fisheries, from photos and direct observations people have reported to me. The insular stock is interacting with other unobserved fisheries.” (Depredation occurs when non-target animals, such as whales, attempt to take caught fish while lines are still in the water.)

“This is just one fishery, albeit the largest one,” Baird said, referring to the longliners. “The question is, how is mortality and serious injury occurring in other fisheries? ... The PBR for the insular stock is so small, and so many other fisheries interact with the insular stock, it wouldn’t take much to increase to the level PBR is reached.”

Elusive Agreement

Everyone on the TRT agreed that reducing interactions was the overarching goal. There was little agreement on how to achieve that.

In the past, gear changes had been viewed as a means of mitigating harm to hooked false killer whales. As Brendan

Cummings of the Center for Biological Diversity noted, the idea was that stronger branch lines and weaker hooks were required to be deployed on longline vessels. “The premise is this would straighten the hooks,” which, with the stronger branch lines, would allow the hooks to be pulled out with no break in the line. “What we’ve seen in the years since, approximately 80 percent of the time it doesn’t work. The branch lines break, or even if it doesn’t break, the hook doesn’t straighten. We need weaker hooks and stronger branch lines,” he said.

Cummings then suggested more experimenting with the new gear types. “If it works, we adopt it,” he said. “To the degree there’s an exchange in building consensus to get the fleet to accept that, the SEZ could be phased out and there could be a strong emphasis on electronic monitoring.”

Steen, however, rejected that. “Asking the fleet to change over all hooks isn’t acceptable. The SEZ has no place in the plan anymore and should be removed.”

One possible area of agreement identified by Steen was in the area of reducing depredation. “That was a big piece of the discussion early on in the TRT,” he said. “If we are going to be shifting focus, the fishery would like to pick that up again. Reducing depredation has the dual benefit of the fleet catching more fish and of keeping whales away from the gear.”

Dennis Heinemann, representing the Marine Mammal Commission on the team, agreed that the plan was not working well. “The bycatch rate in 2016 was way above the new PBR,” he noted. What’s more, the goal of reducing take to below PBR in the pelagic stock was achieved only because “we have a new estimate of population size,” which increased PBR.

“The trend for the last decade has been a strong and large increase in the number of hooks set per year. Given that there hasn’t been a change in bycatch per unit [catch per thousand hooks set], that means we’re just going to be catching more and more false killer whales. In the future, MSI is likely to be back up to where PBR is.”

Fisherman John LaGrange said that the plan was doomed to fail. “The fishery in general thought population estimates were unrealistically low, which has proven to be true. Fishermen universally think the

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False killer whales swim off the coast of Hawai'i.

FKW from Page 6

criteria for determining [mortality and serious injury are unrealistic....

"In fisheries population dynamics 101, if your effort is increasing and [catch per unit effort] is also increasing, that means the population is increasing," he said.

LaGrange then referred to the classification of the deep-set longline fishery as a Category I fishery by NMFS, which ranks fisheries according to the level of interactions with marine mammals that result in serious injury or death.

"The standard is supposed to be, if it's a rare event, it's category II or III. The point zero three [0.03 animals per year] is one animal every thirty years. If you divide that over the fleet, that'd mean one boat would catch an animal every 3,300 years, and if that's not a rare event, I don't know what is."

Heinemann suggested that the team look to what's being done in New England to reduce whale entanglements. There, a "risk-reduction model calculates risk reduction associated with different measures," he said. "Some are gear, or closures, or some have to do with different gear aspects."

"What they've realized there is the same thing we realize here. There is no silver bullet, no single silver bullet. The solution here may be like what they're trying to achieve in New England. Get 10 percent of MSI reduction from this measure, something else from that measure. And then you have an effective plan. We need to look at a broader range than just weak hooks and stronger branch lines. It might require a suite of measures that get you to all the goals of the Marine Mammal Protection Act."

In the end, the team was able to agree on recommendations to NMFS that involved further research on avoiding depredation, additional training of crews, and meta-analysis of data.

Ann Garrett, the assistant regional administrator of NMFS's Protected Species Division, told the team that she was disappointed with the lack of agreement on more meaningful recommendations. "The plan isn't working," she told team members. "I appreciate the recommendation for more studies, but we're looking at two years, probably three, before we get to a reduction of MSIs. But thank you all for your continued work on this problem." — *Patricia Tummons*

Comment Open on Draft Recovery Plan For MHI False Killer Whale Population

On October 16, the National Oceanic and Atmospheric Administration announced that a draft recovery plan for the Main Hawaiian Islands insular population of false killer whales had been prepared and was open for public comment.

The insular population, numbering 167 individuals, was listed as endangered in November 2012, but until now, no recovery plan had been prepared. Recovery plans for federally listed endangered species, or, as in this case, a distinct population segment (DPS) of a species, spell out the threats and the criteria for either downlisting (categorizing it as threatened) or delisting it altogether.

Most of the area presumed to be inhabited by the clusters of insular false killer whales is already off-limits to longline fishing vessels, whose interactions with false killer whales impact the wider-ranging pelagic population. According to the draft recovery plan, "commercial longline fisheries have very little overlap (about 5.4 percent) with the range of the [insular false killer whale population] due to a longline fishing prohibited area around the Main Hawaiian Islands." (The interaction of longliners with pelagic false killer whales is discussed in another article in this issue of *Environment Hawai'i*.)

But even if the insular population doesn't interact much, if at all, with longliners, it is still thought to interact with non-longline commercial and recreational fisheries, such as troll, handline, kaka line (where the line is set on or near the bottom or in shallow mid-water), and shortline fisheries. For all of these non-longline fisheries, regulatory and reporting schemes are practically nonexistent.

Vessels in these fisheries carry no observers, their owners have no reporting requirements, and their crews have no training in handling false killer whales and other protected species such as turtles and seabirds with which they may interact. This means that the degree of harm to the population caused by these fisheries is unknown. But that they do cause harm is evident in the scars on dorsal fins and mouthline injuries that are seen by researchers and scientists studying these animals.

One of the actions recommended in the draft plan is that threats from the non-longline fishing sector be addressed, "including incidental take and competition with fisheries for prey. Specifically, determine how, why, and which non-longline commercial and/or recreational fishery or fisheries may be causing serious injury and/or mortality by implementing adequate reporting requirements for those fisheries, coupled with enhanced outreach with fishermen who may interact with MHI FKWs. Implement management actions as needed to reduce incidental take and competition with fisheries, and monitor their effectiveness."

Other threats to the population called out in the plan include reduced prey size and abundance; environmental contaminants that bioaccumulate in the whales (for example, PCBs, pesticides such as DDT, and heavy metals) and naturally occurring toxins; changes to the ocean climate including warming, acidification, and low-productivity zones; harmful disease vectors that may increase as a result of climate change; anthropogenic noise; and marine debris.

Recovery to the point the population is delisted is expected to take at least 50 years and "assumes an increasing average annual population trend ... greater than or equal to 2 percent over two generations and assumes high resource investment into implementation of recovery actions," the plan states, with a minimum population of 406 individuals. "If resource investment into recovery is low to moderate or if the average annual population trend is not increasing at the predicted rate, then this timeframe may need to be revised." The earliest possible time scenario, NOAA says, is "at least 25 years based on the current reclassification criteria."

The cost? "We estimate the total cost of recovery over a minimum of 50 years to be at least \$346,866,000."

The draft plan is available for public comment through December 15. For more information, see: <https://www.federalregister.gov/documents/2020/10/16/2020-22950/endangered-and-threatened-species-draft-recovery-plan-and-draft-recovery-implementation-strategy-for>. — *P.T.*

Board from Page 1

through abandoned homeless camps.

And then there's the trash.

"State Parks has spent thirty to forty thousand dollars on contractors and roll-offs removing I can't even count the tons of rubbish from Diamond Head State Monument. ... You'd be amazed at the amount of rubbish people can pull up [the crater]," said State Parks administrator Curt Cottrell. "In addition to couches and tents, there's a water heater. Not hooked up to anything, but it's rubbish we have to pay the contractors to pull out," he said.

According to Na Ala Hele program manager Mike Millay, DOFAW staff has taken to cleaning camps left by the homeless. "The trash remnants left behind is horrendous and very time consuming to go pick that up when we're already stretched super thin on our capacity as is. They don't know if there's endemic species or endangered birds or species that they're clearing their camp with. They could be decimating where [the animals or plants] live. There's a lot of potential damage to cultural resources," he said.

DOBOR administrator Ed Underwood said that because of the large amounts of trash being left at the harbors, there is a water pollution concern. Aiu added that boats filled with trash are often found in the water.

Aiu said the DLNR has been able to partner with the state Department of Transportation on removing all of the junk. Accompanied by DOCARE officers, DOT contractor HTM "hauls off all of our big trash," she said. "It would be difficult to almost impossible without the HTM funding. We had to go from August to now without HTM funding. We're almost paralyzed. It's so

hard to do the cleanups without them. We don't have enough staff or money," she added.

Seeking Solutions

Aiu said that DOCARE has stepped up training of its officers on laws regarding the homeless and on how to recognize and handle people with mental health issues. With adequate MH-1 training on mental health issues, DOCARE officers will have the authority to require a person to undergo an involuntary 48-hour psychiatric evaluation, Aiu said, adding, "That will be really exciting to not have to rely on HPD [Honolulu police] to address those issues with us." (MH-1 is an Involuntary Application for Mental Health Evaluation.)

With regard to finding places for the homeless to go, the Legislature passed Act 212 in 2017, establishing a working group to identify state lands that could be used as temporary encampments. So far, the DLNR has not been able to find many lands suitable for shelters or other types of homeless housing.

"Most properties need to be flat and non-flood prone, have existing infrastructure and public transportation. We don't have any. We're looking at less-useful lands that require more mitigation, which is expensive," Aiu said.

She pointed out that the DLNR has already provided more than 70 acres over the years and across the state for homeless housing projects. The lands have been set aside or leased to various counties or to the Hawai'i Housing Finance and Development Corporation (an agency of the state Department of Business, Economic Development and Tourism) or other social service agency, according to Land Division administrator Russell Tsuji.

In the case of the village for the homeless in Waimanalo, however, his division is struggling to resolve the problems surrounding its creation. Many view the village — spawned by Blanche and Willie McMillan of the non-profit Hui Mahi'ai 'Aina, YouthBuild Waimanalo, and others — as a blessing.

"A place to call HOME is a priceless and beautiful thing," wrote Anei Kenison Hiona in her June 23 testimony to the House Committee on Housing in support of Senate Bill 2206. The bill would have allowed the Land Board to grant month-to-month permits for temporary emergency shelters and facilities for homeless people on state lands.

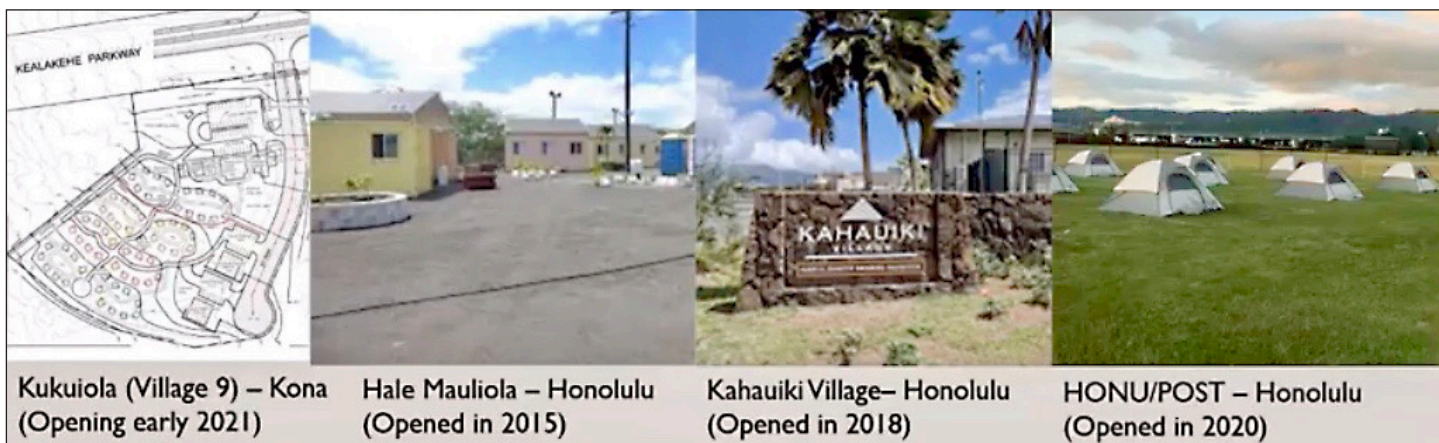
Although the bill did not specifically refer to the state parcel in Waimanalo where the Hui built housing for homeless, it seemed tailored to address the fact that the homes were built without any authorization from the state.

Hiona, who lives in one of the houses with her husband and eight-year-old daughter, stated, "I have had to move 12 times since my child was born! I cherish the opportunity to never be uprooted again. Everyday I wake up I know that we will always have food, shelter, family and friends around. I thank God daily for giving us auntie Blanche and her wonderful, caring family."

In addition to several residents of the village, the Hawai'i Kai Homeless Task Force and the Hawaiian Affairs Caucus of the Democratic Party of Hawai'i testified in support of the bill.

"While these kinds of camps are not the most ideal, given the challenges posed by COVID-19, innovative, short-term solutions need to be implemented to address the housing shortage. This measure would

Continued on next page



Kukuiola (Village 9) – Kona
(Opening early 2021)

Hale Mauiola – Honolulu
(Opened in 2015)

Kahauiki Village – Honolulu
(Opened in 2018)

HONU/POST – Honolulu
(Opened in 2020)

Some of the homeless housing projects on land under the jurisdiction of the Department of Land and Natural Resources.

help BLNR to implement a short-term solution,” wrote Hawaiian Affairs Caucus chair Juanita Brown Kawamoto.

While the bill would have required any permittees to indemnify the state, Land Board chair and DLNR director Suzanne Case testified that her department was “concerned about the actual effectiveness of this indemnity should the state need to invoke it.”

Although the Legislature passed the bill, Gov. David Ige vetoed it.

Had Ige signed the bill, the DLNR would still have to deal with the fact that the village is in a flood zone. “These structures do not comply with the flood plan or federal requirements, placing residents potentially at risk if it was to flood, as well as, potentially, the community on abutting DHHL [Department of Hawaiian Home Lands] homestead land. We got complaints from some in the area because of flooding in the general area,” Tsuji told the board.

In addition to the potential wastewater violation, he said the homes have not been subject to any environmental review. The Health Department wants the wastewater violation resolved and “we have informed the leader of this encampment of the DOH violation and we have been told they are trying to resolve it,” he said.

The flooding issue is still a big problem, he added. “From what we’re told by the Engineering Division, if we don’t correct this problem, it could have a larger impact for the state’s flood insurance program, so we’re taking this pretty seriously,” he said.

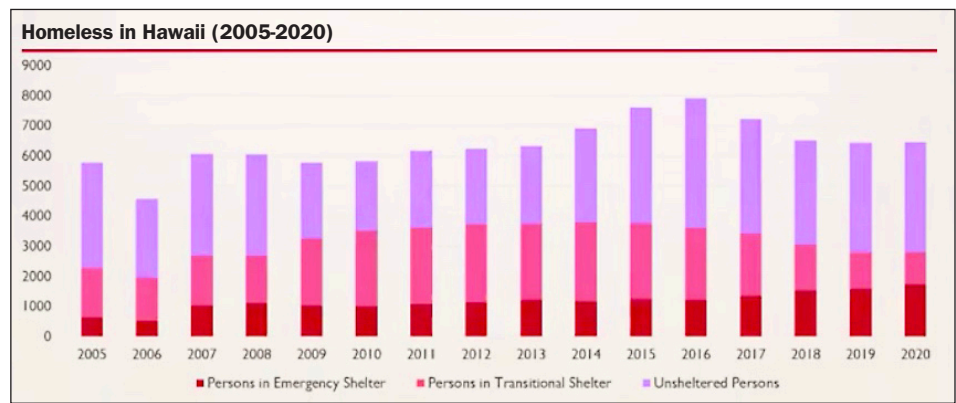
“It’s very likely at some point we would probably be before the board and try to resolve this,” he said.

‘Half-In, Half-Out’

Providing solutions for people who want to get into houses addresses only part of the problem, according to Case. “There are certain groups that are more hard-core criminals. They don’t necessarily want a solution here because they’ve got other priorities in terms of crime and drugs,” she said.

Villalobos and Cottrell concurred.

“These are humans that prefer the lifestyle of camping illegally in our wild land areas and adjacent urban interfaces. The conversations I’ve had with them is, they want this versus the rules of inhabiting a shelter,” Cottrell said.



With a drone, he said, his division was able to map 38 homeless sites in the rugged terrain at Diamond Head.

Aiu said some possible solutions could be to close certain hotspots, such as Kapena Falls State Park on O‘ahu, or to privatize the small boat harbors. Both would require approval from the Land Board.

“What we find is our areas are really popular because we have restroom facilities and we have water. It makes it very easy for people to set up camp. ... At the Wai‘anae small boat harbor, our water bill alone was exceeding revenues generated in the harbor at one point,” DOBOR’s Underwood said.

To prevent homeless encroachment in the state’s more remote, “underused” areas, Aiu suggested that the department could try to encourage more public use through things such as urban forestry. That might also require board approval, she noted.

Board member Chris Yuen said he had concerns about any request to the board to authorize an encampment.

“Strictly on an enforcement level, I don’t see why something has to come to the board. If someone is camping on State Parks who’s not supposed to, you cite them. If someone is on unencumbered land, cite them. Don’t bring it to the board. Just enforce,” he said.

Cottrell clarified that his division, at least, might bring to the board “some creative dispositions of land where there is an entrenched camp [with] the ultimate effect of trying to remove the population.”

With regard to the effect of citations, Cottrell pointed out earlier in the meeting, “There is no threat legally to these individuals. We’ve created, because of litigation and court cases and precedents, a new class of people that are virtually, at

this point in time, immune to any civil process that would break the cycle of their return.

“Gerry’s written countless citations to guys on Diamond Head. There are bench warrants for failure to appear. But one of the big problems is having our state law enforcement interface with county law enforcement. If someone is houseless, there is a very rigorous procedure to get them incarcerated. The counties and state law enforcement really need to work closer together in trying to essentially optimize how we deal with this.

“We know there are social pressures and protections in place, but absent any penalties, in the COVID economy, I anticipate we will be dealing with this situation in greater numbers over the next couple years,” he said.

Yuen conceded, “It may be at some point we have to accept this as a new reality and set up semi-permanent camp sites, instead of this random whack-a-mole situation. Set up a field, bathrooms, running water, storage lockers ... and you tell everybody ‘This is where you go.’”

Aiu said that is similar to the POST camp that the Honolulu Police Department has set up on DLNR land. Homeless people can even take their dogs there, she pointed out. But for some, there are still too many rules there, she said.

“I’ll take you up to Diamond Head. If you were homeless, that’s where you would want to live, honestly,” she said.

“Nobody wants our State Parks to be designated in this fashion. ... This sort of half-in, half-out living style, there’s no perfect place for that. It does tend to materialize in very opportunistic places,” Case said.

Aiu noted that the racial mix of homeless on DLNR land mirrors the state’s, where 35 percent is native Hawaiian.

Continued on next page

Board member Kaiwi Yoon asked whether any native Hawaiian organizations have helped the agency's efforts.

"It's a really difficult issue," she replied. She said the Office of Hawaiian Affairs is not really organized to deal with these kinds of issues, and the DHHL has homelessness on its own lands.

"Because of rules for DHHL, they cannot provide us with housing for homeless. That would mean people on the waiting list would get jumped over," she said.

"It's a big issue for us. It's ongoing. It's an expensive issue, a complicated issue. . . . It's getting worse in a COVID situation and COVID economy," Case said.

Board member Vernon Char admitted he was naive about how extensively the homelessness issue affected the DLNR's lands.

"It cuts across all divisions. . . . Whether we like it or not, we're a big player in this thing," he said. In addition to needing more funds from the Legislature, he said, the Land Board or the department should continue efforts to "pull things together and see if we can be of some assistance."

Case praised Aiu for her work in that regard. "She really stepped up for DLNR as our coordinator when this problem began to get bigger and bigger. She works very closely with all of the divisions, with Scott Morishige [the governor's coordinator on homelessness], with HPD. It's not your typical job in natural and cultural resource protection. She did really step up and the fact that we have a coordinated effort on this is pretty new and we appreciate it very much."



Dumper Claims DLNR Owes Damages for Removed Bin

As if the DLNR didn't have enough problems with dumping on its lands, late last year, the agency's Land Division learned that someone left a roll-off container full of trash on an unencumbered industrial lot in Mapunapuna, O'ahu. Despite the posting of a notice of violation on the container, another one showed up right next to it in January. A violation notice was placed on that one, as well.

The agency's maintenance crew eventually determined, based on the colors painted on the containers, that they belonged to The Trash Man, LLC, a refuse

hauler. Owner John Guinan explained in a February letter that his truck had broken down and the insurance for his equipment had expired, so the containers were left on the state parcel. And because the bins' loads had become too heavy under Department of Transportation rules to take onto the highway, he could not move them.

Later that month one of them was removed. The other stayed put. According to texts and correspondence between Guinan and Land Division agent Robert Medeiros in February, Guinan was prepared to deliver an empty container to take some of the load from the one on state land so it could be hauled away, but Medeiros advised him to hold off. The Land Division had already begun working with a competing hauler to remove the bin and its contents.

But nothing happened. And for months afterward, trash continued to pile up in and around the bin.

"[A]fter the roll-offs were placed on the premises, they served as an attraction for other people in the vicinity to treat the land as a dump site. So, rubbish started to accumulate very quickly," a Land Division report to the board states.

In early August, a state legislator emailed the DLNR photos of all the trash. The department then hired HTM to quickly remove the roll-off, despite Guinan's renewed offer to have his company do it.

In its October 9 report, Land Division staff recommended that the Land Board find The Trash Man liable for the \$3,278 it cost to remove the roll-off and its contents and \$1,758.54 in administrative costs. It recommended a fine of \$5,000 for the dumping, and charging the company \$17,431 in back rent for using the site from December 17 through August 5.

"[Guinan] decided to comply with the Department of Transportation rules about load limits on public highways and did not take the loaded roll-off onto the public highway. Nevertheless, he chose to ignore our posted notice prohibiting dumping on state lands by bringing in the roll-off containing rubbish onto our site without any authorization," the staff report stated.

Land Division administrator Russell Tsuji told the board that his agency would never actually rent the property for storing roll-offs, but opted to seek back rent,

rather than pursue the hefty fine that would have been allowed under DLNR rules. Under those rules, The Trash Man faced potential fines of \$500 a day for 233 days, or \$116,500.

"Due to the lack of timely response to this situation, Land Division acknowledges that it may not be equitable to impose the full amount of the fine against The Trash Man, LLC. Land Division is therefore amenable to accepting the payment of back rent for use of state lands together with the reimbursement of the clean-up cost and administrative charges and a fine of \$5,000," the report stated.

It added in a footnote, "O'ahu Land Division staff will have to conduct more programmed patrol or inspection of the parcels under the jurisdiction of Land Division in the future before any unauthorized uses of State lands become escalated. More immediate actions are needed to enforce any applicable statutes or rules governing the orderly management of State lands."

Faced with having to pay nearly \$30,000 in fines and costs, The Trash Man (TTM), through its attorney Thomas Zizzi, requested a contested case hearing.

In an October 8 letter to the board, Zizzi argued that because the company was prepared to remove the roll-off itself, it shouldn't have to pay any fines or costs. In fact, he said the DLNR should pay to replace the container that it had hauled away.

"The only reason the container remained on the site was because DLNR told TTM to not take action to remove it. Further, under the current governmental proclamations, eviction of a tenant has been suspended. If DLNR is asserting landlord rights to receive rent, then it is hereby implicitly asserting a tenancy upon under current proclamations," Zizzi wrote.

He then claimed that TTM could have easily removed the container and that the DLNR ignored the company's right to remove its own property.



Public Hearings On Proposed Waiea Reserve

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On October 23, the Land Board approved a request by the DLNR's Division of Forestry and Wildlife to hold virtual public hearings on a proposal to add 1,260 acres of former ranch land on the western flank of Mauna Loa to the state Natural Area Reserves system.

Formerly under lease to McCandless Ranch, the land, located a mile mauka of Highway 11, contains mesic and wet native forest ecosystems. Unlike other wet forest ecosystems in the state, which evolved under a winter wet season regime, the Waiea lands' 'ohi'a-dominated forests evolved under a summer wet season, a DOFAW report states.

Federally listed forest birds, including akiapola'u, 'akepa, 'alawi, and 'i'iwi, inhabit adjacent lands, which are under control of the U.S. Fish & Wildlife Service. The lands also used to support populations of the endangered 'alala, which is now, again, extinct in the wild. Three endangered bellflower species are scattered throughout the area.

DOFAW states that protecting the land will improve the watershed that area residents rely on for fresh water and reduce erosion.

"While Natural Area Reserves are generally open to the public, Waiea is landlocked so no public access is anticipated," the report states. DOFAW can, however, access the lands for management purposes through the adjacent National Wildlife Refuge.



'Ohi'a and uluhe forest in the proposed Waiea Natural Area Reserve.

(*Environment Hawai'i* has written about disputes over the Waiea tract between the state and the permittee since our April 1991 article, "A Decade-Long Standoff over Access to Wild Birds." That article and many more on the subject are available at environment-hawaii.org.)



Board Renews Permit To Kahala Hotel

The revocable permit approved by the Land Board last year for a 1.3-acre strip of beachfront land fronting the Kahala Hotel & Resort required Resort Trust Hawai'i to ensure public access "to the extent the area is not occupied for a use allowed under the permit." Those allowed uses included the pre-setting of 70 lounge chairs.

The permit also required the hotel to maintain two 20-foot wide mauka-makai pathways for public pedestrian access.

Those conditions apparently fell short of providing the type of public access that Land Board members, as well as longtime critics of the permit, believe is required.

When the DLNR's Land Division brought its recommendation to the board on October 23 to renew the permit with the same conditions as last year, board member Vernon Char voiced his concern that the existing signage on the property and the way the hotel had set out its chairs discouraged public use.

After having walked the site a day earlier, he praised the hotel for its excellent maintenance of the sandy beach fronting the state parcel. However, he continued, "it was unclear if the shower on the lot was available [for use by the public] and the chairs were spread pretty much throughout the grassy area so that it almost seemed preemptive from public use. ... It was not obvious to me where the public would have access."

Attorney Jennifer Lim, representing Resort Trust, replied that the entire property, including the shower, was open to the public. She said that there were signs indicating where the hotel's property was, a sign welcoming the public, and also signs informing people they are "welcome to pass through mauka to makai."

"The hotel doesn't restrict people on the property. Just the chairs that are permitted under the RP, those would be for hotel guests," she said.

In his testimony before the board, David Kimo Frankel, who had sued over the approval of last year's permit, explained why he believed the hotel and the board were obligated to do much more to facilitate the public's use of the land.

"[Land Division] staff never provides to you the origins and purposes of this lot. And that is, in the early 1960s, the Kahala Hotel Company, Bishop Estate [now Kamehameha Schools, which leases the land under the hotel to Resort Trust] and others wanted the City Council to rezone this property so the hotel could be built.

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In exchange for rezoning, Bishop Estate and the others promised to create a 'good beach for the public' and the public would have free access to it," he said.

He also pointed out in written testimony that the land had been "dedicated in a Land Court document, to be 'used as a public beach.'" And until the 1980s, the parcel was, indeed, a wide, sandy beach that extended up to the hotel property.

Since then, the lot has been grassed over and for years had been used by the hotel to host weddings, as part of a hotel restaurant, and for cabana rentals and other commercial uses. That is, it did so until Frankel, area resident Tyler Ralston, the Sierra Club and others complained and the city advised the company that those uses were prohibited within the Special Management Area.

The hotel has scaled back on the amount of furnishings it sets out on the property, but Frankel emphasized that there is still a significant section of the lot that is unused by the public because of a hedge the hotel planted in the 1980s. Nobody sits in that area because the hedge prevents anyone on the grass from seeing the ocean or getting into the water, he said.

"So when they give you this misleading statistic that 3 percent or 6 percent of the land is what they want to put their beach chairs on, that's because they ignore this entire area, the Diamond Head side of the property," he said.

He also argued that 70 pre-set beach chairs is too many. "All those chairs make it impossible for the public to use [the property]. What the hotel does is exclude people by putting the chairs out early in the morning, in the most desirable spots. Why are we reserving the best spots for the rich folks? That's not what a democratic society is supposed to be about," he said.

He recommended that the board include conditions in the new permit that would bar the commercial use of the property and prohibit the pre-setting of chairs.

"If you do that, the hotel will continue to maintain the property. ... It will allow the hotel guests to use the property, just as members of the public do, but not in a preferred way," he said.

Ralston argued against approving the permit and told the board that the hotel had actually excluded him from the prop-

erty when he wanted to sit on the grass.

Board member Char also questioned the wisdom of allowing pre-setting of chairs.

"I voted for the RP the last time, but this time, I'm up in the air whether the pre-set chairs, whether it was more of a preemption of the public thinking it was hotel property. ... To pre-set, especially with the lack of

clear identification [of public access], creates confusion," he said.

To clear up the confusion about where the hotel property ended and the state's began, board member Tommy Oi said he wanted the hotel to delineate on the ground the mauka boundary of the state parcel.

Board member Yuen agreed that it should be made clearer to the public that the grassy area makai of the hotel property is a public use area, except for the hotel chairs.

Board member Gon then suggested that perhaps the hotel could refrain from pre-setting altogether or at least pre-set no more than 25 percent of the 70 chairs allowed under the permit.

Board member Kaiwi Yoon asked Kahala hotel manager Joe Ibarra whether it was the hotel's intent to meaningfully include kama'aina and the public.

Ibarra replied that it absolutely was. "We are stewards of this property," he said, noting that he is a native Hawaiian and graduate of Kamehameha Schools. "The beach was constructed with the intent of public access as well as hotel use," he said.

Yoon said the hotel could do more to provide an "authentic experience," where visitors and locals mingle together. "To make it well-known that the public can access this great space I think is very important," he said.

In the end, the Land Board voted to renew the permit, with new conditions: that the hotel clearly delineate the boundary between the public and private property and install signage to make it clear to members of the public that they are welcome on the public land.

Board chair Suzanne Case also reminded the hotel representatives earlier in the meeting that the chairs should not obstruct public use. — **Teresa Dawson**



This aerial photo shows where the state parcel, TMK 3-5-023:41, is located.