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Environment Hawai'i
a monthly newsletter

Warming Up To a Changing Climate

The future is now, so far as climate change is concerned. Hawai'i is already experiencing changes in the weather and surrounding seas. And the City & County of Honolulu is developing the tools needed to deal with it.

As Teresa Dawson reports in our cover article, the city's Climate Change Commission is grappling with the nuts and bolts of new construction techniques and industry standards. Many of the major players — who last year obstructed climate-friendly amendments to city ordinances — appear to be willing to engage in discussions as to how these necessary changes can be adopted and put into practice.

In a complementary move, the city's Office of Climate Change, Sustainability, and Resilience has drafted and asked the public to weigh in on its own recommendations on the built environment and other sectors.

IN THIS ISSUE

Honolulu Climate Commissioner Floats Bold Changes to Construction Standards

Last year, environmentalists and the development community jockeyed over bills aimed at revamping the City & County of Honolulu's energy code and parking regulations to help mitigate or minimize climate change effects.

In testimony to the City Council, organizations such as Blue Planet Foundation and the Ulupono Initiative lamented that the final versions of these bills lacked features of the originals that would have gone further to encourage the use of renewable energy and electric vehicles, or to get people to eschew traveling by car altogether. They also complained that the parking bill revisions stemmed from closed-door meetings with developers.

Representatives for developers and the construction industry, however, had some complaints of their own. The measures proposed in the energy code bill — even the watered-down version — are expensive and would make it more difficult to keep housing affordable, they argued.

Then-Mayor Kirk Caldwell ultimately signed the bills — Bill 25 and Bill 2 — requiring new homes to be wired to accommodate solar panels and electric vehicles and eliminating off-street parking minimums for new developments, respectively.

No one got everything they wanted, but a valuable lesson was learned: the parties having stakes in these issues should start talking to each other early.

So when Bettina Mehnert, a member of the Honolulu Climate Change Commission and CEO of Architects Hawai'i Limited, last month presented a white paper she had drafted on the construction industry's role in reducing greenhouse gas emissions, nearly 90 people tuned in to the commission's Facebook Live meeting, including representatives from the state's construction unions.

Mehnert stressed that the paper, which will eventually be adopted by the commission, does not set city policy. It merely informs it. Even so, David Arakawa, executive director of the Land Use Research Foundation, recognized its potential im-

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PHOTO: HONOLULU CLIMATE ACTION PLAN

The City & County of Honolulu, through its Office of Climate Change, Resilience and Sustainability, as well as its Climate Change Commission, is working to find ways to make O'ahu's built environment carbon neutral.

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NEW AND NOTEWORTHY

Big Island Dairy: The cows are gone and the site has been cleaned up, at least to the satisfaction of the state Department of Health. The Big Island Dairy near O'okala, on the Hamakua Coast of the Big Island, has been out of business for more than a year.

But the folks who hold the lease of 2,300 acres of state land where the dairy had operated continue to pay the state rent, now set at $57,000 a year.

At the meeting last month of the state Board of Agriculture, staff with the Department of Agriculture's Agricultural Resource Management Division (ARM) explained the proposed settlement of a rent dispute with the dairy, whose owners are based in Idaho. No mention was made of the fact that the dairy is no longer in operation.

It fell to Mary Alice Evans, representing the Department of Business, Economic Development, and Tourism, to ask if this was the same dairy that closed down following multiple Department of Health violations involving dairy waste fouling area streams.

"Yes," replied ARM's Lisa Murai. "They've pretty much closed operations. … They haven't given any indication they want to terminate the lease."

In response to further questioning, Murai told the board that the lessees "let us know that they are trying to assign their lease position. As a result, they are continuing with the lease and continuing to pay the lease rent."

Apart from the operation of the dairy, board members questioned how ARM arrived at the settlement.

"I'm confused," said Dave Smith, representing the Department of Land and Natural Resources. The appraisal done by the state said the rent should be set at $64,050 a year for the period 2018 to 2028, but it was negotiated down to $57,645 a year, he noted. And on top of that, the ARM was proposing waiving $56,797.50, which was the amount of back rent owed by the dairy since the previous rental rate expired on June 4, 2018, through December 4, 2019.

Murai said that the problem arose because the department was late in getting the appraisal done. To save money, she said, the ARM contracts with an appraiser to do multiple jobs rather than contracting on a case-by-case basis.

Smith pointed out that the practice resulted in the department losing out on roughly $57,000.

But, Murai added, it was done "to support the dairy. This is my belief, not the department's, but I believe we want to support the dairy. We wanted to compromise."

Quote of the Month

"It's just a matter of two different agendas. I think there can be a balance. … I think there's others that see any diversion of water as not what they want to see in that area."

— Brad Rockwell, Kaua'i Island Utility Cooperative

Lanikai Land Grab: Close readers of the December 23 *Notice* published by the state Office of Environmental Quality Control may have seen an item reporting the intention of homeowners at 958 Mokulua Drive in Lanikai to register title to .42 acres of beach land that lies makai of their property. If approved by the Land Court, that would more than double the size of the current house lot, which, according to property tax records, is .41 acre.

Lanikai beach is, of course, one of the prize jewels among O'ahu's vanishing beaches. Seawalls and development at both the Waimanalo end of the beach and the Kailua end have caused sands there to pretty much disappear. Yet in the area of the beach where the house in question sits, the beach is still wide and heavily vegetated with naupaka.

Claims to accreted land by adjoining property owners have been the subject of much litigation and legislation for decades. But in this case, there was a hiccup.

The OEQC *Notice* of December 23 carried a link to what was purported to be the petition to the Land Court. Public notice of such petitions is required by law. As originally published, however, the link took the reader not to the Lanikai petition, filed on behalf of Paul and Sherry Lambert, who own the 7,000-square-foot home on Mokulua, but to a different petition altogether, one relating to a claim filed on behalf of a Mokuleia homeowner.

Tom Eisen, a planner with the OEQC, told *Environment Hawai'i* that that agency was responsible for the error. In producing the issue of the *Notice*, he said, "a link was erroneously made to an older petition submitted for a different project." The link was corrected on December 24.

Hawai'i Revised Statutes Chapter 501, the statute relating to accreted land, "does not appear to provide any time for commenting on the application/petition," Eisen noted. "It merely requires notice to be published, and now a corrected notice has been published."

The corrected link reveals what seems to be further error, though. While the petition to register the accreted land is on behalf of the Lamberts, the petition title page plus the first page of the petition (pages 3-4 of the pdf) refer to an application by Helene Irwin Crocker.

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High Court Ruling Favors ʻAina Leʻa On Question of Statute of Limitations

The Hawai'i Supreme Court has rendered a decision that closes a chapter in the ongoing litigation over the planned ʻAina Leʻa development.

On December 17, the court ruled that the statute of limitations under a "catch-all" provision in state law is six years – a ruling that allows a 2017 lawsuit brought by DW ʻAina Leʻa Development, LLC, against the state to move forward.

DW ʻAina Leʻa (DWAL) is the predecessor owner of most of the thousand-plus acres of land in the South Kohala district of the Big Island where a large urban development has been proposed since the late 1980s. Despite the longevity of entitlements, for the most part, the land still looks much like it did at the time the state Land Use Commission first placed it into the state Urban land use district. About the only difference is the presence of several buildings in the more mauka part of the tract erected a decade ago in a rush to fulfill a condition set by the LUC to show the landowner's sincere intent to comply with affordable housing requirements.

When the LUC determined that DWAL had not met that condition, it voted to revert the land use classification to Agricultural. Bridge ʻAina Leʻa, the company that owned most of the land at that time, appealed, arguing the LUC did not follow its own statutes and rules for redistricting. The judge hearing the case in 3rd Circuit Court, Elizabeth Strance, determined that the reversion was invalid. On appeal, the state Supreme Court disagreed with part of Strance's findings, but upheld it on the key issue, and the land was returned to the Urban district.

Notwithstanding the fact that the land it was intending to develop was back in the Urban district, in 2017, DWAL sued the LUC, claiming damages of $200 million. The reclassification, it argued, increased the purchase price of the property DWAL was required to pay to Bridge, destroyed its "sophisticated funding arrangement" with Asian investors for developing the property, and caused the company to have other increased costs and lost business opportunities.

The state removed the lawsuit to federal court, where Judge Susan Oki Mollway determined that the lawsuit was untimely, since it was filed more than two years after the alleged injury.

Mollway's decision relied upon a prior decision of the state's Intermediate Court of Appeals, *Maunalua Bay Beach Ohana 28 v. State.* On appeal to the 9th Circuit, however, the appellate court found that the *Maunalua case* was contradicted by the state Supreme Court's ruling in *Kahoʻohanohano v. State.*

Before making any determination on the merits of the case before it, the appellate court decided, on March 7, 2019, to have the state Supreme Court weigh in on the subject of what statute of limitations should govern.

The state pressed its case for the two-year statute of limitations, based on HRS §661-5 and §657-7. DWAL argued for six years, relying on a "catch-all" provision for claims not governed by other statutes, HRS §657-1(4). And an amicus, the Owners Counsel of America, suggested the limit should be 20 years, relying on the state's law on adverse possession (HRS §657-31).

In its December ruling, the court found that DWAL's claims were based on Article 1, Section 20 of the Hawai'i Constitution, which states: "Private property shall not be taken or damaged for public use without just compensation." Because this clause does not contain the phrase that it applies "as provided by law," the court's ruling states, the clause is therefore self-executing "and needs no further legislation to facilitate a private right of action."

In conclusion, all five Supreme Court justices agreed: "the statute of limitations for a takings claim under the Hawai'i Constitution is six years pursuant to HRS §657-1(4)."

What next?

The case now returns to the 9th Circuit and then probably back to federal court in Honolulu. But, as one of the sources close to the litigation said, "What exactly happens depends on a couple of decision points by those courts."

County Added to Lawsuit

Meanwhile, ʻAina Leʻa, Inc., the successor to DWAL as the parent company developing the property, is being sued by Iron Horse Credit, LLC. That's the company whose $5 million loan in 2019 allowed ʻAina Leʻa to emerge from bankruptcy. Since June, Iron Horse claims in the lawsuit it filed in 3rd Circuit Court on October 13, ʻAina Leʻa has been in default. Iron Horse is seeking an order allowing it to foreclose on ʻAina Leʻa's property, which it pledged as collateral.

In its reply, filed November 29, ʻAina Leʻa deflected blame for its inability to perform on the loan to the County of Hawai'i and its planning director, who has insisted that ʻAina Leʻa prepare a new environmental impact statement for its proposed development.

The next day, Mike Matsukawa, ʻAina Leʻa's attorney in this case, filed with the court a third-party complaint against the county and then-Planning Director Mike Yee.

That complaint argues that ʻAina Leʻa should never have been required to prepare a supplemental EIS for its project.

What's more, the very fact that ʻAina Leʻa had to enter bankruptcy is placed on the county's shoulders. In 2017, the planning director issued a stop-work order after discovering that ʻAina Leʻa's contractors were on site and working on the affordable housing site. That stop-work order, Matsukawa writes, "caused the third-party plaintiff, ʻAina Leʻa, Inc., to seek bankruptcy protection."

Many of the same arguments had been brought by ʻAina Leʻa in a lawsuit filed against the county last March. As *Environment Hawai'i* reported last month, there had been no new filings in that case following the ruling by Judge Robert Kim against ʻAina Leʻa's motion for partial summary judgment.

But on December 11, four days after Mayor Mitch Roth was sworn in, the county and Lulana Gardens, the subsidiary of ʻAina Leʻa that filed the complaint, filed a stipulation with the court.

"The parties plan on starting settlement negotiations, which could lead to the resolution of this case," they stipulated. They then asked the court to postpone any ruling on the county's motion to dismiss "until the parties file a second stipulation which will either resolve the case or ask the court to issue a ruling on the county's motion to dismiss."

As reported elsewhere in this issue, Robert Wessels, CEO of ʻAina Leʻa, donated $3,000 to Roth's campaign, while ʻAina Leʻa donated $1,000.

— Patricia Tummons

Climate from Page 1

portance: "Policy makers are going to use this document to pass laws," he said.

Given that, Ryan Kobayashi of the Hawai'i Laborer's Union, Local 368 said the commission needs to engage with a larger scope of people than it usually does. "Sometimes, when things come up in silos, there can be big clashes in the end," he said.

Nathaniel Kinney, executive director of the Hawai'i Construction Alliance — which includes the unions for carpenters, laborers, cement masons, bricklayers, and operating engineers — added, "After going through Bill 25 and Bill 2, what was becoming apparent to the unions was we need to get involved more."

"The unions are just looking at the overall construction industry. We become kind of the default conscience of what is best for the entire industry, rather than what is best for a single developer or contractor. … We're the ones, frankly, that are talking to the policy makers more than the contractors or developers," he said, adding, "We would appreciate being invited to the conversation. Once you get our buy-in, it's much easier to get the others to buy in. We're kind of at a critical leverage point."

At the commission's December 9 meeting, Mehnert recommended a host of changes to the way the industry operates, from the kind of concrete it should use to the standards to which the state's architects and new building projects should be held.

The construction industry's role in climate change is huge, Mehnert said, noting that buildings generate nearly 40 percent of annual global greenhouse gas emissions and "the global building stock is expected to double by the year 2060."

It's like adding an entire New York City every month for 40 years, she said.

"This growth gives our industry a tremendous opportunity to change the adverse impact on the climate," she said.

The climate is already getting warmer and the weather is more irregular, requiring more energy for cooling and heating of buildings, so it's increasingly important to recognize the role of the built environment, she said.

Mehnert recommended that carbon-sequestering concrete, a.k.a. green concrete, be the default product for all buildings and infrastructure. Green concrete is made by taking "waste carbon dioxide from an industrial emitter (usually a gas company or a power plant) and inject[ing] it into a concrete mix, creating a chemical reaction that turns the carbon dioxide into solid calcium carbonate. … The injected mineral replaces some of the cement required for the concrete while maintaining strength requirements. By utilizing the byproduct of a different local manufacturing process, this green concrete decreases the cost of cement, the amount of materials to be transported from the mainland, embeds a polluter into a material, and allows a reduced carbon footprint," her paper states.

It adds that a 2019 Hawai'i Department of Transportation demonstration project, using 150 cubic yards of locally produced green concrete, "will save 1,500 lbs. of carbon dioxide, offsetting the emissions from 1,600 miles of highway driving."

Although the state doesn't yet have the capacity to make green concrete the default construction material, "concrete manufacturers will, I am certain, have no objections to fill the demand once it's there," she said.

In addition to adopting new standards regarding greenhouse gas emissions and energy consumption in new and existing buildings and developments, Mehnert recommended providing developers with incentives to make those projects financially feasible. Eliminating building height limitations was one such incentive.

Doing so would give developers an opportunity to come up with innovative solutions to climate change effects, she argued. She said a developer could increase the height of the ground floor of a building to provide some ability to adapt to increased flooding due to sea level rise.

Increasing the ground floor to allow for some resiliency would force the developer to shave off the top floor to avoid piercing the current building height envelopes. If a developer wants to do the right thing, they should not be penalized by having to eliminate a floor from a building, she said.

One member of the public asked whether building up instead of out would increase air pollution and exacerbate heat island effects.

"Sometimes maybe one has to look at the lesser of two evils," she replied, posing the question: Is it better to build up in a smaller footprint, and perhaps create a heat island, or does minimizing a heat island footprint justify sprawl?

"I don't think anything justifies sprawl," she said, adding that heat island effects could be reduced with green roofs.

Implementing her recommendations will require "a bit of imagination and courage by all of us because business as usual simply will not work," Mehnert said. "It will require a dialogue that stretches us and that forces us out of our comfort zones. I believe the fact that we have so many people attending this session here is a very good indication that we are ready to have those types of conversations and the intent of this paper is to trigger them," she said.

She noted that she chose not to specify targets regarding fossil fuel use, greenhouse gas emissions or energy consumption, because stakeholders still need to discuss what those targets should be.

While the rest of the commissioners supported Mehnert's proposals, they all thought more feedback needed to be gathered, and revisions made accordingly.

"This issue of developer incentives, I think this is a really important point. … There's this broader question, if you're pushing infrastructure cost burdens into every individual development project, by definition you're putting that burden onto the buyer of those units, which has long been a problem. How do we think about this in the context of climate change … when we're going to ask the industry to be more creative to meet those challenges?" commissioner Makena Coffman said.

With regard to green concrete, Mehnert suggested that transitioning might be one of the easier feats. "This technology has been around for a while," she said. After reaching out to those in the industry about its use, she added, "what I found incredibly interesting is that it just needed somebody to bring this up. Because the engineers said, 'Yeah, we can do this.' And then the contractor said, 'We can do this.'"

"In the end, we all want to do the right thing. I don't question this at all. If we put our minds together … we can show the rest of the world how it's done," she said.

Climate Action Plan

While the Honolulu Climate Change Commission continues to flesh out and gain broader input for its white paper on the construction industry, the city's Office of Climate Change, Sustainability and Resilience has already published several of its own recommendations on energy

Continued on next page

efficiency in buildings, as part of a draft Climate Action Plan issued late last month and developed in partnership with the University of Hawai'i.

The plan is a requirement of a 2018 resolution adopted by the Honolulu City Council, calling for the city to be carbon neutral by 2045.

According to the city's 2020 Annual Sustainability Report, O'ahu's building emissions decreased by 21.9 percent since 2005. Even so, as existing buildings account for 35 percent of the island's greenhouse gas emissions, increased efficiency brings the city a lot closer to its carbon neutrality goal.

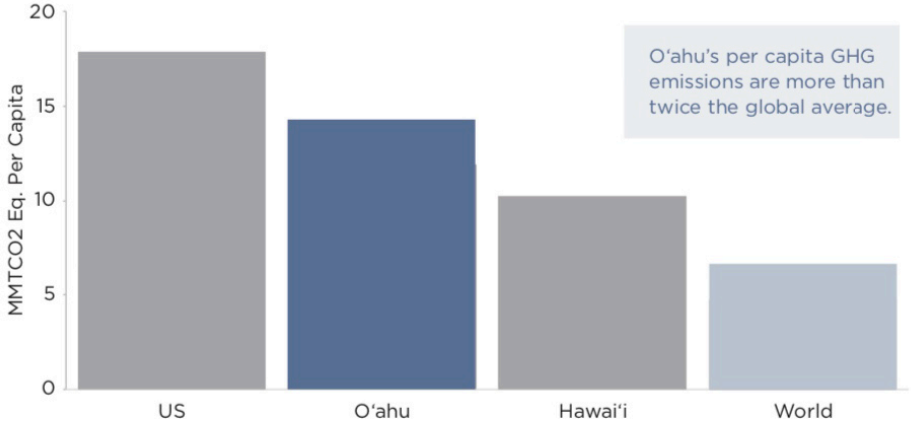
The most important long-term way to enable energy efficiency on the island is to "influence new construction by regularly updating building energy codes to the highest national and state standards," the plan states.

It points out that last year, the city updated its electrical building and energy conservation codes. "However, even in the update of building energy codes, only 2015 standards were adopted rather than the most up-to-date 2018 standards. With the 2021 code on the horizon, the new standards will be quickly outdated," it states.

The plan recommends adopting a building code ordinance that, at the very least, requires the automatic update of city codes whenever the state adopts new building energy standards. "The city should adopt further standards as appropriate. … Future updates, for example, could address high global-warming potential [greenhouse gases] used within air conditioning systems as there are substitutes," it states.

With regard to existing buildings, it notes that some U.S. cities have adopted benchmarking and transparency requirements for large commercial and multi-unit residential buildings. Benchmarking, it explains, involves the tracking and public reporting of energy metrics, "which may be particularly useful to inform buyers or renters of commercial space or apartments of their energy costs."

It notes that commercial and multi-family buildings larger than 30,000 square feet account for 66 percent of the island's floor space. And by implementing benchmarking standards, it estimates that electricity consumption of buildings could drop nearly by 7 percent by 2030. It also estimates that benchmarking of existing buildings could result in a reduction of 1.7 million metric tons of CO_2 equivalent gases between 2020 and 2045. "[There are] potentially large impacts from new buildings over time," it states.



Draft Climate Action Plan

A third of island residents surveyed by the office supported using public funds to retrofit existing large private buildings, according to the report.

"A growing number of cities including New York, St. Louis, and Washington D.C. have gone beyond by adopting incrementally increasing energy-saving targets for buildings to ensure increasing energy savings over time. The city can begin to replicate these efforts by implementing its own municipal benchmarking program for covered city buildings over 10,000 square feet," it states.

The plan envisions the development of a benchmarking program, building performance standards, and reporting mechanisms — including the passage of ordinances — to occur in 2022-2023.

"In order to achieve deep decarbonization goals in the existing buildings sector … we need to measure energy usage, evaluate it against peers and other sectors, and then identify opportunities for energy and water conservation," the plan states, adding that the city will "lead by example and first establish these policies for its own facilities before collaborating with industry partners on a community-wide benchmarking effort."

In addition to benchmarking, the plan calls for the retrofitting of city buildings, facilities, and operations through 2023 using energy savings performance contracts (ESPCs). An ESPC, the plan explains, is a public-private partnership with an energy service company (ESCO). "The ESPC provides the upfront investment for energy efficiency retrofits and assumes the technical and performance risks associated with the building improvements. An ESCO can help the city find, design, and implement energy conservation and renewable energy opportunities at city facilities that will be paid back through savings in energy bills," it states.

It notes that the city has already used ESPCs for an islandwide LED retrofit of 53,500 streetlights, the installation of solar photovoltaics at the Kailua Wastewater Treatment Plant, and an energy efficiency program for the Board of Water Supply.

"Initial estimates suggest that the city could achieve up to a 50 percent reduction in electricity consumption for facilities covered by these ESPCs," the plan states.

Between 2022 and 2025, the plan recommends that the city pursue energy efficiency for city-owned housing. The city owns and operates, or is finalizing acquisition of, 2,508 affordable rental units, the plan stated.

"The aim of these properties is to help meet affordable housing needs. Electricity costs can be a burden on tenants, where a 10 percent savings for the average resident would result in an annual savings of $180 per year. The city should be sure to design these investments in building energy efficiency retrofits such that the energy cost savings accrue directly to tenants," it states.

"The city should first facilitate investment through partnership with Hawai'i Energy, but will likely also have to finance some of the up-front costs," it states. (Hawai'i Energy is the service established by the Public Utilities Commission to encourage energy efficiency. It is financed through a charge on electricity bills.)

The office is accepting public comments on the plan through the end of this month. Comments may be submitted to https://resilientoahu.org/climate-action-plan. ***— Teresa Dawson***

BOARD TALK

Board Continues Revocable Permits For Kaua'i Utility's Water Diversions

On December 11, the Kaua'i Island Utility Cooperative (KIUC) barely mustered enough votes from the Board of Land and Natural Resources to secure a revocable permit to divert water from Wai'ale'ale and Waikoko streams. The streams help feed two of KIUC's hydropower plants.

The utility has had a revocable permit allowing this for nearly two decades, but admitted in its renewal application that last year, it had not taken any water from the two streams because of damages to the 'Ili'ili'ula-North Wailua ditch system. The plants, KIUC reported, provided a little less than 1 percent of the island's power in 2019.

To members of the public who have long called for an end to the diversions, this past year proved that KIUC doesn't really need all — or, in fact, any — of the water it has claimed it needs.

"They [KIUC] offer no evidence of any detrimental consequence from the loss of this water. This confirms what we have always maintained every year we have objected to the renewal of RP7340, that the 40 [million gallons] diverted daily from state land and other Wailua streams is not necessary to meet the power needs of Kaua'i. For this reason alone [the permit] should not be renewed," wrote island resident and activist Bridget Hammerquist in her testimony to the board.

While it did not divert any water last year, KIUC still wanted to maintain its permit so that it could continue ongoing repair and maintenance of the ditch system and eventually resume the diversions. It had also recently submitted to the Department of Land and Natural Resources' Land Division a final environmental assessment for a 65-year water lease.

In its report to the board supporting the permit renewal, Land Division staff noted that the use of water for hydropower "supports Hawai'i's Clean Energy Initiative, which sets goals for the state to achieve 100 percent clean energy by 2045 coming from locally generated renewable sources. Although hydroelectric projects are not an identified public trust use of state waters, the public trust concerns will be addressed in the processing of the water lease applications."

The current permit terms require KIUC to restore stream flow so that it meets interim instream flow standards (IIFS) proposed by state Commission on Water Resource Management staff in 2018. This condition addresses the issue of competing uses for the water, the Land Division stated.

The Water Commission's proposed IIFS for Waikoko and Wai'ale'ale streams, however, is the subject of an ongoing contested case hearing requested by KIUC.

PHOTO: HOPE KALLAI

Broken siphon leaking diverted stream water in 2019.

"If the contested case results in a different IIFS, the allocation will be adjusted accordingly by the board for the long-term lease. In view of these considerations, staff believes that allowing the revocable permits to continue on a temporary basis in support of the state's renewable energy goals is consistent with the public trust," the Land Division stated.

Attorneys for Earthjustice, which represents Hui Ho'opulapula Na Wai o Puna in the contested case, argued in written testimony that the Land Board would fail to meet its public trust duties if it approved the permit as the Land Division proposed, and recommended denial or, at least a deferral.

Quoting the decades-old Waiahole Ditch contested case proceedings, they pointed out that under the public trust doctrine, off-stream water users have the burden to demonstrate their actual needs and "the propriety of draining water from public streams to satisfy those needs." "[A] lack of information from the applicant is exactly the reason an agency is empowered to deny a proposed use of a public trust resource," the attorneys wrote, citing a decision in the more recent *Kaua'i Springs, Inc.* case.

"As in previous years," they continued, "the staff submittal recommends that the board approve diversion of water from Wai'ale'ale and Waikoko, ***even though KIUC has not provided the Board with any information concerning its actual water use or electricity generation needs,*** let alone information about feasible mitigation measures and alternative water sources. Without this information, this board cannot exercise its public trust duties."

If the board chose to approve the permit, however, they asked that it impose conditions to enable it to better meet its public trust duties. "In short, the board should hold the diverter accountable to the public trust with meaningful obligations and deadlines, rather than simply rubber-stamping the diversions repeatedly and indefinitely," they wrote.

The conditions they recommended would require KIUC to install water gages for all diversions on the ditch system and establish deadlines for the utility to 1) develop and implement a plan to mitigate water loss from the system, 2) to develop a means to remotely shut down diversions following damage to either the ditch or the hydros, and 3) to report on alterations to diversion structures to allow year-round mauka-to-makai flows.

They would also require KIUC to report to the board details of its power generation from each of the two plants and to set a timeline to repair exposed rebar at the Wai'ale'ale diversion, "or any other public health hazards that may emerge."

Several Kaua'i residents, some of them native Hawaiians, submitted testimony

Continued on next page

echoing Earthjustice's recommendations.

Leina'ala Ley, one of the Earthjustice attorneys, told the Land Board, "The applicant has never shown it needs water from Wai'ale'ale and Waikoko for hydropower," adding that the utility has access to alternative sources of water from adjacent private land owned by Grove Farm. "There's some question of whether the production that does occur is in high flow season. … We ask they provide information more granular in terms of wet season and dry season and not just generalities," she said.

KIUC's Brad Rockwell countered that the utility has published an environmental assessment on the impact of its diversions and has responded to hundreds of public comments. The information KIUC has provided "is far and above any other revocable permit that I'm aware of, especially for an existing use," he said.

When asked by board member Kaiwi Yoon why there seemed to be such a divide between KIUC and members of the community, Rockwell argued that it wasn't because of a lack of information. "It's just a matter of two different agendas. I think there can be a balance. Native Hawaiian traditional and customary practices can be in the area. … I think there's others that see any diversion of water as not what they want to see in that area. That's where we sort of come to a head in that area. People don't want any water diverted," he said.

KIUC CEO David Bissell added that he did not agree with the characterization that the community is opposed to the diversions. "We don't share that view and our elected board doesn't share that view. … The greater community does support it. … The majority of people on Kaua'i," he said.

In the end, the board voted 4-2 to approve the permit as submitted by the Land Division (members Jimmy Gomes and Yoon opposed). Member Sam Gon abstained. The vote came after the board declined to grant contested case hearing requests made by Hammerquist and others, although board member Chris Yuen advised them that they could follow up with a written petition within 10 days of the board meeting.

Yuen also asked KIUC to provide Ley with more detailed information about how much energy is produced by hydros on a seasonal basis between 2017 and 2019.

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ICA to Decide if Kahala Lot Is Part of the Public Trust

As we reported in November, the Land Board voted on October 23 to renew a revocable permit to Resort Trust Hawai'i (RTH) for 1.3 acres of filled, formerly submerged state land fronting its Kahala Hotel & Resort. This permit, like the previous one, allowed the presetting of 70 lounge chairs on the property and kept open the possibility of commercial use, should it ever be allowed by the city. But the board also added new conditions to address what members of the public had been complaining about for years and what at least one board member finally confirmed for himself: the land, while created for use as a public beach, was being managed in a way that might lead people to think it was the hotel's private property.

The board required the hotel to clearly delineate the boundary between its property and the public parcel and to install signs announcing to the public that it is welcome onto the public portion, known as Lot 41.

Although board chair Suzanne Case told hotel representatives that the lounge chairs should not obstruct public use, the board did not include any conditions making that a requirement.

At the time the Land Board made its decision, one of those concerned members of the public, David Kimo Frankel, had already filed an appeal with the Intermediate Court of Appeals (ICA) of a 2019 1st Circuit Court ruling that shot down arguments he raised in a lawsuit against an earlier renewal of Resort Trust's permit.

Frankel stated in written testimony, "Because Lot 41 has been dedicated to be used as a public beach, there should be no exclusive use of it by a private party. Hotel guests are free to use Lot 41 – to the same extent that local folks are. But they should not be privileged in having the hotel reserve the bests spots for them."

He also recommended that the board adopt conditions to the permit that explicitly banned commercial uses and guaranteed public access to both the sandy beach and grassed-over Lot 41, put an end to chair pre-setting, and require

PHOTO: HOPE KALLAI

"This is unacceptable as someone is going to get hurt badly," wrote Hope Kallai in testimony to the Land Board regarding rebar sticking out at spots along the diversion used by KIUC.

Resort Trusts's employees and contractors to comply and be responsible for any violations.

At least one member of the board seemed amenable to ending pre-setting, but the board ended up adopting conditions that sought only to inform the public of its right to access.

Opening Brief

The concession has not derailed Frankel's appeal of 1st Circuit Judge Jeffrey Crabtree's determination that public trust principles don't apply to Lot 41 because it is not in the state Conservation District. It's in the Urban District.

Crabtree's October 2019 order pointed out that the Hawai'i Supreme Court, in its decision in the Thirty Meter Telescope case, chose not to decide whether public trust principles should apply to lands outside the state Conservation District. Although a subsequent decision by the court in a case involving the Pohakuloa Training Area found that "all pubic natural resources are held in trust," Crabtree argued that the high court would have specified whether that language altered the position it took in the TMT case. But it did not.

Frankel has argued that the Land Board, in its crafting and lack of enforcement of the revocable permits issued to Resort Trust Hawai'i, has breached its public trust duties.

In his opening brief to the ICA, Frankel says the ICA should reverse Crabtree's decision not to grant Frankel's request for grant summary judgment because, "(1) Lot 41—as formerly submerged land, ceded land, public land, and land dedicated to be used as a public beach—is subject to public trust principles; (2) it

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Longline Fishers Propose Gear Changes To Mitigate Bycatch of Protected Species

The Western Pacific Fishery Management Council held its 184th meeting in December – virtually, as necessitated by the ongoing pandemic.

None of the highly dramatic and controversial issues that have characterized many of the council's meetings over the decades were on the agenda. Instead, the meeting was characterized by discussions of how to reduce bycatch in the longline fishery of several protected species, including oceanic whitetip sharks and seabirds.

In 2018, the National Oceanic and Atmospheric Administration determined the oceanic whitetip shark to be threatened under the federal Endangered Species Act. Its population in the Pacific is thought to have declined 80 to 95 percent just since the mid-1990s.

The sharks are especially prized in some cultures for their fins. Since finning has been effectively banned in the U.S., the chief threat to the sharks that the longliners now pose is in their incidental catch. Even if the sharks are released, estimates of post-hooking mortality are greater than 40 percent.

In an effort to improve survivability, the Hawai'i Longline Association (HLA), representing the interests of most of the 140 or so longline vessels operating out of Honolulu, is proposing to transition from steel trace leaders – the part of the line that attaches to the hook – to monofilament leaders.

The HLA unveiled its proposal at the council's advisory Scientific and Statistical Committee meeting, held in late November, a week before the full council met.

"HLA will work to ensure that all Hawai'i-based active vessels in the deep-set fishery" – the fishery that targets bigeye tuna – "will convert from steel trace wire leaders to monofilament nylon leaders," the association said in a statement submitted to the SSC. "This conversion will begin in the first quarter 2021, with all Hawai'i-based active vessels using monofilament nylon leaders by July 1, 2021."

As part of the transition to monofilament leaders, HLA said in its written announcement, vessels would also employ long-handled line cutters "to maximize gear removal as close to hook as possible for oceanic whitetip sharks and other species." Also, HLA said it would assist the National Marine Fisheries Service and the council in disseminating handling guidelines for oceanic whitetip sharks and giant manta rays. The guidelines "describe techniques for safely releasing sharks and rays with as little as possible trailing gear attached," the HLA noted.

The trailing gear is one of the chief causes of death and serious injury to sharks, marine mammals, and sea turtles that interact with the longliners. When the animal is released with a length of wire still attached to an embedded hook, the trailing gear can wrap around fins or

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is irrelevant that Lot 41 lies in the urban district for the purposes of public trust analysis; and (3) BLNR breached its trust duties when it allowed RTH to exclude the public from using portions of Lot 41, engaged in a flawed decision-making process, and failed to take appropriate enforcement action."

"[The state Land Use Commission] [d]esignating Lot 41 as 'urban' does not magically free BLNR of its constitutional public trust duties on land that is (a) ceded and (b) public," he wrote. "[T]here is no sound reason to exclude our beaches from the public trust— particularly given the Hawai'i Supreme Court's long history of protecting our beaches," he added.

"Allowing RTH to hog cheese land set aside to be used as a public beach does not serve any public trust principle. Laying out empty chairs to be filled by RTH guests later in the day does not serve the public's interest. For every chair that RTH pre-sets on Lot 41, members of the general public are excluded from using that area."

The Department of Land and Natural Resources' Land Division staff has taken the position that the Land Board does not have a trust duty to keep the lot "wholly open to the public." "Staff does not agree that it is a breach of the public trust to allow RTH to use a small portion of the premises for pre-setting, especially when the public interest is so well served by the money and services that the State receives in return," it stated in a 2019 report to the Land Board.

At the Land Board's October 23 meeting, RTH's attorney, Jennifer Lim, tried to explain how small of an impact a handful of pre-set lounge chairs would have on public access. Frankel replied, "I don't know what kind of hands Mrs. Lim has. Seventy chairs is not a handful."

In his brief to the ICA, Frankel explains that it doesn't even matter how much space the pre-set chairs would take up. "Neither the percentage nor the precise amount of public beach RTH is authorized to use exclusively (whether 3,000 or 6,000 square feet) is material. The revocable permit authorizes RTH to exclude the general public from using portions of Lot 41 to accommodate RTH's private commercial interests. . . . The Hawai'i Supreme Court has repeatedly emphasized that it is improper to prioritize private commercial interests over the public's use of public trust resources," he wrote.

He asked the ICA to invalidate the Land Board's decision giving RTH exclusive use of portions of the lot and to remand to the board the question of whether a new permit should be issued and whether conditions should be included to ensure uses are consistent with trust purposes and prioritize public uses.

"Before making these determinations, however, as a responsible trustee, BLNR should first assess the extent to which RTH failed to comply with its permit and what consequences should follow," he concluded.

For years, the hotel hosted paid events and weddings, ran a portion of a restaurant, and rented large cabanas and clamshell loungers on the parcel, even though its permits allowed for only recreation and maintenance. The DLNR never brought any enforcement cases to the board. Based on information Frankel brought to the department, the board did impose a penalty of $702 in late 2019 on RTH for renting clamshell loungers earlier in the year. However, it did not characterize it as a fine for a permit violation. Rather, it simply tacked it onto the company's rent. ***— T.D.***

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flippers and lead ultimately to the animal's death. Past efforts to mitigate the problem involved adopting weaker hooks that – in theory – would straighten when the line was pulled taut as the animal was hauled near the boat. In practice, however, few of the weak hooks performed as they were intended to.

Eric Kingma, executive director of the HLA, told the SSC that the main reason wire leaders were used in the first place was to reduce fly-backs, which occur when a taut leader is cut. With the switch to monofilament line, vessels would deploy fly-back prevention devices and reconfigure branchline weight and materials, all measures intended to reduce the risk of crew injury.

Another element of the transition would be to partner with NMFS to train captains and crews on handling the sharks, manta rays, and also leatherback turtles.

"The best available science supports the expectation that the gear conversion will substantially reduce the impact of the deep-set fishery on oceanic whitetips and other shark species," HLA says. "These reductions are due, in part, to the fact that sharks can more easily bite through monofilament line, resulting in earlier release, and that crews can efficiently release sharks that are brought to the vessel with less gear attached…. HLA believes the gear change will also have significant conservation benefit to giant manta rays, leatherback sea turtles, and false killer whales."

Just how much or little the U.S. fisheries contribute to the decline of oceanic whitetip sharks was described in the report of the Oceanic Whitetip Shark Working Group convened by the council. Members included scientists and researchers from NOAA's Pacific Islands Fisheries Science Center (PIFSC), from NMFS' Pacific Islands Regional Office (PIRO), the state of Hawai'i, and representatives from HLA.

Impacts from all U.S. commercial fishing in the Western Pacific region on the spawning potential of the sharks – a measure of their capacity to reproduce – amounted to 1.2 percent, the group reported. About two thirds of that – 0.8 percent – is attributable to the Hawai'i tuna longliners. "Closing all U.S. fisheries for 17 years may lead to a 4 percent increase in stock biomass by 2031," the group's report said.

Mitigating Bird Takes

HLA and the council are backing yet another measure that they say should reduce bycatch of albatrosses and other seabirds. For several years, the council had been concerned over the longliners' rising take of albatross, especially black-footed albatross, a trend that noticeably began creeping upwards in 2014. Suspected factors behind the increase are oceanographic changes and "unique captain effects."

In 2019, the council, HLA, the Science Center, and NMFS' regional office undertook a research project to look once more at tori lines as a means of reducing bird bycatch. The device consists of a tall pole erected at the stern of the vessel as lines are set or hauled in. A line attached to the top of the pole has streamers attached to it at regular intervals. As the vessel moves in the water, the streamers fly over the water where the lines are being set or hauled in, interfering with the birds' ability to go after bait on the line.

Research conducted by that team suggested that tori lines, in combination with blue-dyed bait, significantly reduced albatross feeding attempts and contact with longline gear.

On the other hand, the strategic discharge of offal, now required when birds are present, had the potential to increase bird interactions when gear was being set, the group found. As its report states, the regulation requires vessels "to discharge fish, fish parts, or spent bait while setting or hauling, on the opposite side of the vessel from where the longline gear is being set or hauled, when seabirds are present. … The regulations do not specify the amount or frequency of offal discharge, thus a small amount of offal or bait discarded during setting or hauling would meet the requirement. Additionally, … effective use of strategic offal discard would require a dedicated crew to observe seabirds and discharge offal accordingly. This measure therefore creates compliance and enforcement challenges, and it is likely that the strategic offal discard is not being utilized in a manner that is effective."

As to the blue-dyed bait requirement, that has been the subject of complaints by the longliners. In workshops held by the council with the industry, they noted that the requirement to use blue-dyed bait was intended for squid bait used by the swordfish longliners, not the fish bait that most longliners now use. Participants in the workshop "indicated that blue-dyed bait is not favored by fishermen as the dye is messy and thawing of bait reduces retention on hooks."

Based on that research, the HLA applied to NMFS for an experimental fishing permit that would allow up to four stern-setting vessels to use tori lines and forego having to employ strategic offal discharge or use blue-dyed bait, both of which are normally required when vessels fish north of 23 degrees north latitude. Each vessel participating in the experiment would be equipped with an electronic monitoring system. According to the notice in the Federal Register, "A stern-mounted video camera would monitor the number of birds present, and seabird attacks and contacts, during gear setting. After a vessel returns to port, scientists would review the video recordings and would verify seabird captures through logbook data."

Tori poles had been considered as a seabird bycatch mitigation measure back in the 1990s, when NMFS was first considering regulations intended to reduce seabird interactions with the fleet. According to the options paper prepared by the council on the basis of the research group's work, limited tests backs then "showed that the deterrents were effective in reducing seabird contact rates with bait and gear… However, these studies also identified issues with practicality and crew safety resulting from tori line entanglement with gear. The council considered inclusion of tori lines in the seabird mitigation measures in 1999 and again in 2004, but to date tori lines have not been included as an option for the Hawai'i longline fishery."

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Fines and Other Wrist Slaps

One of the routine reports heard by the council at their regular meetings comes from NOAA's Office of Law Enforcement (OLE), Pacific Islands division.

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Three of the investigations that the OLE conducted in the 10-week period from September 1 to November 16 involved violations of fishing regulations by U.S.-flagged purse seiners. In the case involving the highest proposed fine – $119,000 – the captain of the purse seiner failed to release silky sharks at least 17 times between May and June 2018 while in an area under the jurisdiction of the Western and Central Pacific Fisheries Commission. "After months of deliberating and preparing for an administrative hearing, a final settlement agreement of $63,000 was issued and paid for by the respondents. This was a successful case and 'a first case of its kind' resulting in a successful prosecution involving silky shark regulations," the OLE report said.

Another case involving a U.S. purse seiner involves allegations from a foreign observer aboard the vessel who alleged that the vessel set its net on or around a live whale shark, something that is strictly prohibited. The case has been forwarded to NOAA's general counsel for prosecution.

The third case was requested to be investigated by the Cook Islands Ministry of Fisheries. In that case, the Cook Islands alleges that the U.S. purse seiner was fishing illegally within that country's EEZ. "OLE conducted an investigation and sent a completed case package to Cook Islands Fisheries for their review and final disposition," OLE's report states.

Several cases involving longliners were noted in the report.

The one that goes back in time the longest concerns the U.S.-flagged longliner, the *No. 1 Ji Huyn.* Back in April 2016, it ran aground in the Aunu'u unit of the American Samoa National Marine Sanctuary. The vessel wasn't fishing at the time. Rather, it had been hired by the American Samoa Power Authority government to carry freight to the island of Manu'a– an operation for which it lacked the needed permits.

Last month, the council was informed by OLE that a notice of violation and assessment (NOVA) had been issued in the amount of $20,000. "Further investigation into the owners of the vessel revealed that the corporation was a sham and that it applied for federal fishing permits by providing false statements," the OLE report stated. The OLE completed its initial investigation and referred the case to the NOAA general counsel for natural resources for prosecution; "however, the investigation was declined and referred back to NOAA general counsel for enforcement section for review, and final disposition," the report says.

Environment Hawai'i first reported on this case back in July 2016. At that time, the OLE stated that although the corporation that owns the vessel has a U.S. citizen as its CEO, "[i]nvestigation has shown that a foreign national had control over the vessel at the time of the grounding."

Soon after its grounding, the Coast Guard hired a salvage firm to remove fuel at a cost of $150,000. After it was finally removed in August, NOAA Sanctuaries began an assessment of the damage to the reef and other natural resources caused by the incident.

Another Hawai'i longliner was investigated for fishing in the closed Southern Exclusion Zone; for this, the vessel owner was fined $2,500.

In the last of the fisheries violations, the OLE reported that an importer found to have smuggled sea cucumbers into Honolulu was fined $1,000.

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Commission Fails to Act On Crew Members' Rights

Last month, a crew member aboard the Honolulu-based longliner *Sea Goddess* fell overboard about 150 miles southeast of the Big Island. After two days of multiple passes over and in the area by Coast Guard vessels and aircraft, a Navy Poseidon aircraft, several Marine aircraft, and another longline vessel, the Coast Guard called off the search. Rescue crews conducted a total of 23 searches over the course of 45 hours, searching an area of nearly 9,000 square miles.

"Making the decision to suspend a search is never an easy one, said Ensign Jonathon Smith, a watchstander with the Coast Guard in Honolulu.

The crew member who fell overboard was from the Republic of Kiribati.

Three months earlier, another crew member was lost after falling overboard from the vessel *St. Marie Anne*, also homeported in Honolulu. This time, the missing man was from Vietnam. The Coast Guard again searched a nearly 9,000-square-mile area for 77 hours before suspending its efforts.

The foreign nationals, including the two who died recently, make up by far the largest part of crews on Hawai'i-based longliners. The pay is low, hours are long, work is hard. Because they are not formally admitted to the United States, they have no protections that are available to workers legally admitted.

The employment of foreign labor by the Hawai'i longliners has been challenged by Malama Chun, a Native Hawaiian fisherman. In September, the Hawai'i Supreme Court heard oral arguments in his case brought against the Department of Land and Natural Resources, which issues commercial fishing permits to the foreign crew members. The permits are required of anyone working on a commercial fishing vessel.

The court has not yet issued a ruling in that case.

Following an Associated Press investigation in 2016 on labor conditions aboard fishing vessels, the Hawai'i Longline Association undertook a self-audit and reported finding no evidence of substandard working conditions, human trafficking, or forced labor among crews on its members' vessels.

Meanwhile, the subject of the often inhumane treatment of crews and observers on board fishing vessels in the Pacific came up for discussion at the meeting last month of the Western and Central Pacific Fisheries Commission, which is the internationally sanctioned regional fishery management organization for the area in which Hawai'i longliners conduct most of their fishing.

The commission was pressed by several non-governmental organizations to adopt standards that would provide some degree of transparency in reporting incidents in which observers were injured or died and to adopt labor standards for crews on fishing vessels.

Bubba Cook, WWF's tuna program manager in the Western and Central Pacific, expressed his disappointment. "We remain very discouraged that some members are reluctant to address the serious human rights and labor issues that have come to light," he said in a statement to the press. ***— P.T.***

New Directors of Housing, Planning In Hawai'i County Tied to Developers

Mitch Roth, the newly elected mayor of Hawai'i County, made supporting business one of his key promises to voters.

Roth was regarded by many as a steady hand, having held the elected post of county prosecuting attorney for the previous eight years. His opponent in the general election, Ikaika Marzo, had never held public office, appointed or elected.

But when Roth announced his cabinet picks in early December, his choices for several positions alarmed and puzzled many in the public.

Planning: Zendo Kern

Zendo Kern, who donated $2,700 to Roth's campaign, has been involved in county government in several capacities over the last decade. He sat on the County Council for two years and has served on the Board of Water Supply and the Windward Planning Commission. He has never held a managerial position, however, and has had no formal training as a planner.

Tiffany Edwards Hunt, who was chairperson of Kern's campaign when he ran for County Council, told Nancy Cook Lauer of *West Hawai'i Today* that she had "'grave concerns' about his lack of engagement with the community and his insufficient management experience. She also worried that he'd be beholden to the former clients he helped shepherd through the planning and permitting processes."

Kern's lack of training and his inexperience did not stop him from hanging out his shingle and taking on clients – numbering in the hundreds – who wanted him to plead their case for variances, zone changes, or other approvals from the county's Planning Department and two Planning Commissions, or to bring challenges to those decisions before the county's Board of Appeals.

Many of those applications have generated controversy. Dozens have been made on behalf of homeowners wanting to challenge the planning director's denial of short-term vacation rental permits, following the county's efforts to tighten restrictions on transient vacation rentals, or TVRs. (In this connection, it's noteworthy that the AirBNB pac, Committee to Expand the Middle Class, donated $1,000 to Roth's campaign.)

Several of Kern's applications have involved projects that were withdrawn before they could be heard by the Planning Commission or acted upon by the Planning Department.

Take the case of a "Christian camp" that was planned for a 10-acre portion of two lots totaling 60 acres in the Volcano Farm Lots subdivision, in the state's Agricultural District in Volcano. On behalf of Christian Liberty Ministries of Hawai'i, Inc., Kern submitted an application for a Special Permit that would allow the use of the land for a camp.

Apparently unbeknownst to Kern, the property was subject to restrictions on its use, imposed by the state Board of Land and Natural Resources when the subdivision was established in 1962. Those restrictions limit use of the land to cultivation of crops and the personal residences of the landowners.

In addition, "a large reservoir (approximately 1 million gallons) will be used to teach kayaking and paddleboarding," the permit application states, showing the reservoir as a large, rectangular water feature straddling both lots of record. However, most of the area depicted is dry most of the year and is instead a lined catchment area for a pond that is only about a quarter the size depicted in the application.

The application was to have come before the Windward Planning Commission on September 3, but, given vocal and strong opposition from neighbors, Kern asked that it be deferred. On September 14, the Planning Department received Kern's notice that he was withdrawing the application.

Or take the case of the Fairview Avenue "glamping" proposal that was cooked up by another Kern client. The 294-acre Agricultural parcel, in the Hokukano area of Kona, was former ranch land that had been subdivided in 2009. Last April, Kern submitted an application to use 14.9 acres – just shy of the 15-acre threshold that would trigger involvement of the state Land Use Commission – for a 40-unit lodge and related facilities. The units would consist of individual tents or domes, several of which had already been built (without permits) and were being advertised on AirBnB and other websites.

Once again, neighboring landowners were unanimously opposed. In addition, in early August, the Land Use Commission had agreed with the county that agricultural tourism was not allowed in Hawai'i County under state law.

The planning director recommended against approval, noting in his recommendation to the commission that the county was in fact considering bringing an enforcement action against the landowner.

The matter was scheduled for consideration by the Leeward Planning Commission on August 20. That day, Planning Director Michael Yee notified

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the commission that the applicant had withdrawn the application. (For details, see the article in the September edition of *Environment Hawai'i.*)

As a third example, there is the matter of Kern's involvement in an application to redistrict and rezone about 11 acres near the village of Waikoloa. The landowner, Danny Julkowski, had purchased the land where the county had at one point intended affordable housing to be built, in satisfaction of the affordable housing requirement imposed on the former owner of the land, Waikoloa Mauka, as part of the LUC conditions for redistricting the land from Agricultural to Rural.

The larger development proposed by Waikoloa Mauka (later known as Waikoloa Highlands) never got off the ground, resulting in the LUC reverting the land that was subject of the original redistricting petition – including what Julkowski now owned – back to the Agricultural District.

There is a long history to the project, much of it detailed in past issues of *Environment Hawai'i.* In his report to the Windward Planning Commission, Yee recommended denial.

When the application came before the Planning Commission on August 20, Kern said he had been approached by a county employee about a year and a half earlier who had a "client" with an application for 201H housing (affordable housing) who needed Kern's help.

Kern provided few details of how his client came to own the parcel or the shadowy history behind the creation of Julkowski's parcel and the several transactions that led up to his purchase of it. "I actually did speak to the original consultant," Kern told the commissioners. "He didn't even know what happened. Something really funky happened in that transfer."

The commissioners disapproved the request. Meanwhile, the FBI is reported to be investigating the matter. (For details, see the September edition of *Environment Hawai'i.*)

Housing: Susan Akiyama-Kunz

Unlike Kern, Susan Akiyama-Kunz, Roth's appointee to the head the county's Office of Housing and Community Development, has years of experience in her field.

In fact, Akiyama-Kunz was at the helm of that office in the waning months of the mayoral term of Billy Kenoi, when the "funky" deals – to quote Kern – involving Waikoloa Highlands' satisfaction of its affordable housing requirement occurred.

County ordinances provide several means for developers to satisfy affordable housing requirements. They can build it themselves, donate land to a non-profit to develop the affordable units (for example, Habitat for Humanity), or they can donate the undeveloped land to the county.

In 2016, Susan Akiyama declined the offer of land from Waikoloa Highlands. As *Environment Hawai'i* reported in September 2018, an undated memo to the files in the Housing Office stated, "According to Susan, county is not interested in accepting the land because we would be competing with our own Kamakoa Nui project," referring to a large project the county was developing on the opposite side of Waikoloa Village. That same memo noted that none of the non-profits qualified to undertake affordable housing developments was interested, either.

Instead, Alan Rudo, then a staffer in the Housing Office, came to an agreement with Sidney Fuke, the planner then representing the developer (and who has close ties with Kern), whereby Waikoloa Highlands would donate land the land to a nonprofit. (Rudo left Housing in the fall of 2018, soon after questions began to arise about the deal; coincidentally, he donated $1,050 to Roth's campaign. Fuke's son, Jeffrey, and his wife, Aileen, each donated $1,000.)

Akiyama signed off on the proposal, as did county corporation counsel Amy Self and, eventually, Mayor Kenoi.

In the months that followed, discrepancies emerged. Plumeria at Waikoloa, the company that took title to the 11.7-acre affordable housing parcel, was variously identified as a non-profit or a limited liability company. Somewhere along the line, conveyance documents appear to have been tampered with, whether at the county level or elsewhere remains uncertain.

What is known is that the land was not donated to Plumeria at Waikoloa, but was instead sold to the company for $50,000. Plumeria at Waikoloa turned around and sold the parcel to Julkowski for $1.5 million. (The only name associated with Plumeria at Waikoloa was that of Paul Sulla, Jr., its manager. The company changed its name to Peaceful Ventures, LLC, in 2018. It filed a notice of termination with the state, effective April 30, 2020.)

Akiyama-Kunz was asked about her involvement with the affordable housing agreement last month. She said she had no specific memory of the deal. "I know that there was a federal investigation involving this project after I left," she said. "I'm not familiar with where they're at. I'm not involved in that."

Corporation Counsel: Strance

Roth has appointed Elizabeth Strance, a former 3rd Circuit judge, to be corporation counsel. Strance also has played a key role in one of the most controversial developments on the Big Island. It was Strance who decided in 2012 that the state Land Use Commission erred in its reversion of the land slated for the stalled-out 'Aina Le'a development. (Robert Wessels, the principal of 'Aina Le'a, Inc., donated $3,000 to Roth's campaign. 'Aina Le'a donated $1,000.) — ***Patricia Tummons***