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Breaking Up Is Hard to Do

Neil Sedaka's classic song could be the anthem for the two-part Maui development whose owners now want nothing more to do with each other. Their request to the Land Use Commission that it officially bifurcate them has turned out to be anything but easy.

For one thing, there are the promises made when the development was proposed some 30 years ago. With many of them – including the most expensive and onerous – proposed to be placed wholly on the back of the owner with admittedly limited resources (to say nothing of a history of failed developments), there's the question of equity. Nor is the LUC inclined to overlook the breach of trust with the community if that would-be developer succeeds in his recently disclosed intention to ask the commission to revert the land to the Agricultural district.

For now, the commission has thrown the matter back into the lap of various parties to the original proceeding. But if ever there was a case to be made for giving the LUC greater enforcement powers, Pi'ihana could be Exhibit 1.

IN THIS ISSUE

Exactions in Original LUC Order Hang Up Effort to Split Maui Project

On December 30, the members of the state Land Use Commission gathered, via Zoom, for what was expected to be a fairly brief hearing to review and approve an agreement among Maui County, property owners, and the state Office of Planning concerning the future of a development proposal approved by the LUC three decades ago.

Oh, how wrong those expectations were.

Time and again, commissioners expressed their dismay over statements made by the attorney for one of the landowners.

"For once in my life, I'm a little bit speechless," said commissioner Gary Okuda following the admission by attorney Jason McFarlin that his client, Wailuku Plantation, LLC, and its owner, Vernon Lindsey, lacked the financial ability to carry out the project anticipated in the stipulation signed barely two weeks earlier, on December 14.

"I don't know what to say. I don't know what to ask. I will stop here." That was commissioner Lee Ohigashi, following McFarlin's disclosure that Lindsey would be petitioning the LUC to revert about 79 acres owned by Wailuku Plantation from the Urban land use district back to the Agricultural district.

Commissioner Arnold Wong at one point was obviously angered by what he saw as McFarlin's dissembling.

McFarlin attempted to explain: "I'm trying to be up front about absolutely everything here… I just want you guys to keep in mind I'm dealing with a very indecisive and difficult client here and I am trying to provide you with the best

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PHOTO: MAUI COUNTY PLANNING DEPARTMENT

In this photo submitted to the LUC by the Maui County Planning Department, dozens of abandoned vehicles are visible on the Pi'ihana property.

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NEW AND NOTEWORTHY

Sunset Seawall Court Case: On February 10, 1st Circuit Judge Jeffrey Crabtree will hear arguments on the state's January 12 motion to compel Sunset Beach homeowners James and Denise O'Shea to produce documents supporting their claims that the state holds

PHOTO: DLNR

Rebuilt O'Shea seawall.

some of the blame for their unauthorized 2017 construction of a boulder and concrete seawall on the public beach.

That year, the Board of Land and Natural Resources proposed fining the couple $75,000 for the work, which they initiated after the seawall fronting their home and that of their neighbors fell apart, and which continued for five days after the state ordered them to stop. The matter was deferred after they requested a contested case hearing.

The dispute, now in Circuit Court, has since drawn in that Ke Nui Road neighbor, Rupert Oberlohr. The O'Sheas claim that modifications Oberlohr made to the original seawall caused it to move and ultimately collapse. They also claim that the wall was built in the 1950s "by or for the state of Hawai'i, on state property," and that the state's failure to maintain the wall "and/or the state's negligent or intentional acts or omissions directly or proximately caused the collapse."

The O'Sheas, in a September 2018 counterclaim, attempted to "foist blame upon the state," as state deputy attorneys general put it. So on October and again in December of last year, the state asked the O'Sheas to produce documents (maps, plans, photos, and correspondence, etc.) regarding the old seawall, including those relating to its construction, repair, maintenance, condition, or location.

On December 18, the O'Sheas' attorneys filed a response with the court explaining why they objected to the state's requests. Among other things, they argued it wasn't the O'Sheas' obligation to meet the state's over-broad, vague, burdensome, and expensive request. What's more, some of those documents might, for various reasons, be confidential, they argued.

East Maui Permit Case: When met with a request for a contested case hearing, the state Board of Land and Natural Resources often pauses its regular meeting, holds an executive session, and upon its return immediately and without explanation votes to deny the request.

Instead of seeking a court order forcing the board to hold a contested case hearing, the Sierra Club, in the case regarding the 2018 and 2019 revocable permits for the diversion of East Maui streams by Alexander & Baldwin and East Maui Irrigation Company, chose to ask the court itself to decide on whether those permits were properly approved.

With regard to the companies' permits approved by the board last year, however, the Sierra Club is pressing the court to force the Land Board to hold a contested case.

It took more than 19 months for the Sierra Club's lawsuit over the Land Board's 2018 decision to go to trial, the Sierra Club's attorney, David Kimo Frankel, noted in his opening brief last month. "The trial itself lasted more than two weeks. And more than two years after the Sierra Club filed that complaint, no decision had been reached. In the meantime, A&B has been allowed to continue diverting streams and draining them dry pursuant to both the 2018 and 2019 BLNR decisions. A&B continued to take all the baseflow most of the time from 13 streams and waste most of that water. … Given this court's calendar and COVID, it is completely unrealistic to expect that a trial on the merits of BLNR's decision could be held—and a decision rendered—by the end of 2021. Moreover, it is inappropriate to burden this court with a task that BLNR should be fulfilling," he wrote.

He cited the Hawai'i Supreme Court's decisions in cases involving the Maui electric utility that found that the Public Utilities Commission violated the Sierra Club's due process rights to a clean and healthful environment by approving a power purchase agreement without holding a contested case hearing on environmental impacts.

He argued that the Land Board violated the Sierra Club's due process rights when it authorized the continued diversion of East Maui streams without holding the requested contested case hearing.

He added that there is "a plethora of evidence that the August 2020 trial did not consider," including the state Division of Aquatic Resources' determination that four of the streams the Sierra Club is seeking protection for "should be a high priority for stream restoration."

Quote of the Month

"It is an era where oceanfront property is no longer a benefit, but a major liability."

— Sam Gon, Land Board

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Hawai'i County Folds on Demand For New EIS For 'Aina Le'a Housing

Less than a month after the inauguration of Hawai'i County Mayor Mitch Roth, his nominee for planning director, Kendo Zern, has reversed the county's long-standing position that work on the long-stalled 'Aina Le'a project would not be allowed until a new environmental impact statement was accepted.

In a letter dated December 23 to Robert Wessels, the CEO of 'Aina Le'a, Inc., Kern stated: "We have reviewed the legal position presented by your attorney, Michael Matsukawa. Based on this position we have determined that the affordable housing project referred to as Lulana Gardens, LLC's [sic] (37.863-acres) is 'grandfathered' from EIS review. We encourage Lulana Gardens, LLC to immediately restart the construction of homes for our local families per the approved building plans."

Zern's short letter came on the heels of a six-page letter from Matsukawa to his client dated December 15, in which Matsukawa laid out his position that the stop-work order issued by former county planning director Michael Yee in 2017 was improper. Matsukawa argued that after the county approved in 1996 a zoning change for the 'Aina Le'a area, subject of a 1989 boundary amendment petition to place 1,000-plus acres in the state Urban land use district, "that act was the last discretionary act that the landowner needed for the affordable housing project."

In 1996, he goes on to say, the state's Environmental Policy Act, Chapter 343 of Hawai'i Revised Statutes, did not require preparation of an EIS for the affordable housing portion of the development. (One of the conditions the state Land Use Commission placed on the project was that a percentage of the homes to be built in the development be affordable under the county guidelines. That number was determined to be 385.)

Only in 2004 and 2009 did the Legislature and state Supreme Court, respectively, add triggers to the law, requiring an EIS whenever a development proposed building a sewage treatment plant (2004) or an intersection with a state right of way.

Beginning in 2009, 'Aina Le'a – then known as DW 'Aina Le'a, LLC – began work to develop the affordable housing, in the form of multiple apartment buildings in the far mauka portion of the Urban District land. The EIS, prepared for the entire development and not just the affordable housing portion, was challenged in court by the Mauna Lani Resort Association. The judge hearing the case – Elizabeth Strance (now Hawai'i County's corporation counsel) – determined that the EIS had omitted discussion of a joint development plan that 'Aina Le'a had entered into with Bridge 'Aina Le'a, owner of 2,000 acres still in the state Agricultural district and surrounding the Urban land on three sides. Strance disposed of the matter by remanding to the county a decision on whether that omission was sufficient to effectively void the EIS.

In his December 15 letter, Matsukawa claims that "the act of remanding the matter to the planning department fell beyond Judge Strance's authority" – a claim that, in the seven-plus years since Strance's ruling, was not heretofore raised by any party. Matsukawa bases that claim on the argument that a remand is proper only in an agency appeal – but that the Mauna Lani Resort Association's challenge sought instead a declaratory judgment from the court, "to declare if the EIS is or is not legally adequate as a matter of law, nothing else."

Matsukawa's arguments continue to raise points of claimed error that, in the years since the Mauna Lani litigation concluded, were never raised by any party to the proceeding. In this regard, they echo the arguments that he raised in the lawsuit filed last spring on behalf of Lulana Gardens.

In that case, he argued that the county was wrong to require a new environmental impact statement. The county corporation counsel, in the administration of former Mayor Harry Kim, vigorously argued against those claims and prevailed in a preliminary ruling. However, as soon as the Roth administration took office, a kind of détente was reached between Kern and 'Aina Le'a, with both parties agreeing to suspend further court action pending the outcome of discussions aimed at a settlement. (*Environment Hawai'i* reported more fully on this lawsuit in our April, August, and December 2020 editions.)

The relief sought by 'Aina Le'a was a finding by the planning director that the Lulana Gardens portion of the development is effectively grandfathered – or, failing that, a determination that the affordable housing project is not an "action" subject to Chapter 343.

"The planning director could thereby acknowledge the separate, independent status of the affordable housing project that is not part of the 'action' to be assessed in the EIS… The planning director's determination need not be published in The Environmental Notice."

Like a cheap suit, in three sentences, Zern folded.

Of course, the affordable housing part of 'Aina Le'a is just a small part of the overall project. How it can move forward without much of the remaining development occurring is at this point unclear. Access to the affordable housing area will require a roadway from Queen Ka'ahumanu Highway and significant (and expensive) intersection improvements, to mention only one of the associated improvements required.

'Aina Le'a also faces a legal challenge from Iron Horse Credit, which provided 'Aina Le'a with the capital it needed to emerge from bankruptcy in 2019.

Meanwhile, Kern's confirmation as planning director was in doubt as of press time. The County Council Planning Committee met on January 19 to consider Kern's nomination. Questions from the council members honed in on an apparent mismatch between the qualifications set forth in the county charter and Kern's own work history. When the vote finally came, it was 4-5 to recommend that the council reject his appointment.

The council itself will be voting on the nomination early this month. The committee membership consists of all nine council members. Unless one or member changes his or her mind, Kern will not be confirmed. ***— P.T.***

Pi'ihana from Page 1

information I can. … I really take great offense that I would be alleged to be a liar because I've – uh, you know there aren't any good answers to these questions. There just aren't."

Wong then offered an apology of sorts. "I was taken aback," he said, "because it seemed there were some misrepresentations… I was thrown off my chair by what I heard."

Bifurcation

What the commission was being asked to do was approve a request that McFarlin filed on August 20, seeking to bifurcate the responsibilities and obligations imposed on C. Brewer Properties, Inc., in 1990, when the LUC approved its petition to place into the Urban district two widely separated tracts of land near Wailuku, Maui. The stipulated agreement set forth mechanics to effect that bifurcation.

The larger of those two tracts, just mauka of Wailuku town and referred to as the Wailuku development in the decision and order, consists of 545 acres, and in the 30 years since the LUC approved the boundary amendment request, it has been substantially developed as the Kehalani master planned community.

The smaller tract, consisting of 79 acres arranged in a narrow, irregularly shaped parcel, runs along the eastern side of Kahekili Highway north from its intersection with Pi'ihana Road, near Iao Stream, nearly to its intersection with Waiehu Beach Road. It has seen no permitted development whatsoever.

Within a few years of the LUC's approval, C. Brewer ceased most of its agricultural operations and set up a new entity, Hawai'i Land & Farming, to take over its real estate operations. Eventually, that, too, foundered and developer Stanford Carr ended up owning both tracts.

In January 2013, Kehalani Holdings Company, LLC, which had acquired the land through a process called deed in lieu of foreclosure, divided ownership. RCFC Keahalani, LLC, was the new owner of the mauka tract, while RCFC Pi'ihana, LLC, took title to the smaller, 79-acre tract. RCFC Kehalani continues to hold title to about 50 acres in the mauka development. RCFC Pi'ihana, on the other hand, sold its holdings to Lindsey's company in a series of transactions from August 2017 through April 2019. According to property tax records maintained by Maui County, Lindsey paid around $2 million for the land.

Two of the unpermitted but inhabited structures on Pi'ihana land.

The obligations imposed by the conditions of the LUC redistricting back in 1990 run with the land. In the case of the Pi'ihana tract, those conditions include building a bridge across Iao Stream and developing the infrastructure for some 600 homes that were to be affordable to households earning between 80 percent and 140 percent of the average median income of Maui.

As Lindsey took over the land, RCFC Pi'ihana sloughed off those obligations, which, in 1990, were estimated to cost nearly $13 million. (In today's dollars, that would be around $26 million.)

But unless and until the LUC bifurcates the docket, its affiliated company, RCFC Kehalani, remains potentially liable for them.

That point came up early in the LUC's discussion. Commissioner Gary Okuda asked McFarlin: "You do agree that there is an argument that because your clients are successors in interest to the original order that C. Brewer and Co. obtained, that your respective clients might have obligations with respect to each other's development. I mean, there's at least that argument, correct?"

McFarlin: "Ah, yes. Yes, there is that argument."

Okuda: "And in fact that's one of the reasons why at least your client is asking for this bifurcation so going forward there's not going to be any responsibility for what's happening at the other project, correct?"

McFarlin agreed.

In fact, there's virtually no chance that McFarlin's clients – Vernon Lindsey and the handful of other owners of the Pi'ihana land who have purchased small parcels over the last couple of years – face any real risk of being held liable for fulfilling the as-yet unfulfilled obligations associated with the Kehalani development. Of the two largest landowners – Lindsey's Wailuku Plantation and RCFC Kehalani – Lindsey has, by far, the shallower pockets. Should bifurcation occur, it would be

Continued on next page

RCFC Kehalani who would be relieved of the greater burden.

Joint and Several

Commissioner Dawn Chang pressed the same question with Randall Sakumoto, of Honolulu's McCorriston Miller law firm, representing RCFC Kehalani.

"Currently, both parties – your client and Mr. McFarlin's client – are responsible to fulfill responsibilities under the D&O [the LUC's 1990 decision and order]. Jointly and individually responsible for fulfilling those obligations," Chang stated.

"I don't know that I agree with that," Sakumoto replied. "We have always been responsible for the Wailuku project district. There's never been any sense that we were also obliged to perform conditions as they relate to unrelated property. There's no feasible means of doing that. It's hard to imagine a scenario where that could actually be done."

"Humor me," Chang continued. "If we bifurcated the docket, … would you agree that the Land Use Commission and the public would not have the ability to hold both parties responsible to fulfill all the obligations under the D&O? … Once we bifurcate, we are essentially separating the responsibilities of both parties."

"That's our objective," Sakumoto replied, describing the existing state of affairs as "clouding the title" and an "ambiguity we would like you to resolve."

"We don't think as a practical matter there's any real change," he added. "My client has no … business with respect to [the Pi'ihana] property."

Chang: "You would agree, the benefit is really to your clients? At this time, clearing the cloud is to the benefit of your clients." She agreed that the conditions that apply strictly to the Pi'ihana project should be borne by Wailuku Plantation, but, she went on to say, "I'm more concerned about infrastructure requirements – the roadways, the bridge – those kinds of major infrastructure requirements that were placed in the LUC's conditions, where there is an argument that, to a certain extent, both parties are obligated to fulfill those obligations."

If the LUC were to agree to the bifurcation, as laid out in the proposed stipulation, Chang said, "we would no longer be able to ask your client to fulfill those obligations."

Affordable Housing

Apart from the roadway and bridge obligations, the 1990 D&O required some of the housing to be affordable. In the case of the Pi'ihana development, all 600 of the housing units proposed were to be affordable – with 40 percent (240 units) affordable to families with 80 percent of the county's median income levels, 180 affordable to those at the 80 to 120 percent income level, and 30 percent affordable to those in the 120 to 140 percent range.

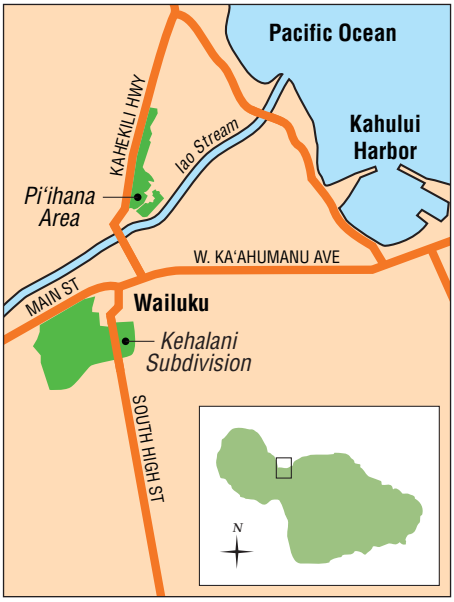
In the case of the Kehalani development, 37.5 percent were to be affordable (for a total of 900 units) within those same ranges. Altogether, of the 3,000 total units planned (600 in Pi'ihana, 2,400 in Kehalani), fully half were meant to be affordable with those ranges.

Commission chair Jonathan Scheuer pressed Sakumoto on this issue. "Where does your proposed bifurcation leave this condition?" he asked. "My concern is, the LUC approved a docket with two project districts and tied project conditions to both…. It appears there's no financial ability or intent of the current owner of the Pi'ihana project district, which was sold the land by your client, to fulfill any of these conditions. So we, the people of Hawai'i, the people of Maui, are out 600 units of affordable housing. And I don't want to be out 600 units of affordable housing….

"If we have any hope of seeing affordable housing in the Pi'ihana project developed, what's our path forward?"

"I can only answer for the Wailuku project district," Sakumoto answered. "We will continue to do what we can… The history of this is, before the lender foreclosed, my client inquired with the county Department of Housing and Human Concerns, what was the status of the affordable housing requirements. Since then, they have been reporting annually to the county."

Okuda picked up the questioning. When Sakumoto's client acquired the Kehalani property by means of a deed in lieu of foreclosure, Okuda said, "bottom line is that the new owner steps in the shoes of the prior owner… So whatever obligations the prior owner had… foreclosure doesn't cut off those obligations. And whoever takes a deed in lieu knows or should know that fact. If you take that deed in lieu, or you're a successor



to someone who took that deed in lieu, you're assuming underlying obligations, encumbrances, and orders that run with the land."

Sakumoto agreed.

A 'Twofer'

Commission chair Scheuer doubled back to the question of the benefits to Sakumoto's clients should the stipulation and bifurcation be approved.

"RCFC Pi'ihana and RCFC Kehalani, were they owned by the same parent?" he asked.

Sakumoto said he didn't honestly know, but, "the fact that RCFC is in both names, I guess there's a commonality."

(Both RCFC Kehalani and RCFC Piihalani are registered as foreign LLCs in Hawai'i and both have the same mailing address on Santa Monica Boulevard in Los Angeles.)

"If the same entity owned both, they got a twofer on the transaction," Scheuer continued. "First, they got paid for the land, and then they got to foist the obligations onto an unsuspecting new owner."

Sakumoto: "Like any real estate transaction, you buy the benefit and the burden. I don't know there was any foisting of anything."

Whether Vernon Lindsey, the sole member of Wailuku Plantation, LLC, was unsuspecting can't be known; he was not present at the meeting. However, Lindsey does have a history as a failed developer. More than a decade ago, he purchased a number of distressed properties in Hilo,

Continued on next page

including the former Western Auto store downtown and the complex known as Waiakea Villas. While he may have had good intentions, in the end, he was unable to move forward with his planned projects. His interest in Waiakea Villas was auctioned off when the bank foreclosed. His efforts to develop the old Western Auto building ran afoul of the county, which ultimately found it to be so unsafe as to be uninhabitable. (The building was eventually demolished and a new McDonald's restaurant and parking lot now occupy the site.) Even before that, in the mid-1990s, Lindsey and his wife, Noenoe, attempted to redevelop the Old Haiku Cannery on Maui – an effort that also ended in foreclosure.

Enforcement

How did it get to this point?

As was noted many times over the course of the hearing, under rulings from the Hawai'i Supreme Court, the Land Use Commission is helpless to enforce conditions it attaches to redistricting amendments once there is "substantial commencement" of work.

In this case, with hundreds of housing units developed in the Kehalani project area, the LUC has its hands tied. Enforcement of conditions fell to the county years ago.

Maui County deputy corporation counsel Michael Hopper was grilled on the county's efforts to hold both the Pi'ihana and Kehalani developers to the promises that C. Brewer made – and which they assumed when they acquired the land.

Okuda pressed Hopper on why the county would go along with the proposed stipulation when, in effect, it would give the county little recourse to force development of the promised 600 affordable housing units in the Pi'ihana area.

"You know, the fact that a landowner or somebody who has an obligation gets rid of an asset doesn't necessarily absolve that person from obligations to perform on the obligations they should've performed," Okuda noted. "If you own a corporation and you know the corporation has obligations and you intentionally don't perform on those obligations and you drain the corporation of its profits, there still might be personal liability against the corporate owner."

He continued: "I'm thinking, if there's no bifurcation, at least not right now, or if there's a deferral, this actually gives the county of Maui more tools in its toolbox on whatever type of enforcement action the county wants to take. I'm not proposing that people be held hostage here, but sometimes, if there's no quid pro quo back to the community, a clear community benefit – what is the community getting in return?"

Hopper acknowledged that that "is a grave concern of ours."

"I understand, technically, yeah, maybe the county could issue a notice of violation against Kehalani only, the developer only, or the homeowners, to fix the situation in Pi'ihana. We could try. Not sure it would be successful. But I don't see that concern as a basis to justify continued opposition to bifurcation," which, he said, was the appropriate means of making the obligations of all parties clear.

Lee Ohigashi, the commissioner from Maui County, was angry. "We're asking you, is it the policy of the county of Maui … to ignore that provision and say we're not going to try to enforce it? 'We're not concerned about having an additional 600 units.'"

Commissioner Dan Giovanni was also concerned about the county walking away from the developers' obligations to provide affordable housing on the Pi'ihana tract. "Would you take the position that if the bifurcation goes forward, there's no recourse for holding Kehalani responsible for any of the conditions that might be judged to apply to Pi'ihana?"

Hopper agreed.

Giovanni: "And if we do not bifurcate, the opposite would be true?"

"Technically true," Hopper replied, going on to mention his "legal concern about forcing Kehalani to build housing on Pi'ihana" land.

It was left to commission chair Scheuer to point out that there are other ways to satisfy the affordable housing condition apart from erecting buildings on the Pi'ihana property.

"Does condition 1 [in the Decision and Order] specify that the physical building of units on that property is the only way to fulfill those conditions?" Scheuer asked Hopper.

"No, there's other ways," Hopper replied.

Scheuer then noted that the original D&O stated that the affordable units could be built in any distribution the developer desired or could produce units affordable to a larger percentage of low-income families and receive more credits against the affordable housing requirement.

Backing Off

Dawn Apuna, the deputy attorney general representing the Office of Planning, a signatory to the stipulated agreement, announced that, "with the new information provided by Mr. McFarlin, we cannot in good conscience continue to support the stipulation."

"I think the [Office of Planning] understands the frustration the commission feels on behalf of the community, on behalf of whatever conditions were made in the original order. I also understand what Mr. Hopper is saying about the legal ability to force developers to make sure they build affordable housing.

"I would offer, maybe what the commission can do, any new [district boundary amendments] that come through, there be more stringent timelines to make sure developers are doing these things in timely fashion. Bond requirements, maybe other ways to require the original developers to perform as represented."

Apuna's retreat from the stipulation pushed the commission to finally wrap up its deliberations.

Okuda weighed in with his thoughts on the issue. "We come across these dockets where the easy money is made by the developer and the stuff that is not easy money, oftentimes affordable housing, it's just left undone, and other infrastructure promises. And then, when 25, 30 years pass, people come and petition us and say changed circumstances, a lot of time has passed. Relieve us of these obligations.

"Isn't there a public policy reason why the LUC should start taking a harder line and say, yeah, I guess somebody's going to suffer, maybe the successor in interest to the original petitioner, but promises made … have to be kept."

In the end, the commissioners approved a motion to reject the stipulation and order the parties to "continue discussions on this matter and not to return to the commission until evidence of (1) financial capability is filed with the commission; and (2) the responsibility for various conditions and requirements is resolved given the information received at this hearing." — ***Patricia Tummons***

Owner of Pi'ihana Land Is Sued By Maui County, Neighbor Farmer

Since acquiring about 79 acres of land north of Wailuku, Maui, Vernon Lindsey has racked up a number of complaints from neighbors and Maui County.

Winn V. Lindsey

Peter Winn, a neighbor who co-owns a 42-acre parcel with Lindsey's wife, Noenoe Lindsey, has sued both Vernon and Noenoe Lindsey along with several others who worked for Vernon Lindsey. Winn alleges that starting early last year, Vernon Lindsey and his agents dumped "substantial amounts of scrap metal along with other trash and junk" onto Winn's and Noenoe Lindsey's land, known as the Pi'ihana Farm. The farm is immediately adjacent to a lot owned by Lindsey's Wailuku Plantation and which was part of the area subject to the Land Use Commission's 1990 order placing it into the Urban land use district.

Over three days in late October and early November, 2nd Circuit Judge Rhonda Loo heard witnesses and arguments on Winn's motion for a preliminary injunction against the defendants. On December 2, she granted the motion, barring all the defendants except Noenoe Lindsey from entering onto Pi'ihana Farm, and enjoining NoeNoe Lindsey from granting permission to any of the other defendants to enter the property.

In her order, Judge Loo recites numerous instances of Lindsey or his workers trespassing on Pi'ihana Farm and dumping truckloads of waste.

In March 2020, Winn observed one of the defendants, Michael Perreira, "emptying a red dump truck filled with trash, rubbish, and debris." Around the same time, "a large pile of rubbish, including construction waste, derelict motor vehicles, sheet metal, bags filled with feces, metal drums, rusted appliances, partially destroyed parts of a structure, bed frames, documents, and other diverse items of non-agricultural waste were dumped … in and around the area" where Perreira had been seen dumping trash on several occasions.

Winn demanded that Vernon Lindsey and/or Noenoe Lindsey clean up the site. On August 7, Maui County issued a warning notice, stating that the trash had been dumped in a flood plain and, as such, violated zoning regulations. Fines would begin to accumulate if the waste were not cleaned up, the warning notice said.

Five days later, the trash pile caught fire. The fire captain who was among the responders testified that he saw "smoldering piles of rubbish consisting of vehicles, appliances, and other garbage." An employee of Winn helped extinguish the blaze using Winn's heavy equipment, which was damaged in the process.

In September, the waste pile caught fire several more times.

Winn got quotes from contractors to haul away the trash, but before they began, Vernon Lindsey hired a crew that came on the site and according to Loo's order, proceeded to "move the trash around, mix it with dirt, and push it along the berm adjacent to the river bank, where they covered the rubbish with more dirt in an effort to conceal the rubbish."

Maui County inspectors revisited the site and once more found that Winn was in violation. At that time, Winn hired a contractor to remove the trash – at a cost substantially greater than the original quote, owing to the fact that the rubbish had been mixed with soil by Lindsey's crew.

When the contractor arrived at the site on September 28, Lindsey was there and "became belligerent and demand[ed] that the workers stop disturbing his, Defendant Vernon Ray Lindsey's trash," Loo's order says.

Police were called. Lindsey told them that the contractor was "harming [his] trash pile" and "falsely claimed that he was an owner of the Pi'ihana Farm property."

Two days later, the Planning Department issued a notice of violation to Pi'ihana Farm, with fines of $1,000 a day beginning to accrue on October 7.

Winn filed his lawsuit against the Lindseys on October 2, and still the fires continued – on October 18-19 and on October 22.

A temporary restraining order against the defendants was issued on October 22, and finally Winn's contractor was able to sort the trash and haul it away.

Since then, the contractor has hauled over 90 tons of trash to the landfill, with an additional 60 tons of scrap metal separated out and ready to be hauled to a metal recycling facility.

"Intermixed throughout the aforementioned trash, and dug out by workers removing and sorting the trash were personally identifying documents of Defendant Vernon Ray Lindsey and Defendant Noenoe Marks Lindsey, including but not limited to cancelled checks, bank statements, tax forms, and other documents going back as early as 1977," Judge Loo says in her order.

Winn's claims for damages have yet to be heard by the court.

Maui County v. Lindsey

On December 9, Maui County filed a complaint for damages against Wailuku Plantation and Vernon Lindsey. The lawsuit sought payment of $24,700 plus court costs, reasonable attorney fees, and any other costs incurred by the county in association with the lawsuit.

At the heart of the lawsuit was Lindsey's breach of an agreement with the county that Lindsey had signed November 19, 2019. The agreement was intended to resolve the county's claims that Lindsey, the sole member of Wailuku Plantation, LLC, had violated the county's zoning code by using his property – part of the Pi'ihana area placed into the Urban district by the 1990 LUC action – as a construction base yard.

The initial notice of violation had been issued on April 24, but, according to the notice of violation itself, the violation had been ongoing since at least November 11, 2017, when Lindsey first received a "notice of warning." Lindsey was instructed to correct the violation by April 30, 2018, or face fines accruing at a rate of $1,000 a day.

Lindsey appealed to the county Board of Appeals. In his defense, on May 24, 2018, he wrote, "facts of the matter is different than inspectors findings. The 'base yard' is the items that is use to start a R-2 Housing Project as current zoning allows. The equip needed to maintain vacate property was fenced and contained. This area has great thief and Homelessness. And a 24 hour guard was also need which is the reason for office trailer."

The Board of Appeals finally held a contested case hearing on the matter in July 2019, which was continued until August and again until October 2019. "However," the complaint states, "prior

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Kehalani Developer Disputes Claim Of a Promised Community Center

Much of the Land Use Commission's attention focused on the apparent inability and unwillingness of the Wailuku Plantation and its owner, Vernon Lindsey, to fulfill conditions of a 1990 district boundary amendment. However, RCFC Kehalani, LLC, which assumed obligations under that same boundary amendment, also came under fire for what residents of its development say are serious breaches of those conditions.

James Buika, a 14-year resident of the Kehalani subdivision, asked the commission to make sure that any stipulation agreement it approved include a specific requirement that RCFC Kehalani "follow through on required dedications that amount to millions of dollars of unmet obligations to date."

Buika noted that in its 2018 report to the LUC, "there is no mention of dedication of the required Community Center parcel as required under the original LUC Condition No. 7." His testimony included proposed language to be added to the stipulation: that bifurcation not take effect until the five-acre community center parcel is dedicated to the Kehalani Community Association and other dedications for parks and roadways are completed.

Livit Callentine echoed Buika's concerns. The 1990 decision and order approved by the LUC included a finding of fact, specifying that the Wailuku portion of the project (known now as Kehalani), "will be supported by a community center, parks, an open space system, and a school." As to parks, there were to be 110 acres of parks dedicated to the county.

One such park has already been dedicated to the county, Callentine continued. "However, this 'park' of approximately 7.5 acres has been closed under padlock and to my knowledge has never been open to the community," she said. "Further, this 'park' actually functions as a drainage basin, and the only lucky user of the 'park' is a herd of goats. It is my understanding that the owners within Kehalani Mauka and Kehalani Makai are paying for the maintenance of the 'park' that they do not own and are not allowed to access."

As to the community center, Callentine said, when she purchased her condo in 2005, "the sales agent proudly pointed out there would be a community center… Further, within the first year of my occupancy, the managing agent for the Kehalani Community Association sent out a survey to all current owners seeking out our thoughts on what amenities we favored at the community center."

Karin Phaneuf, another Kehalani resident, made the same complaint. "Since its inception, the Kehalani residents have taken a back seat to whichever developer was in charge of the community," she said. "We have gone for many years without the park on Waiale which is currently a playground for goats. In the past, all of the neighbors have really enjoyed that park and the community residents met regularly to walk their dogs and catch up with each other. The developer has locked up that park now for about eight years and we are unable to gather there. I believe it has been dedicated to the county now but it still continues to be locked up."

The community center "has never come to fruition and the county keeps allowing the developers to build more homes, build more homes, build more homes, but not to finish the makai park (Prison View Park) for people (not goats) and to renege on their promise to build a much needed community center in our neighborhood. Neighbors have been holding meetings for years in the tiny trailer where the Kehalani administrators work. Please honor the people of Kehalani by holding this developer accountable for the project he purchased and for the promises the county agreed would be fulfilled back in the 1990s."

Randall Sakumoto, attorney for RCFC Kehalani, was asked about the residents' complaints by commissioner Dawn Chang.

"Let me ask one final question," Chang said. "There are outstanding dedications that … your clients have to fulfill?" Sakumoto agreed that there were "still certain things which need to be done," adding that he had been in discussions with the county about them. "It's not something we're hiding from or running from."

Commissioner Lee Ohigashi, following up on the same point, noted that in recent correspondence with Maui County, Sakumoto's client seemed to back-pedal on any commitment to follow through with construction of the community center.

Specifically, in an October 23 letter, Jeffrey Ueoka, another attorney representing RCFC, told the county's directors of parks and of planning that his client "does not agree with the Planning Department's interpretation" that it was bound by terms of the original decision and order to construct a community center.

In that letter, Sakumoto proposed that to resolve the question, RCFC "shall petition the state Land Use Commission to clarify the issue. RCFC's expectation would be that the county support RCFC's petition at the state Land Use Commission to only require the dedication of the community center site," rather than construction of the center proper.

When Ohigashi pressed Sakumoto on whether RCFC intended to petition the LUC for a finding on the question of whether the original LUC decision required the community center and also on the extent of park dedications that were to occur, Sakumoto said that his client was still "awaiting a response" from the county to that October 23 letter. "So I don't want to say there will be something coming … if it is resolved separately with the county."

After still further questioning from Ohigashi, Sakumoto said, "After bifurcation, we will respond to any inquiry the commission has. It's a complicated discussion. … I don't think it's necessarily tied to the bifurcation." ***— P.T.***

Lindsey from Page 7

to a final vote on the contested case, defendants and the county reached a settlement which was reduced to writing and executed by the parties" on November 19, 2019.

That settlement called for Lindsey to pay a reduced fine of $49,700, payable within 60 days of the agreement.

Sixty days came and went, but on February 14, 2020, Lindsey finally made a payment of $25,000.

On that day, the Maui corporation counsel executed yet another agreement, calling for Lindsey to pay the outstanding balance of $24,700 in three monthly installments, starting April 18.

Lindsey and Wailuku Plantation were duly served with notice of the complaint on December 11. Neither filed any response to the lawsuit.

On January 12, Judge Loo entered a default judgment in the county's favor. ***— P.T.***

Owner of Pi'ihana Property Ignored LUC, County Conditions

When Vernon Lindsey and his Wailuku Plantation, LLC, purchased the property that was part of the 1990 boundary amendment petition, the property consisted of seven discrete legal parcels, part or all of which were within the petition area.

Among them was an irregularly shaped parcel of about 25 acres that ran between Pi'ihana Road, on the north, and Iao Stream, on the south. More than half of the lot lies within the flood plain.

The sketches and maps drawn up in 1989 when C. Brewer and Co. proposed shifting the Agricultural land into the Urban district show neat areas of townhouses and single-family homes on small lots, built around a network of winding streets with a park and open spaces.

Initial plans for a project district were approved by the county in 1991. The following year, a Phase II project district approval was granted, anticipating 50 acres of single-family housing, 16 acres for multi-family units, and 12 acres for parks and open space.

Customarily, this would set the stage for the developer to submit preliminary subdivision plans, laying out street configurations, lot sizes, legal lot accesses, utility easements, and the like. Once the infrastructure requirements had been fulfilled and other exactions satisfied, the lots could proceed to be developed and/or sold.

That didn't happen.

Instead, in 2018, Dominic Crosarial, P.E., of DMC Engineering, asked the county Department of Public Works for a determination of lots within that parcel reflecting land commission awards and royal patent grants going back to the time of the Mahele. After reviewing the materials that Crosarial submitted, on September 30, 2018, David Goode, at the time the director of the DPW, informed Crosarial that there were 45 such separate lots for which separate tax-map key numbers might be applied. "Please be advised that our review of this matter was limited to a separate lot determination for TMK (2) 3-4-032:001. We did not make determinations or validate any information regarding legal access, ownership, metes and bounds, lot area, legality of existing structures, and building setbacks," Goode advised.

That was all Lindsey needed to start selling off small lots within the larger parcel.

On December 31, 2019, Jason McFarlin, on behalf of Wailuku Plantation and Vernon Lindsey, filed the required annual report to the Land Use Commission. In it, he listed the sales of seven shards of the larger parcel. The Maui property tax website shows most of the transfers were in the form of quitclaim deeds, and recorded sale prices were as low as $10 in several cases, up to $400,000.

In 2020, at least two more parcels were sold off, including one, for $10, to Crosarial, the same individual who facilitated the shattering of the larger lot into 45 pieces.

Meanwhile, Lindsey was himself planning to build what was described as a "farm dwelling" on the same lot, as he noted in his Phase III project district application, submitted in November 2018.

The Planning Department was taken aback.

In a letter dated April 29, 2019, department director Michele McLean informed Lindsey that "there is an existing Notice of Violation still open for the property, … with fines accruing." (See separate article in this issue for details.)

Moreover, McLean continued, "we are uncertain as to how this one farm dwelling fits with your overall plans as the new owner of a portion of the Pi'ihana Project District. …"

Whatever Lindsey's plans for the property, under the county's Phase II project district approval, no building permit was to be issued "until a construction contract has been executed and a notice to proceed has been issued for the extension and improvement of Eha Street, from Wailuku Industrial Park to Imi Kala Street."

If Lindsey indeed wanted to change the conditions of the phase II project district approval, McLean wrote, he would need to submit a preliminary site plan and proposals for "drainage, streets, parking, utilities, grading, landscape planting, architectural design concepts and guidelines, building elevations, building sections, construction phasing, open spaces, land uses, and signage."

Also, "proposals for recreation and community facilities, proposals for floor area ratios, lot coverage, net buildable areas, open space ratios, impervious ratios, and density factors."

McLean then outlined what would be needed to move on to a Phase III approval.

Lindsey seemed to back off the idea of changing plans.

On August 6 of that year, his attorney, McFarlin, notified the Planning Department and LUC that he was representing Lindsey and Wailuku Plantation. "Wailuku Plantation LLC intends to develop the Pi'ihana Project District pursuant to the conditions set forth" in the LUC's decision and order, he stated.

The next month, when the LUC sought an update on progress toward fulfillment of the Pi'ihana project, McFarlin stated that his client intended to develop the project as presented by C. Brewer in 1990.

The meeting left the commissioners with more questions than answers, as memorialized in a November 2019 letter to McFarlin and Brian Ige, also representing RCFC Kehalani.

Nearly all the questions had to do with the Pi'ihana project – specifically, Lindsey's apparent lack of understanding of the requirement for annual reports and notification of changes in land ownership, as well as concerns over the financial arrangements needed to move forward.

In December 2019, McFarlin submitted an annual report, which included information on the ownership of parcels sold off by Wailuku Plantation. "Financing is currently being obtained to build Affordable Housing within of [sic] the Pi'ihana Project District," he wrote. "Bids for construction and materials are also being obtained for the Bridge, Roadways, and Affordable Housing. This site has a number of exactions that make the development of this project difficult… The petitioner … will keep the commission updated on any progress on this topic."

Owners of the small parcels purchased from Wailuku Plantation were aware by last year that Lindsey planned to downzone the property and be relieved of the exactions associated with the LUC redistricting. In online information advertising several of those lots for sale, there appears the statement that "The property is in the process of being down zoned back to agriculture zoning which began in August 2019." ***— P.T.***

BOARD TALK

Land Board Orders Seawall Removal Fronting Eroding Lot at Sunset Beach

"Grandfathered seawall! … Motivated seller!" a December 2018 sales pitch for the property at 59-175C Ke Nui Road on O'ahu's famed Sunset Beach proclaimed.

Motivated, indeed.

Within three months, the owner sold the lot for about half a million dollars less than the $2.4 million list price. And about a year and a half later, that "grandfathered" seawall — illegally built and on state land, according to officials — buckled after a summer hurricane swell. Further failure threatened not only the home that lay a mere 10 feet inland, but also anyone traversing the beach fronting it.

When a city excavator operator determined that there was not enough sand fronting the property to push into a protective berm, the new owners, Brandee and Liam McNamara, had an estimated 12 cubic yards of concrete poured to prop up and secure the portions of the seawall that had failed.

"What I did was support and keep this existing wall from crumbling and falling. It was a safety issue. There are so many kids in our neighborhood," Liam McNamara explained. With a public right-of-way running alongside the lot, there is a ton of foot traffic in the area, he added.

The work was done in the state Conservation District without authorization and not long after the McNamaras had been ordered by the Department of Land and Natural Resources' Office of Conservation and Coastal Lands (OCCL) to remove an illegally constructed walkway and stairs in front of the seawall.

So on January 22, the OCCL recommended that the Board of Land and Natural Resources impose a $35,000 fine and require the seawall's removal.

After a lengthy discussion, the board voted 5-2 to require the McNamaras to pay a fine of just $5,000 to cover administrative costs, and allow the remaining $30,000 fine to go toward removal expenses, rather than to the state.

OCCL administrator Sam Lemmo had explained that there was no way the concrete could be jackhammered out without destabilizing the wall. "It's on state land. It was always on state land in my opinion. The only solution would be to demo the entire thing and give them a permit for a big burrito system," he added.

While he said such systems are expensive to maintain, he added that allowing the McNamaras and the handful of homeowners surrounding them to harden the shoreline would exacerbate erosion of a beach that was too valuable to lose.

"This little area with five seawalls, it's going to turn into a little peninsula as the shore erodes around it," Lemmo said.

The McNamaras requested a contested case hearing after the board's vote, but it was unclear by press time whether they had followed up with the required written petition.

Before the vote, board members recognized the quandary the homeowners in the area are in. The McNamaras' lot is one of a number of houselots along the beach that have suffered severe erosion for years. The owners have at times received permission from OCCL to push sand to create a protective berm fronting their properties. Some have been allowed to install temporary sand burritos. Others, like the McNamaras, have been subject to enforcement actions for installing protective structures or doing significant seawall repairs without authorization.

"There's no question that this is a very difficult situation and I do not think there is a solution that will make the homeowners on this area of Sunset Beach happy. The homes are built on a sand dune that nature wants to take away," said board member Chris Yuen.

"They can go to the Legislature and ask for some financial relief or some financial assistance. … The only thing that is going to stop the shore from continually eroding is a continuous seawall along the whole length and that's what you're going to have instead of Sunset Beach," he continued.

Board chair Suzanne Case shared Yuen's view. "Unfortunately, the writing is on the wall here. … This is a difficult situation and you're in the middle of it. The medium- and long-term situation is it gets worse and not better, from the standpoint of houses on the beach," she told the couple.

Back to Burritos

The irony of the board's decision is that it sets the McNamaras up to install a burrito system, which is what they wanted to protect their wall.

Liam McNamara said that the home's previous owner had a burrito protecting it, but they had to take it out before the property could be sold (likely because it was unauthorized). And because his neighbors on both sides had them, he argued that their systems caused flanking at the beach fronting his house. Flanking happens when a shoreline structure — soft or hard — causes the land or beach at the ends of it to erode.

"Houses to the left and right [have] massive amounts of burritos. … Those definitely compromised my house," he

Continued on next page

PHOTO: DLNR

Seawall damage at the McNamaras' Sunset Beach home following a July 2020 hurricane swell.

said, adding, "There is illegal activity with burritos."

In 2019, *Environment Hawai'i* reported on one of those neighbors, Gary and Cynthia Stanley, who were fined for installing burritos on the beach without permission from OCCL. They sold their property in January for half a million dollars less than what they bought it for in 2018.

According to McNamara, the new owners of the property on his right added several more burritos, all the way to the ocean.

He suggested that, given the flanking that can occur with burritos, when the OCCL gives a permit to a property owner for them, the adjacent owner should automatically be allowed to install their own.

Lemmo pointed out, "The people to your right, they're in violation."

Even so, McNamara argued that he should have been given an opportunity to have a burrito. "Our seawall would have been safe," he said.

That may or may not be true, as the enforcement case involving Ke Nui Road resident Rodney Youman illustrated.

At the same Land Board meeting, Youman faced significant fines for work along the shoreline to protect his house. He testified that his burrito system, which the OCCL approved in 2018, saved his house at least three times, but ultimately failed after the same hurricane swells that damaged the McNamaras' wall.

The waves tore out a palm tree in his yard, leaving a gaping hole, so in August, he filled it with rocks and covered them with soil, Youman explained. The swells continued into December and "caused the bottom burritos to collapse and empty out completely and the top burritos collapsed, as well. The very top burrito dragged down my property and the rocks," he said.

OCCL staff first noticed the rocks during an inspection last September and determined that they constituted a revetment on state land. The office also noted in December work being done to bury the fallen rocks with sand and install a new burrito system, without the OCCL's authorization.

At the Land Board's January 22 meeting, the OCCL recommended imposing a $32,000 fine for an unauthorized rock revetment and continued work after receiving a violation notice.

PHOTO: DLNR

Rodney Youman's home with rocks atop his failed sand burrito system.

Youman argued that he never committed a violation, as he only placed the rocks on his property, not on state land. He also noted that last month he and his neighbor hired a contractor to excavate the fallen rocks off the beach.

"It's been terrible. I purchased this property in 2016 and I was warned about the erosion. The first summer, basically nothing happened. But in the last three years, it's been exponentially worse. It's been catastrophic, especially in the last year. It's costed me hundreds of thousands of dollars to try and save my property. It reached a point where it was inches from the front of my house. I had a literal precipice, a drop of 20 feet, a couple months ago to the point where I had to literally move my house back and up. Between that and the burrito system, it's costed me $300,000. … It's been devastating to me financially," he said.

The Land Board ultimately chose to defer action in Youman's case to give OCCL staff time to confirm whether or not all of the fallen rocks had been removed and to determine whether it should pursue a violation case for the new burrito system. Youman admitted that some of the smaller rocks might be

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buried under the sand, but said he would work to remove what he could as soon as possible.

Youman argued that the old burritos had been torn apart and were merely replaced. But Lemmo stressed that even so, his office needs to be kept in the loop to ensure that what's being put in is consistent with what had been previously approved.

"This is the problem up there. We give someone an authorization, and then they way over-build things. They add to it. As Mr. McNamara reminded us about his neighbor, he built a gigantic burrito system. We never authorized that. … We have unlicensed contractors doing this in many cases. It's a real sort of rogue situation with respect to the construction of these systems. I'm sorry if the people that you're working with are telling you things. Generally, when I hear about it, I don't seem to be able to verify that what they've told you was the truth. I just have a hard time just keeping up with what's going on up there. We all do," Lemmo said.

Disclosure

In some violation cases, oceanfront property owners know that the state or county would likely require a permit, but nonetheless proceed with installing protection measures without any authorization. Moloka'i resident George Peabody is one such owner. On more than one occasion he has characterized the state's efforts to prevent shoreline hardening as the work of "fascist stooges." At the Land Board's January 22 meeting, he and his wife, Susan, were fined $80,000 for constructing a low, rock and concrete wall in the Conservation District and on state submerged land fronting their Kaunakakai home.

But in other cases — including Youman's, the McNamaras', the Stanleys' — the owners appear to want to comply with laws, but seem to have either been misled or lacked clarity regarding what they are and aren't allowed to do to protect their homes and/or shoreline structures.

The Stanleys said they were told by a contractor that they had a permit to install additional sand burritos when they didn't. Youman believed he could replace shredded burritos without needing OCCL approval. And the McNamaras were led by real estate agents and the previous property owner to believe that their seawall was legal and could be repaired as long as at least half of it was still intact.

All bought their Sunset Beach homes in recent years and knew of the erosion threats they faced beforehand. But all of them eventually wound up in front of the Land Board facing fines for unauthorized shoreline work.

In discussing the McNamara case, board member Sam Gon noted that with climate change expected to cause sea level to rise, "it is an era where oceanfront property is no longer a benefit, but a major liability. … [Buyers] need to be better informed of what they are getting into by their Realtors and others involved in the transaction."

In recent years, state legislators have tried and failed to pass bills that would require real estate transactions in coastal areas or areas vulnerable to sea level rise-associated hazards to include some kind of disclosure statement.

The Hawai'i Association of Realtors has argued that their oceanfront property disclosure forms suffice.

This year, a number of similar bills have been introduced.

Senate Bill 473 and House Bill 596 would "require that a vulnerable coastal property purchaser statement be provided as a condition of the sale or transfer of any vulnerable coastal real property to ensure that new property owners understand the risks posed by sea level rise and other special hazards, permitting requirements, and limitations that may affect vulnerable coastal property."

Among other things, that statement would include a recognition of changes made last session to the state's Coastal Zone Management Act that make it harder to install shoreline protection structures at sandy beaches and in areas that would result in flanking.

"Obtaining permits to repair or install shoreline protection structures may be difficult due to state and federal coastal zone management policies discouraging coastal hardening," the draft states.

If passed as is, the bill would go into effect at the start of next year.

HB 431 and SB 292 call for something similar, a sea level rise exposure statement for "all vulnerable coastal property sales or transfers."

Retreat Incentive

For those who already own these vulnerable coastal properties, there is House Bill 1373, which would establish a beach preservation revolving fund (paid for by 100 percent conveyance taxes collected from the sale of oceanfront property) and a pilot low-interest mortgage program to encourage owners "to relocate mauka of expected sea level rise and erosion hazard zones." The bill would also amend coastal zone management laws to prohibit the "construction of shoreline hardening structures within the shoreline setback area, including seawalls, groins, revetments, and geotextile shore protection projects," except in certain cases where public infrastructure is imminently threatened by coastal erosion. The bill also proposes to prohibit the alteration, repair or replacement of existing shoreline hardening structures.

— Teresa Dawson