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Border Disorder

The Hawai'i Supreme Court ruled years ago that vegetation that's been artificially enhanced to separate private property and the public beach cannot be solely used to determine the shoreline.

Likewise, Environmental Court Judge Jeffrey Crabtree recently ruled that an artificial structure cannot, by itself, fix the shoreline, despite language in the state Coastal Zone Management Act suggesting that it could.

While the seawall at the heart of Crabtree's ruling was built in apparent violation of the act, among other things, he noted that the case still seems to be one of "first impression, which could affect other cases involving seawalls."

Still to be decided in the case: What makes a wave a "storm wave," when it comes to determining the shoreline? Whether the wall stays or goes could depend on the answer.

IN THIS ISSUE

Seawall Case Heads to Settlement Talks With Court Rulings in the State's Favor

The state and homeowners who built a seawall on O'ahu's Sunset Beach in 2017 without any government approvals head into settlement talks this month, following a 1st Circuit Court ruling on October 21 granting in part and denying in part the state's motion for partial summary judgement.

One of the ruling's more significant findings: Seawalls cannot, by themselves, be used to determine the boundary separating private property from the state's coastal lands.

That boundary, also known as the *Ashford* boundary, is where the highest wash of the waves reaches, usually indicated by the edge of vegetation or the line of debris.

The state's Coastal Zone Management Act states that "certified" shorelines, which are used to determine shoreline setbacks, shall not be valid for more than a year, "except where the shoreline is fixed by artificial structures that have been *approved by appropriate government agencies* [emphasis added] and for which engineering drawings exist to locate the interface between the shoreline and the structure."

The fact that contractors for James and Denise O'Shea built their 13-foot-high seawall without any city or state approvals means that they can't use the CZMA to argue that their property line extends to the wall's base. Depending on the outcome of their settlement meeting on November 9, they may be required to remove the wall or, at the very least, be penalized for their unauthorized work in the county setback area.

"At minimum, it appears a variance was required," Environmental Court Judge Jeffrey Crabtree wrote in his order.

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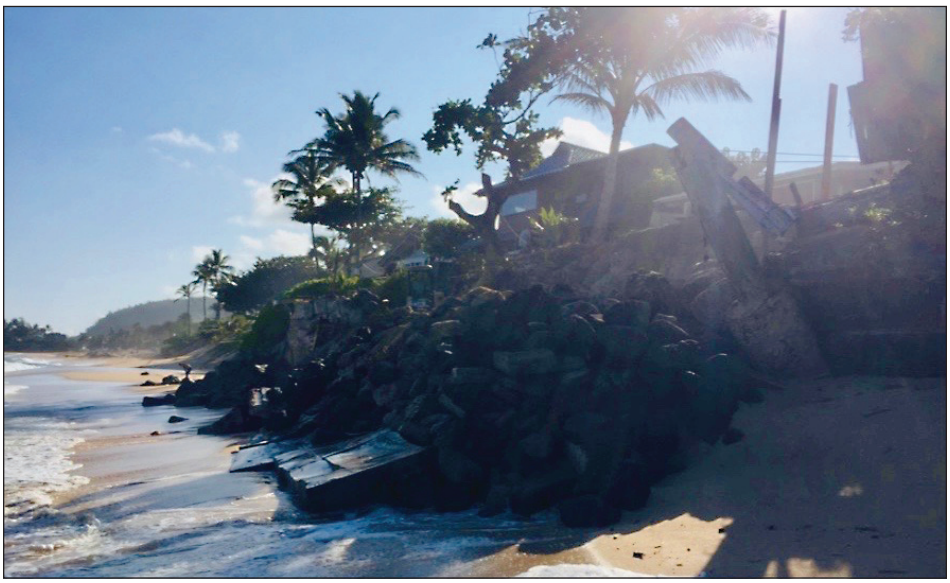

PHOTO: STATE OF HAWAI'I

Boulders littered the beach during construction of an illegal seawall in September 2017.

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NEW AND NOTEWORTHY

Dairy Update: In 2019, the Big Island Dairy shut down, never having been able to prevent runoff from its manure-filled ponds fouling streams that ran to the ocean off the Hamakua coast of the Big Island. The dairy sits on state-owned land leased to the dairy for $57,645 a year. After ceasing operations, the company kept current on its rent, in hopes, it seems, of being able to sell the lease.

On October 26, the Board of Agriculture gave its consent for the sale of the remaining lease term (a period that runs through June 4, 2048) to Hawai'i Secure Foods, LLC. Member/managers of that entity, formed last year, are Buck Holdings, LLC, and Dutch-Hawaiian Dairy Farms, LLC. In return for the transfer of the lease, Big Island Dairy was paid $969,539.

The Dutch-Hawaiian Dairy, run by the Kea family, also has been running Cloverleaf Dairy, near Hawi, at the northern tip of the Big Island. Last year, the Board of Agriculture approved the transfer of the lease for that operation from Ed Boteilho to Dutch-Hawaiian Dairy.

As *Environment Hawai'i* reported in our December 2020 issue, the California Energy Investment Center, a California firm that brokers investment opportunities for foreign nationals seeking to qualify for EB-5 visas, had its eyes on the Cloverleaf operation, as well as other agricultural sites on the Big Island. It challenged the BOA approval of the lease transfer in state court in July 2020, a month following the BOA action.

This past July, 3rd Circuit Judge Ronald Kim issued a final judgment in that case, upholding the lease transfer and ordering CEIC to reimburse the defendants their attorneys' fees as well, amounting to nearly $80,000.

On September 2, CEIC appealed the judgment, so the lease transfer remains on hold.

Quote of the Month

"My question is a simple question. What in the record demonstrates evidence that we as the Land Use Commission … should trust the representations that the Department of Education is making?"

— Gary Okuda, Land Use Commission

Records Request: The Sierra Club of Hawai'i has filed a lawsuit in the Environmental Court seeking to force the state Department of Health to produce documents the organization requested in early September regarding recent fuel leaks at the Navy's Hotel Pier.

The complaint states that an October 8 *Civil Beat* article on the spill indicated that "at a minimum, the documents that the Sierra Club requested include a March 17, 2020 Navy report on the fuel release, the Navy's May 18, 2021 notification, and Department of Health Deputy Director Keith Kawaoka's June 30, 2021 letter."

"The Sierra Club is trying to learn, among other things, when the Navy first discovered the first leak, whether the Navy's Red Hill pipeline pressure monitoring system worked, where the leak occurred, how much fuel leaked, how much fuel was recovered, and how precisely the leaky pipeline is connected to the Red Hill underground storage tanks," it continued.

The same day *Civil Beat* published its article on the spill, a Health Department official informed Frankel that the Navy had claimed that the documents he requested were "protected in the interest of national security. DOH seeks to produce as much of the record as possible. Those documents identified by the Navy as protected by federal law, however, will be withheld in accordance with 92F- 13(4), HRS. I have provided the Navy the complete DOH file so that they can identify those things that must be redacted and this process of redaction is underway. Please allow time for this process to play out and be assured that every effort is being made to provide as much of the record as possible in compliance with federal and state law."

As of the date of the Sierra Club's complaint, October 25, the department has not provided him with any records.

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Department of Education Told to Adhere To LUC Conditions of Kihei High School

Deputy attorney general Stuart Fujioka lobbed a sandbag at the members of the Land Use Commission when it met on October 27.

And the commissioners were not pleased.

The LUC is a quasi-judicial body, with procedures governed by a set of strict rules. Much like a judicial proceeding, timetables are set for production of documents and lists of witnesses. Witnesses are subject to cross-examination by other parties to the commission's proceedings. Lawyers for parties involved draft briefs and reply memoranda and are also able to call rebuttal witnesses.

The commission met on that day to decide on a request by Fujioka's client, the state Department of Education, to delete a condition set on the construction of a high school in Kihei, Maui, back in 2013, when the LUC approved a boundary district change that allowed plans for the school to move forward. The condition requires the department to build a grade-separated pedestrian crossing — an underpass or overpass — to allow students to walk safely to the school site, which lies immediately mauka of the busy Pi'ilani Highway.

The DOE seems to have ignored the condition for the next six years. At no time did it request capital-improvement funds from the Legislature to build either a pedestrian bridge across the highway or reconfigure one of two already existing drainage channels under the highway to accommodate walkers.

Finally, in August 2020, the DOE petitioned the commission to have the condition deleted and replaced with language calling for further studies – and a commitment to build the grade-separated crossing only if those studies show it is warranted.

The commission held off action on the petition for most of a year, during which time it was hoped the DOE, Maui County, and the Kihei Community Association could reach some agreement on another way to provide safe access to the school.

Despite several community meetings and engagement with the county Planning Department, the rift between the KCA and Maui County, on the one hand, and the DOE, on the other, only seemed to grow. The DOE gave up on that effort and, in July, asked the commission to issue its decision, hoping this would settle the matter in the DOE's favor.

The LUC scheduled the first hearing in August, but that was delayed when the DOE sought to have LUC chair Jonathan Scheuer disqualified. The hearing was rescheduled to September. At that time, as *Environment Hawai'i* reported last month, the DOE representative, Brenda Lowrey, and Fujioka attempted to portray the DOE as helpless to move forward with the grade-separated pedestrian crossing (GSPC) because the state Department of Transportation would not allow it. The commissioners indicated their displeasure with the DOE but did not have the time that day to complete their deliberations.

PHOTO: DEPARTMENT OF EDUCATION

Kihei High School under construction.

The hearing resumed on October 27. By this time, more than 350 members of the public had commented on the DOE's request, with nearly all of them opposed.

Fujioka had two witnesses: Ed Sniffen, head of the Highways Division of the state DOT, and Russell Tanaka, assistant superintendent in the DOE's Office of Facilities and Operations. Sniffen repeated his earlier testimony that the DOT did not veto the idea of a GSPC, and, if the DOE provided the funds for it, the DOT would build it. However, Sniffen added that it would take about three years, from initial design through final construction, before a GSPC could be in use.

Tanaka was grilled on what he acknowledged were "misleading" representations to the Maui County Planning Department.

At the September hearing, the DOE's Lowrey stated that the decision to go with an at-grade crossing was made in 2019 by an employee, Jonathan Chun, who has since retired. Yet documents that Maui County submitted to the LUC on October 14 show clearly that the DOE represented to the county in the spring of 2020 that it was committed to building a GSPC.

On March 23, 2020, when the DOE was seeking county approvals of building permits for the school, Tracy Okumura, in the DOE's Facilities Development Branch, informed Planning Director Michele McLean that the DOE "is committed to moving forward with the design of the pedestrian overpass" and that "design of the pedestrian overpass has already been started." A timeline attached to his letter suggested the overpass would be completed by June 2023, after the school had been open a full year.

Given this commitment, Okumura wrote, "the HIDOE is requesting approval of five building permits… Your early and favorable approval will be greatly appreciated."

McLean responded on April 3, pointing out that "the specific language of the conditions of approval by the state Land Use Commission and the Maui County Council call for the overpass (or underpass) to be constructed, not just designed. … [T]he overpass (or underpass) must be completed and useable before or at the same time that the school buildings are ready for occupancy.

"If you can provide us with a letter that documents your commitment to constructing the overpass (or underpass) and having it ready for use before or when the buildings are ready for occupancy, then we can conditionally approve the building permits. Please note that we will withhold approval of any certificate of oc-

Continued on next page

cupancy until the overpass (or underpass) is constructed and useable."

On April 14, 2020, Okumura provided just that, stating that the DOE "is committed to the design and construction of the pedestrian overpass and will insure that it is ready for use when the high school opens for students." The permits were issued.

Under questioning from commissioner Dawn Chang, Tanaka acknowledged that the DOE never requested funds to build the grade-separated crossing.

Commissioner Gary Okuda asked him specifically about the assurances given to the county. "We can conclude that the letter dated April 14, 2020, to the Maui Planning Department contains a misleading statement about the intentions of the Department of Education. That's something we can conclude from these exhibits and Ms. Lowrey's testimony. Do you agree?"

Tanaka agreed. "One could be misled by some of those" exhibits, he stated.

After Tanaka's testimony, it was left to Fujioka to defend his client's position.

"Do you believe the Department of Education should be consistent with its representations made to the Maui County Planning Department?" Okuda asked.

"Generally, yes," Fujioka responded. "But situations change."

What evidence has the Department of Education provided that shows the Land Use Commission can trust the representations it has made? Okuda asked. "What in the record shows us that we, as the Land Use Commission, should trust the representations and promises of the Department of Education?"

"You mean, as trust going forward?" Fujioka replied.

"*Of course*," Okuda said. "My question is a simple question. What in the record demonstrates evidence that we as the Land Use Commission … should trust the representations that the Department of Education is making."

Fujioka: "I'm trying to get clarifications as to what you're having difficulty believing or accepting at this point."

Okuda repeated his question a third time.

Fujioka: "I think you should move on. That's not something I think I can answer."

Commissioner Dawn Chang challenged Fujioka on his response to the county's statement describing its reasons for opposing the DOE's request. In it, Fujioka stated that the DOE "has reservations about the feasibility of the GSPC option [of an underpass] suggested at page 4 of the county's filing. The suggestion requires the involvement of HDOT, which steadfastly opposes construction of a GSPC in the flood zone of Waipuilani Gulch. The county's proposal does not address the grounds for HDOT's disapproval of an underpass…"

After quoting that back to Fujioka, Chang reminded Fujioka that in his testimony earlier that day, Sniffen "didn't steadfastly oppose this," stating instead that if the DOE provided the funds, it could be done.

Fujioka responded by stating the DOE's position "may have been inartfully formulated."

Commissioner Lee Ohigashi asked Fujioka about the extent to which the DOE had made earnest efforts to plan for and design a GSPC.

Fujioka stated that there was "some design work initiated" in 2019, after the LUC confirmed the GSPC condition in response to a petition for a declaratory ruling from the county. But, Fujioka added, he didn't have any documentation of that. "I don't know if I could get ahold of anything," he said. "We did not present documentation that design work for the overpass had commenced… It's just not something that I looked for. Perhaps I should have."

Maui County deputy corporation counsel Michael Hopper then described the reasons for the county's opposition to the DOE's motion. The DOE's proposed language, he noted, "while allowing for additional study, puts off the requirement [to build a grade-separated crossing] and places it entirely in the hands of the petitioner rather than making it mandatory at some point in time. The way the county reads the Department of Education's position, further study needs to be done but there's no assurance that it'll be built."

Okuda, a lawyer, pointed out that the legal term to describe the situation is, "Things are screwed up."

Given the situation, Hopper said, it would be difficult for the county to issue certificates of occupancy for the school buildings if there was no grade-separated crossing.

Chang posed the question to Hopper: "Wouldn't you agree, if the school doesn't open, that's not an action from the Land Use Commission or the county? That's really the action – or failure to act – of the petitioner."

"Not having the school [open] would be terrible, but I think I would agree with you," he said.

Ohigashi concurred that the county's position "is not severe, not onerous. I think it's reasonable. I don't believe they ever intended to build any grade-separated pedestrian crossing. The evidence, the letters the county has provided really show that they appear to be trying to skirt the issue, trying to be able to build the school, place everybody in this particular position that we are in." He went on to thank the county for filing its supplemental statement of position, "bringing to light the evidence that you attached."

The sole party to the proceedings that supported the DOE request was the state Office of Planning and Sustainable Development. Alison Kato, the deputy attorney general representing the OPSD, was left to try to explain that to the commissioners.

Commissioner Nancy Cabral wanted to know how the OSPD came to its position. "Have you folks, as state agencies, met to discuss this matter? Did you have a group meeting? Or did you form that opinion on the basis of your research."

Kato stated that OSPD positions "are largely based on reliance on state agencies and their expertise in their areas. … In this case, we did meet with the Department of Education and the Department of Transportation, and had discussions."

When the commission reconvened after lunch, Fujioka informed them that, during the break, "Facilities [the DOE's Office of Facilities and Operations] were able to pull up some preliminary sketches of GSPCs that were generated in the March 2019 time frame." He then proceeded to display four renderings of what an overpass and underpass might look like.

Commission vice-chair Dan Giovanni, filling in for Scheuer, allowed the drawings to be entered into the evidentiary record.

The lawyers on the commission protested.

Continued on next page, bottom story

BOARD TALK

Guidance for Water Leases May Face Legal Challenges, Legislative Tweaks

"We have to find a way forward somehow. Sometimes that way forward is very messy," said state Board of Land and Natural Resources chair Suzanne Case as the board met on October 22.

At that meeting, the board narrowly rejected a contested case hearing request from Department of Hawaiian Home Lands director William Aila — himself a former Department of Land and Natural Resources director and Land Board chair — on a proposal from the DLNR's Land Division on how appraisers should determine the value of water leases.

A number of individuals and entities that have been diverting water under revocable permits for years, or even decades, have fulfilled their environmental review requirements and are ready to secure long-term water leases.

In September, the Land Board approved the final environmental impact statement Alexander & Baldwin and East Maui Irrigation Company had prepared for the long-term water license they have been seeking for two decades. Other water permittees seeking long-term leases include the Kaua'i Island Utility Cooperative, the Hawai'i Electric Light Co., Kaua'i resident Jeffrey Linder, and farmers and ranchers in the Ka'u district of Hawai'i island.

While the Legislature expected their leases to be issued years ago, the DLNR has never before issued such a lease and is struggling to meet the requirements of the current legal framework.

Continued on next page

Kihei from Page 4

"I will lodge an objection to the introduction of these exhibits," Chang said. "The petitioner had full opportunity to put on their case. These should have been shared with the public and the county. This is far past the eleventh hour. And the petitioners are bringing this to our attention only now? My objection is to this very last-minute, cavalier attitude of the petitioner. You should have made your case. It disappoints me that we are now taking this evidence."

Ohigashi agreed, noting that the DOE had represented to the county in April 2020 that it was earnestly working on the design of the GSPC and even gave the county a time frame for its completion. "I don't even know how this is relevant," he said. "Great, you have nice drawings now."

Ohigashi went on to make a motion to deny the DOE's request. "I tend not to believe what the DOE has testified to. It's clear on the record they made no attempt to even try to meet these conditions" requiring the GSPC. The county's position was correct, he said. "If we deny this, it's incumbent on the Department of Education to work on a solution with the county. Bring forth something that protects the public as well as satisfying the goal of opening the school."

Cabral seconded the motion. "I'm gravely concerned about the process, or lack of process, lack of effort on the part of the Department of Education, and what appear to be their efforts to just do what they want to and not do what they have known since the beginning what they were supposed to do. … Public safety is paramount. The safety of children is even greater."

Chang observed that the DOE "has not engaged in good faith with the community… The LUC delayed action [on the DOE petition] to give the petitioner the opportunity to engage with the community. Now they say they've set up a website and monthly meetings will be held. That is inadequate. … The DOE has not shown good faith."

Okuda joined in with the comments of the other commissioners, but added: "In our system of democracy, evidence matters, truth matters, and those of us in government, we owe it to the community to live up to our words. When we say something, we gotta stand behind what we say, and if we're going to change what we've told other agencies, we have to make it clear with admissible evidence why there's a change. We have a duty to keep and encourage trust in government. If we don't respect the fact that we have to be straight and honest with the community and others, that faith just erodes away."

Giovanni was the last to weigh in: "It's a shame that this high school that's almost built will not be opened on time with the grade-separated pedestrian crossing. But to me, the fault for that lies with the Department of Education. Not the Department of Transportation. And not the county of Maui, who have tried to find resolution, and not with the Land Use Commission. Therefore I will support the motion for denial."

When the commissioners were polled, the final vote was unanimous.

What comes next?

The commissioners suggested that if the county and DOE could work out an agreement on pedestrian access that was not a grade-separated crossing but still provided safety for students, the LUC could move expeditiously to amend the requirement for a GSPC.

Earlier in the hearing, Fujioka was asked what the DOE would do if the motion was denied.

The Department of Education, he said, would then have to decide "whether to just go ahead and do a grade separated crossing now, or do we ask the court to review the ruling, does nothing happen and construction stop? A number of alternatives would need to be discussed."

Meanwhile, the DOE, as promised, has put up a website with information about the new Kihei High School. In a section describing "pedestrian access," the DOT states that a "key issue is the means by which students walk to and from the school and cross the highway."

"A grade-separated pedestrian crossing – such as an overpass or underpass – is a state Land Use Commission condition that the department is requesting being [sic] amended to allow the school to open without it. The department had interpreted the condition as required when warranted by a technical study. The DOE is committed to providing an updated traffic/grade separated pedestrian crossing warrant study."

The DOE "is seeking to allow the school to open with a roundabout and on-grade crossing, with a commitment for future studies for providing a grade-separated pedestrian crossing, starting with a study one year after the school opens." ***— Patricia Tummons***

For some of the old water leases for sugarcane production, issued before statehood, rent was tied to the price of sugarcane. Today, state law requires water leases to be disposed of via a public auction, with the upset rent determined by an appraisal.

Given that many of these permittees will likely be the only bidders for their respective water leases, the DLNR tried this year and last year to get the law changed to allow the Land Board to issue leases through direct negotiation. In the same bills, the department also tried to establish a list of several factors that must be considered by appraisers when determining fair market rent.

"[T]he most significant challenge encountered by staff has been the valuation of the upset rent for the use of water," a Land Division report to the board states.

The requirement to charge fair market rent, it continues, "has created an incongruity when considering the nature of water in Hawai'i, which is a public trust resource. Unlike other markets in the country where water can be held and disposed as other private property interests, water rights in Hawai'i are held by the state for the benefit of the public. This has posed a challenge for appraisers to determine a market value of an interest for which there is no market."

All of the bills that would have allowed for direct negotiation and established some guidance to appraisers failed. Hence, the Land Division's proposal to the Land Board.

"We have a number of water lease applicants that are quite anxious to proceed with their leases. We did not want to put them off for another legislative session … in case that route turns out not to be the way to go," Land Division administrator Russell Tsuji told the board.

He added that the appraisers his staff have talked to say they simply would not take on the job of determining market rent for these leases, at least not without further direction from the state.

And so on October 22, the division sought board approval of guidance to appraisers of water leases. It included the same seven factors for consideration that were included in the failed bills before the Legislature:

• The amount of water diverted and its proposed use;

• The amount of water diverted in proportion to what's available from the diversion source;

• Water delivery costs, including maintenance and upgrades to prevent system losses;

• The avoided cost of getting the water from practicable alternative sources;

• The net economic benefit to the licensee;

• The value contributed by the licensee for watershed management; and

• The public benefit provided from the use of water, such as "domestic uses, traditional and customary practices such as taro cultivation, aquaculture uses, irrigation and other agricultural uses, power development, and commercial and industrial uses."

The division proposed that appraisers use the current revocable permit rent as a starting point, and adjust the lease value up or down depending on the seven factors.

Opposition

The Office of Hawaiian Affairs, the Sierra Club of Hawai'i, the Native Hawaiian Legal Corporation, Earthjustice, and the DHHL testified against both procedural and substantial aspects of the Land Division's proposal.

They all scorned the use of the current revocable permit rent as a valuation starting point and argued in favor of using the avoided cost of obtaining water from another source as an equal or more logical starting value for applying the adjustment factors proposed by staff.

"I'm not sure permit rent should have anything to do with these appraisals," Sierra Club executive director Wayne Tanaka said. He added that, in many cases, the permit rents are based on historical agreements that were directly negotiated, which the Land Division acknowledges "were not necessarily consistent with the law or public trust. So starting with permit rent is like building your house on sand."

In response to the arguments against using the permit rents as a starting point, the Land Division's Ian Hirokawa explained to the board, "You need a number to work upward or downward. The RP was the best we had for now. I don't know if we want to start at zero."

With regard to the factors appraisers would have to consider, Tanaka said it makes no sense to allow deductions for maintenance costs "when the board had years and years to hold these water permit holders accountable for the water waste that was going on in their systems."

"When these permit holders and potential lessees had decades to prevent the waste of millions of gallons of water a day, to appraise lower based on the cost of maintenance, you're basically rewarding neglect," he added.

In written testimony, NHLC attorney Ashley Obrey echoed Tanaka's sentiments about discounts for system maintenance. She also objected to allowing "public benefit" discounts, arguing that it "invites arbitrary and highly subjective adjustments in appraisal value that may in fact conflict with public's actual interest as well as the board's trust duties to Native Hawaiians, public lands trust, and the Hawaiian home lands trust, especially when certain lessees carry political favor."

Tanaka, OHA, the NHLC, and Earthjustice also argued that the overall proposal meets the definition of a rule and cannot not simply be adopted by the board without going through the rule-making process.

"This matter does require rule-making by law. It's not a choice if you want to follow the law," said Tanaka, an attorney and former legal fellow for the DLNR. The Sierra Club also submitted a petition for rule-making that included some draft language.

Earthjustice attorneys Leinā'ala Ley and Isaac Moriwake argued in written testimony that rule-making, which requires public hearings, would allow the DLNR to "consider these issues through a more comprehensive, deliberate, and transparent process that provides the opportunity for public comment and input than can inform the valuation methodology adopted by this board. Absent the opportunity for public notice and comment, individual leases are vulnerable to legal challenge for failure to comply with [Hawai'i Revised Statutes] Chapter 91 with regard to the lease value."

Hirokawa countered that what his division was proposing was merely "conceptual guidance for the appraiser to start their work."

He said rule-making would be inappropriate right now because the DLNR

Continued on next page

wants to try again to get the Legislature to adopt this guidance into statute. "Rulemaking at this point is premature until we get an answer from the Legislature," he said.

"Given that this is fairly new and we're kind of heading into uncharted territory, we need to test this out," he continued. "We need to really work with some appraiser and test this out … before even considering putting it into a rule."

DHHL director Aila said his department agreed with the DLNR that the valuation and public auction process needs improving. However, he added, "What's before the board gives a little too much discretion and not enough guide posts, in our opinion."

He expressed his concern that this discretion could lead to the leases being under-valued, which would have a direct impact on his department. His department, which also testified against the DLNR"s bills and even offered a competing bill, favors tying the value of the lease to the avoided cost of developing alternatives.

He recounted how a condition of statehood was accepting the kuleana of the Hawaiian Homes trust. Under the Hawaiian Homes Commission Act, 30 percent of all water licenses must be transferred into the native Hawaiian rehabilitation fund.

He said the Land Division's proposal "continues to ignore and forget the commitment made as a condition of statehood. … This will likely result in a breach of trust action. We will be speaking with the Department of the Interior. This action clearly reduces benefits to beneficiaries, which is a breach of that trust that was agreed to by becoming a state."

After Aila requested a contested case hearing, the board met in executive session to discuss the matter. Upon returning to the regular meeting, the board voted to deny, with board members Sam Gon, Kaiwi Yoon, and Doreen Canto abstaining.

"We will consider our options at this point," Aila said after the board's denial.

Board Discussion

"Here we are trying to give guidance and we're being challenged with one lawsuit over guidance. Who knows what else is coming down the pike? We're doing this to help the appraiser come up with a value. I'm just not sure how much we're helping with these factors," board member Chris Yuen said after hearing the public's testimony and the DLNR's responses.

He shared the NHLC's concerns about "public benefit" discounts. "Don't get me wrong, public benefit has to be part of our decision to do these leases in the first place … but I'm concerned about telling an appraiser to factor in public benefit when their role is to come up with fair market value. Is the appraiser supposed to say, 'We like diversified ag so we're going to cut the appraisal amount,' versus, I don't know, a residential development? … I'm not sure we should give them the task of determining what is public benefit and discounting an appraisal based on their ideas of public benefit," he said.

He floated the idea of a deferral.

"I'm just wondering if we're causing a problem, and I'm wondering if we have an appraiser that thinks they can appraise this without any guidelines."

"I'm not sure we do," Case replied.

"But I'm not sure we don't," Yuen said.

Tsuji chimed in that the appraisers have asked for even stronger guidance than what was being proposed.

"If we defer it, then we're not going to try anything out. We could defer it and not give any guidance and see if we can get an appraiser to try this…. We've been working on this for several years already and we're stuck," Case said.

Case noted that the board's approval would not prejudice the Sierra Club's petition for rule-making, and that the Legislature may decide to adopt something else. In any case, the guidance, is "not set in stone," she said.

"I'm more likely to move forward today knowing we're trying to forge guidance … eventually through rules or laws," board member Sam Gon said.

"I guess I wouldn't say it eventually will. I would say there are procedures in the future that may alter this path," Case replied.

When Case ultimately called for board members to make a motion, she was initially met with silence. Board member Vernon Char eventually made a motion to approve, and with amendments proposed by Yuen, board member Doreen Canto provided a second.

Yuen proposed nixing the use of the revocable permit rent as the starting point for valuation, and instead making it one of the factors to consider. He also said the factor regarding public benefit discounts should be deleted.

Char's motion passed, with members Yoon and Tommy Oi voting in opposition.

Hirokawa said that with the board's approval, his division would likely hire an appraiser to evaluate a potential lease for one of the existing permittees.

"I don't necessarily mean Mahi Pono," — who co-owns EMI with A&B and would be the largest water user, by far — "maybe a smaller one, run this around the block and see how this works," he said. His division would then come to the board with something short of a full appraisal report that includes a discussion of the proposed upset rent, "so the public is well aware of how we got to this number," he said. ***— Teresa Dawson***

Seawall from Page 1

The O'Sheas made clear in their filings that they believe a removal order would be unacceptable.

"If the O'Sheas' wall is removed and the state is correct that the ocean will immediately move mauka into the O'Shea property, what will happen next? The O'Shea's remaining yard and slab-on-grade home will be undermined. Again assuming the state is correct, the ocean will immediately flank around the existing [neighboring] Mooney wall and Oberlohr wall, causing the failure of each," their attorneys state in a brief.

The state, however, argued that despite multiple warnings and a pending lawsuit brought by the state, the O'Sheas "disregarded the property rights of the state, 'took a chance,' and completed the wall. Landowners such as the defendants cannot simply erect immense, expensive structures on public land and then complain of the hardships they would suffer in removing their encroachments."

If the parties fail to settle the case, a jury waived trial has been scheduled to begin on January 18.

Emergency

On September 3, 2017, an old seawall that protected the O'Sheas' Sunset Beach home collapsed, but not from being

undermined by ocean swells.

The O'Sheas argue that their then-neighbor, Rupert Oberlohr, broke the wall when he affixed and tightened cables to parts of the wall fronting his home in an attempt to secure it.

The wall, which spanned multiple properties, appears to have been built in the 1950s. The O'Sheas claim the state built it. The state denies this.

In any case, immediately after the collapse, the O'Sheas began building a new seawall without any authorization from the City and County of Honolulu — which has jurisdiction over activities within the shoreline setback area — or the state Department or Board of Land and Natural Resources — which control activities on public beaches.

After they ignored warnings from the Department of Land and Natural Resources' Office of Conservation and Coastal Lands to stop work on the wall, the state sought and received a temporary restraining order on September 22, which expired on October 2.

The city also issued the O'Sheas a notice of violation on October 6 for conducting major repairs to an existing seawall in the shoreline setback area without first obtaining a shoreline setback variance and for doing structural work without first obtaining a building permit. The city ordered the O'Sheas to restore the area within 30 days.

Instead, the O'Sheas completed the wall in October, according to OCCL administrator Sam Lemmo.

On October 13, 2017, the Board of Land and Natural Resources discussed a proposal from the OCCL to fine the couple $75,000 for the illegal construction within the Conservation District.

The couple's attorney, Greg Kugle, asked for a contested case hearing before the board could vote on the matter. That case has been stayed pending the outcome of the lawsuit stemming from the temporary restraining order the state had obtained.

"The state for unexplained reasons allowed the TRO to expire, and the O'Sheas then went ahead and built their new 13-foot high seawall," Crabtree wrote in his September 14 ruling.

The O'Sheas argue that the seawall was built entirely on their property, which negates the need for any state approvals. The state, however, says that the wall lies within the high wash of the waves and, therefore, encroaches on public land.

In its motion for partial summary judgment, the state pointed out that the only support the O'Sheas offered as proof that the wall was built on their property were shoreline certifications from 1988.

Ashford Boundary

In its motion, the state asked the court to grant a mandatory injunction ordering the removal of the seawall. If the court chose not to grant the injunction, the state asked instead for a declaratory judgment finding that the seawall encroached on state land.

In their briefs, attorneys for the O'Sheas argued that the *Ashford* boundary and the shoreline as determined by the Land Board in accordance with the CZMA are the same. They also argued that the Land Board alone has the authority to designate where the shoreline is.

They argued that the language of the act incorporates the objective of the *Ashford* boundary line, "indicating that the determination of the shoreline pursuant to its terms serves a much larger purpose than just defining the shoreline setback area."

They added that the act "has entirely subsumed, and also supplemented, the definition of the *Ashford* boundary line, indicating an intent for the BLNR-determined shoreline to replace the *Ashford* boundary line."

Under the act, a certified shoreline is determined to be at the highest wash of the waves — excluding those caused by storm or seismic activity — during high tide and in the season when the waves are highest.

"While the CZMA allows for the shoreline to be fixed by an approved and privately-owned structure, the common law makes no such accommodations in regard to the *Ashford* boundary line. Thus, a court's determination of the *Ashford* boundary line could be considerably further mauka than a shoreline that is fixed by an approved and privately-owned structure. Such a determination by a court would leave the privately-owned structure firmly within the boundaries of public land and subject to trespass proceedings brought by the state, despite the structure's approval by relevant government agencies," they wrote, calling this an "absurdity."

Absurd or not, the Land Board has for years been requiring easements from landowners whose seawalls have been found through the shoreline certification process to be makai of the state property line. The state has explained in the past that the *Ashford* shoreline and the certified shoreline are closely related, but not the same. However, the certified shoreline does serve as a proxy for the property boundary line.

In August 2017, shortly before the O'Sheas' seawall failed, even Land Board chair and DLNR director Suzanne Case asked the Department of the Attorney General for clarification on aspects of the state's ownership of coastal lands, specifically with regard to the board's practice of requiring easements for legally built structures that have come to encroach on state land.

In its December 2017 response, deputy attorney general William Wynhoff assured Case that the state owns additional land when the shoreline moves mauka, that it is not a taking of private land, and that the Land Board can and should charge market rent for any easements obtained to resolve encroachments.

However, in a footnote, he also admitted, "Shoreline and ownership lines are the same where the shoreline is not affected by structures. No Hawai'i case or statute address the question of where the ownership line is when the shoreline is affected by a seawall or other man-made structure."

Although the O'Shea case doesn't resolve the question of where the shoreline is in those cases, it does speak to where it isn't.

When Judge Crabtree signed the order finalizing a ruling he made on September 14, he largely adopted the position the state took in its briefs on whether or not an illegal seawall can artificially fix the shoreline. However, Crabtree expanded that position to include not just illegal structures, but all artificial structures.

As the state did, Crabtree cited a 2014 Hawai'i Supreme Court decision (*Diamond v. Dobbin*) that determined that an artificially enhanced vegetation line cannot "usually" set the *Ashford* boundary. "[N]either can an artificial seawall usually set the *Ashford* boundary in and of itself," he wrote.

Crabtree stated that under the CZMA,

an artificial structure may be used in a shoreline determination. However, he also noted in his September 14 ruling that the act's shoreline determination for county setback purposes was not the same "legal event" as determining the highest wash of the waves to establish a property boundary.

And because the certified shoreline under the CZMA and the *Ashford* boundary are not, as he put it, the same legal event, Crabtree also ruled that the court does have the authority to establish the *Ashford* boundary.

In his September 14 ruling, he noted that the *Ashford* boundary could be decided in Land Court, but a trial court is not obliged to have the Land Court make that determination.

Storm Waves

While Crabtree adopted many of the state's arguments in his ruling, he held back on ruling whether or not the O'Sheas' seawall encroached onto state land.

Although Crabtree found that the certified shoreline under the CZMA and the *Ashford* boundary are not the same legal event, they are defined in the same way.

Crabtree determined that the evidence presented showed that waves do hit the O'Sheas' seawall during the winter, which is when the highest wash of the waves occur on O'ahu's North Shore.

However, he declined to rule on whether or not those waves are storm waves.

If they are not storm waves, then the seawall encroaches onto state land, he wrote, adding, "[I]f the waves are hitting the seawall, the highest wash is mauka of the seawall."

The state had introduced a number of exhibits, including video taken in the years following the seawall's construction, showing waves hitting the wall.

In one exhibit offered by OCCL administrator Sam Lemmo, for example, video taken on October 8, 2019, showed waves hitting the wall before the tide and before expected swells were forecasted to peak.

For all but one of these state exhibits, the O'Sheas have contended that they show waves are washing up against a neighbor's wall, not theirs.

With regard to the state's Exhibit 18, however, there is no dispute that drone footage taken by Dr. Shellie Habel of the University of Hawai'i's Sea Grant program shows waves hitting the O'Shea's seawall on December 2, 2020. There is, however, a dispute over whether those waves were caused by a storm.

Habel and the state's attorneys offered evidence showing that neither the Central Pacific Hurricane Center and the Pacific Tsunami Warning Center reported any storms or tsunamis that might have caused the waves on December 2.

Even so, Crabtree explained that he could not, based on the information on the websites of those agencies, find that the wave in Exhibit 18 was not due to a storm. "The court would have to draw inferences from the exhibits. The court is not allowed to make such inferences against the non-moving party on summary judgment," he wrote.

He added that he was not aware of any requirement that storm waves come from a named storm and also shot down the state's position that storm waves had to come from a storm visible from shore.

"[T]he argument seems counter-intuitive, since it is well-known that storms cause ocean waves from hundreds and even thousands of miles away," he wrote.

On this point, Crabtree referenced the declaration of retired University of Hawai'i oceanographer Patrick Caldwell, submitted on behalf of the O'Sheas. Attached to Caldwell's declaration was his NOAA surf forecast for December 2, 2020, the day Habel's video was taken. That forecast noted that a "hurricane-force" system from the far northwest Pacific had "occluded near 50N, 165W 11/30 with top winds near storm-force. This is the source for the surf arriving locally 12/2."

"Given what is at stake in this case (on both sides), and given the apparent disagreement between Dr. Habel and Mr. Caldwell's conclusions, the court declines to make a dispositive ruling at this time, on this record, that the wave in Exhibit 18 is not due to a storm," Crabtree wrote.

Stalled Enforcement

Whether any portion of the O'Shea's seawall sits on public land remains to be seen. If any of it lies within their shoreline setback area, the City and County of Honolulu would have a say in the fate of the wall.

The Notice of Violation the city issued in October 2017 gave the O'Sheas 30 days to restore the area. Otherwise it would issue a Notice of Order imposing civil fines. There is no indication that it ever did that.

What's more, on September 26, 2019, the city actually granted the O'Sheas' contractor, Uaitemata Ungounga, a building permit for what he claimed were repairs to the O'Sheas' existing 13-foot high seawall. The work was expected to cost $25,000, according to the permit.

The new seawall had already been built by then.

Shortly after issuing the permit, the city realized its error and revoked it on October 9, 2019.

The city stated in its revocation notice that incorrect information had been provided to obtain the permit. The city gave the O'Sheas 180 days to remove or demolish the structure, revise the building permit, or obtain a new permit to complete the work in accordance with current laws.

Also on October 9, the city issued a second notice of violation to the O'Sheas, along with Ungounga and IMH Engineering. They were cited for providing incorrect information to obtain a building permit and for violating the city's 2017 stop work order.

Similar to the 2017 NOV, the notice ordered them to stop work immediately (although it seems to have already been completed), obtain permits or correct the violation by November 11, 2019, and complete restoration of the area within 30 days.

Again, they were warned that the city would issue a Notice of Order imposing fines, but, again, it does not appear that this occurred. The city Department of Planning and Permitting's online list of outstanding notices of order does not include the O'Sheas' property.

Under the city's ordinances, a Notice of Order may include fines of up to $2,000 for each day a violation persists.

According to a February 26, 2021 declaration for the state by Jocelyn Gervacio Godoy, the DPP's custodian of records, no applications had been submitted for either a shoreline setback variance or a building permit for the seawall.

— Teresa Dawson

FWS Proposes Downlisting Bat From Endangered to Threatened

Based on a new five-year status review released earlier this year, the U.S. Fish and Wildlife Service is seeking to reclassify the ʻōpeʻapeʻa or Hawaiian hoary bat from endangered to threatened.

The species was listed as endangered in 1970, "based on apparent habitat loss and limited knowledge of its distribution and life history requirements," the review states.

Despite all of the research done in the decades since, largely spurred by the proliferation of wind farms throughout the state, the species' population size and overall population trends are still mysteries.

However, a lot more is known about their distribution and life history: The bats breed on Kauaʻi, Oʻahu, and Hawaiʻi, and also likely breed on Maui and Molokaʻi. They're also known to visit Kahoʻolawe and be present on Lanaʻi. A 2007-2011 study suggests the Hawaiʻi island population is stable or increasing.

Studies indicate there is geographic variation in the bats' genetic structure, but it "does not clearly support taxonomic reclassification," the review states.

Wind farms, as part of their habitat conservation plans, have contributed millions of dollars toward research to better understand the animals and help determine what actions are needed to offset the bat deaths caused by their turbines.

Last year, the state Endangered Species Recovery Committee held a two-day workshop where the results of the research funded by these wind farms was presented. The review incorporates much of that work.

"Overall, over the last eight years, ʻōpeʻapeʻa have been documented to occur over a much broader range than was known at the time of listing or when the species' recovery plan was finalized," the review states, also noting that the bats have been found to be highly mobile and to use fragmented habitats in a range of environments.

"While there are no monitoring methods that can quantify the abundance of ʻōpeʻapeʻa on each island, all of the major Hawaiian islands are now recognized as providing roosting, breeding, and/or foraging habitat for the species," it continues.

With the last status review released a decade ago, the review identifies wind farms as a "new threat." Eight are currently operating and one is under construction.

"Based on an 80 percent credibility standard used for modeling fatalities, the number of direct and indirect bat fatalities at all existing commercial wind projects on Maui are estimated to not exceed 11.3 bats per year," the review states. On Oʻahu, that number is 14.7 bats per year; on Hawaiʻi island, it's 3.2 bats per year.

PHOTO: USGS/C. PINZARI

A Hawaiian hoary bat, or ʻōpeʻapeʻa.

Wind farms operating at night do pose a risk to bats on those islands, but not so much to populations on Kauaʻi, Lanaʻi, and Molokaʻi, which don't have wind farms. Although the bats are highly mobile, sometimes flying long distances in a single night, they generally do not move between islands, researchers have found.

"The entire statewide population of ʻōpeʻapeʻa are not at direct risk of extirpation from the limited operation of the wind farms on the islands of Oʻahu, Maui and Hawaiʻi, as not all individuals are likely to enter wind project sites and be killed," the review states.

Still, it notes that wind turbines operating at night, which is when ʻōpeʻapeʻa are active, could cause a localized reduction in bat numbers if the facilities lie within the bats' core use areas.

The extent of that reduction "depends on how rapidly a niche vacated by a fatality is filled, and on the behavior of the resident ʻōpeʻapeʻa population," the review states.

Although the wind farms have been required to mitigate their take of the bats, through the conservation and management of forest lands, among other things, the effectiveness of those actions "remains uncertain and requires continued research, monitoring, feedback, and adaptive management to ensure the mitigation meets the success criteria and the needs of the bat," it states.

Other "new" threats identified in the review include timber harvesting, coqui frogs, and climate change. Timber harvesting of trees taller than 15 feet, which occurs mainly on Kauaʻi and Hawaiʻi, is a threat to roosting bats and their dependent pups. Coqui frogs compete with the bats for food in low elevations, and climate change may foster the spread of those frogs to higher elevations, the review states.

"Warmer temperatures may allow an expansion of pupping habitat into higher-elevation areas, but may also affect habitat conditions by effecting changes to the prey base, resulting in suboptimal foraging conditions. These impacts may be mitigated by the ability of the ʻōpeʻapeʻa to range widely in search of resources and its generalist diet," it adds.

Despite these and other threats, the FWS found that it now knows enough about the bats to recommend a change in their status.

Under the Endangered Species Act, the review concludes, an endangered species "is one which is in danger of extinction throughout all or a significant portion of its range. A threatened species is defined as any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The ʻōpeʻapeʻa appears to possess resilience, redundancy, and representation across the islands such that it is not on the brink of extinction. Therefore, we conclude that the ʻōpeʻapeʻa appropriately meets the definition of threatened under the ESA." — ***T.D.***

County, 'Aina Le'a Sign MOA While Court Cases Drag On, Taxes Go Unpaid

One of the first actions taken by the new administration of Hawai'i County Mayor Mitch Roth following his inauguration last December was to soften the county's stance toward the 'Aina Le'a development. The previous administration had been insisting that the developer would need to prepare a new environmental impact statement before being allowed to do further work on the 1,100-acre site in South Kohala where 'Aina Le'a is proposing to build more than 2,000 housing units.

'Aina Le'a challenged this requirement in a lawsuit filed in 3rd Circuit Court and the county corporation counsel vigorously defended the Planning Department's position – until last December, when the county and 'Aina Le'a filed with the court a stipulation that put the case on hold while the parties attempted to work out a settlement.

In late April, the county appeared to have worked out an agreement with 'Aina Le'a to resolve their differences. A Memorandum of Agreement signed by Richard Bernstein, identified as president of 'Aina Le'a, Inc., and Mayor Roth, recited many of the conditions in the redistricting order approved by the state Land Use Commission in 1989 and in the county rezoning ordinance, adopted in 1996.

The most recent annual report that the developer filed in March, provides an update on progress toward some of these conditions. 'Aina Le'a claims that plans for the intersection with Queen Ka'ahumanu Highway "are in final review" by the state Department of Transportation and that it has placed $2 million in escrow to pay for intersection improvements. It also reports that the state Department of Health had approved a decade ago the installation of a membrane bioreactor wastewater treatment system to serve the townhouse development, Lulana Gardens, that has been partly built on a 38-acre parcel within land owned by 'Aina Le'a. On that parcel, a total of 432 units are planned, with 385 intended to satisfy the requirement that 'Aina Le'a develop at least 385 units of affordable housing, as defined by county guidelines. So far, 'Aina Le'a told the county in March, 40 of those units had been completed.

'Aina Le'a is required to donate a school site to the Department of Education. However, specifically with regard to developing the Lulana Gardens parcel, it has asked the county to waive the requirement.

In the annual report, signed by Robert Wessels – the CEO of 'Aina Le'a and its many related companies since 2009 – Wessels notes that Lulana Gardens "has not reached agreement with the County Planning Department on the amount of 'Fair Share' contribution the Lulana Gardens affordable housing should contribute. Lulana Gardens desires to reach agreement with the Planning Director as quickly as possible defining what will be acceptable 'in kind' and what is required in cash. Lulana Gardens desires to pay the cash portion with the issuance of Certificates of Occupancy for each unit." (Boldface type is in the original.)

The memorandum of agreement addresses this – for Lulana Gardens. For the 432 units planned in that increment, the fair-share payment comes to $4,645.29 per unit, for a total of $3.3 million.

In addition to the fair-share payment, Lulana Gardens must pay real property taxes — something it has failed to do for several years. For the Lulana Gardens parcel alone, the tax bill at press time stood at $335,438. The total property tax owed for all 'Aina Le'a parcels, including penalties and interest, stood at more than $812,600.

Outstanding Balance

The unpaid tax bills suggest 'Aina Le'a may not be in the pink of financial health. But adding to its woes is a foreclosure lawsuit brought against it by Iron Horse Credit, LLC, the lender of last resort whose $5 million loan allowed 'Aina Le'a to emerge from bankruptcy in 2019.

Iron Horse brought the lawsuit in October 2020. A few weeks later, 'Aina Le'a responded by adding the County of Hawai'i and its planning director as third-party defendants, alleging that 'Aina Le'a could not pay off the loan because the county had prevented it from fulfilling its obligations under the loan agreement. In other words, 'Aina Le'a's argument went, because the county at that time had refused to approve an environmental impact statement preparation notice, or EISPN — the first step toward preparing a new environmental impact statement — 'Aina Le'a could not move forward with construction of the buildings that, when sold, would create the revenue stream needed to pay back Iron Horse.

Continued on last page

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From late November 2020 until late September 2021 — a period of nearly 10 months — the county did not respond to 'Aina Le'a's efforts to drag it into the Iron Horse case.

But on September 21, deputy corporation counsel Ryan Thomas asked the court to dismiss the county as a third-party defendant.

"[T]he obligations 'Aina Le'a had to pay the Iron Horse mortgage was [sic] not conditioned upon actions of the county, because said obligations did not interfere with the county's requirement that 'Aina Le'a obtain approval of an EISPN. The county's requirement was excepted from the Iron Horse mortgage as evidenced by the terms of the loan agreement. The loan agreement also showed that the county was not privy to the mortgage," Thomas wrote.

Then there was this: Ryan told the court that the claims 'Aina Le'a was making "are presently being litigated in another case" – the case that the company brought seeking to void the county's requirement that an EIS be prepared. The same case, that is, where action had been suspended last December by virtue of a stipulation agreed to by both the county and 'Aina Le'a, purportedly allowing the county and 'Aina Le'a to arrive at some agreement short of requiring an EIS.

The third-party complaint, Ryan wrote, "should be dismissed because the alleged claims are the same claims that are currently being litigated in *Lulana*. The complaint in *Lulana* was filed against the county on March 10, 2010 [sic], approximately seven months PRIOR to Iron Horse filing their complaint. The claims asserted in the third-party complaint and *Lulana* arise from the same exact set of facts and circumstances. In that case, *Lulana* (organized by 'Aina Le'a) moved for partial summary judgment, and the motion was denied. *Lulana* is still active. The claims raised in the third-party complaint should continue to be addressed in *Lulana*, not here, as it is improper."

The motion to dismiss the county as a third-party defendant will be heard by the court at 9 a.m. November 19 via Zoom. (Zoom conference ID is 610 665 7731.) The *Lulana* case, on the other hand, remains dormant, with no substantive filings with the court since the stipulation was filed last December.

The Mayor and the Sellers

In 2019, then-mayor Harry Kim memorialized a meeting with 'Aina Le'a principals in a letter to Wessels dated November 6. In it, Kim reaffirmed the county's position that 'Aina Le'a would be required to prepare a new environmental impact statement. Noting that "the representations made to me at our meeting on October 14, 2019, appear to be incorrect," Kim went on to list key elements that the company seemed to mis-understand, including:

The project "is not exempt from environmental review.... There is not a valid accepted Final EIS ... In 2010, the Planning Department previously accepted a final EIS for a larger project that differs from the present proposal for Lulana Gardens. As you know, in 2013, the Circuit Court of the Third Circuit found that the Planning Department should not have accepted that statement because it did not take a hard look at whether the project covered by the 2010 EIS was a segment of a larger project or also whether there were cumulative impacts which were not fully analyzed."

But the current administration of Mayor Mitch Roth has been actively promoting sales of units in the Lulana Gardens development.

Roth makes an appearance in a video broadcast on Hawaii News Now's HI Now program, a platform where commercial entities can buy time. The segment is sponsored by Hawai'i Development Group, a company whose two principals, Kelly Valenzuela and her daughter, Lailan Bento, say they have entered into a partnership with Roth to bring affordable housing to the Big Island.

The program's narrator claims that thanks to a partnership with Hawai'i Development Group, Lulana Gardens "has come to life."

"The great thing here," says Roth, making an appearance in the video, "is that they're going to be providing over 400 rental units."

The video shows Valenzuela and Bento showing off staged units to the mayor. "This is really nice," Roth says.

Another website, ainaleahi.com, would seem to solicit investments in the publicly traded company. "The Town of 'Aina Le'a provides an outstanding opportunity to its partners to acquire a major holding of residential-zoned estate [sic] in the heart of one of the fastest growing luxury neighborhoods, with a proven track record of significant land value appreciation," reads the text under the "Investment" and "Program" tabs of the website. No prospectus for potential investors is offered.

Investment solicitations are highly regulated by both the state and the federal government. There has been no filing with the federal Securities and Exchange Commission since June 22, 2017, when the company announced it had filed a voluntary bankruptcy petition.

— Patricia Tummons