

Gimme Shelter?

No, gimme credits. That, at least, seems to have been the anthem of the Hawai'i County housing agency a few years ago, when it so generously awarded hundreds of valuable affordable housing credits to two companies that, seven years later, haven't erected so much as a tent.

At a time when the need for affordable housing couldn't be more urgent, the question of how the agency's policies and practices failed to deliver must be asked and answered. Even if legal action is not an option, those who were involved in the schemes outlined in this issue should be called to account.

And steps must be taken to ensure this never happens again.

The Intriguing History That Underlies A Kona Affordable Housing Development

How did a newly minted company get the County of Hawai'i to purchase 13 acres of land for it? With only \$1,000 in out-of-pocket expenses the company was able to acquire land valued by the county at \$948,200.

It later sold off more than half of that acreage for \$950,000 and it still owns the remaining six acres. That land has now been leased for \$84,000 a year to a developer that is proposing to build 112 affordable rental units on the site in Kealakehe, near the village of Kona, at a per-unit average cost of more than \$400,000.

Not a bad return for an initial investment of less than a month's rent for a two-bedroom apartment in Hilo.

So how did West View Developments, LLC, pull it off?

county Office of Housing and Community Development (OHCD) in an effort to answer this question – and a host of others, too. Not every question was answered, and in some cases, when answers were found, they only led to still more questions.

Here is what we did learn:

The secret to the West View deals lies in the award by the county of what are called excess housing credits. Chapter 11 of the Hawai'i County Code, which deals with affordable housing, lays out a complicated system whereby developers can earn excess credits by exceeding the minimum requirements for affordable housing associated with various types of development. (This is more fully described in another article in this issue.)

West View Developments was registered with the state Department of Commerce and Consumer Affairs on December 17,

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'Excess Credits'

Environment Hawai'i reviewed files at the

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Architect's rendering of proposed Honua'ula development.



NEW AND NOTEWORTHY

‘Aina Le‘a Suit Dismissed: The state has prevailed in the efforts of DW ‘Aina Le‘a, LLC, to claim \$200 million in damages as a result of the Land Use Commission’s reversion of land it once owned from the Urban land use district to the Agricultural district. DWAL had brought the lawsuit against the state in 2017, even though it had turned its interest in the property over to ‘Aina Le‘a, Inc.

Soon after the lawsuit was filed, U.S. District Judge Susan Oki Mollway granted the state’s motion to dismiss, finding that the lawsuit had been untimely filed. DWAL appealed to the 9th U.S. Circuit Court of Appeals, which determined the state law regarding statute of limitations was ambiguous and referred the question of timeliness to the state Supreme Court.

The Supreme Court ruled in 2021 that DWAL was within its rights to sue when it did, and so the lawsuit ended up again before Judge Mollway.

This time, the state once more moved to dismiss the lawsuit, arguing that, among other things, DWAL had assigned its rights to the property to ‘Aina Le‘a, Inc., as evidenced by the record in Bankruptcy Court. DWAL “responded with obfuscation,” Mollway wrote in her ruling, issued May 25. “Moreover, it has failed to offer any coherent argument in support of its standing or this court’s jurisdiction.”

DWAL sought to amend its initial filing after reviewing the state’s motion for summary judgment, Mollway continued. Only then, she wrote, did DW apparently realize “that it possibly should have included ‘Aina Le‘a as a party.”

(For details on the original complaint, see the article in the April 2017 issue of *Environment Hawai'i*.)

Year of the Rat: The new book by Kay Howe might better be called Years of the Rats. Interwoven with her account of the trials of dealing with her son’s affliction with rat lungworm disease and her own dedicated research to address the problem through a formal course of pioneering research, is the shameful history of the response of government officials and legislators.

Were they concerned with the impact of publicity about the problem on tourism, or supporting favored institutions to the harm of the University of Hawai'i at Hilo, where Sue Jarvi and Howe had been laboring on rat

YEAR OF THE RAT



lungworm for years? Maybe it was a combination of both. In any case, the head of the Department of Health at the time, Bruce Anderson, the chief epidemiologist, Sarah Park, and key legislators seem to have conspired for years to undermine efforts to address the growing and devastating parasitic infection.

Howe’s self-published book is subtitled, *Disease, Deception, and Discovery in Paradise. A Memoir*. It’s a good read, and not just for people wanting to learn more about *Angiostrongylus cantonensis*. For anyone wanting to understand the way politics in Hawai'i works to undermine public health – or at least did so in this particular case – the book is required reading.

Hu Honua Denial: The proposed biofuel power plant north of Hilo has been struck down, again, by the state Public Utilities Commission. On May 23, the PUC rejected the application of the Hawai'i Electric Light Company for approval of the power purchase agreement it had worked out with the nearly complete plant.

The majority of two commissioners found that the project “will result in significant [greenhouse gas] emissions” and that “Hu Honua’s proposed ‘carbon commitment to sequester more GHG emissions than are produced ... relies on speculative assumptions and unsupported assertions.”

Hu Honua can appeal to the Supreme Court, as it has done in the past; it can ask the PUC to reconsider; or it can work out a new power purchase agreement with HELCO that can once more be presented to the PUC.

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Quote of the Month

“We count our blessings.

However, what has not happened in the past cannot dictate what will happen tomorrow.”

— *Carty Chang, chief engineer at the Department of Land and Natural Resources, on the potential failure of the Wahiawa Reservoir.*

EDITORIAL

Big Island's Housing Policy: Troubled, Confusing, Ineffective

Hawai'i County's affordable housing policy is a disaster.

Other counties have their problems as well when it comes to addressing the shelter needs of households who are priced out of market-rate rentals.

But on the Big Island, the insanely complicated process by which developers are encouraged to build affordable housing has left the door open to abuse that may well rise to the level of criminal activity.

The cover story in this issue and sidebars provide details. But to make this very long story as short as possible, in 2015, the county gave away hundreds of affordable housing credits, each worth tens of thousands of dollars, to two freshly minted companies, controlled by the same person, with no assurance that the promises of affordable housing he had made would be kept.

To be sure, not all of the credits that have been awarded over the years – 1,848, according to Housing Administrator Susan Kunz – were issued inappropriately. But the fact that 18 percent of these (326) went to the same individual, with no history of involvement in housing development; were awarded before his companies even owned the land; and, what's more, were actually used to effect his purchase of the land – well, words fail.

At one point, and perhaps still, those housing deals and perhaps others that were put together by a former staffer in the housing agency itself were the subject of an FBI investigation. If that federal investigation bears no fruit, then it surely falls to the county prosecutor or state attorney general to look into this scam.

At the very least, the county auditor should investigate how this could have happened.

The people of the county, and most especially those who still await the promise of affordable housing, deserve no less.



Reforms Needed

Whatever the well-intentioned reasons behind Hawai'i County's affordable housing law – Chapter 11 of the County Code – it is time for an overhaul.

For one thing, there is no requirement

for accountability. The code says that the administrator of the Office of Housing and Community Development *may* provide timely periodic reports to the County Council. In more than two decades, not once has any housing administrator made such a report.

For another, there is the system of earning excess credits for developing affordable housing, with those credits sold directly or auctioned off to developers who are then able to use them to get out from under the obligation to develop affordable housing themselves. The county is short-changed when those credits allow for-profit developers to buy their way out of the need to include affordable units as part of their own projects. For instance, if a developer of a 20-unit complex can purchase four credits at \$25,000 each, he will effectively get out from under the county's requirement that he otherwise earn those credits by building four affordable units – units that would cost far more than \$25,000 apiece if actually built.

In addition, the very system of earning credits for affordable housing is so complex, it is vulnerable to manipulation by unscrupulous employees. Housing administrator Kunz was asked what controls are in place to ensure that housing staff don't get kickbacks or otherwise profit from schemes to exploit this system. She responded by stating that "multiple departments sign off on any affordable housing agreements." However, in the two cases examined by *Environment Hawai'i*, that review process was perfunctory in the extreme, with Kunz herself signing off on one of them. The oversight by the deputy corporation counsel assigned to the office at the time, Amy Self, can kindly be described as incompetent. Kunz also noted that employees are "bound by the County Code of Ethics" – a weak reed to lean on when the temptation to cheat is so great.

Kunz was asked whether OHCD ensures that the credits are awarded appropriately, given that in at least two instances, they were awarded before the developer owned the land, much less had developed any housing. Kunz's response was forward-looking: "OHCD will verify that requirements and conditions of affordable housing agreements have been met before awards are made," she stated in a written reply to questions.



Demographic Consequences

With the developers of market-rate housing able to avoid having to include low-income housing in their projects thanks to the trade in credits, the predictable – and actual – result has been increasingly dense affordable housing developments.

But Kunz denied that this was the case. "Zoning dictates the density of a housing project," she stated, and not the credit policy. However, zoning has been changed to allow for denser affordable projects, as witness the rezoning approved just last September by the County Council for the affordable housing development in Kealakehe.

What's more, the Honua'ula project in Kealakehe will be the fourth income-limited rental development in less than a square mile. "Is OHCD concerned about the concentration of low-income housing" in the area? Kunz was asked. No, she replied. "OHCD's mission is to facilitate and promote the development of affordable housing... It is misleading to categorize all the [Kealakehe] projects as low-income housing, as they all vary in their targeted income levels as well as tenant profiles."

OHCD developed none of those projects, she added, "and the development and location of these housing projects went through the appropriate public review and approval processes. Their locations are probably more a result of availability of infrastructure such as roads, water, and sewer."



Scrutiny

It is understandable that the Office of Housing and Community Development is eager to promote projects that will address the pressing need for affordable housing. Kunz has stated that the county will need more than 13,000 additional units of below-market rate housing by 2025.

Yet that does not obviate the need to vet developers who are proposing to build projects to meet that need. In the case of Honua'ula, one of the company's officers has a record of violating hazardous waste laws in South Dakota. Despite this, the "No" box was checked in response to a question about past environmental infractions that appears on the county's questionnaire for affordable housing developers.

Kunz states that OHCD is not able to vet private developers. If so, it should at least

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Housing Agency Has Had Difficulty Tracking Low-Cost Housing Credits

Hawai'i County, like every other county in the state, struggles with the problem of affordable housing. Unlike the others, though, it has a law – Chapter 11 of the County Code – that is intended to spur the development of lower-cost housing by awarding housing credits to companies that propose to build units that will be within reach of households earning from 60 percent up to 120 percent of the area median income (AMI).

It is a system of almost byzantine complexity, with no fewer than a dozen ways

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give members of the public the opportunity to do so. But with most 201-H housing proposals, opportunities for the public to weigh in are limited, with little environmental disclosure required in most cases. When at last the documents in support of a project are delivered to the County Council and the public, the sheer volume of material – 722 pages in the case of Honua'ula – makes a mockery of the idea that timely and thoughtful review could possibly occur.



Next Steps?

The Office of Housing and Community Development has retained a consultant to review the existing policies and law. Its report is due sometime later this year. That could provide a good starting point.

Whatever else happens, the deferential, uncritical attitude toward any project that parades under the banner of affordable housing has to change. This needs to start with the Office of Housing itself, but cannot end there. Council members, the mayor's office, and every other agency that has blindly embraced any proposal – no matter how sketchy – need to step up their game and ensure that county resources are never again squandered in this way.

Two and a half years ago, and in relation to another Hawai'i County affordable housing fiasco, we ran an editorial headlined,

“Oversight Required for Hawai'i County Housing Office.” That is, sadly, still true. (*Environment Hawai'i* reached out to Raj Budhabhatti, Alan Rudo, and the U.S. Marshal's Office for comment. No response was received by press time.)

for developers to earn these credits.

In the case of housing developments, developers receive half a credit for each sale of a completed unit to households earning between 120 and 140 percent of AMI. If the unit is affordable to households earning between 100 and 120 percent of the AMI, that earns the developer one credit. Some of those credits apply to the development itself, to satisfy the onsite affordable housing requirements (equal to 20 percent of the total number of units). The remainder of the credits are deemed to be excess.

Sales of units to households earning between 80 and 100 percent AMI get 1.5 credits per sale, while sales of units to households earning less than that earn two credits.

Builders of rental units have a similar sliding scale of credits.

And so it becomes possible for a developer of an affordable housing project of, say, 100 units that are theoretically affordable to households earning no more than 60 percent of the area median income to actually earn 200 credits, of which 180 are excess.

When acquired by other developers – whether they are building houses to be sold or rented at market rates, or whether their projects are shopping centers, industrial parks, or most anything else requiring rezoning – those credits can be cashed in to satisfy the affordable-housing obligations imposed on them.

Developments that need to “earn” these credits include not only housing developments, but also:

- Resorts and hotels that are expected to employ more than 100 full-time workers. These must earn one credit for every four full-time equivalent jobs.

- Industrial developments (except home improvement centers), which are required to earn affordable housing credits depending upon the size of the development, number of anticipated employees, and where they are proposed to be built.

Options available to satisfy the credit requirement include:

- Building and selling “affordable for-sale units off-site,” but only if that site is within 15 miles of the main site being developed;

- Building and renting out affordable units, either on the site itself or within 15 miles;

- Donating to the county or, if the county so directs, to a non-profit organiza-

tion “developable land” within 15 miles of the main site.

- Finally, the developer can “obtain excess credits from another developer.”

When that last option is chosen, the developer need not create any affordable housing at all.

A market has thus developed in the trade of affordable housing credits, with at least one recorded sale of \$50,000 per credit.

The county Office of Housing and Community Development (OHCD) is charged with keeping track of these “excess credits.” This is not stated explicitly in Chapter 11 of the County Code, but is implied in § 11-19, “Reports by housing administrator.”

“The housing administrator may provide timely periodic reports to the council of all significant actions taken under authority of this chapter, including but not limited to the approval of excess credits, the acceptance of transferred credits, and the choice of resale restrictions.”

Susan Kunz, OHCD administrator, told *Environment Hawai'i* that no such report had ever been made.

What's more, a 2021 memo from OHCD staffer Anne Bailey to Kunz suggests that at least until late 2018, the agency “had no tracking procedure for the affordable credits that had been issued over the years.” Only then did it develop “credit transfer procedures to begin to account for the credits issued by OHCD,” the memo states.

OHCD has retained a consultant, Keyser Marston & Associates, a California firm, to review Chapter 11. The firm will be paid \$102,000, Kunz said, and its report is due in October.

Belated Accounting

What seems to have prompted the development of a tracking system was confusion surrounding the 261 credits awarded to both West View Developments and Luna Loa Developments in 2015. Both entities were registered the same date – December 17, 2014 – with the Hawai'i Department of Commerce and Consumer Affairs, and both were controlled by Rajesh Budhabhatti.

West View had received 104 housing credits on the promise of developing 52 low-income units on 13 acres of land at Kealakehe. Nine credits were to be applied to the onsite development and 46 were assigned to the seller, Ron Brown, in lieu of cash as payment for the land. That left West View with 49 credits. Luna Loa received 212 credits on the promise of developing 106 low-income rental units on 4.6 acres in Waikoloa, with apparently no deductions

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to be applied to onsite units.

As of this year, West View has 45 credits on the books, having transferred four credits to Luna Loa in 2016.

An account register maintained by OHCD for the Luna Loa credits shows that of the original 212 credits, 70 remain on the books. It is near impossible to assign any certainty to that number, however, since the account reflects some transfers that apparently were not approved by the county, some registered with the Bureau of Conveyances, most not, and some of the documents for which BOC numbers were provided not matching up at all with what they were purported to reflect in the account. In addition, there is said to be a transfer of 22 credits to Big Island Housing Foundation “in the pipe line.” However, a note attached to this entry states that the county did not sign on to this in 2017. In 2018, the note continues, Gytoku “transfers credits from/to BIFH ... File is corrupt ... so don’t know what was transferred.”

According to Bailey’s memo to Kunz, developments in the fall of 2018 led Gytoku to devise a more structured protocol for the assignment of credits. That November, OHCD prepared a form “that Alan [Rudo] had put together” for Gytoku to sign that would allow the release of five credits held by West View to a developer called Ha-

waii One 1 Investors, LLC. The following month, Gary Zamber, attorney for West View, called the OHCD, stating that the credits should *not* be transferred.

In January 2019, Zamber stated that the transfer should now be approved by OHCD.

In the end, the transfer was not approved, but “there was significant discussion about whether we should allow West View to sell credits when their Affordable Housing Agreement was about to expire,” the memo states.

In August 2019, West View again requested that OHCD approve the transfer of five credits to the same investor. Gytoku reminded Budhabhatti of the correct procedure to transfer credits, including the production of corporate documents indicating that the parties to the transfer are empowered to execute the transfer on behalf of their respective businesses.

In 2021, Budhabhatti was still trying to flog the excess credits to Hawaii One 1 Investors. When the OHCD was slow to respond, he emailed county deputy managing director Bobby Command, complaining about “the kind of 2nd rate treatment we the developers [sic] get from OHCD. Something is wrong here.”

That got the attention of Kunz. In an email to Bailey, she wrote, “I am concerned that now it is going to the mayor’s office...

This is unacceptable... I keep hearing Raj’s name but I am not familiar with him or his project.” (Kunz – then known as Susan Akiyama – had signed off on the West View affordable housing agreement in 2015, when she was housing administrator under Mayor Billy Kenoi.)

Bailey responded with the long memo referenced above, reciting the troubled history of dealing with the excess credits assigned to Budhabhatti.

Finally, on March 7 of this year, Kunz replied to Budhabhatti’s request to assign credits. She recapped the history of credit assignments from the West View balance and noted that his accounting – that he had 49 credits – disagreed with OHCD’s accounting, which included the four credits transferred to Luna Loa, leaving West View with just 45.

If Budhabhatti still wanted to transfer credits, she said, he would need to submit a revised form, reflecting a corrected accounting of credits, to the housing administrator, as well as documents attesting to the corporate authority of the parties involved.

There was no response to Kunz’s letter in the files reviewed by *Environment Hawai’i*.

If, as *Environment Hawai’i* was told, Budhabhatti’s excess credits have been impounded by the U.S. Marshals Office, the matter may be moot. — **P.T.**

West View from Page 1

2014. The only organizer named in the articles of organization is Raj Budhabhatti, who listed an address in the Puna district of Hawai’i County. Budhabhatti has no documented involvement in development of any type, other than his involvement in a 75-kilowatt solar power farm on his Puna land. In 2013, the groundbreaking for that feed-in-tariff facility was attended by, among others, then-Governor Neil Abercrombie. (On April 3, 2014, Abercrombie nominated Budhabhatti to a four-year term on the High Tech Development Corporation’s board of directors, but just four days later, the nomination was withdrawn without explanation.)

In any event, here is what can be known from the public record about West View’s involvement in the Kona development.

For about 15 years, the land had been owned by Ron Brown. Brown was famous – or, more likely, infamous – for his development in the early 1990s of what was then known as Crazy Horse Ranch. That controversial development consisted of 20 three-story buildings on 10 acres in the state

Agricultural land use district. His intentions for the nearby 13-acre Kona land evolved over time, but he was motivated enough to work out an agreement with the Department of Water Supply to provide service to the site.

In 2015, however, Brown was ready to sell the property. Working with the OHCD, he and Budhabhatti agreed to a purchase contract that was signed by Budhabhatti’s attorney, Gary Zamber, and by Brown on October 9.

The agreement had three contingencies: a “proposed affordable housing agreement;” the “assignment of affordable credit [sic];” and a “critical regional housing letter.” The total purchase price was given as \$1,000 “total cash funds from buyer,” but also “including other good and valuable consideration.”

That “good and valuable consideration” came in the form of excess affordable housing credits – 46 of them, to be precise. The value of such credits depends on a number of factors, but in recent years, they have sold for between \$20,000 and \$50,000 each. In other words, 46 credits were easily worth \$1

million and likely far more.

On November 18, 2015, county housing administrator Susan K. Akiyama (now Kunz) signed the “critical regional housing determination” that allowed the housing credits to be used outside of a 15-mile radius of the original property. If West View had questions or required more information, Akiyama said to “please call Alan Rudo” at OHCD, the staffer who had apparently worked out details of the agreement.

Those 46 credits were just part of a total of 95 “excess credits” awarded to West View Developments in an affordable housing agreement that Akiyama and then-Mayor Billy Kenoi had signed just five days earlier. As stated in that agreement, West View was to complete within five years construction of no fewer than 52 rental units on the site, which were to be affordable to households earning less than 60 percent of the area median income. For each unit, West View would earn two affordable housing credits, for a total of 104. Nine of those were to be used to satisfy on-site affordable housing requirements, leaving a net of 95 credits.

Continued on next page

After subtracting the 46 assigned to Brown, West View still had 49 credits.

In other words, by the award of 104 housing credits to the inexperienced developer West View, the county effectively purchased the land for West View by satisfying Brown's terms of sale. What's more, it left West View not only with the land, but with "good and valuable consideration" that was likely worth more than \$1 million.

According to county property tax records and the state Bureau of Conveyances, the purchase price for the three parcels included in the housing agreement was \$948,200. Just how that number was pinned down is explained by the purchase agreement, which states: "For purposes of computing the conveyance tax, title insurance, and escrow fees, the real property shall be valued at 2015 county of Hawai'i assessed value of \$948,200."

It Gets Better

The deed assigning title to West View Developments was filed at the Bureau of Conveyances on December 17, 2015. A year later, West View proposed selling off the largest (seven-acre) and most mauka of the three lots, at the southern end of Kiwi Street. Housing staffer Rudo prepared the internal accounting forms needed, and on December 27, 2016, the partial release from the housing agreement was filed with the bureau.

The lot has no permitted improvement, but aerial photos and Google street-view photos show a rag-tag collection of out-buildings, including trailers and other impermanent structures, on the site. In 2019, West View filed a complaint for ejection against a tenant on the premises, stating that the tenant was six months in arrears of the \$750-a-month rental payment.

For more than five years, the land remained unsold. But in May 2021, Budhabhatti signed a warranty deed placing title for the Kiwi Street parcel in the hands of PMJ Kona, LLC. Purchase price was recorded at \$950,000. The address for West View was given as in care of Margaret Reynolds, on South Pueo Place, in Kona. Reynolds is married to Rudo, the former OHCD staffer.



A New Face

Meanwhile, work on the two parcels that remained bound by the now-diminished housing agreement appeared to be at a standstill.

In February 2019, more than three years

after the housing agreement was signed, then-housing administrator Neil Gytoku wanted to know what, exactly, West View had done to develop the property.

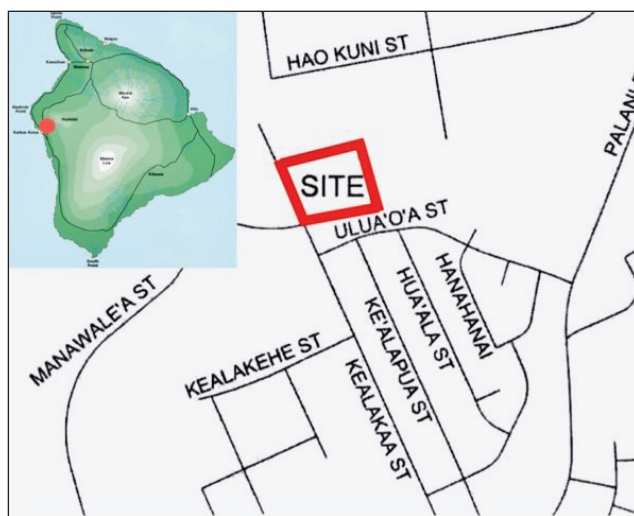
Zamber replied on March 1, stating that West View had "invested over \$200k in design, engineering & capacity studies" and that "preliminary subdivision and plan approval [was] near completion." The company had run into challenges, he added, citing problems with sewer lines and the unwillingness of the Department of Water Supply to honor earlier agreements. He stated also that "Westview [sic] Developments offered to convey two of our three parcels totaling 6-acres to the county, which would provide the county the opportunity to complete the affordable housing... To this date, Westview [sic] has not received a reply." (No documentation of this offer was found in the files made available for *Environment Hawai'i's* review.)

Zamber then announced that West View was working with Hawai'i One 1 Investors, "which is providing the much-needed funding in exchange for the housing credits." (West View's ultimately unsuccessful efforts to transfer the credits to Hawai'i One 1 and other entities are discussed elsewhere in this issue.)

Four weeks later, Zamber emailed Gytoku with an ambitious timetable for various phases of construction for phase 1 of the project. The project now included 60 affordable housing units, Zamber stated, eight more than the 52 originally planned. According to the timetable, "completion of studies" was to be completed by June 2019, while "vertical construction" would commence in May 2021 and continue for 16 months, to August 2022.

Nothing in county records provides evidence that West View Developments actually moved forward with earnest efforts to develop the parcel. Instead, by spring of 2020, West View had teamed up with a new LLC that would take over that task.

On June 8, 2020, the Office of the Secretary of State in Texas received a certificate of formation of a limited liability company. The initial registered agent of the entity, Honua'ula, LLC, was Aaron L. Hultgren, of McKinney, Texas. He was one of three



named managers of the LLC, along with Bruce D. Beard of Indianola, Washington, and Carlo R. Mireles, of Kealakekua. Eleven days later, Honua'ula registered as a foreign (i.e., out-of-state) LLC with the Hawai'i Department of Commerce and Consumer Affairs.

By July, Honua'ula and West View had worked out a Ground Lease Agreement that gave Honua'ula a 55-year lease on the property. Honua'ula is to "construct and operate a multi-family apartment complex containing fifty-five (55) affordable housing units and forty-five (45) market-rate housing units." Lease rent was set at \$84,000 a year, and in addition, West View would receive "as additional rent a \$100,000 acquisition of lease fee at closing of the financing" with the primary lender.

Over the next year, Honua'ula and OHCD worked out details of the plan, which were presented to the County Council in August 2021. The material provided to the council, which was being asked to waive permit fees and rezone the land from County Ag-1a (minimum lot size one acre) to RM-2 (2,000 square feet of land for each residential unit), came to 722 pages. (It included, among other things, the full 220-page "Hawai'i Housing Planning Study" prepared for the state in 2019 and a three-page Phase I Environmental Site Assessment Questionnaire filled out by Rudo, who now identified himself as a consultant to the developer.)

The site plans included in the package of supporting documents show the 112 units arranged in four buildings, with a central pavilion. Unit sizes ranged from about 1,200 square feet for a four-bedroom home down to 585 square feet for a one-bedroom layout. According to Kunz, the project now includes 105 units instead of 112.

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Fatal Building Collapse in South Dakota Laid to LLC Owned by Honua'ula Officer

On the chilly but clear day of December 2, 2016, around 10:30 in the morning, the building housing the old Copper Lounge in downtown Sioux Falls, South Dakota, collapsed. A contractor working on the first floor had removed two load-bearing walls that separated the bar from Skelly's Pub, another closed watering hole.

One worker perished in the rubble. As OSHA inspectors dryly reported, "while removing two load-bearing walls of two buildings that were going to be made into one, the entire structure collapsed on top of the employee. The employee was killed by blunt force trauma to the chest along with asphyxia due to the amount of material that had trapped him in the rubble of the building." A young woman whose family lived above the worksite was trapped in the debris for hours. She survived, but suffered serious injuries.

In the days and months that followed, it emerged that no fewer than 29 separate violations of federal Occupational Safety and Health Administration standards had taken place at the worksite, including two that were willful. The agency proposed a

fine just shy of \$100,000 for the non-willful violations, and another just over \$100,000 for the two willful ones. Eventually, the contractor pleaded guilty to the willful violations of OSHA standards, causing the worker's death. But, as the sentencing judge, Karen Schreier, pointed out in December 2019, "in light of the fact that [the company] has gone through bankruptcy and has no assets, and it's an LLC so there's not someone that I can put into prison, this court has very little that it can do at this point." A \$50 assessment against the company was the result.

That wasn't the end of the investigations. Six weeks before the collapse, the contractor had removed asbestos from the building basement. Asbestos removal, done correctly, is expensive and time-consuming. Specially trained workers are supervised by a certified asbestos contractor. Asbestos disposal must be made at a designated and licensed facility.

None of that was done. According to the state's Department of Environment and Natural Resources, which enforces hazardous materials removal, some 380 linear feet of friable asbestos-containing pipe wrap

and insulating cement were removed from the basement by the contractor's workers, including the one who was killed when the building later collapsed. The asbestos materials were simply placed into black plastic garbage bags and hauled to the Sioux Falls municipal landfill, constituting another violation.

The contractor had been put on notice as early as September, shortly after it began work on the site, about the need to comply with state laws concerning asbestos removal.

When the state completed its investigation, it issued a notice of violation to the contractor and another company that was involved in the work. A \$20,000 fine was imposed on Hultgren Construction, LLC.

The Hawai'i Connection

Less than a year after Judge Schreier voiced her frustration over the lack of meaningful punitive options available to her in sentencing Hultgren Construction, the owner of that company, Aaron Hultgren, had signed on as the chief financial officer of a company that has received Hawai'i County's blessing to develop 112 affordable housing units in Kona.

Last September, the Hawai'i County Council approved a resolution that

West View from Page 6

The council's Planning Committee held a hearing on the resolution requesting the zoning change and the waiver of fees on August 18.

In response to concerns that the traffic impact study for the project had been done in the summer of 2020, when covid kept many people from commuting and schools were out of session, Mireles, COO of Honua'ula, told the committee that a second traffic study had just been completed a week earlier. He and county Public Works chief Ikaika Rodenhurst assured the council members that they would work out appropriate mitigation measures, with Rodenhurst stating that some of the problems are of long-standing and that the county would share mitigation costs with the developer.

Council member Holeka Inaba asked whether the council could amend the resolution to make sure that traffic mitigation measures—yet to be determined—could be included as an obligation of the developer. Malia Hall, the deputy corporation counsel advising the Office of Housing, stated that it would be more appropriate to amend the

affordable housing agreement between the county and Honua'ula.

When the full council heard the resolution on September 8, several neighbors submitted testimony opposed to the project. Traffic was foremost among the concerns, with none of the testifiers aware of the more recent traffic study.

But many other issues weighed on the neighbors' minds. Beverly Bahasa, who lives next to the project site, pointed out that there were already five multi-family affordable housing projects in the area.

"I am opposed to four-story buildings being built right behind my home... There will be issues of headlights, noise and gathering of people on the outside perimeters of the project to smoke, as it is a proposed smoke-free project," she wrote. Others cited the impact to schools, which, Donna Mayer-Leialoha wrote, "are already overcrowded and at this time cannot absorb an increase in enrollment."

In support were several nonprofit organizations that advocate for affordable housing, including Habitat for Humanity and Neighborhood Place of Kona.

Kunz told *Environment Hawai'i* that

no final affordable housing agreement had been signed with Honua'ula. "Although the county does not have an affordable housing agreement with Honua'ula, we are currently in negotiations to amend an executed Development Agreement to reflect the action by the County Council and concerns over traffic. The Development Agreement is between the county of Hawai'i, West View Developments, LLC, and Honua'ula LLC."

Nearly nine months later, the site where Honua'ula is to be built remains as it has been for the last two decades: overgrown, scattered with old tires, abandoned car seats, roofing material that may have been part of a homeless shelter at one time, household trash.

A website hosted by one of the three officers of Honua'ula, Hultgren, includes a timeline for the project. By November 2021, funding was to be in hand. Construction was to start in December 2021 and conclude by December 2022. The units were to be open to renters a month later.

The timeline is fiction. No more current timeline is available.

— *Patricia Tummons*

Hultgren from Page 7

granted certain waivers from county zoning requirements and permit fees to the company, Honua'ula LLC. An affordable housing agreement had already been signed six months earlier by the county's Office of Housing and Community Development, without any input from the council and little from the public.

OHCD administrator Susan Akiyama Kunz attached to the resolution a 700-plus page addendum that included much of the documentation prepared by Honua'ula. Among the items was a questionnaire that probed the background of the contractor's principals: CFO Hultgren, now residing in Texas, CEO Bruce Beard, of Washington state, and chief operating officer Carlo Mireles, of Kealakekua.

Loves to Dance?

Aron Hultgren, chief financial officer of Honua'ula, LLC, is a mere 39 years old, according to his website. Yet the Dallas-area resident has started up more companies in his relatively short career than most others do in a lifetime. At present, some two dozen companies scattered across at least three states have been organized by Hultgren.

Recently he has taken to naming his LLC's after Latin dances: Tango Development Services, Cumbia Real Estate Holdings, Capoeira Real Estate Holdings, and Rumba Real Estate Holdings.

Little can be found online about most of the dance-named entities. But Tango Development has an elaborate website (tangocre.com). Among other things, the site solicits investors in several developments, including Honua'ula. "We target a 7-9% current pay monthly preferred return with a full cycle internal rate of return (IRR) of 11%-15% based on project type and risk," the website states. — *P.T.*

In a section headed "regulatory actions," question five asked if the applicant or any of its "partners, joint venture(s), corporate officers, or guarantors [had] ever been named in any governmental or private injunctive, preventive, or other administrative proceedings, actions, or litigations involving hazardous waste, toxic substances, hazardous materials, or any other environmental issues?"

The "No" box was checked.

Technically, that answer may be correct. After all, it was the LLC, and not Hultgren himself, that was found to have violated South Dakota's hazardous waste laws. But Hultgren was the principal of that company and responsible for the actions of his workers.

Even if the "Yes" box had been ticked, it might not have meant automatic disqualification. In that event, the questionnaire asked that an explanation of the incident be provided.

Environment Hawai'i asked Kunz about the level of scrutiny that OHCD gives to prospective affordable housing developers. "If OHCD is developing the housing project a thorough vetting of the developer is conducted," she replied. "If the affordable housing project is done by a private developer, OHCD does not have control or have involvement in selection of the development or developers of affordable housing projects."

More Legal Trouble

The addendum also contains a long report prepared by Mireles, Honua'ula's chief operating officer, on how the day-to-day operations of the housing project would be conducted. Among other things, Mireles would be in charge of collecting the rents, keeping tenant files, safeguarding security deposits, and handling other revenue, including the coin-op laundry machines on the premises. Gross rental income is expected to start at \$1.8 million for the first year of occupancy up to about \$2.2 million in the eighth year, according to projections given to the county.

Yet Mireles is a convicted felon. In 2003, he and Darryl Scott Poll were accused of having made millions through the sale of cable television descramblers. A press release from the U.S. attorney for the Eastern District of California stated that Poll and Mireles "operated a business which manufactured and sold cable television descramblers allowing illicit access to cable programming. Defendants advertised the descramblers extensively through a series of websites on the internet and also through

national magazines... The devices were specifically modified and/or designed to allow consumers to receive premium and pay-per-view cable television programming without the knowledge or authorization of cable operators. ... It is believed that defendants sold approximately 100,000 illicit descramblers and received over \$12 million in revenue from these sales. The court determined that the 'infringement amount,' a reasonable estimate of the pecuniary harm caused to cable operators through loss of programming revenue, was over \$7 million."

In 2004, Mireles pleaded guilty to seven counts, including conspiracy to commit mail fraud, mail fraud, aiding and abetting in the unlawful interception of cable services, and conspiracy to commit money laundering. He was sentenced in 2007 to 16 months on each charge, to be served concurrently, followed by three years of supervised release.

In connection with the charges, the U.S. government seized assets of Mireles, including a Las Vegas home worth \$102,000, around \$20,000 for his share of property in Kealakekua, and a 2003 Harley Davidson Springer Softail bike, valued at more than \$10,000.

Yet to Come?

The property in Kona that is being leased by Honua'ula is owned by West View Developments, LLC, an entity registered with the state in 2014. Its manager is Rajesh Budhabhatti of Paho. In the company's 2020 filing, he was still listed as the sole manager, but the address had shifted to a post office box in Kona, one that is shared with Alan Rudo, a former employee of the county housing office. West View did not file the required annual report for 2021 and the state's Business Registration Division considers the company to be not in good standing.

Budhabhatti is also the sole named member of Luna Loa Developments, LLC, which, like West View, is not in good standing for failure to file annual reports with the state for at least three years.

Over the last year, Budhabhatti has sought legal help from the federal public defender in Honolulu. In an August 30 letter to Magistrate Kenneth Mansfield of the Honolulu District Court, Salina Kanai, the federal public defender, stated that Budhabhatti "is a subject of a public corruption/wire fraud case," asking for approval of his request for her office's help.

Mansfield granted the request.

— *P.T.*

He Owned the Land for Just a Day, But Received 212 Credits from County

In January of 2015, barely a month after Luna Loa Developments, LLC, was formed, its sole member of record, Rajesh Budhabhatti, signed onto an affordable housing agreement with the County of Hawai'i. Terms of the agreement called for Luna Loa to develop at least 106 low-income rental units on 4.6 acres along Pua Melia Street in the village of Waikoloa within five years of February 4, 2015 – the date the agreement was signed by then-Mayor Billy Kenoi.

Luna Loa had no experience in real estate or development. Nor, at the time the agreement was signed, did it even own the property where the housing was to be built.

Yet because the housing agreement called for the units to be affordable to households with incomes below 60 percent of the area median income (AMI), Luna Loa received 212 so-called “excess” affordable housing credits. The length of time the units would need to remain affordable was, the agreement said, “a period of at least ten (15) years.”

Not until April 21, 2015, did Luna Loa actually take title to the property, which had earlier been owned by D.R. Horton/Schuler Homes. The nominal price, reflected in the conveyance tax paid as well as property tax records maintained by the county, was \$1 million. It is unlikely that this was a cash transfer. More likely, the payment was made in the form of excess housing credits.

Records reviewed by *Environment Hawai'i* at the county Office of Housing and Community Development (OHCD) did not include a purchase and sale agreement similar to the one in the file for West View Developments. However, the deed transferring title to Luna Loa refers to a purchase and sale agreement made on January 2, when Luna Loa had been in existence for just over two weeks. That agreement is unrecorded, but the log of

Luna Loa credits prepared by OHCD does mention a transfer of 30 credits to D.R. Horton Homes.

That same log indicates that Luna Loa had begun selling off credits even before it took title to the Waikoloa property. In March, an entry in the log shows Luna Loa had sold four credits, at \$50,000 each, to RCFC Kaloko Heights.

And the sale of credits continued even after Luna Loa had sold the property to an entity called Koo674 Waikoloa, LP. That sale occurred on April 21, the same day that Luna Loa had itself taken title.



Kaiaulu development under construction.

In other words, Luna Loa owned the property for less than a day, and yet had received 212 affordable housing credits without developing so much as a single unit.

In January of 2016, Luna Loa sold three more credits to Glory Nani Mau, at \$30,000 each. That allowed Glory Nani Mau to satisfy the affordable housing requirements for its 22-lot subdivision south of Hilo. Alan Rudo prepared the memo to the county Planning Department on May 24, 2016, stating that the developer had satisfied the condition.

The sales continued. In March, Luna Loa conveyed 12 credits to Moaniala Holdings, LLC, developer of the Hilo Hillside market-rate subdivision, no sale price recorded.

Inexplicably, Luna Loa acquired four

credits from West View Developments in May 2016.

In 2021, the new landowner, now renamed Ao674 Waikoloa LP, worked out a new affordable housing agreement with the county. Since taking title, the company had scaled back the project. It would still consist of rental units affordable to households earning less than 60 percent of the area median income. But now there would be just 60 such units, not the 106 called for in the original affordable housing agreement with Luna Loa. (Reflecting this decrease, the OHCD log of Luna Loa credits shows a deduction of 95 credits from the balance, leaving Luna Loa with 70 unsold credits.)

An environmental assessment for the project, to be called Kaiaulu o Waikoloa, was published in 2019. The build-out timeline in the EA stated that construction was expected to start in November of that year and continue through 2021 with a total project budget of around \$30 million.

A year later, and still there was no earth turned at the site. The developer now was requesting from the Hawai'i Housing Finance and Development Corporation an extension on its approval for tax-exempt bonds for the project, now estimated to cost

\$35,520,000. In a report submitted to the HHFDC board, Douglas R. Bigley, representing the developer, stated that the project had been delayed by the need to address possible unexploded ordnance, from the time in the 1940s when the area had been used as a military training ground, and also difficulties associated with the COVID-19 pandemic.

Still, Bigley stated, “Kaiaulu o Waikoloa remains a viable project and has a path to completion.” Any further delays “should be manageable within the requested timeline.”

While the timeline has been delayed, there has been progress. In March 2021, the county issued the first building permits for the project and more than a year later, work on the complex is nearing completion.

— P.T.

Owner of Kona Land Had History Of Controversial Development

When Ronald A. Brown proposed to build 20 affordable rental units on 13 acres of land off Kealaka'a Street, in Kona, Chris Yuen, then the Hawai'i County planning director, was willing to let bygones be bygones.

In the early 1990s, Brown had built what was then called Crazy Horse Ranch just above Palani Road. The complex consisted of 20 buildings on 10 acres of land in the state Agricultural District, where dwellings are to be permitted only when they are in support of agricultural activities on the site.

Brown contended they were all farm dwellings, but in practice, they were more like dormitories. Residents paid for private rooms with shared kitchen facilities.

In 1994, the state Land Use Commission heard a challenge to the approval

of Crazy Horse Ranch, issued by one of Yuen's predecessors. As described in that proceeding, "each of the dwelling units are three stories in height and consists of four bedrooms, six baths, five dressing room areas, two enclosed lanais, a kitchen area, a dining room, a living room, and a housekeeper room."

At the time, Brown wrote an op-ed piece published in *West Hawai'i Today* defending his project. The dwelling units, he wrote, were an alternative to sharing a typical three-bedroom, two-bath home with others, and the intended occupants were individuals wishing to live privately on a budget. Agriculture didn't come into play at all.

The LUC, whose powers of enforcement are constrained once work has substantially commenced on a project, concluded that the Crazy Horse houses

had been approved by the county without regard to state law that limits residential use of land in the Agricultural District. But it was up to the county to enforce: "The Planning Department has represented to the commission that it will enforce the agricultural use upon Ronald Brown after performing an investigation and determining his actual use of the property."

When, in 2006, Brown floated the idea of building affordable rentals on 13 acres off Kealaka'a Street, Yuen indicated his general support for the project in a memo to Dixie Kaetsu, the deputy mayor.

"Ron Brown does not have a good reputation (Crazy Horse and some other issues with the county)," Yuen wrote. But, he continued, "Bottom line, we are trying to get more middle-income housing built."

Crazy Horse, now known as Hale Kaloko, continues to rent out units, which now include kitchens. Rents start at \$1,400 a month.

Brown sold off Crazy Horse but continued to hold on to the Kealaka'a acreage. By 2015, he still had not obtained permits for any buildings on the site, which had an assessed valuation of nearly \$1 million.

When presented with an offer to purchase the 13 acres for \$1,000 plus 46 excess housing credits, Brown took it.

In 2017, he wrote the Office of Housing, stating that, "To facilitate getting my affairs (estate) in order, I wish to sell my forty-six excess affordable housing credits. . . . To verify these credits you may contact Mr. Alan S. Rudo." Rudo, Brown said, "was instrumental in the creation of a 100 percent affordable housing project which generated these excess credits."

Not until March of 2019, however, did Brown sell off 20 credits to Hilco IP Services, which advertised them for sale at a minimum bid of \$20,000 each. Hilco apparently sold just five – to Kukui Development, LLC – with Brown taking back 15 of them in October 2020, meaning he now had 41 credits.

Two months later, Brown sold all 41 to Gretchen Osgood, a Kona real estate agent.

A year later, Brown seems to have disappeared.

On February 16 of this year, the Hawai'i County Police Department issued a missing person report on Brown, who, the notice stated, had last been seen on August 29, 2021, at 3:45 a.m., in the area of Kuakini Highway in Kailua-Kona. He continues to be missing. — P.T.

Bogus People, Bogus Projects

Photos of grannies making cookies with the kiddos, a grandfather and grandson hand in hand, kicking through fall leaves, and a grandmother reading to a loving child on her lap.

These are among the scenes that, the Tenderlycare.org website would have you believe, are playing out in three Big Island developments: Luna Loa, a 60-unit affordable development in Waikoloa; Westview [sic], a 112-unit complex in Kona; and Crystal Orchid, 30 affordable units in Puna. The first two are underway in one fashion or another. As to the third, it's apparently lying low for the time being. A company called Crystal Orchid Developments, LLC, was formed in Hawai'i in July 2020, with its registered agent Zendo Kern – now the county planning director. Its sole member is Terry Kershner, whose listed address is in California. So far as *Environment Hawai'i* is able to learn, there is no affordable development of that name in the state.

But there's more:

The Hilo Tenderly Care project will accommodate "about 50 affordable elderly care units and a childcare center" – if Tenderly Care's realtor can get a long-term lease from the state for the property depicted. That property is a multi-story stucco building with balconies, backing up against an even taller brick building. In Hilo, there's no such thing.

That's not the only made-up thing on the website. Click on the "Team" tab to learn about the people involved, and you'll see four handsome, multiracial people, two men, two women. The same faces appear on other websites from Australia to Long Island, advertising everything from corporate services to hairdressing salons.

They're real people – models whose images are sold on stock photo sites. Just like every other image on the website.

— P.T.

BOARD TALK

Board Pre-Approves Fines to Spur Critical Fixes to Wahiawa Reservoir

“We’re already pushing our luck with a hundred-year-old dam,” said Aimee Barnes last month.

Barnes was the sole member of the state Board of Land and Natural Resources to vote against a recommendation by the Department of Land and Natural Resources’ Engineering Division to give Dole Food Company Hawai’i more time to meet milestones to make the Wahiawa Reservoir in North O’ahu safer.

Nearly 15 years ago, the division informed Dole that the deteriorated concrete spillway for the reservoir, which it co-owns with Sustainable Hawai’i, Inc., was also dangerously small.

Under Hawai’i administrative rules, high hazard dams such as the Wahiawa Reservoir need to be able to handle a probable maximum flood (PMF). A 2008 report based on an October 2007 inspection found that the reservoir could handle less than half of that.

“Failure to address this deficiency can result in overtopping and failure of the embankment,” wrote Eric Hirano, chief engineer at the time, in a June 2009 letter to Dole Hawai’i director of operations Dan Nellis.

Wahiawa Reservoir, which sits above the towns of Waialua and Hale’iwa, can hold just under 3 billion gallons of water. That’s more than six times the capacity of the Kaloko Reservoir on Kaua’i, the failure of which killed seven people in 2006.

In that June 2009 letter, Hirano tasked Dole with several things, including lowering the water level in the 88-foot-high reservoir to 65 feet, removing unwanted vegetation, and developing plans to increase and improve the spillway.

While Dole made some progress in the years that followed, the undersized spillway remained.

The division issued notices of deficiency in 2016 and again in 2020.

In a December 30, 2020, letter to the DLNR, Nellis reported that in 2018, Dole had received cost estimates for modifying the spillway to pass a PMF storm, and for breaching the dam.

“The high cost of the spillway modifica-

tion balanced against Dole Hawai’i’s profit margin is concerning. The 2020 Covid-19 economy has created an even more difficult path forward in pursuing funds as Dole Hawai’i is operating at a significant loss for 2020, and likely well into 2021,” Nellis wrote, adding that Dole had hired AECOM to perform an “incremental hazard assessment ... to potentially support a variance that could reduce the size of a new spillway.”

Because the assessment would not be complete until early 2021, Nellis stated, Dole did not expect to meet the Engineering Division’s March 1, 2021, deadline to submit a dam safety permit application for the construction of a new spillway.

The division may ultimately reject AECOM’s findings. It still hasn’t accepted the conclusions in a 2017 report by R.M. Towill that informed Dole’s spillway cost estimates, and it has asked Dole to explain why the PMF in that report, 32,660 cubic feet per second, is so much less than the 53,437 *cf/s* PMF estimated in a 2008 U.S. Army Corps of Engineers report.

Fed Up

Given the continuous delays in upgrading the spillway, the Engineering Division

finally brought an enforcement action to the Land Board on April 9, 2021.

“In 1921, a 5,000 cfs flood caused the failure of the dam, which was rebuilt with the existing 183-foot-wide spillway. A dam failure of the current dam would flood a significant portion of Waialua and Hale’iwa towns. ... To date, the safety deficiencies with the spillway have not been addressed,” the staff report stated.

The division recommended fining Dole and Sustainable Hawai’i \$20,000 for failing to meet the March 1, 2021, deadline to submit a dam safety permit application. It also recommended that the companies be required to submit within 90 days an explanation for the differences between R.M. Towill’s and the Army Corps’ PMF numbers. The division also recommended giving the company six months to come up with a plan to address the spillway deficiencies and a year to submit a permit application.

Division chief Carty Chang noted that while Dole was keeping the reservoir water level at 65 feet to reduce the risk of overtopping during a storm, he said that a large storm event could fill the reservoir in a matter of hours.

“We count our blessings. However, what has not happened in the past cannot dictate what will happen tomorrow,” he told the board.

Division staff reported that it is working with consultants to recalculate the probable maximum 24-hour rainfall

Continued on next page



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at different areas statewide, which is what PMF estimates are based on.

Because that work won't be completed for another year or so, the division recommended that the rainfall estimate from a 1963 U.S. Department of Commerce publication, Hydrometeorological Report No. 39 (HMR 39), be used.

That report estimated a probable maximum precipitation (PMP) of 40 inches in 24 hours.

Bill Kappel, president of Applied Weather Associates, which is doing the PMP work for the Engineering Division, said that despite its age, HMR 39 is still a very useful document. "Until our work is completed... it should be the standard," he said.

Edwin Matsuda, head of the dam safety division, suggested that even though Dole has improved its outlets to drain the reservoir faster, it's not enough to prevent overtopping if it fills during a big storm.

"Once it's at that level, they are unable to drain it back down to 65 (feet) for weeks. The whole watershed is slowly draining into the reservoir. ... Even when the rain completely stops, they're probably able to drain at half a foot per day," Matsuda said.

Nellis testified to the board that Dole has been making good faith efforts to improve the spillway and that one major setback has been that Dole was only recently made aware of potential faults in R.M. Towill's 2017 PMF study.

"While it appears that we are intentionally dragging our feet, that's not the case. We did get cost estimates based on studies that R.M. Towill did for us and they were excessive, up to \$15 million."

He said that Dole has been looking for public and private funding, but is also looking to sell the reservoir to investors who want to generate hydroelectric power.

"Dole Hawai'i will probably go out of business if we have to dig out all this money on our own," he said, adding that levying

finances for non-compliance "is not going to get us to the end zone any faster."

Matsuda told the board that his division was not trying to be punitive. "We just want to see action taking place," he said.

Kappel added that while 40 to 45 inches in 24 hours seems like an unbelievable amount of rain, "we've seen it happen. Forty-nine inches fell in Kaua'i in 24 hours. ... How much risk do we want to tolerate?"

In the end, the Land Board voted to approve the fine, but extended the division's proposed deadlines for the PMF justification and spillway plan by three months. It amended the deadline to submit the permit application to be six months after receipt of the dam safety program's comments on the PMF justification and spillway plan.

More Extensions

On May 13, the Engineering Division returned to the Land Board with a recommendation to extend the deadline to submit the permit application to November 1, 2023. It also recommended several interim deadlines to keep progress on track, as well as pre-approved penalties — ranging from \$5,000 to \$20,000 — for each missed deadline.

Nellis opposed the automatic penalties and said that fines should only be assessed if the Land Board determined Dole was not working in good faith.

He added that his company was in the process of selling the reservoir to the state. The budget bill passed this year by the Legislature was awaiting the governor's signature at press time and includes \$26 million for the reservoir's purchase and spillway repair.

Land Board chair and DLNR director Suzanne Case said that because the Wahiawa Reservoir is "high profile, high risk ... I just think it's better to keep the automatic deadlines."

Board member Barnes noted that the



PHOTO: DLNR

Wahiawa Reservoir.

project was proceeding without updated guidance on storm risk that accounts for climate change. She asked what kind of insurance Dole held, in case there was any loss of life due to a dam failure.

"I'm not in a position to answer that. The dam may be insured by a third party. I'm not sure," Nellis replied.

"There is a risk there would be a cost to the state. ... The board would potentially be liable or culpable," Barnes said.

Nellis replied that it was way out of his expertise to comment on that. He said he was very confident the dam is not going to fail, in part because Dole is keeping the water level low. "We've handled all of the big storms in the last 120 years," he said, adding that it has on site an "inflatadam, which gives another cushion."

Barnes said she was worried about going through another wet season without any progress on the spillway. "The risk of loss of life is concerning," she said.

The Land Board ultimately approved the recommendations, which included authorizing fines of \$5,000 a day for any missed fine payments. Barnes dissented.

Case suggested that the Engineering Division might want to review whether Sustainable Hawai'i also carries some liability for the spillway's condition.

Sustainable Hawai'i owns the spillway, but Dole apparently holds a lease for it.

— Teresa Dawson