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A Question of Faith

Almost 20 years ago, the University of the Nations-Kona asked the Land Use Commission to place more than 60 undeveloped acres next to its current campus into the Urban Land Use District. With little dissent, no EIS, and a plausible financing plan, the commission approved.

Now, though, the university is proposing a completely different development. Turning its back on the more conventional financing scheme it initially proposed, it now says the millions of dollars needed to build out the campus under a new master plan will –

Well, God will provide. That's it.

Whether the commission will be able to go along with this is an open question. Under its own rules, it must find that developers have the financial ability to undertake their proposals. What's more, when the LUC approved the original plan, a significant element was the provision of housing, including affordable housing. The new plan calls for none.

IN THIS ISSUE

New Kona School Plans Raise Concerns About Financing, Affordable Housing

Conceptual rendering of buildings proposed for University of Nations-Kona. G70 Master Plan Update, February 2020.

Dawn Chang, a member of the state Land Use Commission, had a question for David Hamilton, president of the non-accredited University of the Nations-Kona, relating to the school's plans for developing about 62 acres of undeveloped land adjoining the existing campus. The site is about a mile south of the Kailua-Kona town center, sandwiched between Kuakini Highway on the west and on the east, the area where Queen Kaʻahumanu Highway intersects with Hualalai Road.

"You made a comment that, 'we're back on track with a normal project.' But I think you'd have to agree this is a little unusual, in the sense that, normally, [land use] entitlement comes after the environmental impact statement process, after we know what the project is.

"In this case, though, 20 years later, we've got entitlements and we're doing the EIS process for a very different project than what was originally proposed," she said during the November 2 meeting of the Land Use Commission, held in the University of Hawaiʻi-Hilo campus center.

The meeting had been called to give commission members the chance to ask representatives of the school about their updated plans for developing the acreage. When the school petitioned for a district boundary amendment – from Agricultural to Urban – back in 2003, it had said it would build a 300-unit condominium on about half the land, with the rest given over to a tourist-oriented Cultural Center and associated parking, an "educational facility," and infrastructure.

There has been little to no progress on the development since then, and two years ago, the university proposed a new master plan that nixes the Cultural Center and all of the housing units.

Crickets

In August 2003, when the commission voted to approve the project, it had determined

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NEW AND NOTEWORTHY

Clawing Back: Hawai'i County is arguing that the federal government should give it the land in Kealakehe that was purchased as part of a fraudulent housing scheme, $938,428 in cash forfeited by former housing employee Alan Rudo, and 45 affordable housing credits. Those assets were among the goods seized by the government following Rudo's entry of a guilty plea last July.

In a petition filed with the federal court on October 20, the county claims that the land was purchased with housing credits awarded to the company that Rudo organized with three other defendants in the fraud. The cash was realized when the defendants sold off around half of the Kealakehe property. The housing credits are what remained of the total awarded to Rudo and Co.

Attached to the filing was an affidavit from housing administrator Susan Kunz. In it, Kunz states that she "personally learned of Rudo and his co-conspirators fraudulent scheme … when the news of the fraudulent housing scheme was made public in July 2022.

In addition, Honua'ula, LLC, the company that sought to build on the Kealakehe property, has filed with the court a petition asking the court to protect its leasehold interest in the land, where it has said it intends to build 112 affordable units. According to the petition, the principals of Honua'ula had no idea that anything was amiss until July 13, when the government filed a *lis pendens* on the property.

The petition states that the 55-year lease was entered into in July 2020. However, it was not recorded at the Bureau of Conveyances until June 23 of this year. Under lease terms, Honua'ula is to pay $8,000 a month to landowner West View Developments, one of several companies Rudo was involved in.

Rudo is to be sentenced for his involvement next May. Jury selection for the three other defendants – attorneys Paul Sulla Jr. and Gary Zamber, and sometime Puna resident Rajesh Budhabhatti – is now set for April.

Another Housing Project: The same three individuals that are the principals of Honua'ula are now proposing to build a 104-unit complex in Hilo. The three – Carlo Mireles of Kealakekua, Aaron Hultgren of Texas, and Bruce Beard of Washington state – have organized now into a Texas company called Hualalai Court, LLC.

Last month, the Hawai'i Housing Finance and Development Corporation approved a $25 million loan to the company. Total project cost is estimated at more than $55 million.

A rendering of the proposed Hualalai Court.

The project has yet to come before the county's Windward Planning Commission or the County Council.

For details on the schemes to defraud the county housing agency, as well as information on the Hualalai LLC principals, see the June and August issues of *Environment Hawai'i.*

Camping in Court: Should campgrounds be allowed on highly productive land in the state Agricultural land use district? That is the question that will be argued before the state Supreme Court early this month.

The issue arises from a 2016 Land Use Commission decision that determined the only legal means for camping to be allowed on A or B rated lands was by means of a boundary amendment – not by means of a county-issued special permit.

The Ho'omoana Foundation, which had wanted to use 22 acres of B-rated land on Maui as a camp for tourists as well as homeless people, appealed the decision in 2nd Circuit Court. Judge Rhonda Loo overturned the LUC ruling, prompting neighboring homeowners and the LUC to appeal.

In May, the Intermediate Court of Appeals issued its opinion, which upheld – reluctantly, it seems – the lower court finding. That decision will now be reviewed by the state high court.

Arguments will be heard when the court meets on December 6 at 9 a.m. in the Lahainaluna High School. The court hearing will be broadcast live on the @hawaiicourts YouTube channel.

For more details on this dispute, see "Farm Dwellings, Overnight Camps at Issue in 2 Court Cases the LUC Votes to Appeal" in the July 2022 edition of *Environment Hawai'i.*

Quote of the Month

"It's hard to swallow praising the same data for one thing and not other. That's just me."

— Ayron Strauch, Water Commission hydrologist

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EDITORIAL

Kona Development Puts LUC in Uncharted Territory

What on earth is going on at the University of the Nations-Kona? More specifically, what is the Land Use Commission going to do with the messy situation that confronts it?

The development proposal that prompted the LUC to redistrict 62 acres of land adjoining the campus in Kona was abandoned long ago by the school's governors – though they didn't inform the commission of that in anything approaching a timely manner. Year after year, they failed to give the commission required progress reports.

Yes, in 2007, there was a half-hearted effort to amend terms of the redistricting, but the university never followed up.

In 2019, the university presented the commission with a request to have the land revert to the state Agricultural District. That lasted a New York minute. Then there was a request to withdraw the request to revert and to give the school a chance to draw up a new plan to develop the land.

At that point, the commission sought to require the university to show cause as to why the land should not revert, given the failure to commence substantial work on the site.

The school got serious about developing a new plan for using the land. It hired consultants, developed a master plan, and managed to persuade members of the LUC that it could and would move forward with an ambitious expansion of the school campus.

The order to show cause was set aside.

And that was a mistake. A mistake that has put the commission in an unprecedented situation, where it seems no one is quite sure how to proceed.

The original proposal did not require preparation of an environmental impact statement. Now, however, the LUC determined that the university would need to prepare one for its new master planned development.

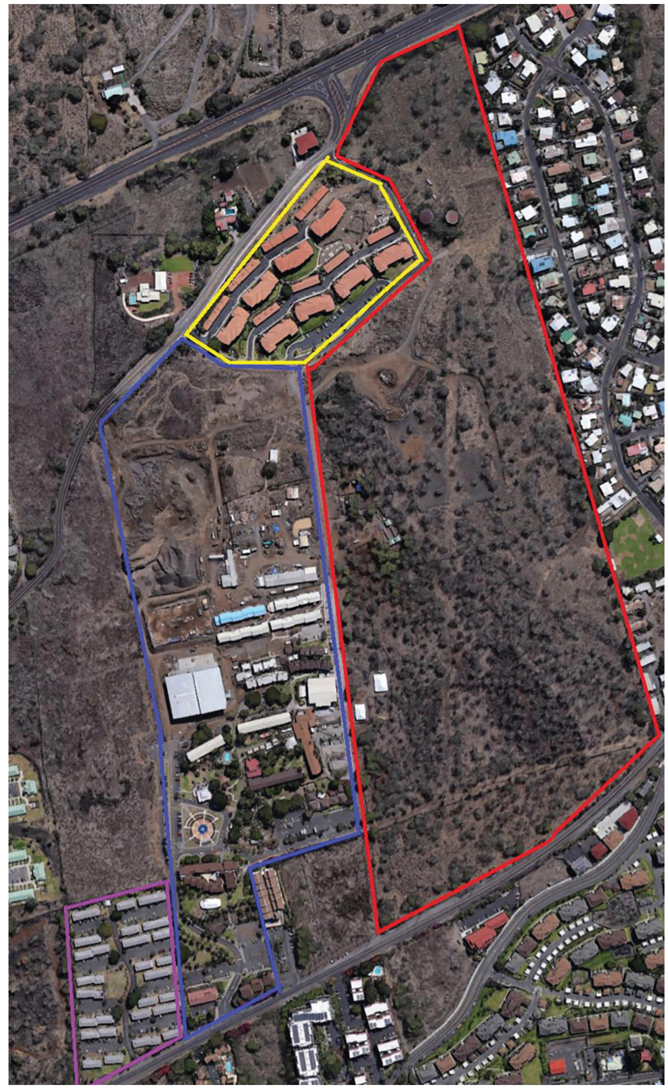
The university has retained competent consultants to prepare the EIS, but that is no assurance that it will be accepted. Given the manner in which the university has changed its plans, the community has had little opportunity to weigh in on the new proposal nor is it likely to have such an opportunity until well into the new year.

The housing that was such an important element of the original plan — especially the affordable housing — has been dropped, with the university now claiming that there is no trigger under county law that would require it to provide affordable units.

But maybe the biggest question the commission faces is this: how can it accept any plan that is not accompanied by a reasonable means of financing it?

The ability of a developer to finance a project is ordinarily addressed when the commission first hears a proposed boundary amendment. Back in 2003, the university had a plan that passed LUC muster. The condos and cultural center it would build on the site would be developed with conventional financing, and then would provide the school with revenue for years to come.

It may have been naïve on the part of the university's governors, with no history of undertaking a project of that size, to think that they could do this. But the LUC went along with it.



Area outlined in red is redistricted area. Yellow-lined area is Hualalai Village. Existing campus is outlined in blue. (Source: 2019 presentation to LUC by University of the Nation-Kona.)

Then they discovered they weren't cut out to be developers at all – not in the usual sense of the word. While building the first increment of Hualalai Village, just outside the petition area, they encountered the rough and tumble world of conventional development, There was the messy business of contractors demanding payment, of having to line up sources of capital. For a board that was accustomed to volunteer labor and donated goods, it was a revelation, and not a happy one. And so after that first increment, they dropped the idea of Hualalai Village phases 2-4 and jettisoned the cultural center.

All without letting the LUC know.

Now, suddenly, the commission has a project that is already entitled but which diverges drastically from the one it approved. Not only does it not include the promised housing, but the new approach to financing – based on faith – is, to say the least, not anticipated in commission rules.

For the next few months, the university and its consultants will be preparing the promised EIS, with a final document not anticipated until nearly a year from now. But no matter the environmental impacts, the issue of financing remains. And how the commission addresses that will be interesting to watch.

Concerns Raised *continued from page 1*

that the boundary amendment was consistent with state and county plans and that the project did not require any environmental assessment or environmental impact statement.

Among other things, school-affiliated U of N Bencorp, the land's owner, was required to submit annual reports documenting progress made and compliance with the 18 other conditions.

Not until August 2006 did the university submit an "annual" report, through its then-attorney, Steve Lim of Carlsmith Ball. And it was a doozy.

Lim reported that U of N Bencorp had changed its name to AEKO Hawaii. "AEKO, together with Loren Cunningham, the founder of the University, determined that the Original Project, with its commercially driven Hualalai Village condominiums and Cultural Center, was not in keeping with the purpose, mission, and needs of the University, and that the educational facilities planned under the Original Project were insufficient for the current and projected needs of the University."

Lim did not offer any explanation on the name change or the altered plans, but information in other filings with the LUC suggested there was a good deal of turmoil in the university leadership in years following the original LUC decision. In a traffic impact analysis report (TIAR) prepared in 2006, there's this:

"Early in the spring of 2004, the top administration of the University of the Nations decided to change direction in the planning for development of the … property. They decided it was a mistake to develop the land for primarily commercial purposes…. At that time, the Bencorp board renamed the benefit corporation 'AEKO HAWAII,' appointed new members, and all of the former Bencorp members resigned."

In 2006, Lim informed the commission that the university would be filing a motion to amend its original proposal. "AEKO believes that the Revised Project continues to be in substantial compliance with the representations made to the commission" in the original proceedings, he said, adding that it also "is more in keeping with the important mission and purpose of the University and will have significantly less impact on the surrounding area than the Original Project."

That December, Lim submitted the motion to amend, with the new project now consisting of about 400 units of housing, athletic facilities, and educational buildings. The housing was to be either sold or rented to staff and students at rates subsidized by the university.

(Since the housing would be sold or rented out at rates substantially below the area median income, Lim suggested in a letter to the Hawai'i County Office of Housing and Community Development that the university would qualify to receive affordable housing credits. He asked that the OHCD "confirm that these subsidized 'for sale' and 'for rent' residential units will … satisfy the affordable housing requirements [imposed by the LUC] for development of the project." In addition, he asked that "any affordable housing credits generated in excess of the minimum requirements … will be classified by OHCD as 'affordable housing excess credits' which may be sold or transferred to third parties and other project areas."

"In regards to excess affordable housing credits, since these units are not available for sale or rent to all qualified households, no excess credits will be approved."

— former Office of Housing and Community Development Director Edwin Taira

(The OHCD did not agree. Replying to Lim's letter, OHCD Director Edwin Taira wrote, on February 6, 2007, that under Chapter 11 of the Hawai'i County Code, "the affordable housing units must be available for sale or rent to all qualified households. In regards to excess affordable housing credits, since these units are not available for sale or rent to all qualified households, no excess credits will be approved.")

In March 2007, the LUC held a hearing on the motion to amend but did not vote on it. In 2019, Anthony Ching – who had been executive officer of the LUC at the time of the March meeting, but who now was a planning consultant for the University of the Nations – told the commission that it had lost quorum back then.

"I think just before we lost quorum, it's my recollection that there was a comment made to the petitioner to not come back to us until you have all your ducks in a line and financing and ready to go," Ching testified.

More Crickets

From 2007 to 2019, the LUC heard nothing from the University of the Nations. Then, in February 2019, it petitioned the LUC to have the land withdrawn from the Urban District and revert it to the previous classification of Agricultural.

Barely six weeks later, though, it asked to withdraw that petition. On March 28, it submitted a report to the LUC, just minutes before the commission was about to begin a status hearing on the school's compliance with terms of the 2003 decision and order. That report, covering the period from 2008 to 2019, refers to a period of indebtedness related to the school's development of a market-rate condominium project just outside of the area covered by the LUC petition, known as Hualalai Village, and also to the resolution of unspecified litigation.

In his testimony that day before the LUC, Paul Childers, at the time the chief operating officer, described "several issues that have happened over the last several years that definitely absorbed a lot of our effort and energy." One such issue, he added, "was a fraud perpetrated on us over the last year by Pablo Rivera.

Rivera, whom Childers described as a volunteer, served as the university's chief financial officer. In 2017, he pleaded guilty to defrauding the school of more than $3 million and in January 2018, he was sentenced to 115 months in federal prison.

(In 2020, Rivera asked to be released from the federal medical center in Massachusetts where he was held at the time, citing fears of contracting COVID-19. In denying his request, U.S. District Judge Susan Oki Mollway wrote, "Over a significant period of time, he wrote scores of checks to himself, created a fraudulent spreadsheet in an attempt to hide his crime, and falsely inflated invoices from others. With the proceeds of his crime, he bought residences, jewelry, a gold mine in Africa, and other luxury items. He paid thousands of dollars for spa treatments. Uncovering his crime was difficult, as he did not promptly admit to any wrongdoing when questioned. Instead, in an apparent attempt to gain sympathy, he falsely claimed that his wife had breast cancer. Then, approaching sentencing, Rivera submitted to the court a materially altered email purporting to show that he was not hiding assets.")

Childers also mentioned that the school had been sued "in connection with an accident on the mainland." Ultimately, he added, the school was cleared.

"So," he continued, "as we have come through this relatively challenging season, we believe that reestablishing, reaffirming our faith-based model, which is walking forward, really, walking with the Lord in the issues of development, we really believe that we will be able to develop this campus as an educational facility for the local Hawaiians, training missionaries to go around the world, and we will be able to do it in a way that accords with Kona, our town here, as well as being able to fulfill our mission mandate."

The LUC was unmoved. The following day, it issued an order to show cause as to why the land should not revert to the Agricultural District, given that the university "had failed to perform according to conditions imposed and representations made to the LUC" when the 2003 reclassification was approved.

At a hearing on the order in May, the LUC agreed to postpone any decision for at least six months, at which time the university was to report on progress made toward developing and financing its plans for the area.

After several further hearings, in March 2020, the university withdrew its 2006 motion to amend and filed a new motion to amend. In July, after an executive session, the LUC dismissed its order to show cause, but strongly encouraged the school to comply with the Hawai'i Environmental Policy Act (Chapter 343) as it moved forward with its plans.

'Points of Concern'

On August 8 of this year, the university submitted a three-page status report to the LUC. Rather than explaining the progress made toward each of the conditions contained in the commission's 2021 amended decision and order, Paul Childers, identified now as a "university leadership team member," described the way in which the disruptions experienced by the university as a result of COVID-19 impeded its ability to move forward with its plans.

The university then, on its own initiative, sent a more fleshed-out, 13-page-long supplemental report on September 9, signed now by university president Hamilton.

Dan Orodenker, the commission's executive officer, prepared summary of the status report as well as background information and staff comments in advance of the commission's November 2 meeting.

The report cites several "specific points of concern:" affordable housing, apparent lack of progress toward preparation of the environmental impact statement, a change in the planned project, and the ability of the university to finance the development.

"[H]e wrote scores of checks to himself … and falsely inflated invoices from others. With the proceeds of his crime, he bought residences, jewelry, a gold mine in Africa, and other luxury items."

— U.S. District Judge Susan Oki Mollway

Housing

On the issue of affordable housing, Derek Simon, the attorney representing the university, said that in 2020, Duane Hosaka, then-head of OHCD, stated that the university's master plan, while including dormitory housing, did not trigger any affordable housing requirement under the county code, since dormitories are not considered housing.

Hamilton said that despite that, the university already had been involved with two housing projects.

The Hualalai Village project was originally intended to be the first phase of a four-phase project, with phases two through four being part of the 62 acres included in the 2002 boundary amendment petition. More than 100 units were eventually built in Phase One. According to a 2019 presentation to the LUC, the land under five of the eight buildings in that phase is owned by a university land trust.

Phases 2-4 – part of the original project now abandoned – were to include 297 units in 21 buildings on roughly half of the LUC petition area. That would have triggered the county affordable housing requirement, which the LUC referred to in its original decision and order.

Hamilton also mentioned the university's role in rehabilitating the 126-unit Kama'aina Hale, off Kuakini Highway immediately north of the campus. That development is owned by the state on land held by Kamehameha Schools, but with permission of the Hawai'i Housing Finance and Development Corporation, the university renovated and now manages the project under a sublease from HHFDC. Hamilton told the commission that 42 of the apartments are rented to households earning 50 percent or less of the area median income, while 84 are rented to applicants earning up to 80 percent of AMI. While university staff may apply for these units, he said, there is no preference given to them.

Deputy attorney general Bryan Yee, representing the state Office of Planning and Sustainable Development, asked Hamilton to confirm, "for the record, because it's an existing facility, it's not used as a credit by other developers."

"Correct," Hamilton responded. "We took it over in 2014 and created a separate entity to manage. Technically, it's not University of the Nations."

But if the new plan does not trigger any affordable housing requirement, as the university claims, then why did the August 2022 status report mention ongoing talks with the current OHCD director, Susan Kunz? Commissioner Michael Yamane asked the question of Simon.

"That relates to Phase One of Hualalai Village," Simon replied, adding that the statement in the status report "caused confusion."

Actually, the statement raises questions as to whether the university had in fact complied with affordable housing requirements relating to its market-rate housing. According to the August status report, a June 22 meeting with Kunz was "to confirm that all affordable housing obligations related to its predecessor's development of Hualalai Village … have been satisfied, and to determine whether UNK may be entitled to any additional affordable housing credits as a result of the affordable units provided at Hualalai Village. … UNK is in the process of providing OHCD with additional information on the affordable housing units it has provided. UNK's discussions with OHCD remain ongoing."

The affordable units in Hualalai Village, however, would seem to be restricted to those occupied by university staff and faculty – the units which, as the university explained in 2019, are sold at a "fixed price" to staff and may only be resold at the same fixed price to other staff. As former OHCD administrator Taira noted in commenting on the housing plans presented in the first development proposed to the LUC in 2002, credits are not to be awarded for any affordable housing if it is not made available to the general public.

Commissioner Chang weighed in on the housing issue as well. "My concern is, in 2003, when this project was presented to the Land Use Commission, the community had certain expectations, including affordable housing, based on the project being presented. And this affordable housing condition is kind of vague. It depends on the county, depends on the project.

"Because you have dramatically changed what was presented – and there's no judgment whether this is better or not – it's substantially different from what was presented. I am concerned about the change… The decision-and-order may not match what you are proposing to do now."

Simon, the university's attorney, replied that the environmental impact statement would be the first approach to the community, before the commission would address what's being presented.

The EIS

An environmental impact statement preparation notice was published in the *Environmental Notice* in March 2021. In the September status report, the university reported that the EISPN had overestimated the number of students that were anticipated to be on site at any given time. "Specifically," it stated, "UNK's intent is to reduce the number of dormitories, based on modified projections of student enrollment, which in turn reduces the other planned facilities, such as classrooms."

At the November meeting, university representatives said that the draft EIS would be published in the first quarter of 2023, with the final EIS "by the end of 2023." "The motion to amend the LUC petition" – the one approved in 2003 – "will be after the EIS process is completed," Jeff Overton said. Overton is principal planner with the G70 Design group, retained by the university to prepare the EIS and master plan.

Although the draft EIS has not yet appeared, the university provided to the LUC a "master plan update" in 2020. It provides a general description of what the forthcoming draft EIS is likely to propose.

The first phase (to be completed within 10 years) includes a chapel for the university's "Discipleship Learning Center," classroom building, dormitories, a gym and practice field, roads and paths, and an "instruction building" and playground for the primary school for children of staff.

Phase Two (build-out in 10-20 years) anticipates a "student resource center," more classrooms and dorms, a soccer field and aquatic center, classroom buildings and athletic areas for the middle and high schools for children of staff, and cabins for a youth camp.

Phase Three (beyond 20 years) includes further buildings and dorms to support the discipleship learning center, more dormitories, full build-out of the aquatic center, including parking areas and a pool complex, and a "Discovery Center" and associated exhibit buildings along Kuakini Highway, among other things.

> ***"My concern is, in 2003, when this project was presented to the Land Use Commission, the community had certain expectations, including affordable housing."***
> — Commissioner Dawn Chang

Financing

"The LUC staff is particularly concerned about the financial status of the petitioner and funding of the project," the staff report stated.

The question of exactly how the new plan would be financed had arisen earlier in the proceedings. In November 2019, the university entered into a stipulated agreement with the county and the Office of Planning, under which the university would be allowed to file all its financial information under seal. Only the commission and staff would be allowed to review the financial documents submitted by the university.

That didn't fly with the commission. Its chair, Jonathan Scheuer, informed the university's attorneys that they had not provided "a legitimate basis for approval of such a protective order." Scheuer noted that the LUC's rules require petitioners "to show, and the commission to find, that the petitioner has the economic ability to carry out the representations relating to the proposed use or development."

To that end, the petitioner must provide "a statement describing the financial condition and a current certified balance sheet and income statement and a clear description of how the petitioner intends to finance the proposed development." A protective order may be allowed if the information falls under one of the exemptions set forth in Hawai'i's Uniform Information Practices Act," Scheuer noted. However, he continued, "[t]he stipulation … does not state a statutory authority under which the petitioner would be entitled to a protective order, or what specific privacy interest is being claimed. In sum, we do not see anything in the presented stipulation that justifies the level of protection sought or why the privacy interest of the individual outweighs the public interest in disclosure."

Following Scheuer's letter, the university released to the LUC audited financial statements covering the years 2017 to 2019. Assets at the end of the 2019 fiscal year (June 30) were pegged at $45.5 million, the bulk of which were non-cash, including land and buildings valued at more than $37 million. Actual cash on hand was just over $3 million, with another $700,000 or so made up of accounts receivable, prepaid expenses, and "cash advances." (Those cash advances were explained as funds given to missionaries and students "for travel and outreach purposes. The cash advance is maintained in full on the balance sheet until receipts are provided.") The actual amount of cash available to meet cash needs for one year, the auditors stated, came to just under $2.9 million.

According to a master plan update submitted to the council in 2020, the total cost of improvements over the next 30 years is around $163 million. Without the volunteer labor, the cost would approach $270 million, the university claims.

Faith-Based Financing

The university's original plan for the 62 acres, presented to the LUC in 2003, called for the development to be financed by the sales of condos in the Hualalai Village complex. The first increment was built on land outside the LUC petition area, but adjacent to it.

But the plan to continue on with construction of the remaining 300 or so condos in the redistricted petition area was abandoned.

In a filing with the LUC connected with the 2020 motion to amend the original petition, the university describes reasons for this. The original plan was based on what the university calls a "business model." "In the business model when funds are needed for expansion it is typical to borrow," the university says. While the university and its sponsoring Youth With a Mission (YWAM) does not believe it is wrong to borrow, the statement continues, "we agree with Proverbs 22:7 where it says: 'The rich rule over the poor, and the borrower is slave to the lender.' Thus we have chosen to fund our campus development through faith/donations and not through borrowing."

The university still owed around $5 million in debt "related to the time when we followed the business model," the statement says, "but we are paying this off and hope to be debt-free in the near future."

It then goes on to list the various improvements and buildings on the campus that have been developed, "with a faith-based model," over the last 35 years, placing their collective value at more than $78 million ("based upon new building costs").

Another document submitted at the same time to the LUC shows how yearly increases in enrollment over the 30-year project timeline could generate more than $181 million, with each student paying tuition of $2,000 per quarter. That projection calls for student numbers to increase from the current 500 to 2,000.

Yet, as the most recent annual report notes, the university is experiencing a decrease in enrollment, leading to "a significant reduction in funding and revenue."

The commission's administrative rules require petitioners to provide "a clear description of the manner in which the petitioner proposes to finance the proposed use or development." The commissioners must then determine whether the petitioner "has the necessary economic ability to carry out the representations and commitments relating to the proposed use or development."

Economic Impact

In the discussion of affordable housing, commissioner Chang wanted to know about the provision of housing for the university's work force. "How many people work within the campus, serve the campus, who are not faculty members?" she asked.

Pretty much none. That was the answer given by university president Hamilton. "All of our staff on campus – not just faculty, but also operational, administrative staff – all of them serve on the campus as members. No one has a salaried position. Everyone raises their own support. We're not hiring anyone for any of those functions. Everything is all volunteer."

View of the University of the Nations-Kona campus. CREDIT: UNIVERSITY OF THE NATIONS-KONA.

He later qualified that a bit. "We do have times when we employ people. Construction workers, electricians, engineers. Sometimes we can provide expertise on our own. … When we have a function we can't provide on our own, we employ locals."

A review of the financial documents provided to the LUC tells a slightly different story. In a note to the auditor statement, there's this: "the university contracts with outside employment agencies for certain key functions, but is otherwise staffed by volunteers (missionaries). Volunteer staff are responsible for raising their own support and are considered independent contractors and not employees. The university acts as a qualified missions agency and collects and disburses donations to the missionaries. The volunteer staff are individually responsible for any required filings with government agencies."

In other words, the volunteers ("missionaries") can receive disbursements from the university. Any payments to those volunteers, however, since they are from a "qualified missions agency," don't have to be reported to the government on any 1099 or W-2 form. As the audit states, the responsibility of reporting is placed on the individual "volunteers."

The most recent IRS filing by the university (for the fiscal year ending June 30, 2021) states that the university employed just two individuals, but had 1,050 volunteers.

Among the missionaries who received support, four of them are closely related to members of the board of directors. Darlene Cunningham, wife of Loren, the university president, received $64,092 in missionary support. Allen Anjo, husband of Julie Anjo, in-house counsel and secretary of the board of directors, received $23,337. Yoo Lee Park, wife of board member Sun Wah Park, received $41,277. Janice Rogers, identified as a sister to a board member, received $45,689. (The 2021 Form 990 does not show anyone surnamed Rogers on the list of board members. That filed for FY 2018-2019 does, however, list a James Rogers as treasurer. James Rogers is reported to have received a loan of $90,000 from the university, with a reported balance due of $148,000.)

What's more, despite the Land Use Commission having been informed by Hamilton that "everything is all volunteer," the school paid out a total of $335,186 to its board members, including $68,034 to Hamilton. Among the others receiving payment were Loren Cunningham, $67,961; Park, $51,051; Julie Anjo, $30,219; and Paul Childers, $79,000.

— Patricia Tummons

Water Commission Defers Scaling Back Restoration of Three East Maui Streams

"Hopefully we can put to rest, at least for a couple years, all the East Maui water issues," Mike Buck said at the October meeting of the state Commission on Water Resource Management.

Alas, that would not be the case when the commission took up its staff's recommendations a month later to amend instream flow standards for streams in East Maui while also approving reservations for non-potable water requested by the Department of Hawaiian Home Lands.

Staff had recommended increasing the flow standards for eight streams that were part of a 2021 petition by the Sierra Club of Hawai'i to amend interim instream flow standards (IIFS), and for two streams that were part of a 2001 petition filed by the Native Hawaiian Legal Corporation and Maui Tomorrow.

However, the staff also recommended reducing the standards for three streams whose flow standards were increased as a result of a 2018 decision and order in the contested case on the 2001 petition.

Commission hydrologist Ayron Strauch explained that by reducing the flow standards for West Wailuaiki, Waikamoi, and Waiohue streams, which do not appear to support significant amounts of native stream biota, more water would be available to further restore Honomanū and Nua'ailua streams, where native species are thriving.

"We're getting more bang for our buck," he said.

What's more, the IIFS reductions for those three streams would also help accommodate the DHHL's reservation request, as well as other offstream uses such as diversified agriculture on tens of thousands of acres in Central Maui owned by Mahi Pono.

Jerome Kekiwi, Jr., president of Nā Moku Aupuni o Ko'olau Hui, said he supported the DHHL reservations, as well as farming and ranching, but called the proposal to reduce minimum flows in the three streams "kinda heartbreaking."

"Our kupuna fought for years for this restoration," he told the commission.

To avoid eroding whatever trust the commission had with the East Maui community, the commission voted to defer a decision on those recommendations dealing with the streams that were part of the 2018 decision and order, as well as the portion of the DHHL reservation that was to be met by the proposed reductions.

In contrast, the staff recommendations for the streams included in the Sierra Club petition, as well as a DHHL reservation for about 1.3 million gallons a day from those streams, practically sailed through.

The petition sought restoration of about a dozen streams in the Huelo region of East Maui, but after extensive stream surveys, commission staff determined that only eight should have their IIFS increased.

The Sierra Club did not object but did offer some amendments to staff's suite of recommendations.

"Our kūpuna fought for years for this restoration"
— Jerome Kekiwi, Jr.

Native Hawaiian Legal Corporation attorney Ashley Obrey also did not oppose the recommendations but testified that the increased IIFS in the Huelo region should not come at the expense of streams that were part of the 2018 decision and order.

In written testimony, the Sierra Club stated, "After more than a century of complete devastation for dozens of streams in East Maui, the staff submittal for agenda item B-5 is progress . . .

"The Sierra Club is pleased that water will finally be allowed to flow in some of these streams, although we do think more water should be returned under the Water Commission's own standards. Both this Commission and the Division of Aquatic Resources have concluded that a minimum of 64 percent of each stream's median base flow is necessary to provide suitable habitat conditions for recruitment, growth, and reproduction of native stream animals. Yet, few, if any, of these streams are being restored to that level in their upper reaches. And three streams will continue to see all their water taken."

In addition to approving the Huelo recommendations, the commission also required its staff to convene quarterly meetings with stakeholders to discuss the status of diversion modifications to meet the new IIFS, and specified that the commission revisit the amended IIFS four years after they are implemented. Both of those amendments were recommended by the Sierra Club.

Spread Thin

When it came to amending the IIFS in the Nāhiku, Ke'anae, and Honomanū regions of East Maui covered by the 2018 decision and order, a commission staff report noted that the order did not accommodate water to be used by the DHHL because the agency had not requested any at the time.

"In the balance with non-instream water use, the Commission's 2018 Decision and Order provided for public trust uses of domestic water and 90 percent of the reasonable irrigation needs of the important agricultural lands of Central Maui serviced by the EMI system," a commission staff report states.

In December 2020, the DHHL formally requested a reservation of about 11 mgd from East Maui for its non-potable needs in Central Maui. "As DHHL's water needs are a public trust use that must be considered in the balancing of water management, the 2018 Decision and Order must also be revisited to address this deficiency," the report continues.

The commission had approved the reservation of 1.3 mgd from the Huelo region. Staff proposed that the rest of the DHHL's reservation request — 9.85 mgd —be met by streams in the other three regions.

The staff report noted that there are tens of thousands of acres of agricultural land outside of East Maui that rely on the streams for irrigation: 26,600 acres owned by Mahi Pono, Maui County's 709-acre Kula Agriculture Park, and 800 acres of other farm land.

Commission staff did not recommend that Mahi Pono use more groundwater resources as an alternative water source. It stated that the large-scale furrow irrigation and use of unlined reservoirs during the plantation days artificially recharged the Paia and Kahului aquifer systems.

"Based on the information presented, it appears that increasing reliance on ground water while simultaneously reducing surface water supplies may not be a feasible alternative. For Maui [Department of Water Supply], additional water is available from the Makawao aquifer system; however, the high cost of pumping to meet Upcountry demands may be financially burdensome on Maui's limited customer base," the report stated.

The DHHL's use of 9.85 mgd of stream water from the Nāhiku, Ke'anae, and

Honomanū regions would represent 22 percent of the median streamflow and all of the water in the stream at times of its lowest flows.

Strauch reported that for some streams, climate change has caused flows to drop by a quarter since the 1980s.

“We’re going to be in a shortage just for public trust uses, not including reasonable, beneficial [offstream] uses,” he said.

Data

In the months preceding the commission’s November 19 meeting, Strauch briefed commissioners on results from the dozens of East Maui stream surveys that commission staff and the Department of Land and Natural Resources’ Division of Aquatic Resources conducted over the past few years.

Generally speaking, they found that native species that live in and around streams terminating in waterfalls (such as Waikamoi) benefitted less from restoration than those that lived in streams that flowed into estuaries.

But even for West Wailuaiki and Waihoue streams, which empty into estuaries and support amphidromous species, they found that full restoration did not benefit native stream organisms any more than the partial restoration that had occurred after the commission amended their IIFS in 2010.

For Waikamoi, staff recommended reducing the IIFS to 0.17 mgd, roughly 7 percent of the previous IIFS of 2.46 mgd.

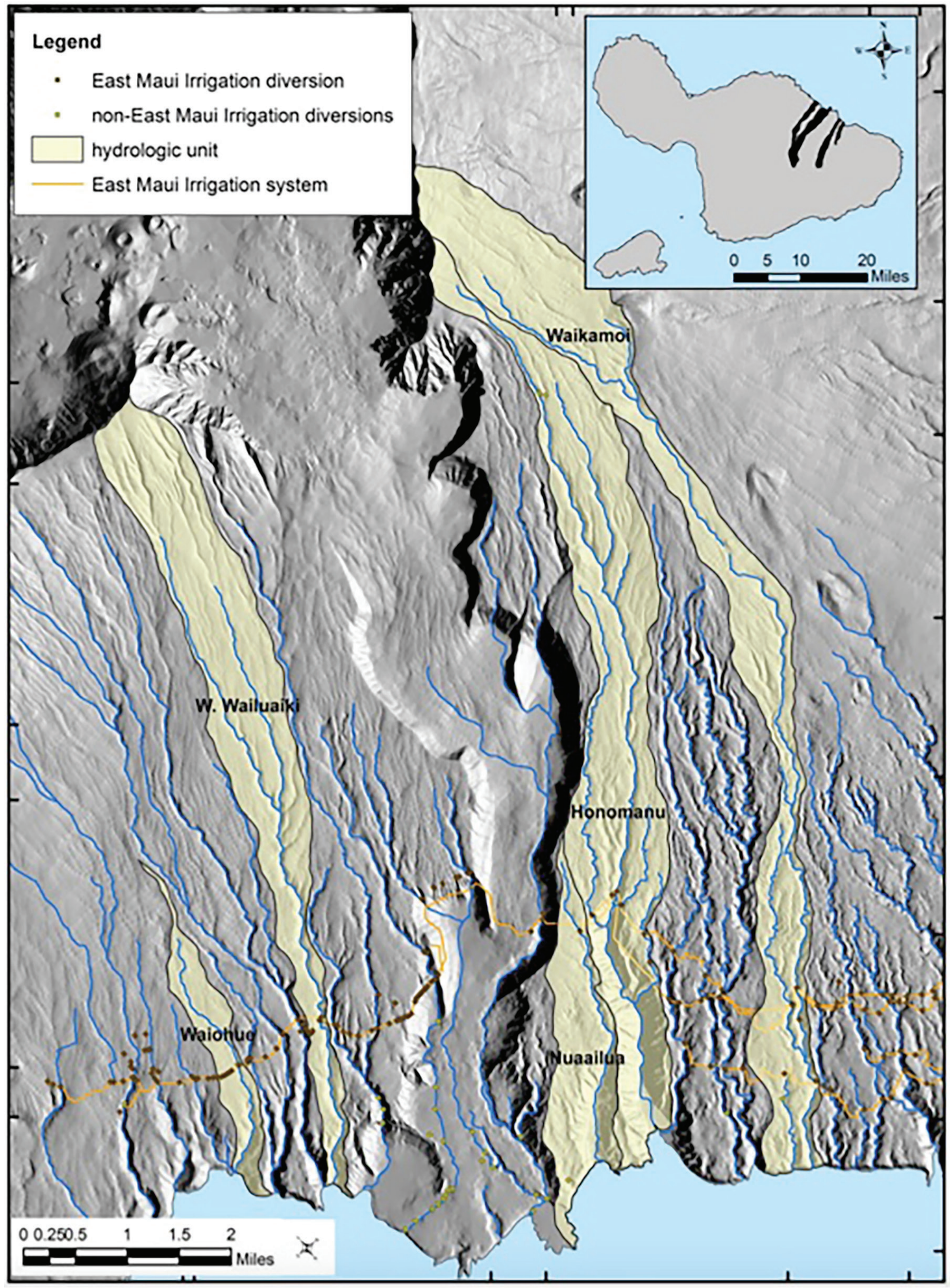
West Wailuaiki and Waiohue streams had been fully restored following the end of sugar cultivation in 2016, and the 2018 decision amended their IIFS to retain that state.

The proposed IIFS for West Wailuaiki would be 2.33 mgd, about one quarter of the stream’s median flow of nearly 9 mgd. For Waiohue, the proposed IIFS of 1.91 mgd is barely a quarter of the median flow.

On the other hand, staff proposed increasing the IIFS for Honomanū and Nua‘ailua, which are both relatively small streams. For Honomanū, which has an IIFS of 2.71 mgd, staff recommended full restoration at three of the four diversions along the stream. For Nua‘ailua, which has an IIFS of 0.18, staff recommended full restoration.

To Nā Moku’s Kekiwi, it didn’t seem fair to walk back any restoration of streams that had been diverted for 150 years based on only five years of data collection.

NHLC attorney Obrey also opposed the IIFS proposals for West Wailuaiki, Waikamoi, and Waiohue. She noted that



it took nearly two decades to resolve the petitions to amend the IIFS for about two dozen East Maui streams that were used for taro growing and other cultural practices. Reducing flows in those three streams would undo overnight the progress that had been made, and would do so without adequate consultation with Nā Moku, she said.

“There is gathering in these streams,” she continued. She also questioned whether enough time had passed to unequivocally say that native species won’t return to them.

She asked the commission to defer the matter, warning that she would request a contested case hearing on it, as well as on the commission’s decision for the Huelo region, if it did not.

Lucienne de Naie, a Huelo resident and member of the Sierra Club, was also shocked at the proposed IIFS reductions. She suggested that the DHHL’s water needs should not be met by taking water from the streams, but rather by ensuring that claimed reasonable and beneficial offstream uses are realistic. She noted that Mahi Pono’s water use projections “seem like they’re continually inflated.”

Attorney David Kimo Frankel, who represents the Sierra Club, testified in support of the DHHL reservation and the IIFS increases for Honomanū and Nua‘ailua, but against the proposed IIFS reductions.

“Ayron is probably the smartest person in this Zoom room,” Frankel said.

Nevertheless, Frankel questioned Strauch's assumptions. "EMI has been taking water from the furthest reaches on occasion in low-flow periods. … That kind of information is important and would confound information collected by DAR and CWRM," he said, adding, "There are a lot of components of [the ditch system's] plumbing that do not allow for real restoration of streams. That affects the data."

He added that there may be issues with when the data was collected, given the seasonal and annual variability of rain.

Frankel, who represented Nā Moku when he worked for the NHLC, added that it was important to honor the group's years of struggle to restore East Maui streams, a heroic effort that was "treated with disdain and contempt by people in power."

Helene Kau of the Maui Department of Water Supply testified that the DHHL should explore alternative sources of non-potable water, such as wastewater treatment and reclamation.

In response to the push-back on the IIFS recommendations, Strauch stressed, "We cannot expect species to recruit to Waikamoi." He added that the proposed flow reductions in West Wailuaiki, Waiohue, and Waikamoi are "not going to affect the aquatic ecosystem both at the higher elevation and at the estuary. I hope that helps clarify."

'Prospectively Dire'

At least one member of the Water Commission expressed some concern that the science behind the proposed IIFS amendments may be lacking.

Commissioner Aurora Kagawa-Viviani said she agreed with testifiers that the staff analysis was incomplete. She said that while it may be beyond the commission's remit, it did not incorporate any local or generational knowledge of the streams. There is an opportunity to fold in a more holistic analysis, she said.

Commissioner Paul Meyer, on the other hand, was fine with the IIFS recommendations. However, he was deeply concerned about how, under staff estimates, little water would be available for offstream uses if and when the new IIFS for all of East Maui are implemented. Under median flows, 64 mgd would be available for the county's municipal uses, Mahi Pono's and other agricultural uses, and the DHHL. But under low flow conditions, only 9 mgd would be available.

The quarterly meetings commission staff plans to host will be where stakeholders discuss how the DHHL's reservation and water shortage plans will be implemented, Strauch said.

"Under drought conditions, there isn't going to be enough water," he said. In West Maui, which also faces conflicts over shortages, the commission previously voted to designate the area as a water management area to control water use. Designation triggers a long, intensive process where all water users must obtain a permit from the commission for all existing and new uses.

"We don't have the capacity to add a designated water area to East Maui at the moment," he said.

"I think what we've got here is a situation that's prospectively dire. … Who's going to get cut back? … You've got dueling public trust uses," Meyer said.

"Coming together on a drought plan will help with that," Strauch replied. He added that there was time to plan, since the DHHL's reservation won't be drawn on anytime soon. "We're trying to plan out 30 years in advance," he said.

Given the calls by several members of the public to defer amending the IIFS, commissioner Neil Hannahs said that all parties seemed interested in having a discussion and listening to each other. "Let's let this dialogue occur," he said, adding that he didn't want to risk eroding the valuable trust the commission has built with the East Maui community, "largely on the back of our [2018] decision."

Commission deputy director Kaleo Manuel acknowledged the benefit of conversation, but added that Strauch, who had been repeatedly praised by members of the public and commissioners for his work, is trying to balance the various uses and look at the issue holistically.

"Everyone is looking out for their own interest. We have to be the arbitrator. [More conversation] may result in better recommendations, but it might not," Manuel said.

Meyer suggested that staff return with recommendations in six months, after interested parties have had a chance to discuss matters.

Commissioner Buck, however, said it was justifiable to at least approve the IIFS recommendations for Honomanū and Nua'ailua streams, since he said there was "good science behind that." He made a motion to approve just those two IIFS amendments.

Strauch said staff could definitely come back in six months with new IIFS recommendations, but he seemed perplexed over the support for restoring Honomanū and Nua'ailua given the doubts expressed over the proposed IIFS reductions for Waikamoi, Waiohue, and West Wailuaiki.

"It's hard to swallow, praising the same data for one thing and not the other. That's just me," he said.

Commissioner Kagawa-Viviani asked for the DHHL's opinion.

Jonathan Scheuer, a consultant for the DHHL, was eager to have the reservations approved. Awarding a reservation only when it's immediately needed defeats the purpose of the reservation process, he said. He added that because the department has been under-funded, other users "swept in and took control of water. Reservations are a planning tool. It indicates to all other parties, there is a reasonable basis for a public trust demand."

He said that in other areas where the DHHL has a reservation, the department has been able to secure funding for its projects. Deferral could endanger funding, he suggested.

When the contested case hearing was going on in 2018, he said, the DHHL informed the commission that "we had unmet demands. … We didn't object or intervene or contest the 2018 settlement, knowing it was important for those streams to be restored. … Deferral might make sense in terms of having dialogue, but deferral will reduce the ability of DHHL to fulfill its mission."

Should the commission choose to defer the matter, he asked that it take up the DHHL's reservation separately from any proposed IIFS amendments.

When Buck's motion failed to receive a second, Meyer moved to accept just the IIFS recommendations and hold off on the DHHL reservation for six months.

Chair Suzanne Case, however, tweaked his motion so that everything was deferred while staff held meetings with the community, with the reservations and IIFS to be taken up separately.

Meyer said he was satisfied with the staff's IIFS recommendations, but was willing to defer "for more appropriate discussion."

Meyer's amended motion was approved, with commissioner Kagawa-Viviani voting in opposition.

(For more background on this, see the Water Commission coverage in our October and November 2022 issues.)

—Teresa Dawson

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Olowalu Water Company, Commission Settle Disputed Violations

On November 15, the Water Commission approved a settlement with Olowalu Water Company, LLC of a violation case commission staff brought in October.

Staff had initially recommended that the commission find that the company had violated the interim instream flow standards for Olowalu Stream, set by the commission in March 2018, for 553 days between January 1, 2019 and October 7 of this year. They recommended fines totaling $470,000.

At the company's request, the commission deferred voting on the matter for one month to see what improvements could be quickly made to the water diversion system to avoid future violations. Even though they chose to defer, commissioners made it clear they felt a large fine was justified.

After the October meeting, OWC bought two data loggers, one to monitor how much water is being diverted and the other to measure what's left in the stream. Data from the loggers are to be shared with commission staff. The company also repaired leaks and cracks in its diversion system and submitted required water use reports.

The company still has not modified its intake to keep low flows in the stream and to meet the IIFS. Although a design had been approved years ago, the company is developing a new one. Once OWC receives design approval from the U.S. Army Corps of Engineers and the commission, the work should be completed within a year.

At the November meeting, staff recommended approval of the settlement that had been worked out over the past month. In lieu of the fine, OWC would provide the Olowalu Cultural Reserve, which receives water via a pipe in the stream, with a sand filter to reduce blockages and leaks. The estimated cost is $15,000-$20,000.

For four years and no more than once a month, OWC would also assist the cultural center with chipping invasive vegetation cleared around the stream. The value of that work was estimated to be $168,000.

Finally, the settlement called for OWC to drain its lower reservoir, remove any silt and debris, and reline it within three years to increase storage capacity and system efficiency. That work was estimated to cost $300,000.

Altogether, the value of the work required under the settlement exceeded the proposed fine amount.

"There was no intent to violate the law. We apologize," OWC's Glenn Tremble told the commission.

Several members of the public testified both for and against the settlement.

Some appreciated that the settlement work ensures that the money will be spent improving the Olowalu area. Others thought the company was getting off easy and preferred the imposition of fines given its history of violations in Olowalu and actions of related companies with regard to other streams in West Maui.

As a compromise, commissioner Neil Hannahs made a motion to approve the fine as originally proposed and allow OWC to get credit for the work included in the proposed settlement. However, Hannahs said that because OWC stands to benefit from the reservoir improvements, it should only receive a 50 percent credit for that work.

Commissioner Mike Buck seconded the motion.

Cal Chipchase, an attorney representing OWC, said he didn't think they could agree to that approach. "The settlement was to avoid a contested case," he said, adding that the company does not agree with the commission staff's fine calculation.

"With respect, we would accept the proposed settlement as drafted," he said.

"I just offer back, one of your objectives is to gain the trust of the community. They think you're paying for things that benefit you. On the reservoir, it does benefit you and your customers … Not that they'll get any more water, but they'll get it more reliably," Hannahs replied.

A new data logger to measure Olowalu Water Company's diversion. CREDIT: CWRM

Earlier in the meeting, Chipchase had announced that in addition to the work called for in the settlement, OWC planned to line another of its reservoirs. Given that, commissioners decided to fold that work into the settlement. So rather than giving OWC full credit for improving one reservoir, the commission would give it a 50 percent credit for two.

Hannahs' amended motion to reflect that change was unanimously approved.

—Teresa Dawson

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Land Board Approves Settlement For Illegal Sunset Beach Seawall

On November 10, the state Board of Land and Natural Resources approved a settlement over an unauthorized seawall built by James and Denise O’Shea in 2017 after the one that had fronted their Sunset Beach home for decades collapsed.

The O’Sheas argued that they built the wall on their property. The state argued that the wall sat on the public beach and sought a court order to remove the wall. A jury-waived trial was expected to have begun this past August, but attorneys for both sides had agreed to settlement terms beforehand. The settlement required Land Board approval.

At the board’s meeting last month, Michael Cain, administrator for the Department of Land and Natural Resources’ Office of Conservation and Coastal Lands, recommended approving the settlement, which would make removal of the seawall a restrictive covenant on the O’Sheas’ property. (The property was for sale as of press time.)

Cain also recommended that the board declare that the seawall removal is exempt from any requirement to conduct an environmental assessment.

He said it’s unknown who built the original seawall, but it appeared to have been built as part of a county park. “As far as we know, no government agency built it,” he said. In any case, he added, the wall was built outside of property boundaries.

According to coastal geologist Bradley Romine with the University of Hawai‘i’s Sea Grant program, the beach fronting the O’Shea’s property is eroding at a rate of about 0.7 feet per year.

“When installed on an eroding beach, seawalls lead to beach narrowing and beach loss through a process called ‘coastal squeeze.’ As sand continues to be washed away fronting the new seawall by ongoing erosion, the seaward edge of the beach (i.e., beach toe) continues to move landward toward the base of the fixed seawall, narrowing and ultimately pinching-off the beach. Beach sand is impounded behind the New Seawall that would otherwise be eroded through coastal processes to nourish and sustain the beach system, compounding the erosion and beach loss,” an OCCL staff report states.

The O’Shea’s seawall fronting their Sunset Beach property.
CREDIT: DLNR

“OCCL and the O’Sheas have negotiated a proposed settlement agreement which would give the O’Sheas a reasonable amount of time to remove the new seawall but would enable the State to immediately remove the wall itself, impose fines against the O’Sheas, and hold the O’Sheas accountable for the costs of the wall removal if the O’Sheas do not comply. The agreement would run with the property and would thus be enforceable against any new owners should the O’Sheas sell the property. The agreement would thus avoid the delay, costs, and uncertainty of litigation,” it adds.

Under the settlement, the O’Sheas would have to remove the wall by December 31, 2024 and would receive assistance from the state in obtaining necessary permits. If circumstances arise that make it impossible to meet that deadline, the O’Sheas may ask the Land Board for additional time.

“However, the mere fact that surf becomes higher in the winter months is not in itself a circumstance outside of the O’Sheas’ control; the O’Sheas agree to plan so that removal can take place when conditions allow,” the report states.

The O’Sheas would be required to obtain insurance to cover any liability arising from the seawall removal or before removal. They would also indemnify the state from any claims associated with the new seawall or its removal. However, the state would not be indemnified from any claims brought by adjacent landowners alleging that the seawall should not be removed.

The O’Sheas would also be liable for fines and administrative fees totaling $52,500. If they remove the wall by the deadline(s), removal costs would be credited against the fine.

The settlement would require the parties to execute and record in the Bureau of Conveyances a stipulated judgement ordering the seawall removal. The judgement would not be executed until the latter of January 1, 2025 “or such other extensions as may be granted by the BLNR.”

Land Board member Vernon Char asked Cain why it would take two years to effectuate the judgement.

Cain replied that the deadline takes into account “seasonal considerations” and also allows time for the development of a longer-term, more holistic approach to the erosion problems on the North Shore.

— Teresa Dawson