Volume 33, Number 8 February 2023

Environment Hawai'i
a monthly newsletter

Ol' McDonald Had... a Jacuzzi and Wine Fridge

Farming isn't what it used to be – at least in the farms on the Big Island and elsewhere in the state that have been rented out for years as luxury vacation retreats.

For years, the short-term rental of these luxury homes on lands in the state Agricultural District has given rise to conflicts with neighbors and county officials. A Land Use Commission ruling in 2020 upheld Hawai`i County's ordinance strictly limiting short-term rentals on Ag land. In 2022, a Circuit Court judge overturned that ruling, and now the LUC is appealing that decision to the Intermediate Court of Appeals.

Our cover article reviews the opening briefs in the appeal. No hearing date has been set.

IN THIS ISSUE

Farm Dwellings as Vacation Rentals? The Question Heads to Appeals Court

The long-running dispute over what activities are permitted on the Big Island's agricultural land is as far from being resolved as it ever has been.

Last year, the 3rd Circuit Court found that the state Land Use Commission was wrong when it determined that the rental of houses in the state Agricultural land use district as short-term vacation rentals was not allowed. By law, the LUC had ruled, any house on Ag land is presumed to be a farm house, and farm dwellings can be used for no purpose other than that of supporting agricultural uses.

But 3rd Circuit Judge Wendy DeWeese overruled the LUC in her May decision. Nothing prevents a farm dwelling from also being rented out as a short-term vacation rental, she found. And nothing in state law sets a minimum length of time for which a farm dwelling may be rented.

The LUC decision was in the form of a declaratory ruling, which had been sought by both the County of Hawai'i, on the one hand, and, on the other, a number of landowners who had been asking the county to allow them to continue using homes on their Agricultural land as vacation rentals. The county Planning Department had denied the requested permits, in keeping with an ordinance passed by the County Council in 2019.

That ordinance disallowed the short-term – 30 days or less – rental of homes on lots in the state Agricultural district if those homes were on lots of record established after June 4, 1976. That was the date a law took effect that specified the uses allowed on land in the state Agricultural District.

The landowners asked the county Board of Appeals to overturn the Planning Department's ruling. However, both the county and the landowners agreed to withdraw that action and seek a declaratory ruling on the subject from the Land Use Commission instead.

Following the LUC's ruling, issued in

continued on page 8

A 4,500-square-foot house in Kona on Ag land. CREDIT: PALEKAIKOESTATE.COM

Environment Hawai'i
a monthly newsletter
Volume 33, No. 8
February 2023

NEW AND NOTEWORTHY


CREDIT: HAWAII LIFE

Cliff Sheds, Price Soars: A coastal house in Hilo had to be partly demolished a few years ago, when county inspectors deemed it unsafe. The house, perched atop a cliff near Honoli'i, had begun to slide into the ocean. Debris in the water posed a hazard to surfers and others who regularly enjoyed the popular surf spot.

It was not the first time the land under the house had sloughed off into the ocean. Hawai'i County records show that as far back as the early 1990s, supports for the deck were failing. An effort to stabilize the cliff face with gunnite was attempted, to no avail. By 2017, the Department of Public Works declared the house unsafe for habitation.

Large parts of the deck were shorn off. A new, much smaller deck was built on footings drilled deep into the earth. A permit issued for the demolition by the Department of Public Works placed cost of the work at $70,000.

In 2021, the owner sold the property at a price reflecting its distressed condition: $266,000.

Now the three-bedroom, three-bath house, freshly painted and staged, but still served by a cesspool, is on the market once more, with an asking price of $995,000.

(The house was the subject of an article in the January 2018 edition of *Environment Hawai'i.)*

Environment Hawai'i
421 Ka'anini Street
Hilo, Hawai'i 96720

Patricia Tummons, Editor
Teresa Dawson, Managing Editor

Environment Hawai'i is published monthly by Environment Hawai'i, Inc., a 501(c)(3) non-profit corporation. Subscriptions are $70 individual; $120 non-profits, libraries; $150 corporate. Send subscription inquiries, address changes, and all other correspondence to:

Environment Hawai'i
421 Ka'anini Street, Hilo Hawai'i 96720.
Telephone: 808 933-2455.
E-mail:ptummons@gmail.com
Web page: http://www.environment-hawaii.org
Twitter: Envhawaii

Environment Hawai'i is available in microform through University Microfilms' Alternative Press collection (300 North Zeeb Road, Ann Arbor, Michigan 48106-1346).
Production: Mark Taketa

ISSN 1050-3285

Quote of the Month

"A declaration of rights… is meaningful relief, even if it is not a magic wand that will eliminate climate change."

— Washington chief justice Steven Gonzales

Water Deputy Approved: On January 24, the state Commission on Water Resource Management unanimously approved the reappointment of Kaleo Manuel as its deputy director.

Manuel, who served as deputy under former director Suzanne Case, garnered support from many who have been impressed by progress he and his staff have made in restoring long-diverted streams and protecting groundwater resources.

They included the heads or representatives of the Hui o Nā Wai 'Eha, Sierra Club of Hawai'i, Kua'āina Ulu 'Auamo, the PA'I Foundation, the Aha Moku councils, the Native Hawaiian Legal Corporation, and the Association of Hawaiian Civic Clubs.

Former commissioner Kamana Beamer and others praised Manuel as a gifted facilitator, especially with those who have long felt unheard. Jonathan Scheuer, former chair of the Land Use Commission who often consults for the state Department of Hawaiian Home Lands (Manuel's former employer), testified that under Manuel's leadership, local and Hawaiian communities and the Water Commission now have a connection that bodes "very well for the heavy, complex, and difficult work over the next four years."

Retired commission senior hydrologist Charley Ice, however, submitted written testimony in opposition. Ice stated that although Manuel was a friend and respected colleague, "the Water Commission is not a place to learn how to administer a complex program, and he failed to understand a workable process for making transitions on policy and procedures. My own retirement came too early, after long months of struggling to get applications to move. People have a reasonable expectation to have action within 90 days, and I found that I could not get anything to budge for well over a year (if even now)," Ice wrote.

Manuel explained, "I have always come in working within the system, but always have questions about efficiencies," and sometimes he and his staff disagree. With regard to the alleged backlog, Manuel suggested his commitment to quality may have played a part. "I take everything I put my signature on very, very seriously," he said, adding that COVID-19 and staff retirements may have also slowed processing times.

Transportation Agency Seeks to Dismiss Climate Lawsuit Filed by Hawai'i Youth

For 15-year-old Navahine Fukumitsu, climate change has made it harder for her family to farm kalo on its kuleana lands in Hakipu'u, O'ahu, which it has done for more than ten generations.

"[C]limate change is altering the growing season, decreasing crop yields, and threatening Navahine's ability to continue this cultural practice. Among other threats, heavy rains, which are becoming more common, flood the ancient 'auwai, destroying crops, and forcing Navahine's 'ohana to spend days of hard labor rebuilding the ditch system. On the other extreme, extended drought periods dry out and damage the 'auwai and contribute to decreasing stream flows, which can harm wetland kalo that is dependent on cool, flowing water. The extreme weather fluctuations also degrade habitat for native stream life and waterbirds that are dependent on this ecosystem for their survival and are part of the landscape of resources that Navahine's 'ohana both relies upon and cares for in perpetuating traditional farming practices. Additionally, rising seas are infiltrating the groundwater table and raising the pH of the soil, which also reduces crop yields; some of the 'ohana's lo'i are located only six inches above sea level, and if urgent reductions in greenhouse gas emissions are not made, these lands will be underwater within Navahine's lifetime."

That's according to a complaint Fukumitsu and 13 other Hawai'i youths filed last June against the state and its Department of Transportation (DOT) for failing to follow through on direction from the Legislature and other agencies and even its own plans on how to meet greenhouse gas (GHG) emission reduction targets.

The complaint, filed by attorneys with Earthjustice and Our Children's Trust, alleges that the DOT's practices and policies have led to increased emissions from the transportation sector that have, in turn, contributed to harmful climate change impacts the 14 young plaintiffs have experienced and expect to endure for years to come.

The complaint describes how sea level rise, changing weather patterns, and increasing ocean temperatures and acidification are harming their ability to live in a clean, safe, healthful environment, and in the case of Nawahine and others, to continue traditional Hawaiian practices.

Despite Hawai'i being a leader in adopting climate change legislation and setting ambitious greenhouse gas emission reduction targets, its 2045 emissions are projected to be just 30 percent lower than they were in 2016, the complaint states. (The 2008 Hawai'i Clean Energy Initiative, or HCEI, set a goal of reducing greenhouse gas emissions 70 percent by 2030.)

"Youth like Kaliko, Kā'onohi, and Navahine (pictured here) have a right to a 'healthful environment' under the Hawai'i state constitution, but under current state policy transportation pollution will increase to an alarming 9.15 million metric tons of greenhouse gas emissions by 2030," a press release from the non-profit law firms Earthjustice and Our Children's Trust stated. CREDIT: EARTHJUSTICE/OUR CHILDREN'S TRUST

The transportation sector shoulders a lot of the blame for the state falling short of its goals, the plaintiffs argue.

"Transportation is increasing as the dominant source of carbon dioxide emissions in Hawai'i, from approximately 49 percent of total carbon dioxide emissions in 2008 to approximately 59 percent in 2018," it states. And according to a 2017 Department of Health report, transportation emissions are projected to increase 41 percent between 2020 and 2030, while emissions from other sectors are projected to drop.

This, despite a 2011 HCEI roadmap that described how to meet its emission goals: 1) reduce vehicle miles traveled to four percent below 2011 levels by 2020, 2) put 40,000 electric vehicles on the road by 2020, and 3) reduce ground transportation petroleum consumption 70 percent by 2030.

That same year, the DOT published its Hawai'i State Transportation Plan, which aimed to support the HCEI goal by creating a transportation system that included bicycle and walking options, as well as more use of alternative fuels and electric vehicles.

A 2015 analysis of the HCEI commissioned by the state Department of Business, Economic Development and Tourism found that the transportation sector was still falling short.

In their complaint, the plaintiffs noted that the DOT has been adding 31 new miles of vehicle lanes each year since 2000, which "does not alleviate traffic or reduce greenhouse gas emissions from transportation. Rather, it proportionally increases vehicle miles traveled, increasing vehicle emissions and exacerbating climate change. If this trend continues, an additional 20.25 [million metric tons of carbon dioxide equivalent emissions] will be added to the atmosphere between 2021 and 2050, moving Hawai'i even further away from achieving the Zero Emissions Target." (In 2018, the Legislature passed a bill that became Act 15, which established a state "zero emissions" target to sequester more atmospheric carbon and greenhouse gases than were emitted by no later than 2045. After January 1, 2020, agency plans, decisions, and strategies were required to consider their impact on the state's ability to "achieve the goals in this section, weighed appropriately against their primary purpose.")

The department also has not reduced barriers to electric vehicle adoption, electrification of transportation, public transit, walking, and cycling, the plaintiffs argue.

The complaint notes that Hawai'i currently has the second lowest number of charging ports per EV in the country, the DOT has still not funded or implemented its decade-old Statewide Pedestrian Master Plan, it's made limited progress towards implementing a 2003 Statewide Bike Plan Hawai'i, and it has not convened the Sustainable Transportation Forum for the past five years.

"In response to a public records

request, HDOT identified only five 'highway plans and actions' it has taken since 2011 to address greenhouse gas emissions: (1) implementing an internet broadband pilot program to increase opportunities for rural commuters to work from home; (2) administering the federally funded Transportation Alternatives Program which to date has awarded $5 million (approximately 0.0036% of HDOT's total 2021 operating budget) for third-party, multimodal projects; (3) securing a vendor to assist state and county agencies with procuring and ordering EVs; (4) adopting SmartTRAC, a program that assesses how well transportation projects address state priorities relative to the requested funding; and (5) conducting a 2019 test of a sustainable concrete mix designed to reduce the carbon footprint of road construction," the complaint states, adding that these actions are "wholly inadequate."

Given the DOT's track record, the plaintiffs asked the court to declare that the state and DOT have a public trust obligation under Article XI, Section 1 of the Hawai'i Constitution "to protect and conserve the climate system and atmosphere, and all natural resources affected by climate change, for the benefit of present and future generations," and that they have violated that section "by establishing, maintaining, and operating a state transportation system that fails to preserve, protect, and maintain Hawai'i's public trust resources."

The plaintiffs also asked the court to declare that their right to a clean and healthful environment under Article XI, Section 9 "encompasses the right to a life-sustaining climate system" and that the defendants have violated that right.

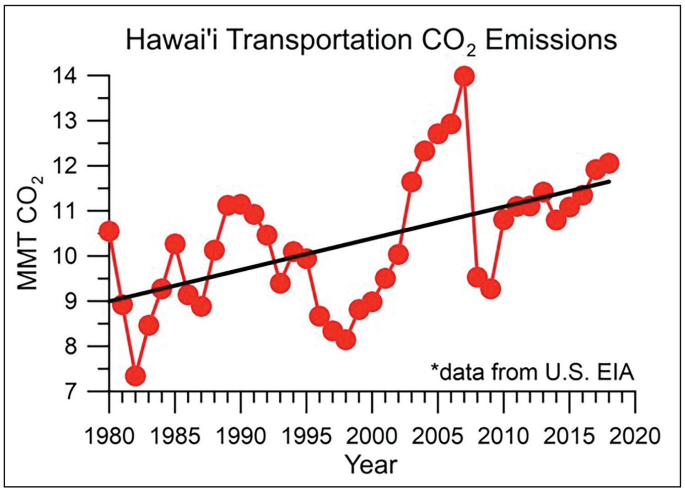
The plaintiffs also asked the court for appropriate and necessary injunctive relief, including but not limited to:

1) Ordering the defendants to stop perpetuating a transportation system that breaches their public trust duty, is incongruous with climate mitigation mandates, and infringes upon the plaintiffs' constitutional rights;

2) Compelling the defendants to take concrete steps under prescribed deadlines to bring its transportation system in line with their constitutional duties and the plaintiffs' rights; and

3) Exercising jurisdiction and oversight as necessary, including the appointment of a special master.

The complaint argues that a declaration that DOT is violating its constitutional obligations and the plaintiffs' rights is timely because the department is in the midst of updating its transportation plan, which will govern projects for the next decade



Furthermore, the Infrastructure Investment and Jobs Act recently signed by President Joe Biden, "channels over 1.746 billion dollars in federal funds to HDOT for transportation related projects," the complaint states, adding that without a court order, the department will continue its long-running patterns and practices that violate its constitutional duties and the young plaintiffs' rights.

"Where plaintiffs describe a plan or action by HDOT, they do not allege any facts that could demonstrate a violation of law."

State Response

On August 22, state attorney general Holly Shikada, one of her deputy attorneys, and a handful of lawyers from California and Washington, D.C., filed a motion to dismiss.

They argued that the relief the plaintiffs sought, such as an injunction ordering the DOT to create new regulatory programs, can't come from the courts; that direction must come from the Legislature.

"The court cannot appoint its own super-director of the agency, particularly one that would be responsible not only for ensuring that HDOT implements a regulatory program according to judicially established deadlines but also evaluating those regulations to ensure their 'compliance' with the court's directives. What's more, the oversight plaintiffs seek could last for decades," they wrote.

They added that the plaintiffs' beef isn't really with the DOT, but with the countless people who choose to use gas-powered vehicles.

"Imagine if, overnight, everyone in Hawai'i abandoned fossil-fuel-running vehicles and switched to electric vehicles. The GHG emissions that plaintiffs complain about would drop dramatically, yet the physical facilities that HDOT maintains would exist and operate exactly the same. Thus, it is clear that HDOT is not causing plaintiffs' injuries," they wrote. Even if the court ordered the DOT to expand bike lanes, "private individuals would retain the freedom to choose whether to use bike lanes or to continue driving cars," they added.

Despite the plaintiffs' recounting of the emission reduction goals, recommendations, and plans that the DOT has failed to meet, implement, or create, the department was not required by any specific law to do so, the state attorneys argue.

"Plaintiffs cite no law requiring such plans. And where plaintiffs describe a plan or action by HDOT, they do not allege any facts that could demonstrate a violation of law—for example, they assert that HDOT has failed to timely reconvene its Sustainable Transportation Forum to work on a plan for achieving emissions reductions, but they identify no legal obligation to do so," they stated in their motion to dismiss.

They argued that even if the youths alleged that the DOT violated its constitutional duties under an environmental law, that claim should have been addressed via a contested case hearing.

And they pointed out that youth plaintiffs in mainland cases similar to Hawai'i's have lost.

"Because Hawai'i agencies are only able to control a small portion of the globe's greenhouse gas emissions, they cannot realistically control climate change's local impacts, like sea level rise and shoreline erosion. The Washington Supreme Court recently rejected such an approach …, finding the plaintiffs' concerns about emissions that a state agency had 'allowed into the atmosphere' could not be 'recharacterized' as an obligation to protect local lands and waters. This court should also reject an overbroad reading of the public trust doctrine for the same reasons," they wrote.

They continued, "Tellingly, three other courts—one Federal Court of Appeals and two state appellate courts—have each dismissed similar cases on political question grounds. While there are some differences in the underlying state laws in those other cases, the considerations that led those courts to decline to decide a political question are equally present here. For example, … the Washington Court of Appeals held that resolving the case would 'inevitably involve resolution of questions reserved for the legislative and executive branches.'"

With regard to an Alaska case, the state's attorneys stated that the plaintiffs there also "sought a declaration that the state had violated their constitutional rights, that it had a public trust duty to protect the state's natural resources, and that it had violated its public trust and other obligations by failing to sufficiently reduce greenhouse gas emissions. The court found that resolving those claims would not 'settle' any legal issues between the parties for a number of reasons, including that the court lacked the ability and expertise 'to provide the plaintiffs any certain basis on which to determine in the future whether the State has breached its duties.'"

Rebuttal

In filings opposed to the state's motion to dismiss, the plaintiffs' attorneys clarified that they are not asking the court to take control of the DOT. They just want the court to declare that the state and DOT have violated "established legislative and constitutional mandates to mitigate climate change, in a case where HDOT itself demonstrates a need for clarity, focus, and attention."

"Far from a 'political question,' interpreting and defending the Constitution is the courts' appointed role in our democratic system," they wrote.

Regarding the defendants' argument that injunctive relief requires the court to make policy judgments about steps and timing necessary to achieve GHG reduction objectives, the plaintiffs pointed out, "the Legislature has already set these objectives and mandated that defendants 'decarboniz[e] the transportation sector,' and 'utilize the best available science, technologies, and policies to reduce greenhouse gas emissions, with the overarching goal of achieving the statewide Zero Emissions Target 'as quickly as practicable, but no later than 2045.'

"The Legislature has also dictated that after January 1, 2020, 'agency plans, decisions, and strategies shall give consideration to the impact of those plans, decisions, and strategies on the state's ability to achieve' Zero Emissions."

Whether or not people still chose to continue to drive gas-powered vehicles if there were more EV charging stations, electrified transportation options, etc., "specific emissions–reducing projects (such as bikeways and pathways) will never be funded or constructed if they are not included in defendants' plans now," given the agency's past disregard for environmental mandates approved by the Legislature, the plaintiffs' attorneys argued.

With regard to the state's claim that the plaintiffs failed to identify a violation of any statute governing how the DOT functions, their attorneys countered, "[I]n attempting to relegate the constitutional public trust to some secondary, subordinate duty in relation to HDOT's 'statutory function,' HDOT contradicts established law. As the Hawai'i Supreme Court has made clear, '[t]he State's constitutional public trust obligations exist independent of any statutory mandate and must be fulfilled regardless of whether they coincide with any other legal duty.'"

"Defendants, moreover, disregard the numerous statutes enacted by the Legislature to address the escalating 'climate emergency. … Defendants seek to dismiss them as mere 'aspirational' goals that cannot be 'violated'—at least not yet, until it is too late to do anything about it," they added.

They pointed out that the Legislature recently mandated a reduction of statewide greenhouse gas emissions so that by 2030, emissions would be half of what they were in 2005, "confirming the need for near-term action in pursuing a trajectory of emissions reductions to achieve the end goal."

The attorneys disputed the state's argument that the youths' claims should have been addressed in a contested case hearing first. They also explained how the decisions in the Washington and Alaska cases do not apply here.

They pointed out that unlike in Washington, the Hawai'i Supreme Court has made it clear that the public trust relates to "protection of air and other trust resources affected by climate change," and recognized the associated constitutional "right to a life–sustaining climate system."

While both the Alaska and Washington cases were wrongly decided, "neither state's constitution enshrines a judicially enforceable constitutional right to a clean and healthful environment that expressly provides that 'any person may enforce this right,' or includes a public trust mandate directing the state to 'conserve and protect ... all natural resources,'" they wrote.

A declaration from the court would terminate any controversy as to the existence, scope, and violation of the plaintiffs' rights and the defendants' duties, they argued. "Injunctive relief would similarly terminate the controversy as it would ensure that defendants fulfill their statutory and constitutional responsibilities. In sum, Youth Plaintiffs readily satisfy the standing test for declaratory relief," they wrote.

Environmental Court Judge Jeffrey Crabtree heard arguments on the state's motion to dismiss on January 26.

— Teresa Dawson

Flood damage from an April 2018 severe rain event in north Kaua'i. "This climate change-induced 'rain bomb' ... cut off road-based access into and out of Kalā's community for several weeks," the youth plaintiffs' complaint states. CREDIT: UH SOEST

Issues in Climate Case by Hawai‘i Youth Echo Those Raised in Washington, Alaska

The climate change lawsuit filed last year by about a dozen young people from Hawai‘i against the state and its Department of Transportation is similar to others filed over the past several years in other state and federal courts.

Filings in the Hawai‘i case touched on decisions in the last couple of years on cases brought by youth in Washington and Alaska over alleged failures by state agencies there to do more to reduce greenhouse gas emissions.

Andrea Rodgers, one of the attorneys who represented the Washington youths, is also part of the team of attorneys representing the Hawai‘i plaintiffs.

The Washington and Alaska youths ultimately lost their cases, which the Hawai‘i Department of Transportation noted in its motion to dismiss. Attorneys for the Hawai‘i youth have countered that the case here differs significantly and that the Washington and Alaska cases were not only wrongly decided, they are irrelevant to Hawai‘i law.

Still, as the parties in the Hawai‘i case await a decision by Environmental Court Judge Jeffrey Crabtree, who heard oral arguments last month on the DOT's motion to dismiss, the two mainland cases provide some insight into what he may consider.

In fact, attorneys for the Hawai‘i youth have encouraged Crabtree to review the dissenting opinions in the Alaska case, which was narrowly decided in a 3-2 decision, and the Washington case, where two justices — including the chief justice — thought a review should have been granted.

The dissents "are more in line with Hawai‘i jurisprudence recognizing the constitutional right to a life-sustaining climate system and the need for judicial interpretation and enforcement of constitutional rights. … The Court should look to the analysis by those justices and judges as far more persuasive and aligned with constitutional law," the plaintiffs' attorneys wrote in a footnote in its reply to the DOT's motion to dismiss.

The Cases

The Alaska and Washington cases were filed in October 2017 and February 2018, respectively. Both involved about a dozen youth plaintiffs suing their governors and various state departments and commissions that were allegedly creating and maintaining systems and policies that were exacerbating climate change.

In the Washington case, the youth plaintiffs argued that the defendants' creation and support of fossil-fuel-based energy and transportation systems endangered their ability to "grow to adulthood safely and enjoy the rights, benefits, and privileges of past generations of Washingtonians due to the resulting climate change."

What's more, they argued that the defendants' creation, operation and maintenance of those harmful energy and transportation systems violate the state's Constitution and public trust doctrine.

The youth asked the court to make several declarations, including that they have constitutional rights to life and a healthful environment, and that the defendants have duties under the public trust doctrine to protect and properly manage trust resources, including the atmosphere. They also asked the court to find that the state had violated their rights and its duties.

In addition to seeking the declarations, they sought to have the court enjoin the state from further violating their rights and order an accounting of the state's greenhouse gas emissions and the submission of a state climate recovery plan.

On August 14, 2018, King County Superior Court Judge Michael Scott granted the state's request to dismiss the plaintiffs' claims.

"The young people who are the plaintiffs in this case can (and must) continue to help solve the problems related to climate change. They can be advocates, urging the Legislature and the executive to enact and implement policies that will promote decarbonization and decrease greenhouse gas emissions, such as a carbon tax, the development of alternative energy sources (including nuclear energy), and international cooperation in climate regulations. These are solutions that must be effected through the political branches of government, and not the judicial branch," Scott wrote in his ruling.

The Court of Appeals of Washington State supported Scott's decision in an opinion issued on February 8, 2021.

Although the King County court decided in a 2015 case that the public trust doctrine applies to the atmosphere, "we are not bound by a trial court's decision, and our analysis does not lead us to the conclusion that the public trust doctrine applies to the atmosphere. Accordingly, we are not persuaded," the appeals court stated.

Among other things, it concluded that granting the young plaintiffs' requests would require the court to order the creation and implementation of a climate plan, which would "violate the separation of powers doctrine."

On October 6, 2021, the Washington Supreme Court denied the plaintiffs' petition to review the appeals court's decision.

The Alaska case covered much the same ground as the Washington case and fol-

Plaintiffs in the Washington case detailed how the increasing wildfires in the Cascades have harmed them. Above is a forest charred by a fire in the North Cascades. CREDIT: WIKIMEDIA lowed a similar trajectory. In October 2018, the Superior Court granted the state's motion to dismiss. The plaintiffs appealed to the state Supreme Court, which decided on January 28 of last year to affirm the lower court's dismissal.

The high court had already ruled years earlier in a similar case *(Kanuk)* that it could not make the legislative policy judgements necessary to grant the relief the youth plaintiffs sought, and that dismissal was prudent because the declarations they sought would not provide them any relief. It decided those findings applied to the more recent case, as well.

Native youth plaintiffs in the Washington and Alaska lawsuits alleged that climate change-induced sea level rise and increased temperatures were endangering their homes, including Taholah village in Washington (left) and Shishmaref in Alaska (inset).

The Dissents

In the Washington case, two of the nine Supreme Court justices — Chief Justice Steven Gonzales and Justice Helen Whitener — dissented.

Gonzales, who authored the dissent, lamented, "We recite that we believe the children are our future, but we continue actions that could leave them a world with an environment on the brink of ruin and no mechanism to assert their rights or the rights of the natural world. This is our legacy to them described in the self-congratulatory words of judicial restraint."

He stated that the youths had presented a justifiable argument that they have the right to a stable climate system "that sustains human life and liberty" and had asked the court to recognize "a fundamental right to a healthful and pleasant environment that may be inconsistent with our state's maintenance of a fossil-fuel-based energy and transportation system that it knows will result in greenhouse gas emissions."

Global warming foreshadows potential environmental collapse and an unstable climate system that is "conceivably unable to sustain human life and continued enjoyment of ordered liberty under law. Today, we have an opportunity to consider whether these are the sorts of harms that are remediable under Washington's law and constitution. … The youths sought review to determine what rights they have in the face of these present and future harms. If there is in fact a right to a healthful and pleasant environment, we could so declare," he wrote.

He stated that the primary issue in the case was whether the youths' claims were justiciable. "I would have granted review so this court could give meaningful consideration to that question," he stated.

The Court of Appeals finding that the claims were not justiciable is debatable, he wrote.

With regard to whether the claims should be addressed by other branches of government, he stated, "As the youths and amici point out, the Court of Appeals decision unnecessarily expanded the political question doctrine. The youths' requested relief would require actions by the other branches of government to resolve complex issues, but the political question doctrine should not foreclose review of the declaratory issue presented. Critically, the Court of Appeals also addressed the substantive issue and held there is no fundamental right to a clean and healthful environment. Whether this is correct warrants our review given considerable statutory authority that suggests otherwise. …

"A declaration of rights from this court is meaningful relief, even if it is not a magic wand that will eliminate climate change. Even though an 'issue is complex and no option may prove wholly satisfactory,' the judiciary should not 'throw up its hands and offer no remedy at all.' The court should not avoid its constitutional obligations that protect not only the rights of these youths but all future generations who will suffer from the consequences of climate change."

In the Alaska case, two of the five Supreme Court justices dissented in part.

Justice Peter Maassen, who has since become the court's chief justice, wrote in his dissent, "In my view, a balanced consideration of prudential doctrines requires that we explicitly recognize a constitutional right to a livable climate— arguably the bare minimum when it comes to the inherent human rights to which the Alaska Constitution is dedicated."

He admitted that granting declaratory relief would not stop future litigation over the same or similar issues. "But I am no longer convinced that nothing can be gained by clarifying Alaskans' constitutional rights and the state's corresponding duties in the context of climate change," he wrote.

He continued, "When considering the value of declaratory relief, the proliferation of climate-change litigation cuts both ways. On the one hand, as the court cogently explains today, it means that any decision we make here cannot 'terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding,' the consideration we found most compelling in *Kanuk*. But because prudential concerns such as 'practicality and wise judicial administration' also guide our use of declaratory relief, we may conclude that it is an appropriate remedy even when terminating controversy is not possible. …

"We decided in *Kanuk* that the plaintiffs had standing to assert their claims and that their claims for declaratory relief were justiciable. But we have yet to say explicitly whether such claims have a basis in the Alaska Constitution. … Our failure to answer the question now will not eliminate it but will only postpone our answer, in the meantime putting the burden of redundantly litigating it on plaintiffs, the state, and the trial courts, potentially to return to us on appeal again and again until we conclude that prudence finally requires an answer. Given the urgency of the issue, I would conclude that 'practicality and wise judicial administration' militate strongly in favor of limited declaratory relief identifying the constitutional source of the right plaintiffs claim."

He concluded, "In my view, the law requires that the state, in pursuing its energy policy, recognize individual Alaskans' constitutional right to a livable climate. A declaratory judgment to that effect would be an admittedly small step in the daunting project of focusing governmental response to this existential crisis. But it is a step we can and should take."

—Teresa Dawson

Vacation Rentals *continued from page 1*

August 2020, that was adverse to the landowners, they appealed to the 3rd Circuit Court.

To the ICA

Following Judge DeWeese's ruling, the Land Use Commission was the sole party to appeal to the Intermediate Court of Appeals.

In its opening brief, filed October 22, the LUC notes that state law limits dwellings on land in the Agricultural District to only those single-family homes that are an accessory use to a bona fide agricultural service. As such, it argues, there is no need for any rule limiting the length of time that such homes may be used as vacation rentals. "Meeting the definition of farm dwelling," the LUC argued, "would come first and foremost before appellants' duration question could even be entertained." (The team of attorneys representing the LUC includes deputy attorneys general Holly Shikada and Julie China, but also two "special deputy attorneys general," former state attorney general Douglas Chin and Eric Robinson.)

The state went on to list deficiencies in the landowners' petitions to the county for permits as non-conforming uses, given that their properties were used as short-term rentals before the county ordinance limiting them on Ag lands took effect.

Those landowners, known collectively as the Rosehill petitioners, had asked the county for non-conforming use certificates for short-term rentals based on their use as such before the county ordinance took effect in 2019. As the LUC showed, however, the county records demonstrated that none of the petitioners' lots was in existence prior to the 1976 cut-off date.

Aside from the factual evidence supporting the LUC's decision, the state argued, the Circuit Court should have given deference to the LUC's own interpretation of its rules.

The county's filing with the ICA made many of the same points. It also noted that the Circuit Court "appears to have improperly required the LUC to make express findings whether petitioners are entitled to declaratory rulings both when the LUC denies a petition and when the LUC grants a petition." State law requires agencies to give reasons only when their decisions are adverse to a party, the county argued. "There was no dispute as to whether or not the county's factual basis was sufficient for the LUC to issue a declaratory ruling as to the county's petition," it stated. "However, as to the Rosehill petitioners' petition, the LUC explained why it was denying the petition because to not do so, i.e., to deny relief with no explanation, would have been arbitrary and capricious."

Further, the county stated, "In focusing solely upon whether [Hawai‘i Revised Statutes] Chapter 205 did or did not prescribe a minimum rental period for 'farm dwellings,' the Circuit Court relied upon an overly simplistic analysis that missed the point as to why the Agricultural District was created in the first place. The permitting safeguards thoughtfully implemented by the county were to ensure that agricultural lands remain in agricultural use and are not transformed into commercial vacation-rental properties. The intended use and purpose of a farm dwelling is to support and serve as an accessory to the agricultural activities from which the single family exclusively occupying that dwelling obtains income. While a farm dwelling's primary purpose is to be a bona find agricultural service and use which supports and is accessory to agricultural activities, the purpose and use of a short-term vacation rental is merely to provide transient accommodations. These uses are completely incongruent to one another."

A Motion to Strike

Whether the county's brief will be considered by the Intermediate Court of Appeals was an open question at press time. On January 13, the Rosehill petitioners challenged the county's effort to involve itself in the appeal, asking the court to strike it.

"Only appellant State Land Use Commission (the LUC) appealed the Circuit Court's reversal of the LUC's decision," the motion stated. "Appellee County of Hawai‘i (the County) did not appeal." The county's brief, writes attorney Christopher Goodin, one of several Cades Schutte attorneys representing the Rosehill petitioners, is not an "answering brief," as the county titled it, but rather "an opening brief."

The county's brief "should be stricken," he goes on to argue, citing to a rule of the appellate court that requires an appellee who supports the position of the appellant "shall meet the time schedule for filing documents that is provided for the appellant."

"The purpose of the rule is to 'ensure … that the 'real' appellees are able to respond to the arguments for reversal – which they can't if the 'appealing appellee'" files with the 'defending appellee,'" Goodin writes, adding that if the county supports the LUC's position, as its brief sets forth, then it should have met the time schedule imposed on appellants.

County deputy corporation counsel Mark Disher answered the Rosehill motion on January 18. The county's position diverges from that of the Land Use Commission, he argues, and therefore should be considered by the appellate court.

The LUC declaratory order did not uphold the county's ordinance, he writes, since it did not carve out the exception granted to homes built on lots of record that existed prior to the 1976 cut-off date. Under the LUC's order, owners of those homes would not be able to receive non-conforming use permits allowing them to be used as short-term rentals – a clear divergence from the county's ordinance.

"As the LUC did not directly address this issue with specificity in their appeal," he continues, "it was necessary for the county to seek this distinction by way of its answering brief. Nor would the county necessarily know the LUC's position until after the filing of their opening brief, thus, to be held to the same scheduling requirements as the LUC would have been impractical in this case."

Disher raises the prospect of still more litigation to come if the LUC should prevail and its declaratory order affirmed. That, he notes, "would affect those properties … that have already been granted special use permits to continue use as [short-term vacation rentals]. To avoid any further need for litigation on what can arguably be stated as a side issue to the appeal before the court, the county seeks to have this issue addressed here and now."

The Contrary View

On the same day they challenged the county's involvement, the landowners also filed their answering brief to the state.

Again, they claim that the only question that matters is whether state law sets a lower limit on the duration of rentals of homes in the state Agricultural District. "The [county] ordinance allows owners of lots that were created before June 4, 1976, to obtain permits to rent their properties for less than 31 days," writes attorney Molly A. Olds, going on to affirm that all of the lots her clients own were created after that date. That date was selected, she says, because the state's land use law, Hawai‘i Revised Statutes Chapter 205, "was amended as of that date to allow 'farm dwellings'" in the Agricultural District.

"The amendment to Chapter 205 defined 'farm dwelling' as 'a single-family dwelling located on and used in connection with a farm or where agricultural activity provides income to the family occupying the dwelling.' Nothing in the amendment (or the rest of Chapter 205) set a minimum length of

The back yard of Palekaiko Estate. CREDIT: PALEKAIKOESTATE.COM

time that a farm dwelling must be occupied," she continues.

Olds accuses the state of failing to accept the plain language of the law. "On appeal," she writes, "the LUC works hard to ignore the words used in the Ordinance and Chapter 205. Along the way, however, the LUC hints that its arguments are untethered to the text of those laws. The hints include asserting that the 'question on appeal is whether transient use akin to short-term vacation rentals in Hawai'i County are outside the bounds of "farm dwellings," '… that the 'purpose of a short-term vacation rental is to provide transient overnight accommodations that will be temporarily rented for periods of 30 days or less by vacationers,' and that the [ordinance] 'title alone … shows that it is a rental for vacation use. … When an argument over the text skips the text in favor of references to 'similarities,' 'purposes,' and 'titles,' we know that the advocate has forgotten the first principle of statutory interpretation is that 'is the language of the statute itself.'"

As to the deference the court should have given to the LUC's own interpretation of its rules, Olds writes: "The county defined 'short term vacation rental' by the length of the rental. The LUC is not entitled to deference in rewriting the county ordinance. The LUC is not entitled to deference in rewriting HRS Chapter 205. … There is nothing ambiguous about the definition of 'farm dwelling' in HRS Chapter 205."

Amicus Requests

As of press time, two parties had requested the ICA for leave to file amicus briefs.

The first request came just three weeks after the state filed its opening brief. It was made by attorney Michael Matsukawa on behalf of Maile David, a former member of the County Council who voted in support of the ordinance limiting short-term rentals on most Agricultural land, and the unincorporated group Ka Pa'akai o ka 'Aina. In his filing, Matsukawa argued that the state had neglected to raise critical issues in its appeal having to do with exactly what government agency is charged with enforcing what part of Chapter 205. The county's role, he maintained, was pre-eminent in the case of prime agricultural land.

Despite this, he wrote, the Rosehill petitioners "tried to remove the case from the county Board of Appeals by submitting their petition to the Land Use Commission for a declaratory order, even though the Land Use Commission has no enforcement authority or responsibility to determine whether the proposed use in question is permitted on land that has soil productivity class A or B. It is further not clear why the county of Hawai'i … also tried to remove the matter … from the county Board of Appeals to the Land Use Commission as well."

The Rosehill petitioners were the only parties to the litigation who addressed Matsukawa's request for amicus status. In his memo to the court in opposition, attorney Christopher Goodin was sharp and brief.

"As a procedural matter, amicus briefs are not supposed to raise new arguments. … No one has argued that the commission's authority is limited because movants' argument is meritless," he wrote.

"As movants raise a new issue that has no merit, there is no reason to let them file a brief," he concluded.

The ICA agreed.

The second request to the court to allow the filing of an amicus brief came from the City and County of Honolulu Department of Planning and Permitting.

Saito also noted that the DPP had conferred with attorneys for the LUC, Hawai'i County, and the Rosehill petitioners. "The LUC and county consent and Rosehill objects," he wrote.

The Rosehill petitioners have asked the court to deny the DPP standing as an amicus. No decision on the DPP's motion had been made by press time.

— Patricia Tummons

For Further Reading

Environment Hawai'i reported on this in our July 2022 edition, "Farm Dwellings, Overnight Camping at Issue in 2 Court Cases the LUC Votes to Appeal."

Courts Roundup: Aquarium Fishing, Koloa Development, Kahala Permit

On January 30, Environmental Court Judge Jeffrey Crabtree granted a motion filed last year by the Pet Industry Joint Advisory Council (PIJAC) to amend a statewide ban on the issuance of aquarium collecting permits that had been in place since October 2017.

He ruled that the state Department of Land and Natural Resources could start considering up to seven permits for commercial aquarium collection in the West Hawai‘i Regional Fishery Management Area. Those permits would have to be approved by the Board of Land and Natural Resources at a public meeting. In the past, the DLNR issued collection permits administratively.

In August 2022, the 1st Circuit Court upheld PIJAC's revised final environmental impact statement on the potential effects that aquarium collection by seven permittees would have in that area. The Land Board rejected an earlier EIS in 2020 that considered the environmental impact of 10 collectors. In June 2021, however, the board deadlocked 3-3 on accepting the revised EIS. As a result, on July 8, 2021, the revised EIS was deemed to be accepted by operation of law because the board had not accepted or rejected it within 30 days of its publication.

"That decision is now before the Hawai‘i appellate courts to resolve the legal issues with the trade's revised EIS," according to a press release by Earthjustice, which represents the plaintiffs in the case that led to the initial ban.

The DLNR supported lifting the ban with regard to West Hawai‘i. "The RFEIS has been accepted and the acceptance upheld by this Court. The required [Hawai‘i Environmental Policy Act] review is thus complete. There is no actual controversy remaining … There is no basis for keeping the injunction in place," deputy attorneys general Julie China and Melissa Goldman wrote.

The Earthjustice attorneys had argued that the injunction should be kept in place until the appeal over the EIS's acceptance is resolved, because the plaintiffs are likely to prevail, there is a threat of irreparable harm to the fish and reefs, and there is a public interest in a valid environmental review.

"We're disappointed that the court would agree to open West Hawai‘i to aquarium collection again, especially given the serious legal deficiencies with the industry's EIS that will be addressed on appeal, and the serious threat of environmental harm posed by opening West Hawai‘i to collection again," said Earthjustice attorney Mahesh Cleveland in the press release. "Fortunately, we still have recourse in the appellate courts to correct these flaws, and we plan to do everything we can in that process to avoid West Hawai‘i's reefs from getting hammered by the trade once again."

An EIS PIJAC prepared for potential aquarium collectors on O‘ahu was rejected by the Land Board in October 2021. The council has not published a revised version.

Koloa Hearing: On February 3, 5th Circuit Court Judge Kathleen Watanabe will hold a hearing on a motion for a preliminary injunction filed by opponents of a luxury condominium development in Koloa, Kaua‘i, on lands they believe sustain, or sustained, endangered cave-dwelling spiders and arthropods.

The hearing had been repeatedly delayed. Meanwhile, blasting work on the property continued and was expected to be completed last year.

The hearing this month will include live witness testimony from county planning officials involved in allowing the development to proceed, as well as the scientists who concluded that the site isn't likely to support any habitat that the endangered spiders and arthropods would occupy.

The live testimony comes despite attempts by the County of Kaua‘i to avoid it, which was one of the reasons for the hearing delay. However, Judge Watanabe ruled last month to allow it.

An aerial view of the Kauanoe o Koloa luxury condominium development in December 2022. Blasting had been completed, pipes were being laid, and building pads prepared. CREDIT: KAUANOE O KOLOA

In arguing for the live testimony of county officials, attorney Peter Morimoto, representing plaintiffs E Ola Kakou Hawai‘i (also known as Save Koloa) and Friends of Maha‘ulepu, stated that all four county employees had been deposed. Even so, "The credibility of a live witness continuously feigning a lack of memory should be considered, as opposed to merely reading 'I don't remember' in a deposition transcript. This court, as the finder of fact, should view defendant County of Kauai's Planning Department employees' demeanor, tone of voice, attitude and manner when determining their credibility," he wrote.

In arguing against the live testimony, Kaua‘i County pointed out that the plaintiffs had taken more than 25 hours of deposition testimony "amounting to over 700 pages of transcripts from various county employees, including over six hours from the planning director, over five hours from the deputy planning director, nearly eight hours from various Planning Department employees, over six hours from various Department of Public Works employees, and involving 45 documents totaling hundreds of pages.

"[B]y now, plaintiffs have surely obtained whatever testimony and evidence they believe necessary for their motion for a preliminary injunction," counsel for the county wrote.

Kahala Permit: Tyler Ralston's fight against the Kahala Hotel & Resort's pre-set lounge chairs and tables blocking people from state land that's supposed to be open to the public is inching forward.

Ralston, who has enjoyed the beach fronting the hotel since the late 1960s, has for years opposed the board's annual renewal or continuation of revocable permits to the hotel's owner, Resorttrust Hawai‘i, LLC, for the use of a parcel of filled land abutting the makai edge of the hotel lot.

In the early 1960s, the state allowed the hotel's predecessor to create a swimming lagoon and improve the parcel, which was to be used as a public beach. (According to the 1963 agreement governing the project, “all of the filled and reclaimed lands and improvements seaward of the makai boundaries [of the hotel parcels] … shall be used as a public beach,”)

While the entire parcel was a sandy beach for years, the mauka side was eventually grassed over. Now, only a small fraction of the parcel remains sandy. The grassy area came to be used by the hotel for weddings, part of a restaurant, and rentals of cabanas and lounge chairs, all of which gave the impression that the grass was off-limits to the public.

In response to complaints from members of the public, including Ralston, that those uses were illegal, the Land Board eventually narrowed the scope of the permit to allow only the pre-setting of about 70 lounge chairs with small tables for hotel guests, with a requirement that the hotel install signage demarcating the state parcel and informing members of the public that they are welcome.

Despite this reduction in use, Ralston opposed the board’s November 2021 approval because he said that the hotel had been storing equipment on the parcel in violation of the permit, and that the pre-setting still inhibited his use of the property.

The Land Board rejected his request for a contested case hearing. Ralston filed an appeal in 1st Circuit Court, which he lost in June of last year. He then appealed that court’s decision, as well as the Land Board’s 2022 renewal/continuance of the hotel’s permit to the Intermediate Court of Appeals.

Attorneys for Resorttrust argue that Ralston and his attorney, David Frankel, “have been on a years-long crusade against the hotel and BLNR. Rather than acknowledging the significant public benefits the state and public receive in exchange for the RPs, they have taken the patently unreasonable position that ***any*** degree of private use of the state parcel by the hotel and its guests is *per se,* a categorical breach of various statutes and BLNR’s constitutional obligations. Their current fixation: BLNR’s authorization allowing the hotel to place a limited number of temporary, lightweight beach chairs for its guests on the state parcel. This appeal is just the latest attack from two individuals trying to force their personal preferences of how the state parcel should (and should not) be used upon BLNR and unilaterally dictate BLNR’s management of the state’s resources.”

Attorneys for the state add in their answering brief, “Ralston’s inability to sit or lie on grass that is occupied by a hotel chair cannot conceivably give rise to a property interest grounded in the constitutional right to a clean and healthful environment.”

Tyler Ralston’s appeal points out that a few years after dredging and filling of the state parcel, “the sandy beach stretched from the ocean to the edge of the hotel property, as depicted in this photograph.”

While the state’s attorneys in the case have argued that the hotel’s pre-set chairs exclude the public from only three percent of the entire state parcel (Resorttrust’s attorneys say it’s only two percent), Frankel disputes that.

He noted in his reply filed last December that neither the Land Board nor the 1st Circuit Court made any findings that the chairs only covered three percent of the parcel. And, he added, that claim can’t be considered a binding fact when Ralston has never been given the opportunity to challenge it.

What’s more, areas open to the public “should not include those areas that no one in their right mind would occupy: the area between the chairs,” Frankel wrote. He noted that a recent photograph of the lot at sunrise “reveals that RTH uses effectively prevent the public from using more than 97% of the area (particularly if just considering only the areas where people sit). Moreover, BLNR ignores the blight that these empty chairs impose upon an otherwise beautiful spot.”

Frankel argued that the permit adversely affects Ralston’s constitutional rights to a clean and healthful environment and the rights to the enjoyment of life, liberty and the pursuit of happiness. As a result, due process required the Land Board to grant a contested case hearing, he argued.

“[I]n this case, the right to a clean and healthful environment includes the right that explicit consideration be given to a variety of environmental factors, including ‘recreational, scenic, and open space values,’” Frankel wrote, citing a portion of the state’s Coastal Zone Management law, which he said governs state actions, not just those of the counties.

Frankel also argued that the state’s land use law, as well as the need to protect public beaches, also require the Land Board to consider those environmental factors.

No hearing on the appeal has yet been scheduled.

— Teresa Dawson

Environment Hawai'i, Inc.
421 Ka'anini Street
Hilo, Hawai'i 96720

Address Service Requested

Efforts to Quash Aquarium Collecting Ramp Up at Land Board, Legislature

Last month, the Environmental Court opened the door to the Board of Land and Natural Resources considering up to seven permits for aquarium species collection in the West Hawai'i Regional Fishery Management Area.

When it does, opponents will be there. And they're going after aquarium fish dealers, as well.

On January 13, the Land Board heard from opponents of a revocable permit for Hawaiian Sealife, Inc., which sought to rent warehouse space at the Honolulu airport for its live tropical fish import/export business and wholesale made-in-Hawai'i products.

The proposed rent was to be about $6,000 a month plus about $1,400 for utilities.

Perhaps not expecting any controversy for the permit, which the state Department of Transportation recommended for approval, no representatives from Hawaiian Sealife, including owner Richard Xie, attended the Land Board meeting.

Public testimony, however, was all in opposition.

Robert Wintner, founder of Snorkel Bob's dive shops, claimed that Hawaiian Sealife is the biggest exporter of reef wildlife in Hawai'i and that it may be exporting far more fish from Hawai'i than the state realizes.

Inga Gibson, testifying on behalf of For the Fishes and Pono Advocacy, added that she had concerns about whether the state Division of Aquatic Resources had ever completed an audit of Hawaiian Sealife's dealings with local aquarium collectors.

She asked that the Land Board defer action on the permit until DAR could answer questions on the audit that she said it was supposed to have conducted years ago.

"I have grave concerns regarding some activities regarding this warehouse. … The audit would compare all of his prior dealer reports, who he purchased fish from, how many fish, species, dates, comparing to collectors who sold to Mr. Xie. … It's the only way to attempt to verify what's taken from our reefs and shipped out," she said.

Some Land Board members pointed out that it was the DOT's responsibility, or kuleana, to make sure that its tenants comply with all applicable laws. But board member Aimee Barnes said, "I also think it's our kuleana to make sure you're fulfilling your kuleana." She went on to suggest giving the DOT and DAR some time to confer on whether the proposed permittee is in compliance.

Interim board chair Dawn Chang also wanted to defer the matter, mainly because no one from Hawaiian Sealife was present to answer the board's questions and the concerns raised by the public.

The board ultimately deferred the matter. To the DOT, Chang said, "My parting words to you: the applicant should be here. … They should be prepared to address those [public concerns]."

Legislation

Bills have been introduced in both the state House and Senate seeking a ban on commercial aquarium collection, regardless of the type of gear used. The House bill, HB 910, had not yet had a hearing as of press time. A hearing on the Senate bill, SB 505, had been scheduled for January 30, but pushed back to February 3.

Land Board chair and Department of Land and Natural Resources director Dawn Chang submitted testimony that seemed to support the status quo.

She noted that the DLNR's management of the West Hawai'i Regional Fishery Management Area has increased populations of two of the most heavily fished aquarium species, yellow tang and goldring surgeonfish (kole). Populations of those species, "which together accounted for 91% of the total FY2017 aquarium catch, increased significantly within FRAs between 1999/2000 (when FRAs were first implemented) and 2021/2022," she wrote.

"If the goal is resource sustainability and environmental protection, the department believes that the environmental review process, the permit application and review process, and the community engagement process should be allowed to proceed to determine whether commercial aquarium collection is appropriate or inappropriate in Hawai'i," she stated.

However, she added, the DLNR recognizes that "there may be other reasons to prohibit commercial aquarium collection based on cultural or social values, which the Legislature must consider."

The bill, introduced by Sen. Mike Gabbard, states that the Legislature must take action to protect the herbivorous fishes that help protect the state's coral reefs from the harmful effects of climate change.

"The aquarium pet trade has removed some herbivorous fish species by upwards of 80 percent of their population in many areas, directly impacting food fishers and leading to the potential extinction of some fish species. Further, the [DLNR] estimates it costs taxpayers upwards of $500,000 every year to manage the aquarium pet trade, yet the trade annually generates less than $25,000 in revenue for the state," the bill states.

The bill would allow the continuation of non-commercial capture of aquatic life for aquarium purposes, as well as captive-breeding, aquaculture, and special activity permits.

— Teresa Dawson