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Reef Capital Investors Heading to Shoals?

For the last two decades, efforts of the state and a host of would-be developers to bring new life to the old Coco Palms resort on Kaua'i have come to naught. The latest group of investors who have taken over the project seem to be headed toward the shoals as well.

Not only do they not have control over state land that they want to make a part of their operations, they are also suspected of violating laws and rules that govern land use in the most protective of the subzones within the state Conservation District.

On top of that, a non-profit group is suing to force compliance with environmental disclosure laws, while at the same time pressing forward with its own plans for a Hawaiian cultural center.

IN THIS ISSUE

Developers of Coco Palms Site Face Violation Allegations, Injunction Lawsuit

The companies working to redevelop the former Coco Palms resort properties on Kaua'i have a lot to answer for if they want to use state lands for parking, access, and a restaurant, as envisioned in building permits secured by project architect Ron Agor in 2019.

Last October, the state Board of Land and Natural Resources approved the annual renewal of three revocable permits covering those lands. Together, they total a little less than an acre but they adjoin the larger, privately owned hotel parcel.

But there's a problem: The company whose name is on the permits — Coco Palms Ventures, LLC — ceased to exist years ago.

The board knew this when they approved the revocable permits over objections from members of the public opposed to the hotel redevelopment. So as part of its approval, the board asked that the Department of Land and Natural Resources' Land Division return in March with a status report and recommendations on whether to discontinue the permits or take some other course of action.

It wasn't until the board's April 14 meeting that the Land Division reported back to the board. Kaua'i district land agent Alison Neustein stated in her submittal that continuing the permits was "in the best interests of the state and is the most prudent course of action at this time."

She noted that the owners and managers of the private property — Reef Capital Partners, RP21CP (a Reef subsidiary), and, formerly, Stillwater Equity Group (another Reef subsidiary) — had been paying the rent, providing liability insurance and maintaining the state lands. "The hotel properties (both private and state owned) have at times been a hotspot for homeless camps," she added.

She stated that her office planned to ask the Land Board to issue new permits for the three state parcels to RP2lCP. For the two smaller parcels, she also recommended that

continued on page 7

A drone shot of unauthorized work on Conservation District lands owned by RP21. CREDIT: GARY HOOSER.

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NEW AND NOTEWORTHY

'Aina Le'a Update: Last August, 38 acres of 'Aina Le'a land were sold off at a foreclosure auction to a Canadian lender, Romspen Investment Corporation. The parcel is the site where several buildings that were to be part of an affordable housing development were put up more than a decade ago. Romspen purchased the land with a $13 million credit bid.

But transfer of title and writ of possession were delayed. As the foreclosure commissioner, George "Rick" Robinson, noted in his report to 3rd Circuit Judge Wendy DeWeese, he "had attempted to secure an updated title report from several title companies, with one title company declining the request and the other title company agreeing yet not delivering that report to date."

Finally, on March 17, Old Republic National Title Insurance Company provided Robinson with the requested report. However, the report "notes several encumbrances that will need to be clarified and/or resolved before this matter can close," the court found in an order signed March 29.

The new deadline for transferring the property is now May 12.

Meanwhile, at the entry to the overall 1,000-acre site, the sign heralding the 'Aina Le'a development at the entry to the project has been painted over.

Coral Reef Plan Update: The National Oceanic and Atmospheric Administration (NOAA) has announced it will be preparing a National Coral Reef Resilience Strategy, replacing the current strategic plan adopted in 2018. Under the Coral Reef Conservation Act of 2000, NOAA administers the federal coral reef conservation program, which supports conservation projects in U.S. waters of the Caribbean and off Florida, Hawai'i, Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, and the Pacific Remote Islands Area, as well as international regions in the Caribbean, South Pacific, and Micronesia.

On April 6, it opened the scoping period intended to identify content for specific elements of the national strategy. Among other things, the strategy is to address: continuing and emerging threats to the resilience of coral reef ecosystems; gaps in coral reef ecosystem research, monitoring, and assessment; and the status of management cooperation and integration between federal managers and local authorities.

For more information and to submit comments: www.regulations.gov/NOAA-NOS-2023-0043. Click on the "Comment Now!" icon.

Quote of the Month

"So this is the language of the Hawai'i Supreme Court kinda staring us in the face with these eyeballs looking at us, telling us this is the law."

— Gary Okuda, Land Use Commissioner

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LUC Grills Kona Developer on Compliance With Environmental, Cultural Regulations

What is an act?

The question, posed in all seriousness, arose in the course of the state Land Use Commission's deliberations relating to a 40-year-old planned residential development near Kailua-Kona, in West Hawai'i.

The developer, RCFC Kaloko Heights and related companies, had been seeking an extension of time – the sixth – to comply with conditions that needed to be met before the developer could ask for the 195-acre parcel intended for its second phase to be placed into the Urban land use district. Back in 1983, when the LUC approved the project, environmental regulations, affordable housing conditions, and laws respecting Native Hawaiian traditions were much less rigorous than they are today. The developer has argued that the legal and regulatory environment that existed in 1983 is the one that still rules today, regardless of the many changes that have occurred in the intervening four decades.

Commissioner Gary Okuda was wanting to know whether Alison Kato, the deputy attorney general representing the state's Office of Planning and Sustainable Development, agreed with him that the Supreme Court's decision in *Ka Pa'akai o ka 'Aina,* handed down nearly a quarter century ago, would need to be complied with before the LUC could act on the developer's time-extension request. The OPSD and the Planning Department of Hawai'i County had both signed on to a stipulation prepared by the developer that would have granted the time extension.

Earlier in the April 12 hearing, Okuda had quoted at length the *Ka Pa'akai* decision, which provides protections for Native Hawaiian rights and customs. He had questioned the developer's attorney, William W.L. Yuen, whether the commission was bound by that decision in this case. "Isn't it true that *Ka Pa'akai* says that the Land Use Commission has an affirmative duty to make the *Ka Pa'akai* inquiry before the Land Use Commission takes any type of action that might implicate resources protected by the Hawai'i State Constitution?" he asked.

The decision was not meant to be retrospective, Yuen replied, adding, "I don't believe the action being requested at this time requires a re-analysis of the project."

When it came time for the County of Hawai'i to present its position, Okuda posed the same question to the deputy corporation counsel representing the Planning Department, Jean Campbell.

"If we don't have a *Ka Pa'akai* analysis here, doesn't that place this decision at risk if we grant the relief requested by the petitioner?"

Campbell responded that "the spirit of the case is completely addressed" and that the LUC grant of a time extension "just allows the project to move ahead. At every future stage a *Ka Pa'akai* analysis will take place."

Okuda pressed on: "Isn't it true that that's the point the court made? That the Land Use Commission could not delegate its duty to anybody else, so it's the Land Use Commission that has to do the *Ka Pa'akai* analysis."

Mark Meyer of RCFC (left) and the company's attorney, William Yuen.

"That's your reading of the case," Campbell said. "I agree with Mr. Yuen that it was not intended to be retroactive."

Kato, representing OPSD, had to have known what was coming by the time she was asked to present her client's position in support of the time extension to the commissioners.

Okuda did not disappoint.

"You heard, when I read from the *Ka Pa'akai* case, what the Supreme Court said, that agencies such as the Land Use Commission may not act without independently considering the effect of their actions on Hawaiian traditions and practices," he said.

So, he continued, "my first question is, as that term 'act' – A C T – is used in that sentence, are we taking an action or acting as that word is used in the *Ka Pa'akai* case today? Is what we're being asked to do is act?"

Kato seemed to be flummoxed. "I'm not sure I know the answer to that," she replied.

Okuda pressed her: "What is the Office of Planning and Sustainable Development position on this? When we as a government agency take an action which affects land use as we're being requested to do here today, is that an act or action as that term is used in the *Ka Pa'akai* case?"

"I don't know the answer," Kato said. "I have not researched this issue before."

Okuda: "Based on your experience as a lawyer, what does the word act mean?"

Kato (puzzled): "What does the word mean?"

Okuda: "Aren't we being asked to do something? A rule of statutory construction is you just use the plain meaning of the word. Or are you saying that what we are being asked to do isn't really an action?"

Kato (struggling): "I mean, that has to be taken into context, with a review of the case —"

Okuda: "Are you aware of any legal authority that indicates that what we are being asked to do today is not an act as that word is used in the sentence I read from the *Ka Pa'akai* case?"

Kato: "I'm not."

Times Change

The developer, which took over a project initiated by a Japanese firm, Y-O Limited Partnership, and Yuen argued that with respect to *Ka Pa'akai* and practically every other regulation and court decision made since 1983, the LUC's hands were tied. By its actions back then, it had established the conditions of the Phase Two redistricting and, so long as the developer met them, the LUC could not impose any new requirements and would have to grant the requested redistricting.

Under that 1983 decision, Y-O Limited Partnership was to have applied for redistricting of the Phase Two land by January 19, 1988. It was anticipated that by that time, the developer would have "made substantial completion of the onsite and offsite improvements," including construction of a road connecting Queen Ka'ahumanu Highway to the belt road, Mamalahoa Highway, and partial completion of affordable housing requirements. The deadline was shifted to 1993, then 1998, then 2003, then 2013, then 2023.

Last November, Yuen submitted a motion to the LUC seeking to have it grant another 10-year extension to allow the developer to make "substantial completion" of the specified improvements. Yuen wrote that the commission had "pre-approved" the reclassification of the Phase Two land, with reclassification to be granted, no questions asked, when the developer made "a prima facie showing" of "substantial completion."

The Office of Planning and Sustainable Development was initially agreeable to a time extension – not of 10 years, but of three. The office, wrote then-OPSD director Scott Glenn, was concerned "with the length of time that has passed since the original proposal was approved by the LUC. OPSD finds that another ten-year extension is unnecessary given the representations made by the petitioner that construction can begin once the wastewater line is in place, i.e., 2024. A shorter extension would give the LUC an opportunity to weigh in earlier, if the project is further delayed. …. Finally, OPSD recommends that the Phase II application comply with the state and county's policies, regulations, and rules pertaining to land development, including, for example, but not limited [to], conformity with current planning documents and subdivision design standards."

The one-paragraph stipulation that was ironed out among the OPSD, county, and developer, was submitted to the LUC one day before the hearing. It would give RCFC 10 years before it needs to seek redistricting of the Phase Two land, but it also would set a three-year time frame for completing 10 percent of the required affordable housing units built and offsite infrastructure.

Archaeology

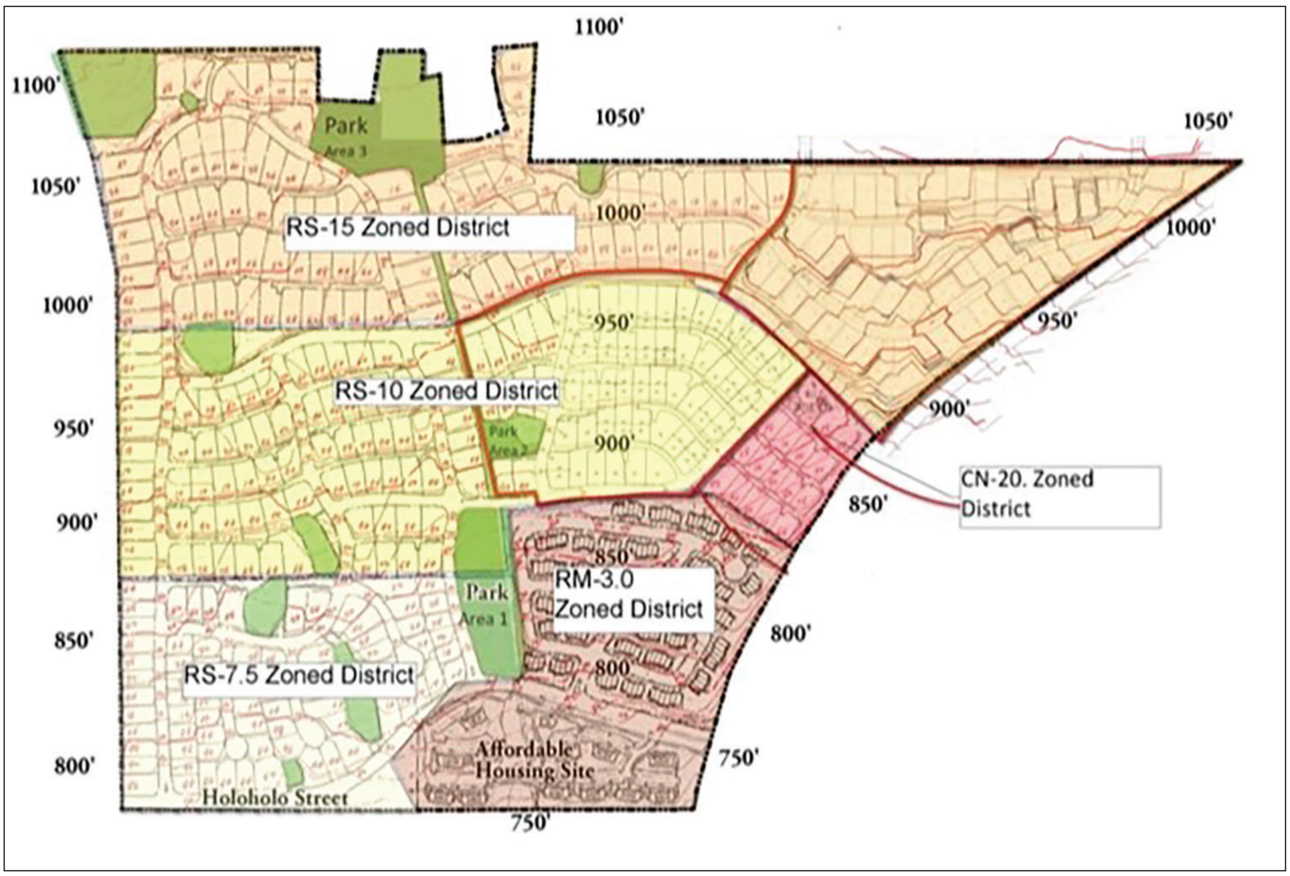
Commissioners as well as members of the public who testified in person or who submitted written statements raised other concerns besides *Ka Pa'akai* issues.

Questions were raised as to the adequacy of the 2005 archaeological inventory survey, given that an AIS completed in 2019 for an 11-acre subset within the larger 213-acre Phase One parcel found several significant archaeological sites that had been overlooked in the earlier survey. The 11-acre parcel had been deeded to the Hawai'i Island Community Development Corporation, which is developing an affordable housing complex on the site to comply with affordable housing conditions in the 1983 decision.

Mark Meyer, speaking for the developer, was firm on this point: "There are kind of two different questions at hand. One of them is, are we going to redo the entire archaeological survey up front on the first phase? The other one is, are we going to be respectful of history out here, make sure we abide by the rules and regulations?

As to the first, he said, "we're not in a position to re-do that entire process. I probably have never done a study of a large-scale property in my entire life that somebody couldn't go, how do you know you got everything right? And the answer is probably never that we can get everything exactly right the first time."

But, he continued, "what we are committed to is, there will be no – you find a burial out there and you say, 'hey, let's go move it to somewhere else.' We are a very large firm with a lot at stake in both our reputation and the financial side of our company. We're not going to risk that by doing some illegal activity." (RCFC is indeed a large firm, but its reputation in Hawai'i – among the Land Use Commission and some Maui residents, at least – has perhaps been tarnished by its actions in relation



Kaloko Heights Phase One Plan. CREDIT: RCFC KALOKO HEIGHTS to the Kehalani subdivision. For details, see the February 2021 edition of *Environment Hawai'i.)*

Chapter 343 Compliance

Commissioners spent a fair amount of time during the six-hour-long meeting questioning whether RCFC should have been or should now be required to comply with the state's environmental disclosure law, Chapter 343, which would require preparing an environmental impact statement or environmental assessment.

"What would be the practical harm in doing this assessment, which would also take into account the concerns raised in public testimony about whether there could be potential impacts to surrounding areas?" Commissioner Okuda asked Meyer. "Just do that. And would there be any real practical delay in what you're doing right now? Because you might be able to do that within the same period of time and nothing really slows down. And in the end you have an ironclad – or close to an ironclad – legal situation. Is there a practical problem in just trying to comply with Chapter 343?"

Meyer replied that the project was in compliance. "And," he added, "there certainly is a huge practical problem" that would accompany preparation of an EA. "The process you go through to the point you're entitled to build something … is a long and laborious process. We go through all this stuff … to then say, 'let's go back and start over again' – just from a practical standpoint makes no sense."

Okuda then quoted from a case decided in 2006 by the state Supreme Court, *Sierra Club v. Office of Planning.* At issue was whether the tunnelling under state roads to accommodate water and sewer lines supporting the development of the Koa Ridge project on O'ahu required Chapter 343 compliance: "This is what the Hawai'i Supreme Court said, in connection with what triggers a Chapter 343 review: 'Additionally, the project proposes the use of state lands inasmuch as the construction of the sewage and water transmission lines will require tunnelling beneath state highways.' …

"This is the final sentence: 'Accordingly, the project is an action that proposes the use of state land and an environmental assessment that addresses the environmental effects of the entire project is required.'

"So this," Okuda continued, "is the language of the Hawai'i Supreme Court kinda staring us in the face with these eyeballs looking at us, telling us this is the law."

Yuen, who represented one of the parties sued by the Sierra Club in that case, responded: "I believe that the environmental assessment that was prepared by HICDC covering the affordable housing project that also covered their sewer line adequately addressed the environmental assessments of the sewer line."

"Yeah," Okuda said, "but that's not what the Supreme Court said in *Sierra Club versus Office of Planning.* It says the assessment has to cover the entire project."

The environmental assessment for the affordable housing project, prepared in 2019, covers just the 11-acre affordable housing project immediately makai of the market-rate development.

"The HICDC property" – 11 acres – "is referred to throughout this EA as the Project Site," that document states. It mentions the much larger Kaloko Heights market-rate development as one of several "reasonably foreseeable future" projects, along with other residential and light industrial projects near Hina Lani Street and housing in the Villages of La'i'opua in Kealakehe. There is no further mention of impacts from the Kaloko Heights development, either in the brief discussion of projected wastewater generation (22,000 gallons per day from the affordable units) or in the traffic impact analysis report. Other planning documents not included or mentioned in the environmental assessment describe the sewer line as running along the south side of Hina Lani Street (requiring tunneling under that county roadway) and using county-owned rights-of-way along both Hina Lani and Ane Keohokālole Highway.

The 2019 agreement between the county Department of Environmental Management and RCFC allowing for wastewater to be treated at the Kealakehe sewage treatment plant states that the total wastewater generated at full build-out of Phases One and Two, as well as the affordable housing units, will be 364,000 gallons per day. In other words, the affordable housing wastewater flows mentioned in the environmental assessment are about 6 percent of the total flows expected to be generated by the Kaloko Heights development.

Under Chapter 343, environmental review is required for any action that uses state or county funds, including "any form of funding assistance … and use of state or county lands."

A Denial

In his closing argument, Yuen continued to insist that to the extent the sewer line triggered Chapter 343, that had been taken care of in the 2019 environmental assessment done for the affordable housing parcel.

Now, he said, "the only question in the commissioners' minds is whether the commission has to make a *Ka Pa'akai* determination on reclassification" of Phase Two.

"It's our position that the commission in 1983, when it made the decision, was not bound by the *Ka Pa'akai* decision because the *Ka Pa'akai* decision followed after the 1983 decision. If the commission would like a *Ka Pa'akai* analysis, we would be prepared to say the petitioner would do one before coming to the commission in 2033 for approval of Phase Two. Other than that, we think the statutory scheme is, once the Land Use Commission makes a boundary redistricting determination, all the other studies, drainage, et cetera, in the remainder of Phase One and Phase Two would pass to the county."

Commission chair Nancy Cabral then asked if any of the few members of the public in attendance wished to testify. Kimberly Crawford and Ruth Aloua, both of whom had testified in favor of placing more requirements on RCFC at the start of the hearing, weighed in once more, repeating their earlier concerns about impacts of the development on water and Hawaiian rights. Both mentioned the need for housing – but housing that the community could afford, and not another gated community that would not address the community's needs.

Crawford informed the commissioners that she herself was living in a three-generational home, along with her parents and children. "Although we need housing for our people, 100 affordable housing units is barely putting a dent in this. Housing at the market rate isn't affordable to even the people living here with good-paying jobs. Let's be real.

"Are we really doing a service to our community by pushing forward this Phase Two or could we do better planning in 2023 than we did in 1983?"

Aloua was even more passionate on the need for housing that was affordable to the community.

"Do we need market homes that are going to be in a gated community?" she asked. "Who in this room can buy a house for a million dollars? That's the market. That's what we're looking at…

"We have our kids living in cars in the Kmart parking lot. We have families living in cars, going to work, hoping they come home and all their mea [things] are still inside their cars parked on the side of the road. This project, it has to be looked at. It has to be reconsidered. We cannot continue

continued on page 6

Suspect Housing Credits Won't Be Used – At Least at Kaloko

Mark Meyer, a representative of RCFC Kaloko Heights, LLC, has told the Land Use Commission that the company will not be making use of the Hawai‘i County affordable housing credits that it purchased in 2015 from one of the companies associated with former county Housing employee Alan Rudo, who has pleaded guilty to federal charges of fraud. Not at Kaloko, anyway.

As *Environment Hawa‘i* has reported, RCFC purchased the four credits from the fraudulent Luna Loa Development, LLC, for $50,000 each. Affordable Housing Agreements worked out with the county Office of Housing and Community Development for the Kaloko Heights development stated that by using these four credits, RCFC satisfied requirements for 40 units of affordable housing.

Commission Chair Nancy Cabral asked Meyer if he was "aware of some controversy involved with that, that this may have been part of something else going on in the bigger picture of Hawai‘i County, with problems with those transfers or those housing credits?"

Meyer replied: "I think I know what you're talking about. We had purchased like three credits or something like that early on from somebody. I read about it recently. Bill [Yuen] brought me up to speed with it. Somebody was selling credits who is now in some legal hot water.

"We're not actually relying on those credits for this development, okay? So that those, whatever those credits may or may not be, whether they are valid or not valid, it doesn't affect this project.

"I think originally those were bought when the group was looking at, 'hey, maybe we can get out and get started right away if we have some credits.'"

But, he continued, "we really determined as we looked at it that what we really needed was to find a partner to develop all the units so that we weren't trying to piecemeal our way through this thing, okay?"

There has been no updated Affordable Housing Agreement with the county that deletes the use of the four housing credits.

County Office of Housing and Community Development administrator Susan Kunz was asked whether she had been notified by RCFC it would not be using the credits. She replied: "OHCD is not aware of RCFC's intentions regarding its obtained housing credits. It would be inappropriate for OHCD to comment on that."

But just because RCFC will not be using the credits for the Kaloko Heights project does not mean they won't be using them at all. William Yuen, attorney for RCFC, was asked if RCFC had surrendered the credits to the county. Here's what Yuen told *Environment Hawai‘i*:

"The Land Use Commission and the county have differing affordable housing conditions and differing standards of how their respective affordable housing conditions [are met]. Mark Meyer told the commission RCFC would not use the county credits to satisfy the commission's affordable housing requirement. That statement does not preclude use of the credits for other purposes."

— Patricia Tummons

For more information, see "Affordble Housing Agreements May Violate Condition Set by LUC" in the April 2023 edition of Environment Hawai‘i.

Compliance *continued from page 5*

to just expand, expand, and grow."

Tom Yeh, an attorney who has worked for RCFC, then testified.

"RCFC wasn't responsible for the last 40 years," he said. "They've taken this project and brought it to the point where they can develop Phase One to get to Phase Two.

"You can make sure they comply with the conditions of *Ka Pa‘akai* for Phase Two, comply with all those rules and regulations that they're going to have to comply with either from a state or county level."

Okuda asked Yeh, "If you're saying a *Ka Pa‘akai* analysis is going to have to be done at some point in time, why not just do it now and get the ball rolling? I mean, what is the harm? … What is the practical effect by just making sure these last couple of boxes are checked off so there is not something that happens like the Superferry case later on, where somebody pops out of the woodwork and just grenades this thing?"

"To the extent the applicant is required to follow *Ka Pa‘akai,* it will follow it to the extent the law requires it," Yeh replied.

Okuda then made a motion that the commission defer a decision on the time extension request "until a date that Mr. Yuen selects. … If you and your clients decide that this is a waste of time to deal with the issues raised today, fine. This will also give us time to consider and digest everything that was said today."

His motion failed, prompting him to make a motion to deny the request.

"I've already stated my reasons why I don't think we can move forward today," Okuda said. There was the lack of compliance with *Ka Pa‘akai,* he said. "Secondly, I believe Chapter 343 has been triggered."

Other commissioners voiced their agreement.

Before the vote, Chair Cabral weighed in: "Denying [the request] at this time does not mean Phase Two disappears. It's just in limbo until such time as Phase One continues to be developed. Then the petitioner could come back with another request to get Phase Two activated. Hearing the concerns of the community might help the petitioner."

With that, the commission voted unanimously to deny the time extension.

Following the hearing, *Environment Hawai‘i* asked Yuen how his client would respond to the denial. "No comment," he replied, "as I don't know what the owner intends to do. It certainly presents some problems, although the easy way out would be to develop agricultural lots."

With the 193-acre Phase Two parcel zoned for five-acre Ag lots, there would probably be at most around 30 lots, given the need for roads, including the proposed extension of Kealaka‘a Street south from Hina Lani, and the inevitable set-asides for archaeological sites yet to be found and inventoried.

— Patricia Tummons

Board *continued from page 1*

they eventually be converted to long-term easements to RP21CP. For the largest parcel of 0.855 acres, she recommended that a permit to RP21CP continue until staff can sell a long-term lease for the land at public auction, "since there has been interest from other parties, besides [the non-profit community group I Ola Wailuanui] and RP21CP."

Standing in the way of any of that occurring are a couple of things, if not more: 1) possible Conservation District violations that appear to have occurred on RP21CP's private lands, and 2) a lawsuit brought by I Ola Wailuanui seeking to enjoin further activities on the lands until a review of environmental impacts is completed.

Coconut Trees

At the Land Board's April 14 meeting, as representatives of Reef Capital, RP21CP, and their local contractor were professing their desire to be good stewards of the culturally significant area, Stillwater received a notice of alleged violation and order from board chair Dawn Chang regarding what appeared to be unauthorized clearing, grading, and grubbing on lands in the Protective subzone of the Conservation District.

Days earlier, I Ola Wailuanui board member Gary Hooser had sent the DLNR's Office of Conservation and Coastal Lands a drone video taken on April 7 showing "machinery moving debris and grubbing, and dumping debris into what appears to be a wetland." The video showed scattered piles of dozens, if not more, felled coconut trees.

A follow-up inspection by DLNR staff on April 13 showed that the Conservation District parcel, owned by RP21CP, had, in fact, been cleared, vegetation piled up, and a dirt road graded.

Chang recommended that the landowners stop all work and respond to the allegations within 30 days. She also noted that the Land Board might impose fines of up to $15,000 per violation plus administrative and restoration costs.

When asked last month whether the department had received a response to the notice of violation, a DLNR representative stated that it could not comment because the investigation into the alleged violations is ongoing.

Whatever the ultimate findings are in the case, at least one Land Board member made it clear at the board meeting how he felt about the company's decision to cut coconut trees in the area.

After ecologist Carl Berg testified that live coconut trees were being cut on Conservation District lands in the area, board member Kaiwi Yoon noted that in the Hawaiian culture, cutting coconut trees is considered an act of war.

The developer's contractor, John Gibb, responded that his crew had cut coconut trees that were rotting and posed a danger, or were in an area that the Fire Department had asked to be cleared to provide better access.

Gibb suggested that only 15 trees had been cut.

"Nobody said, 'Hey, we're going to clear this out per what the Fire Department requested in an act of war. … I understand where you're coming from. … By no means am I looking for an act of war," he said.

Later in the meeting, Hooser showed shots from the drone footage he had taken.

"There's hundreds of trees. Not 15. Not five," he told the board.

When the board members asked Land Division administrator Russell Tsuji whether Conservation District violations on RP-21CP's private lands would affect the company's ability to obtain or retain a lease or permits for the state lands, Tsuji said he didn't think so.

"We've never interpreted a violation on private land to affect a state lease," he said.

DLNR permits and leases usually contain general conditions requiring that the holder comply with federal, state, and county laws, and some testifiers suggested that failing to keep current on property taxes or violating Conservation District rules could be seen as a violation of a DLNR permit or lease.

The specific lease for the coconut grove section of the Coco Palms Resort area, however, seems to limit that to laws "pertaining to the said premises." However, it also prohibits any tree-cutting without permission from the DLNR first.

CREDIT: DLNR

It's not clear who cut all of the felled trees shown in the drone footage, or where those trees were cut from. In any case, to say that Yoon looked unfavorably on any of the coconut tree-cutting in the area would be an understatement.

"When I saw [Hooser's] picture, I almost fell out of my chair. The reason why the trees are so important is because Kapuaiwa, we all know him as Kamehameha V, was the one who planted 1,000 of them. Why? To commemorate his warriors," he said, noting that there appeared to be only 100 of those trees remaining. "If we continue cutting these trees, what are we saying about the monarchy and the people before that? … I hurt when I saw that picture. And we can do better," he said.

Follow-Up

"The board has been put on notice the department needs … some additional information," board chair Chang said after hearing all of the public testimony.

A lone backhoe operator digs a hole near the coconut grove area of the former Coco Palms Resort site.
CREDIT: GARY HOOSER.

In addition to the alleged violations in the Conservation District, testifiers suggested that the developers were not following a 2013 archeological monitoring plan for the area that had been approved by the State Historic Preservation Division.

Because of the high likelihood that ancient burials may be found on the properties (they've been unearthed before), the plan requires all ground-disturbing activities to be monitored by an archaeologist and perhaps limited to hand clearing.

A photo provided by Hooser shows a backhoe operator digging a hole along a fence near the coconut grove. It's unclear whether anyone else is present, but Hooser says that there wasn't.

"To my knowledge, we've had an archaeologist onsite for all digging operations," Reef's Chad DeCoursey told the board in response to the allegations.

Other testifiers alleged that an ancient fishpond had been filled in. DeCoursey, who is based in Utah, said he was not sure that that had actually occurred.

Carl Berg, an ecologist who testified that he had been hired to advise workers doing road construction in the area on where to avoid protected bird species, told the board that a number of endangered waterbirds are there.

"They specifically asked me to find all the endangered species of birds and to tell them where they should go and I had the authority to say, 'You can't go here. You can't go there if birds are there.' Nene (Hawaiian goose) is there. Koloa (Hawaiian duck) is there. Ae‘o (Hawaiian stilt)," he told the board.

Back in March 2018, when the land was under different ownership, Dave Smith, administrator for the DLNR's Division of Forestry and Wildlife, recommended that any activity on the site "should take into account the presence of endangered species that may be in the area and proceed accordingly to avoid take of listed species."

Also, in the past few years, the Coco Palms Resort area was listed on both the state and national registers of historic places. Chapter 6E of Hawai‘i Revised Statutes requires projects on listed properties to obtain a concurrence letter from SHPD before commencement.

By all accounts, work by the current owners has commenced.

"We have been to a number of meetings with SHPD," DeCoursey said, but added, "We would have to check our files," on whether his company had received a concurrence letter.

"Have they filled the fishpond? Have they complied with SHPD? Do they have a 6E concurrence letter?" Chang wanted to know. What's more, because the developers were clearly not the holders of the current revocable permits, "If anything happened on the three RPs today, if someone got hurt, the state of Hawai‘i would be responsible. … We do have an obligation to follow up," she said.

Litigation

The Land Board is expected to meet again soon to revoke the permits issued last year and to issue new ones to the current project developers. Attorney Bianca Isaki, who is representing I Ola Wailuanui in the litigation over the board's permit approval last October, told *Environment Hawai‘i* that even if that happens, her clients would still want to follow through with their efforts to have the potential impacts of the full hotel redevelopment analyzed in accordance with the state's environmental review law, Chapter 343 of Hawai‘i Revised Statutes.

A hearing on I Ola Wailuanui's motion for summary judgment on the complaint it filed last December is scheduled for May 23 in 1st Circuit Court. Among other things, the group seeks a declaration that the Land Board violated Chapter 343 when it exempted the permit renewals from any analyses of environmental impacts.

The group does not ask that the permits be declared void. Rather, it asks that the court enjoin the Land Board and various Doe entities, "and their employees, agents, servants, and representatives, and any other persons acting in concert with it, under its authority, or with its approval, from taking further action on the basis of the Coco Palms RPs until defendants fully comply with HRS chapter 343, §171-55 (which governs use of state land), and article XI, §§1, 7, and 9 of the Hawai‘i Constitution (regarding the conservation, control and development of resources)."

Isaki said the state's attorneys have said they may ask for a continuance of the hearing on the motion for summary judgment to allow the Land Board to revoke the old permits and moot the case. She added that a case that appears to be moot may nonetheless be heard by the court if a ruling would serve the public interest. In this case, she said her clients

Endangered Nene (Hawaiian goose) and other protected native waterbirds reportedly inhabit or inhabited the Coco Palms Resort area.
CREDIT: USFWS.

would not want permits to be issued to the current developers without an environmental assessment being done first.

Segmentation

Under state law, a developer cannot avoid the requirement to do an environmental review by breaking its project up into smaller, less impactful pieces. In the case of the former Coco Palms Resort site, it spans 32 acres. About 12 are privately owned. The rest is owned by the state.

DeCoursey told the board his company had purchased the former lessee's interest in the state lease for the coconut grove area. That lease, for "landscaping and maintenance of premises for aesthetic, park and recreation purposes," expires in 2048.

The lease allows the Land Board to approve the transfer of the lease to the "corporate successor of the Lessee." The Land Division has not yet brought that matter to the board.

As for the revocable permits, they cannot be transferred. The Land Division has described the areas they cover as ancillary to the hotel redevelopment on the private lands. And in its October 2022 recommendation to renew them, it determined that they were exempt from the need to do an environmental review under Chapter 343. (Rules for the department allow exemptions for permits "that are routine in nature, involving negligible impacts beyond that previously existing.")

While the areas under the permits cover only a small part of the overall project, the Land Division's report to the board notes that Archie McDonnell of Reef Capital Partners thought they were important to retain. McDonnell told the division in March that if the board cancelled the revocable permits, "the developer would sue the state since the cancellation of the Coco Palms RPs may affect the developer's permits and the developer would suffer monetarily."

An attorney for Kaua‘i County informed the division that none of the resort parcel's entitlements would be affected if the permits were cancelled. However, she added that access, which at least one of the RPs provides, might be an issue.

In I Ola's motion for summary judgment, filed on March 17, Isaki and co-counsel Christina Lizzi and Ryan Hurley argued, "The Board's Wailuanui RPs and other Coco Palms land dispositions are increments of a larger total program of hotel redevelopment. Easements for sewer, access, parking, restaurants, and other hotel infrastructure are necessary for the larger action of hotel redevelopment. And a single environmental disclosure document could address the Board's apparent endorsements of Developer's hotel redevelopment project as a whole. The Board incorrectly segmented its Wailuanui RPs from the larger total program of permitting Developer's hotel redevelopment through multiple leases, easements, and permit actions, all of which should have been considered together in their October 28, 2022 decision."

They continued, "Permitting, leasing, and granting easements to the adjacent Developer and Coco Palms Ventures, LLC are part of plan to construct a hotel resort, including three swimming pools, a lagoon, several restaurants, an audience hall, walkways, parking lots, rows of cottages, wings of hotel rooms, and other hardscaped construction. The cumulative impact of such development is significant and therefore ineligible for exemption from HRS §343-5 environmental document requirements."

In cases where cumulative impacts may be significant in a particularly sensitive environment, exemptions do not apply, they noted. "Neither the Board nor its staff conducted an analysis to determine whether exemptions could be applied to the Wailuanui RP lands," they wrote.

They added, "The Board's tacit approval of hotel redevelopment through issuance of the Wailuanui RPs entails unassessed impacts on public facilities, climate change planning, traffic, greenhouse gas emissions, and other environmental factors. The failure to adequately review and mitigate impacts, threaten to impair Plaintiffs' aesthetic, cultural, subsistence, and recreational interests in and near areas that would be affected by Coco Palms hotel redevelopment."

Attorneys for the state had not yet filed their response to the motion by press time.

Another Option

While a court determination that an environmental assessment or environmental impact statement needs to be done for the revocable permits would be a legal victory for I Ola Wailuanui, the group would much rather see the whole project go away.

The group has its own vision to create a Hawaiian cultural center on the properties. According to its website, the center might include a community gathering space, agricultural restoration and food production, lāau lapa‘au medicinal and native Hawaiian gardens, fishpond restoration, museum, musical amphitheatre, hula mound and more.

The group has offered to buy the private lands and asked the DLNR in February about the possibility of it obtaining the revocable permits and the coconut grove lease.

In its April report to the Land Board, the Land Division rejected the idea, noting that the lease for the grove does not expire until August 2048 "and cannot be arbitrarily cancelled."

The report added that the Land Board cannot compel the lease's assignment and that in any event the uses allowed under the lease do not align with the groups' vision. (The lease does allow the Land Board to withdraw portions of the lease area for public uses or purposes.)

"[S]taff feels that the RPs on their own are not suited for [I Ola Wailuanui]'s suggested use due to size and location. Therefore, the IOW's proposed project is not feasible with just the Coco Palms RP areas only," the report states. (The group has also suggested that the smaller RP parcels be dedicated for public beach parking, as erosion has eaten away previously used areas.)

Following the Land Board meeting, Reef Capital announced that it was committed to demolishing the old hotel to make way for a new 350-unit hotel. As DeCoursey told the board, "We want to be good stewards… We spent just over three quarters of a million dollars in the last six months on this site. … Those are numbers no one in the community has been willing or able to produce."

Even so, the company's path is far from clear.

In January, it survived an attempt by I Ola Wailuanui to get the county Planning Commission to find that building permits issued for the project years ago had lapsed. However, the lawsuit in state court is still alive.

Also, in written testimony to the Land Board, attorney Teresa Tico, who also represents I Ola Wailuanui, stated that the group was challenging an expired determination by the U.S. Army Corps of Engineers that the resort development is not in a wetland and, therefore, does not need a federal permit.

"Based on historical data, the entire Wailuanui area is a wetland. The Army Corps jurisdictional determination (JD) that no federal permit is required EXPIRED and has not been renewed. … We have historical data that the entire area is a wetland, requiring Army Corps permitting. We are requesting Army Corps issue a Cease and Desist Order until a determination is made," she wrote.

In addition to the challenges raised by I Ola Wailuanui, Coco Palms Hui LLC, the company that previously owned the private lands and interests in the state lands, has challenged the claim of title made by Reef Capital. That appeal could hamper efforts by Reef Capital to secure funding, to sell the property, or to even get the Land Board to approve permits or a lease transfer.

— Teresa Dawson

Iconic Hilo Condominium Gets Permit to Armor Eroding Cliff Face

The Bayshore Towers condominium is an iconic fixture of the Hilo shoreline. The tall, pinkish building clings to the coast on a high cliff point just north of the Singing Bridge that links the town to the Hamakua Coast. The 15-story condominium complex is the tallest structure on the island, having received in the 1960s a permit to build before the county banned future construction of such tall buildings.

Now, like so many other near-shore structures across the state, it is confronting the problem of coastal erosion.

Last year, the homeowners' association applied for a permit to undertake a $2 million shoreline stabilization project. In late March, the county Planning Department approved the work.

The steep cliff face fronting the Bayshore Towers. CREDIT: JPB ENGINEERING.

This isn't the first time the buildings' owners have attempted to address an eroding cliff face. According to the application, "Around 2004 Meta Engineering proposed a slope stabilization solution that included a grade beam at the top of the slope supported by vertical piers and horizontal tie backs. This solution was completed and has failed. The failed piers can be seen on the cliff face."

In 2016, another engineering company proposed "installing vertical piers on the pool to remove the vertical load on the slope. Their assumption was that if the pool weight was removed from the slope, the slope would stabilize." No work was undertaken at that time.

In 2019, JPB Engineering "did a full geotechnical investigation," including three borings down more than 20 feet. Based on the borings, soil analysis, and engineering analysis, "it was determined that the cliff consists of material that is susceptible to erosion for the upper 20 feet. Below 20 feet (approximately) is stable rock." Jonathan Brandt, principal of JPB Engineering, completed the application on behalf of the homeowners' association, attaching summaries of the studies, engineering drawings, and photographs.

Despite the price tag, Zendo Kern, county planning director, issued a Special Management Area minor permit to cover the work. No shoreline certification was required, he wrote. The shoreline is situated at the base of the cliff, while "all work will occur within the shoreline setback area." Hence, "a shoreline certification will not be required for the proposed project as it is unnecessary to determine the setback location."

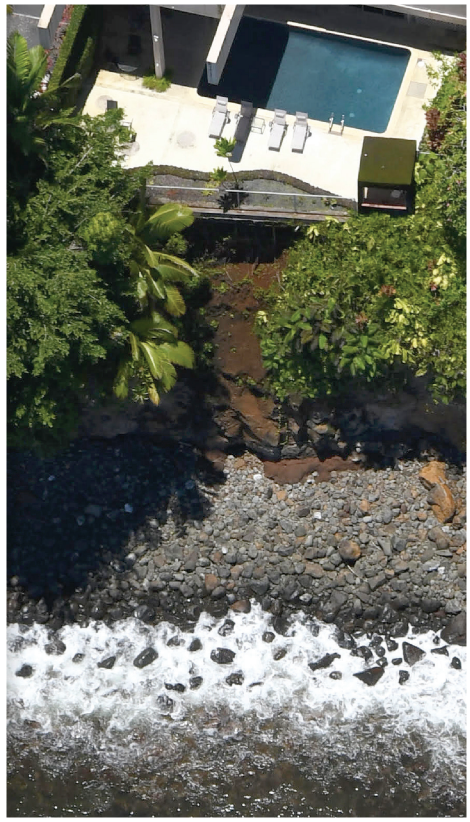
Plans and photos submitted to the county show a nearly vertical cliff face that is covered in vegetation – shrubs, grasses, and palms. The proposed work will remove the vegetation but, Kern says, "will not alter the exiting [sic] grade of the shoreline setback area other than to smooth out eroded areas that will eventually collapse into the ocean."

The engineering firm intends to cover the cliff face with more than five inches of concrete. "The removal of loose material will result in the edge of the cliff moving more inland," the application states, necessitating removal of a garden wall and walkway near the swimming pool and loss of at least one parking space – although these are to be restored after the project is completed.

As described in the application and approval letter, the pali (cliff) is "approximately 30 feet tall with the top 20 feet being unconsolidated lose [sic] sediment, and the bottom 10 feet being rock." The vegetation and loose soil will be removed, followed by an inch-and-a-half "flash coat" of concrete. Soil anchors will be placed every six feet along three horizontal rows on the cliff face, then more concrete, four-and-a-half inches thick, will be applied to the cliff face.

"Once the pali face is completed," the plans state, "the soil anchors will be connected via galvanized steel plates to the concrete."

To clear the cliff face, "men will move up and down the slope removing all the vegetation and loose material." The application states that, "on past projects, governing agencies required a platform be built and lowered into place below the workers so that any loose material that fell would be captured."



Aerial shot shows erosion on cliff face fronting the Bayshore Towers. CREDIT: RYAN PERROY, UH HILO, SDAV RESEARCH LAB.

The county approval doesn't require this. Instead, Kern writes: "The applicant states that debris removed during smoothing of the pali face will be collected… No material will enter the ocean."

Despite the project's eye-popping cost, the planning director determined that it was a permitted activity within the Special Management Area. The letter takes note of a permit issued in December 2004, allowing construction of a "seacliff retention system." At that time, "It was determined that the proposed project was considered to be a 'minor structure or activity.'"

In the March letter, Kern goes on to justify issuance of a minor permit on the basis of that the action is needed "to maintain an existing portion of an apartment building" and that it won't interfere with shoreline access or public views. Further, there are no "public viewplanes that will be affected by this project."

"Based on the preceding information, the Planning Department has determined the proposed activity may be permitted in the shoreline setback area without the need for a shoreline setback variance pursuant to Planning Department Rule 11-8: *Minor Structure and Minor Activity.*"

— Patricia Tummons

NOAA Begins Environmental Scoping For Pacific Remote Islands Sanctuary

The National Oceanic and Atmospheric Administration has begun the environmental scoping process for a proposal to establish a national marine sanctuary surrounding the Pacific Remote Islands. The proposal would extend sanctuary waters from the fast land out to the 200-mile limit of the U.S. Exclusive Economic Zone. At present, the Pacific Remote Islands National Marine Monument extends 50 miles offshore.

The Pacific Remote Islands Coalition, which has for years been pushing for the sanctuary, submitted a formal nomination to NOAA on March 11. On March 24, President Joe Biden directed NOAA to consider it for designation.

In the nomination, the coalition cites more than the need to protect the natural resources of the area. It points to the region's "storied history, beginning with Pacific Island cultures – Native Hawaiians, Chamorro, and other Indigenous Peoples – who voyaged across the Central and Western Pacific interpreting the stars, winds, and currents to exercise a wayfinding proficiency that allowed for the vastness of the largest ocean on Earth to become a shared home."

It also celebrates "the bravery and sacrifice of the Hui Panalā‘au – a group of 130 young men, mostly Native Hawaiian, who voluntarily occupied the islands of Jarvis, Baker, and Howland, from 1935 to 1942 when the region was the prime oceanic battlefield of World War II. Their presence played a vital role in the United States making a territorial claim over the islands, which are defining elements of the modern footprint of America."

"These men should be honored and their work and stories celebrated in the new National Marine Sanctuary. The federal government should do this in close communication and collaboration with the living descendants of the Hui Panalā‘au," the group says.

"In the face of the mounting climate and biodiversity crises and in line with the administration's priority to honor Indigenous and Tribal cultures and practices," the nomination states, "the administration should use its authority to make history, and honor history, by designating the waters surrounding all of the Pacific Remote Islands to the full extent of the Exclusive Economic Zone (EEZ) as a new National Marine Sanctuary (NMS). … This would add nearly 700,000 square kilometers of highly protected waters, resulting in creation of the world's largest highly protected marine protected area (MPA) in national waters."

Acropora corals grow toward the sunlight to form beautiful, massive tables at Palmyra Atoll.
CREDIT: JEFF MILISER/NOAA.

The coalition would like to see NOAA strictly limit activities within the proposed sanctuary, including a ban on all commercial fishing and on all extractive activities, including seabed mining.

However, it adds, cultural practices and "limited recreational and sustenance fishing could be allowed," but "should only be considered if such activities can be documented to be consistent with maintaining the high level of protections of the existing [Pacific Remote Islands Marine National Monument] and the ecological integrity of the entire geographic scope of the proposed [National Marine Sanctuary]."

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To manage the sanctuary, the coalition proposes "a co-governance or co-management framework to ensure Indigenous Pacific Islanders with long-standing genealogical ties to the area have a seat at the decision-making table for the area."

The nomination also calls for cultural, historic, and scientific research to be undertaken within the sanctuary. The sanctuary "will provide a natural laboratory where nature and culture are one," the group says. It should also "provide public education, outreach, and community engagement around the marine ecosystems, wildlife, and maritime, historic, and cultural heritage of the sanctuary through high-quality virtual experiences that overcome the remoteness of this area."

The nomination describes at length the natural resources that would be protected by the proposed sanctuary. The coral reefs "are some of the last remaining reefs relatively untouched by human activities," it says. "Wake Atoll is the northernmost atoll of the Marshall Islands ridge and may be the oldest living atoll. …

"Johnston Atoll is a genetic and larval steppingstone from the Pacific Remote Islands to the Hawaiian Islands for corals, other reef fauna, and dolphins. … It supports a thriving diversity of 45 coral species, including a dozen species that are regionally endemic. …

"Palmyra Atoll and Kingman Reef are known to be among the most pristine reefs on the planet, providing an ideal laboratory for benchmarking and monitoring the effects of climate change on such ecosystems. They support a greater diversity of corals and other cnidarians than any other atolls or islands in the central Pacific."

Waters further offshore, it says, are "important as a habitat and foraging area for a variety of highly migratory species, many of them endangered or threatened. …. Abundant top predators roam the vast waters of the area, including several tuna species, swordfish, marlin, and more than 10 species of endangered or critically endangered sharks and rays."

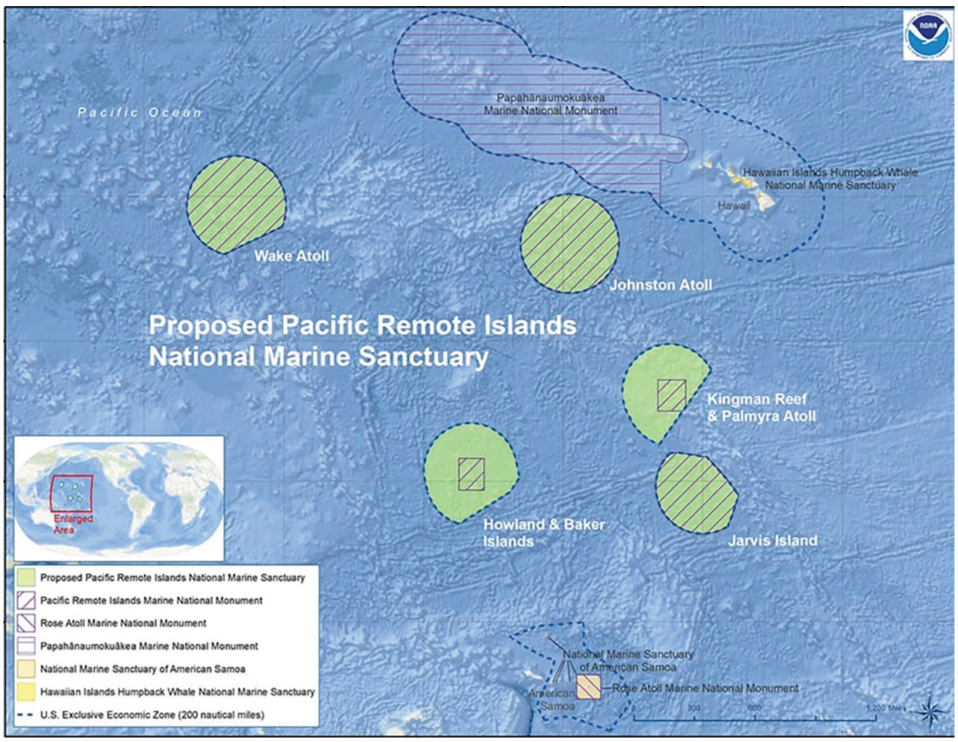
The Western Pacific Fishery Management Council has gone on record already as opposing designation of a sanctuary. Last year, the council issued a press release stating it was "offended" by the proposal to create the PRIA sanctuary. Much of the council's discussion of the proposal at its June 2022 meeting focused on the harm this would cause to the U.S. purse-seine fleet and the American Samoa economy, which is heavily dependent on the one tuna cannery still in operation there and provides employment to about a third of the territory's workforce.

At the council's most recent meeting in March, Will Sword, a council member representing American Samoa, said closing off even more U.S. waters in the Pacific would be the "death knell" of the tuna industry.

Public scoping hearings have been set for Hilo (May 10) and Honolulu (May 11) as well as elsewhere in the U.S. Pacific territories. For more information, or to comment: https://sanctuaries.noaa.gov/pacific-remote-islands/

To read the full nomination: https://nmsnominate.blob.core.windows.net/nominate-prod/media/documents/20230210-pri-nomination-coalition-with-appendices.pdf.)

— Patricia Tummons



Proposed Pacific Remote Islands National Marine Sanctuary. CREDIT: NOAA.