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Environment Hawaiʻi
a monthly newsletter

Reservoir Dogs...

Dole Foods Hawaiʻi, the state's Dam Safety program, the Agribusiness Development Corporation, to name a few.

For decades, Oʻahu's Wahiawa Reservoir has needed significant safety upgrades and has also served as an effluent dump site in violation of the Clean Water Act.

State and city agencies that have long struggled to resolve the problems the reservoir poses while maintaining its benefits are edging closer to the finish line. But the monumental costs and legal complexities make the path ahead a tricky one.

IN THIS ISSUE

ADC Agrees to Million-Dollar Settlement, Anticipates Big Ask For Irrigation Funds

A decade ago, *Environment Hawaiʻi* published a story titled, "Water May Be Limiting Factor on Former Galbraith Ag Lands." The subject: the limited water available to irrigate more than a thousand acres of land purchased by the state Agribusiness Development Corporation.

Since then, the agency has spent tens of millions of dollars acquiring more land in North-Central Oʻahu and building reservoirs, but it still lacks a water supply sufficient to make those lands fully productive.

Next year, the state Legislature will be asked to appropriate $1.25 million to settle a lawsuit filed in 2019 against the ADC by a former tenant, Ohana Best, LLC, which was formed by the owner of local produce distributor Aloha Products.

Ohana Best claimed it was misled by the ADC about when enough water would be available to meet the irrigation needs of the company's 160-acre license area. A trial was set to begin this month, but the parties reached a settlement in September.

While $1.25 million may seem like a large sum, it still represents a loss for Ohana Best, compared to what the company spent improving its license area and the profits it could have earned had the ADC provided enough water, said the farm's attorney, Peter Chen Hsieh.

It's also a pittance compared to what irrigation improvements to the former Galbraith Estate lands will cost. According to a consultant for the ADC, providing irrigation water to those lands will cost $178 million, spread across three phases.

Susan Mukai, a project manager with consultant Brown & Caldwell, laid it out at the ADC's board meeting last month.

In Phase 1, estimated to cost $90 million, pipelines would be laid to allow the ADC to pump treated effluent from the City &

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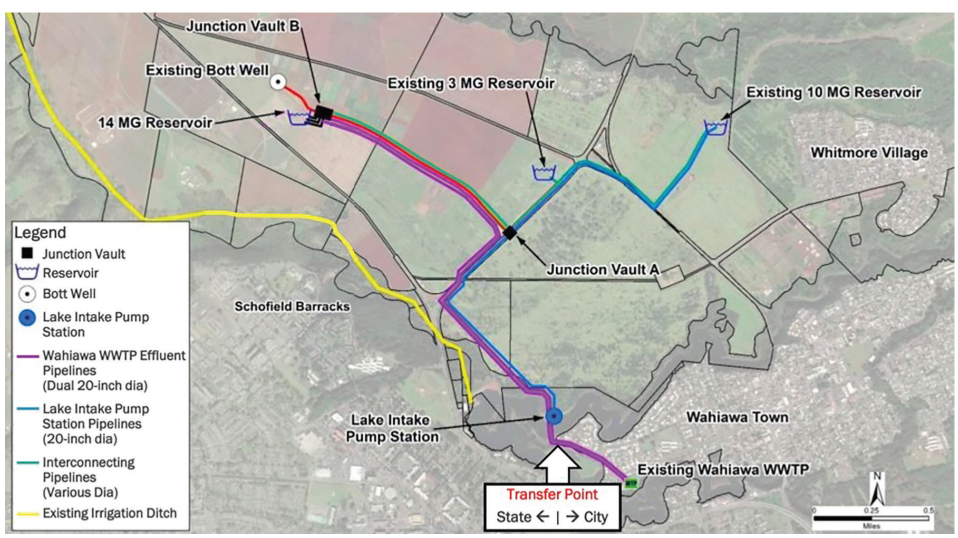

The irrigation system project for the former Galbraith Estate lands now owned by the state Agribusiness Development Corporation. CREDIT: BROWN & CALDWELL.

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NEW AND NOTEWORTHY

Tori Lines and Tuna Fish: On October 16, the National Marine Fisheries Service proposed a rule requiring almost all Hawai'i-based longline vessels targeting tuna in the Pacific Ocean north of 23 degrees N latitude to use tori streamers to scare off albatrosses and other seabirds when the vessels are setting out their lines. At present, the seabird mitigation measures involve the use of thawed, blue-dyed bait and also the discharge of fish parts or spent bait while setting lines.

Tori lines, also called bird-scaring streamers, are mounted on a pole at the stern of a fishing vessel. When the vessel is setting fishing lines, the streamers interfere with the birds' ability to snatch bait from the hooked longlines and thereby become hooked themselves.

The Western Pacific Fishery Management Council has been advocating for just such a rule change for the past three years, with fishing crews. As the proposed rule states, "use of blue-dyed bait is burdensome due to the amount of time required to thaw and dye the bait, thawed bait loss from hooks, vessel maintenance costs related to using vats of blue dye, and the administrative burden to monitor and enforce consistent application of blue dye."

Apart from the inconvenience of using blue-dyed bait, its effectiveness in reducing bird interactions has fallen in recent years. Use of the blue-dyed bait began in 2002. Initially, reductions of 70 to 90 percent in bird interactions were reported. According to the *Federal Register* notice, "seabird interactions … gradually increased in the subsequent years, with significant increases in black-footed albatross interactions in the deep-set fishery since 2015."

While the proposed rule applies only to deep-set longline vessels that set lines from the stern, it may eventually apply to shallow-set vessels as well. In September, NMFS authorized the experimental use of tori streamers on four vessels deploying shallow-set lines (i.e., targeting swordfish). That experimental use permit expires next August.

Fire Order: On October 4, Environmental Court judge Jeffrey Crabtree issued an order granting in part the Sierra Club of Hawai'i's motion to modify the revocable permits held by Alexander & Baldwin and East Maui Irrigation Company. The permits, granted by the state Board of Land and Natural Resources, allow the companies to divert tens of millions of gallons of East Maui stream water a day to Upcountry and Central Maui.

The Sierra Club's August motion sought to require the companies to submit a fire protection plan to the Land Board and to line one of their reservoirs to ensure that at least some of the diverted water banked for fire fighting is not lost to seepage.

Rather than grant the group's request, Crabtree ordered the Sierra Club, the companies, and the Land Board (including a representative of the Department of Land and Natural Resources' Division of Forestry and Wildlife) to discuss firefighting needs with the Maui Fire Department.

From those discussions, the parties must submit to the court a priority-ranked list of the Fire Department's or DOFAW's potential needs of East Maui water for firefighting, fire suppression, or fire prevention.

The parties must be prepared to answer questions the Fire Department might have about how they can help it or DOFAW meet their fire-related needs. "This preparation will include but is not limited to information about the number, location, and capacity of reservoirs which can receive water from the subject streams, and the timing and logistics of diverting water from the streams at issue in order to make it available to the Fire Department or DOFAW in various places when needed," Crabtree wrote.

Crabtree stated that he recognized that the Fire Department and DOFAW may not readily know what their needs are, "such as where, why, how, and when fires may start in Kula or other areas related to the streams and four permits at issue."

"If the Fire Department or DOFAW does not have sufficient information to provide the above-described information, submit to the court a list of information that is necessary before such needs can be described in better detail, together with information about where such information might be found," he wrote.

He stated that his order would be voided by the Land Board's issuance of new permits resulting from an anticipated contested case hearing, or by another court order, whichever occurs sooner.

Quote of the Month

"We're trying to do big things."

— Ken Nakamoto, Agribusiness Development Corporation

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Myriad Concerns Stall Progress On Planned Holualoa Development

A housing development first proposed 40 years ago and into which the current owners are seeking to breathe new life faces a series of daunting challenges.

There's the uproar from the community over traffic impacts from the proposed 450-unit development.

Affordable housing agreements have fallen apart.

Residents worried over the impact on cultural resources and possible trails on the 70 acres proposed for the new housing have not been mollified by the developers' studies.

Finally, a recent federal lawsuit alleging Clean Water Act violations by the publicly owned Kealakehe sewage treatment plant could bar any new connections, including those from the proposed Kona Vistas development, until the litigation is settled.

Traffic

Among other things, landowner Kona Three, LLC, undertook a traffic impact analysis report, included in the 2021 environmental assessment for the Kona Vistas multi-family project.

The traffic report stated that while the project would add to problems, congestion on Queen Ka'ahumanu Highway would get worse even without the project being built. Because of this, the developer would not need to make any improvements to intersections beyond construction of the proposed four-lane, unsignalled intersection of the spine road of the project with the highway. Placing a traffic light so close to the existing Lako Street signal is not an option. The state Department of Transportation has indicated its opposition to the planned Royal Vistas intersection, stating in comments on the EA, "the proposed full access intersection with Queen Ka'ahumanu Highway is not advisable."

In the mauka area of the subdivision, a road will cross over the county-owned Holualoa Drainageway to the existing Kekuanaoa Place, part of the single-family Kona Vistas development, completed years ago. This is intended to let southbound traffic from the multi-family units have access to Lako Street, where, at the intersection with Queen K, traffic signals allow left-hand turns. The developer has stated that this will avoid left turns onto Queen K from the subdivision's main entrance.

Residents of the upscale single-family subdivision, where houses can sell for seven-digit figures, have not welcomed the proposed connection. They have, however, managed to get the county to agree to not improve Kekuanaoa as it runs through their area with sidewalks and curbs, which are required on the connecting roadway in the multi-family development.

Typical vegetation in the makai portion of the development area. A rock wall is thought to be associated with post-contact ranching activities. CREDIT: RON TERRY, GEOMETRICIAN.

Other residents in the area have been outspoken in their objections to the additional traffic, noting that the Lako intersection is itself subject to long and frustrating delays. Some changes in the signal pattern have been suggested, but even with these, the projected flows are predicted to worsen.

Trails

Among the critical comments received on the environmental assessment, many alleged the presence of important cultural sites that should be preserved, including a holua, or slide, connecting to the Kealakowa'a heiau a short distance makai of the property. Archaeologists retained by Kona Three have disputed the claim.

The possible presence of ancient trails crossing the site has become another issue. Again, Kona Vistas' consultants say there is no evidence of this on old maps. Any evidence of unmapped trails on the ground has been pretty much erased following decades of ranching and bulldozing on the site.

Jackson Bauer, the Hawai'i island trails specialist for the state Department of Land and Natural Resources' Na Ala Hele program, has argued that the property was the site of trails that merit protection. In a letter to the county Planning Department last December, Bauer wrote:

"The Holualoa ahupua'a was a main population center for pre-contact Hawaiian society. Extensive agricultural field systems are present above and within the subject area. Extensive mauka-makai trails were known to connect these agricultural fields with the coastal villages and fisheries, many of which continued to be used well into the 20th century. …

"Several maps from the early 20th century, when stitched together, show continuous trails from the coast up to the Māmalahoa Highway and the uplands." Bauer attached maps from 1914 and 1928 that clearly show these trails, including one that runs along the boundary of Land Court Award 3660, which crosses the property east to west.

While Kona Vistas' archaeologists reports are "detailed and extensive," he continued, "little research was conducted on the known trails and alignments. An important site just below the project area and between this network of trails is the Kealakowa'a Heiau complex. As its name

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Developer, County Push to Revive Entitlements for Kona Vistas Project

"Stale entitlements." That's the term that the Hawai'i County Planning Department uses to describe approvals given decades ago for a Holualoa development. The time for performance ran out and, with no requests made for time extensions, one might think that the entitlements are not just stale, but dead and buried.

Yet for the last eight years, landowner Kona Three, LLC, has been pushing the county to refresh a rezoning ordinance for the 70-acre area, first rezoned in 1984 and most recently reauthorized in 2003. Now Kona Three is asking for ten more years to finish the Kona Vistas project, at an estimated cost of $170 million in 2022 dollars.

Not only has the time frame changed, but also the project itself. What had initially been proposed as a 285-unit development has now morphed into 450 multi-family units, some to be rented, others to be sold.

In 1983, this area was part of a 170-acre development that included around 215 single-family lots to the south of the current project. The development in Holualoa, around three miles south of Kona village and mauka of Queen Ka'ahumanu Highway, was about half done when Kona Three acquired the land in 2015.

By that time, most of the single-family lots had been developed and sold. What remained undone was any improvement on the area proposed for multi-family units.

Last year, after years of working with Kona Three, the Planning Department asked the Leeward Planning Commission to forward a recommendation to the County Council that it amend the 2003 ordinance by extending the deadline for completion – which had expired in 2012 – and removing some requirements for roadway improvements.

The Leeward Planning Commission held a hearing on the proposal on December 15.

It did not go well. About two dozen people testified in opposition. Twice the then-chair, Michael Vitousek, called recesses "for the purpose of maintaining decorum."

After a raucous four hours, the commission deferred voting on the proposal and instead asked the county's Cultural Resources Commission for its recommendation.

Over the past year, the CRC held three meetings where the project was on the agenda. At the first, it authorized a permitted interaction group to visit the site. At the second, it heard the P.I.G.'s report. At the third, in June, it adopted a motion to ask the developer to include more open space in its plans and to "more sensitively integrate the natural, historical, and cultural features of the landscape, including trails and archaeological sites." In addition, the CRC asked Kona Three for further documentation "of lineal descendants and kama'aina knowledge of the cultural resources of the project," including trails.

The Leeward Planning Commission was to consider Kona Three's proposals at its October meeting, but the company requested a deferral because the Cultural Resources Commission had not yet made any recommendation.

The commission has been tentatively scheduled to meet next on December 21.

A Long History

The project now known as Kona Vistas started out more than 40 years ago, when a Japanese-owned company, Gamlon Corp.,

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Holualoa Development *continued from page 3*

suggests (along with historical accounts and histories), this was an important site in relation to the canoe carving and the hauling of canoes on these mauka-makai trails (*Ke ala* = "the trail," *ko wa'a* = "for canoes")."

Jackson included in his letter a copy of a statement in 2004 from Goro Inaba, a lifelong resident of the area, attesting to his use of the Holualoa Trail. "As early as 1929, I walked this trail along with two of my classmates," he wrote. "I would meet my friends, expert pole fishermen, and proceed with them, walking the lower section of the Holualoa Trail below Hualalai Road to Holualoa Beach, where we would spend the day at the beach. I remember the trail being marked by rock walls spaced approximately 10 feet apart."

Wastewater

In the 2021 environmental assessment, the subject of wastewater was given one sentence, to wit: "Wastewater would be disposed of through a tie-in with the county sewer system."

Nothing more.

Kona Three's planning consultant, Daryn Arai, was asked for details. He acknowledged in a responding email that the EA "did not contain an extensive discussion on the county's sewer system that will service the proposed project."

"The closest sewer lines are located roughly 2,000 feet to the north," he said, "and it is from this system that the sewer line will be extended to the south to service the proposed project. The line extension is expected to be within the Queen Ka'ahumanu Highway."

The trigger for the 2021 environmental assessment was the use of county drainageways. The use of a state-owned highway – for the extension of a sewer main – constitutes a separate trigger.

Wastewater from the project would be treated at the Kealakehe sewage treatment plant, six miles to the north, Arai said, noting that the county Department of Environmental Management had not expressed any concerns.

For years, however, the Kealakehe plant has been the subject of complaints that it was operating without a National Pollutant Discharge Elimination System permit. On September 25, the county was sued by Hui Mālama Honokōhau, alleging that the ongoing operation of the Kealakehe plant without such a permit violated the federal Clean Water Act.

In addition to asking the court to require the county to obtain an NPDES permit, the lawsuit, filed in U.S. District Court for Honolulu, also seeks "additional injunctive relief as may be necessary to ensure that [the county] fully complies with the CWA."

David Henkin, an attorney with Earthjustice, which represents the Hui, noted that that additional "injunctive relief" may well include "a moratorium on new connections."

"That certainly will be one thing we will consider when we get to the remedy phase of the lawsuit."

— Patricia Tummons

Affordable Housing Requirements Still Unmet by Kona Vistas Developer

When the Land Use Commission approved the redistricting of the property to be developed by Kona Vistas, the very first condition concerned affordable housing.

Condition A required 10 percent of the housing built on the property be "offered to residents of the state of low and moderate income."

The Hawai'i County Council then included Condition J in its rezoning ordinance, requiring compliance with the affordable housing condition in the LUC order, as determined by the county Housing Agency.

For the last 40 years, finding a path forward on affordable housing has proven to be difficult. Multiple agreements between the developer and the county have been signed, only to dissolve for one reason or another.

The most recent was signed in January 2022. But just 11 months later, the county Office of Housing and Community Development (OHDC) asked that new conditions for affordable housing be imposed in any rezoning amendment.

The first agreement lasted much longer, although it required numerous extensions. That agreement, signed in December 1992, called for the developer to purchase about 12 acres makai of the redistricted land, make drainage improvements and donate it to the county for development of affordable housing by a third party.

Not until 2015 did the county receive title. Drainage improvements, however, still had not been made, prompting the county's then-housing administrator, Susan Akiyama, to demand performance in July of that year. At the same time, she informed the then-owner, Kona Vistas, that on the advice of the county corporation counsel, it would not be able to "use excess affordable housing credits to satisfy their obligation" under the LUC's redistricting order. Should the developer have any questions, Akiyama advised it to call Alan Rudo of her office.

Barely two months later, Akiyama completely reversed her position. The conveyance of title to the 12 acres to the county "or our designated non-profit will fully satisfy Condition A" of the LUC order and the county's affordable-housing condition as well, Akiyama wrote on October 7. Again, questions were to be directed to Rudo.

The drainage improvements had still not been done a year later, when the county planning director advised the new landowner, Kona Three, LLC, that it was still on the hook for them.

Richard Wheelock, one of the members of Kona Three, replied, noting that developing the drainage improvements was difficult. An environmental impact statement had been done in 1996, since county property would be affected by them. "Then it was discovered that the drainage design to link into the county ditch at Kupuna Street would need to be routed through some land owned by two separate homeowners…

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Kona Vistas Entitlements *continued from page 4*

petitioned the state Land Use Commission to place around 175 acres of land then in the state Agricultural District into the Urban District. The LUC approved a two-phase redistricting process, with the second phase, of around 50 acres, to be redistricted only after a showing that infrastructure improvements had been made for the first increment. That first increment was to include about half of the single-family lots and all of the area where multi-family units were proposed.

In 1992, Gamlon – which by then had changed its name to Gamrex – asked the LUC to approve redistricting of that second increment. No infrastructure had been extended to the multi-family portion of the first increment. However, Gamrex said it was prevented from doing so until the second increment was developed. The LUC approved, noting in its order, "The water system master plan for the area requires [Gamrex] to develop the water system and other improvements within Increment II prior to the development of infrastructure improvements in the multi-family residential areas within Increment I."

In 2006, Gamrex conveyed roughly half of its interest in the entire property to Kona Vistas, LLC, a Delaware entity whose three members were Chase Berkeley, based in Austin, Texas, a company called BIMAC, and Gamrex itself. To the LUC, this was not described as a change in ownership – which, under the redistricting order, would have required prior approval of the LUC – but rather as a name change. Court records indicate that Gamrex's share was 49 percent.

In a 2014 report to the LUC, covering the previous eight years, planning consultant Sidney Fuke referred to challenges brought about by changes in ownership. Although he said the report was to "cover all activities" to date, he omitted any mention of a lawsuit that Gamrex brought against its partners involving the unauthorized transfer of about 50 single-family lots to a Texas business. The outcome was a mediated settlement, with Kona Vistas regaining title to the properties.

By the time the LUC received the next nominally annual report in 2016, the property had changed hands once more – again, with no advance notice to the commission. Kona Three now held title.

Signing off on the report was Richard Wheelock, a real estate agent and one of three members of Kona Three. The others are OIP, LLC, and RJL, LLC. OIP is managed by Orchid Isle Properties Profit Sharing Plan, whose sole member is Robert Williams, a Hilo real estate agent. The three members of RJL are Hilo businessman Roland Higashi, his wife, Janice, and his daughter, Laurie, a real estate agent.

Since then, the company has been working with the Planning Department to develop a new, denser design for the area. Following the publication of a 2021 environmental assessment, the Planning Department appears to have been satisfied with Kona Three's proposal.

But, 40 years and counting from the original approvals for the project, whether other authorities go along with the plan remains an open question. The surrounding community has already weighed in, voicing its strong disapproval in comments on the environmental assessment and at numerous public meetings.

— Patricia Tummons

Affordable Housing Requirements Unmet *continued from page 5*

[I]t took another six years to negotiate a deal between the county, the two property owners, and Kona Vistas LLC."

But what seems to have killed the plan was a hydrological analysis that found the increased flows in the Holualoa Ditch brought about by the planned changes would result in the channel overtopping both Queen Ka‘ahumanu and Kuakini highways in heavy rains. "Therefore," he wrote, "the plans for drainage improvements … will need to be altered."

Also, Wheelock wrote, the 2015 transfer of title to the county was an error. It was only to be recorded after the county completed an environmental assessment for the transfer, Wheelock said, but, "for unknown reasons, escrow recorded this deed before the EA was complete."

A meeting was held in the Planning Department on September 22, 2016, involving Wheelock, Daryn Arai, then a county planner, Alan Rudo of Housing, and Ron Kim of the Corporation Counsel's office. They agreed that Kona Three would work with the Corporation Counsel to reverse the conveyance of the property and work with Planning to update the SMA for the drainage improvements. In addition, Kona Three would work with Housing to arrange to convey the property to a third-party developer.

In 2019, the OHCD again addressed the affordable housing issue. On October 31, then-administrator Neil Gyotoku informed Robert Williams of Kona Three that "no affordable housing agreement exists" between the county and Kona Three. "A new agreement must be developed and signed by the owners and the county before the Kona Vistas project in Kailua-Kona may move forward."

The previous agreement, involving the land transfer, signed in 1992 and amended seven times, "ultimately expired almost 13 years ago on December 31, 2006," Gyotoku wrote.

While the county was willing to negotiate a new agreement, he continued, it "no longer believes acquiring [the 12 acres] are in the best interest of the taxpayers … as it would free Kona Three LLC to pursue the development of hundreds of market-price homes without any guarantee the third party will be able to develop the affordable homes."

"Kona Three LLC should reveal how it will satisfy requirements of 10 percent affordable for the development of the completed increment" of 210 single-family homes, Gyotaku wrote, observing that the previous developer had not built any homes in satisfaction of the affordability requirement. In addition, "the county also believes that since there is no affordable housing agreement in place, any agreement with Kona Three LLC must comply with the current requirement of 20 percent affordable to meet the requirements of Chapter 11 of the County Code. Should Kona Three LLC build 465 new homes … 93 of the units must be offered as affordable." The total number of affordable housing credits required stood therefore at 114.

"In the spirit of moving forward, … the OHCD will agree to allow construction of 114 affordable units" on the 12 acres, Gyotoku wrote. Alternately, he added, the developer could satisfy the agreement by purchasing excess affordable housing credits.

With the election of Mayor Mitch Roth in 2020, Susan Kunz (formerly Susan Akiyama) returned to head the OHCD. She proceeded to work with Kona Three on devising a complicated plan to satisfy the affordable housing requirement by having the developer purchase about 10 acres mauka of the Kona Lowe's store. Kona Three would then convey the land to a third party developer that would build 100 affordable rental units on the site. Kona Three would obtain 67 credits in this deal that it would then surrender to the OHCD, thus satisfying Kunz's determination that Kona Three needed that number – and not the 114 Gyotoku had proposed – to comply with the county affordable housing law.

Kunz signed off on the agreement in January 2022.

Later that year, the scandal involving former housing employee Alan Rudo's abuse of the affordable housing credit system broke, with Rudo and three of his partners in the scam facing federal charges of fraud. County Council members expressed dismay on learning how the market in credits allowed developers to avoid having to build any affordable housing at all.

Wheelock reported the fallout in his August 2023 report to the state Land Use Commission, noting that "[O]ne of the Kona council members expressed dissatisfaction with the fulfillment of the Kona Vistas/Royal Vistas affordable housing requirements by the use of affordable housing credits."

That wasn't the only problem. "The Planning Department and the Office of the Corporation Counsel approached Kona Three with a legal position that the agreement couldn't be used to fulfill the affordable housing obligation," Wheelock wrote, adding that they maintain that the LUC condition requires the affordable lots or houses "to be developed on the subject property."

Omitted from Wheelock's report was any mention of a letter that housing administrator Kunz sent to the Planning Department on November 30, 2022, in response to a request for comments on the rezoning amendments.

"The OHCD entered into an affordable housing agreement with the applicant on January 10, 2022," Kunz wrote. "The applicant desired to satisfy this requirement through the purchase of 67 excess housing credits… To date, the applicant has not satisfied the agreement.

"Since the applicant intends to amend Ordinance 02-131 … the OHCD kindly requests … that the condition be updated to reflect the current housing conditions … requiring the applicant to earn housing credits equal to 20 percent of the number of units or lots."

— Patricia Tummons

For Further Reading

Some of the principals of Kona Three – Roland, Jan, and Laurie Higashi and Robert Williams – have developed other properties subject to affordable housing agreements. For details, see the articles in the March 2023 edition of *Environment Hawai‘i,* especially "Affordable Housing Gets Short Shrift as Developers Devise Work-Arounds."

Our June 2023 edition includes an article on a development in Kea‘au by a company led by Roland Higashi and Laurie Higashi. See "Kea‘au Subdivision Gets Final Approval with No Affordable Housing Agreement."

Handling of Burials at Holualoa Sites Reflects Changing Laws, Sensitivity

Archaeological studies going back decades have been undertaken on the area that is the site of the Kona Vistas project. Aside from the numerous pre-historic and historic sites documented, there have been several burial sites discovered.

Over the last 40 years, how those burials have been dealt with reflects the increasing sensitivity of the archaeologists who conducted those studies as well as the agencies legally responsible for them.

In 1984, during one of the first archaeological surveys of the Gamlon property, a burial site was found in the area now proposed for multi-family housing. The site was quite elaborate, involving the construction of an underground cupboard in which the bones of two bodies were found. As described by Cultural Surveys Hawai'i, "an enclosure was constructed with roughly stacked boulders on three sides and a double alignment of vertical slabs on the other." The enclosure was "occupied and used for everyday work activities and food consumption," the report states. At the base of the site "a stone-lined crypt was constructed. Two human skeletons were interred in the crypt," one a child about six years of age, the other a young woman, between 18 and 25 years old. The skeleton of the child was complete. Both the young woman and the child were buried at the same time, the report said.

An unusual aspect of the burial was the fact that the long bones of the arms and legs of the woman had been removed and "her separated hands and feet were placed on her pelvis."

Making the burial even more anomalous was the fact that there was a hole in the back of the woman's skull caused not by an external blow, but by decay originating in the interior of the cranium. This, the archaeologists wrote, "is characteristic of the effects of tertiary syphilis."

"The significant aspect of this site is that if the adult female did actually carry syphilis and this disease is considered to have been introduced to Hawai'i by Captain Cook in 1778, then the burial and overlying occupation must date to the post-contact period," the archaeological report states. "However, with the large amount of material excavated and screened from this site, not one object indicating a post-contact age was found. Either the site dates from the earliest known contact before foreign objects were dispersed or syphilis was present in Hawai'i before Cook's landing."

As to the disposition of the remains, there is this account in a letter from Scientific Consultant Services to Kona Three's Robert Wheelock:

"SCS Senior Archaeologist Glenn Escott contacted Gregg Kashiwa by phone on April 19, 2016, to ask about the final disposition of the iwi… He [Kashiwa] recounted that the iwi were first transported to the University of Hawai'i Hilo for laboratory analysis. UH-Hilo later contacted Mr. Kashiwa and requested that he pick the iwi up. Mr. Kashiwa arranged to reinter the iwi at Pu'uhonua o Hōnaunau National Historic Park. He was met by an NHP employee who directed him to an open area in the south corner of the park. He was instructed to put the iwi in the ground and cover them with rocks."

Escott followed up with a call to Adam Johnson, an archaeologist at the park, to ask if there was any record of the reinterment. According to Escott, Johnson said that he was unable to locate any official correspondence regarding the reinterment, but that such records were not regularly kept at that time.

In 1990, the Legislature established island burial councils to advise on the treatment of remains discovered in the course of land development.

Three years later, an archaeological survey of the entire Gamrex property, including the single-family portion, discovered three sets of remains. The island burial council apparently approved reburial on a site "located in the southeast corner of the [single-family] subdivision near Kilohana Street," according to correspondence between the planning consultant, Gregg Kashiwa, and Don Hibbard, then head of SHPD. Kashiwa informed Hibbard that, per the burial council's decision, "A six-foot deep hole will be excavated of sufficient size to accommodate a 4'x4'x4' box (of the type used for electrical connections) with no bottom and a cover. The remains will be buried on or about April 1, 1993. The hole will be backfilled over the cover of the box to ground level after reburial."

On April 5, Hibbard replied to Kashiwa, letting him know that on the evening of April 1, "the three sets of Hawaiian remains recovered from the … property were respectfully reinterred."

Most recently, a five-acre site that is set into the border between the multi-family and single-family areas of the Kona Vistas development was surveyed by SCS. The site had not been included in development plans as it was owned in the 1980s by Hawai'i Preparatory Academy. Much later, it was sold to Kona Vistas, which then resold it to a property owner to the east.

During that archaeological survey, a single burial site was found in a lava tube, with the date of burial ranging from pre-contact to early post-contact. In 2019, SCS prepared a preservation plan for that site, in which the remains were determined to be either of a young person of small stature or a sub-adult.

The preservation plan calls for the burial to remain in place. In accordance with current practices and rules, public notices were published in newspapers to alert cultural descendants of the discovery. J. Curtis Tyler III and Nicole Lui responded. Lui, who visited the site, asked that three lauhala mats be placed in the lava tube over the iwi kupuna and that a nearby large rock be used to seal the makai opening of the tube, with the mauka opening sealed by filling with rocks.

A permanent rock wall is to be built around the site at a distance of 20 feet from the outside perimeter of the burial portion of the lava tube. Should any construction occur before that happens, an orange construction fence is to be placed a minimum of 30 feet from the site, with a qualified archaeological monitor to be present during any construction within 50 feet of the site. Pedestrian access is to be allowed.

Finally, signs are to be erected, stating:

WAHI KAPU

This site is historically and culturally significant to the Hawaiian people.

KAPU – DO NOT ENTER

Historic sites are protected under state law. Violation could result in a $20,000 fine. (Chapter 6E-11, Hawai'i Revised Statutes)

DLNR-SHPD (808) 692-8015

— Patricia Tummons

New Owner at Marconi Point Decimates Coastal Habitat for Native Bees, Birds

When resource managers caring for the native bee and seabird habitat on Oʻahu's North Shore learned what was happening early last month, they spread the word as far and as wide as possible in hopes of keeping the damage from spreading. One of the Marconi Point Condominiums unit owners also tried to stop the workers from clearing the shrubs and trees along the shore.

By the time the work finally was stopped, bulldozers had already stripped a large swath of vegetation — just outside of an ecological restoration fronting the Turtle Bay Resort golf course — that caretakers describe as some of the island's most robust habitat for endangered Hawaiian yellow-faced bees, as well as a nesting and resting site of native seabirds.

"Shockingly, they ignored and bulldozed around the multiple signs that are posted (and still standing) to alert people that this is an area for nesting albatross," according to one concerned community member.

Following an October 17 inspection, the state Department of Land and Natural Resources quickly issued a press release announcing that it had issued a notice of alleged violation to all of the unit owners in the Marconi Point CPR. The alleged violations included not only the unauthorized clearing, tree removal, and spreading of mulch in the Conservation District, they also included the construction years ago of fence lines bordering the 100-acre property subject to the CPR.

Each violation could incur fines of up to $15,000 per day plus administrative costs.

"Of concern to the department is that habitat for the endangered yellow-faced bee and native birds has been altered. Mulch is a breeding site for the invasive Rhino Beetle that is infesting and killing palms," the press release stated.

The matter will eventually be brought to the state Board of Land and Natural Resources.

In addition to the DLNR, the City & County of Honolulu's Department of Planning and Permitting also investigated the site for potential violations within the Special Management Area mauka of the Conservation District. *Environment Hawaiʻi* did not learn by press time whether the department also found any potential violations.

Big Island resident Yarden Danker, who owns one of the coastal units and considers herself a conservationist, was shocked when she heard what had happened. "We would never do anything like that," she stressed.

Consultant Mark Howland, whose clients include coastal unit owners Yue-Sai Kan and Richard and Elizabeth Snow, also said that they had nothing to do with the clearing. And in fact, he said, the Snows tried to intervene.

Honolulu attorney Kalani Morse, the local agent for three companies that have purchased several Marconi Point units in recent years, did issue a one-sentence statement on behalf of his client: "Management is actively working with DLNR to put together a remediation program that is acceptable to all parties and is moving forward with that."

All three of those companies are owned

State officials survey a recently cleared area at Marconi Point. The coastal vegetation there is known habitat for endangered Hawaiian yellow-faced bees, as well as protected seabirds. CREDIT: DEPARTMENT OF LAND AND NATURAL RESOURCES.

by international tech entrepreneur Sushil Garg.

In May of last year, Garg's company Greystone HI Investments, LLC, bought units 16-19, which include the dilapidated historic buildings associated with the old Marconi Wireless Telegraphy Station. His company BSS HI Properties, LLC purchased unit 31 this past August. And his company LKG HI Properties bought units 28 and 32 in September.

In total, the companies bought more than 35 acres of the 100-acre CPR, at a cost of about $10 million. Garg was also named president and chair of the non-profit Marconi Agricultural Roadway Corporation around the time Greystone purchased its units. The CPR's developer, Jeremiah Henderson III, serves as vice president and secretary. Serving as treasurer is Kalani Schrader, who owns a CPR unit and who is executive vice president of CBRE (Coldwell Banker Richard Ellis).

Garg is founder of Birchstreet Systems, which provides cloud-based business systems used by some of the hospitality industry's most recognizable chains, including Hyatt, Marriott, and Omni Hotels.

About a decade ago, Garg and one of his other companies, Garg Data International, Inc., settled a complaint by the Securities and Exchange Commission that alleged they had aided and abetted PurchasePro.com, Inc., in a scheme to artificially inflate the latter company's revenues. Without admitting or denying the allegations, Garg and his company consented to the entry of final judgments and were fined $50,000.

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Violation Dismissed, Permit Rejection Appealed

In November 2022, *Environment Hawai'i* reported on a notice of violation issued to Marconi Point Condominiums unit owner Yue-Sai Kan for unauthorized construction. The entire CPR lies within the Special Management Area and she had built without permits what looks like a house, raised on stilts with tall ocean-facing windows. She told the city that it is a barn and storage/operation room and asked that she be exempt from the need to obtain a building permit.

At the time our article was published, the Honolulu Department of Planning and Permitting stated that the structure needed SMA approval and that her exemption request was pending.

A DLNR notice of alleged violation includes the unauthorized construction of this fence within the Conservation District. CREDIT: DEPARTMENT OF LAND AND NATURAL RESOURCES.

Since then, the department has determined that it issued the violation notice in error, according to Kan's consultant, Mark Howland of WHALE Environmental Services. Because the building has an area of less than 1,000 square feet, it is considered an agricultural structure that does not require building permits, he said.

Kan joins other unit owners who had received similar violation notices that were later resolved by a DPP determination that their buildings were agricultural structures totaling less than 1,000 square feet.

The resolution of Kan's violation cleared the way for her to seek an SMA permit to build a farm dwelling on her lot. In June, Howland filed an SMA major permit application for agricultural operations and construction outside the shoreline setback area of Lot 160-B. Lot 160-B is the large, oceanfront parcel within the CPR that includes Kan's lot and that of the Snows.

The DPP rejected the application in July. Howland says he and the department disagree over the ordinances that apply to the proposed development of the lot and that his clients are appealing the rejection. How or whether the DLNR's recent notice of alleged violation affects their efforts to obtain an SMA remains to be seen.

Although Kan is not a part of it, companies owned by the CPR's developer, Jeremiah Henderson III, are in the midst of a lawsuit against the city, the DPP, and other departments. Henderson has challenged the DPP's determination that an SMA permit may be required for the planned development at Marconi Point.

— Teresa Dawson

For Further Reading:

For more background, see the following articles available on our website, environment-hawaii.org:

- "Condominium Regime at Marconi Point Complicates Construction, Enforcement," November 2022;
- "Developer Sues City for Holding Up Permits, Subdivision at Marconi Point," and "Developer Seeks Fair Taxation, Disclosure of DPP Documents." July 2023;
- "Claim that Marconi Point Developer Is Exempt From SMA Permit Need Is Disputed by City," October 2023.

Irrigation Funds *continued from page 1*

County of Honolulu's Wahiawa Wastewater Treatment Plant to a 14-million-gallon reservoir. That alone would provide a steady source of irrigation water — an average of 1.6 million gallons a day — to the ADC's agricultural tenants. At the same time, it would help the city finally meet the terms of a decades-old consent decree with the state Department of Health aimed at ending the release of treated sewage from the Wahiawa reservoir, also known as Lake Wilson, into Kaukonahua Stream. It would also meet the DOH's storage requirements for R-1 recycled water. Currently, even though the effluent is treated to R-1 levels, it's still considered R-2 water, which has much more limited agricultural use. Finally, by ending the release of the effluent into the reservoir, it allows water from it to be used for unrestricted non-potable irrigation, she said.

Phase 2 would connect the 14 MG reservoir to the ADC's existing 10 MG and 3 MG reservoirs. Phase 3 would establish a system that could pump as much as 5.1 mgd from the Wahiawa reservoir to the ADC's irrigation system. Those phases were estimated to cost $33 million and $55 million, respectively.

According to Mukai's presentation, bid solicitations for the three phases are expected to occur next year. The Phase 1 design is 90 percent complete; designs for phases 2 and 3 are at 60 percent and 45 percent, respectively.

After hearing her presentation, ADC board members were clearly concerned about the estimated cost, which does not include operation and maintenance of the system.

Board member Glenn Hong suggested that the pipelines for phases 1 and 2 could be laid simultaneously, since they follow the same route in some areas.

Mukai said that while they follow the same route, they would not run in the same trench and would, in fact, be on opposite sides of a road. Also, she said, the Phase 1 work is focused on meeting the terms of a memorandum of agreement between the city and the ADC regarding the city's effluent. The city will be doing upgrades simultaneously with Phase 1 to meet R-1 certification requirements and to get water to the ADC, she said.

She added that the project was broken up into phases to secure construction funds faster.

Hong asked whether locating the Wahiawa reservoir intake pump station in Phase 3 further mauka had been considered. The water would be cleaner and the higher elevation would allow for gravity flow, which is cheaper than pumping.

The Agribusiness Development Corporation's 10 million gallon reservoir on former Galbraith Estate lands. CREDIT: BROWN AND CALDWELL.

"The cost of operation is going to be very high," he said.

Mukai replied that they had not evaluated anywhere else upstream because the land there is owned by the Office of Hawaiian Affairs. "We weren't able to look at those areas as possible places for a pump station," she said, noting that the ADC would need to bring large vehicles onto the property for construction and maintenance.

Even so, board member Dane Wicker said, "We have to find a way to lower that cost." He said he believed Dole had a pump station in Whitmore Village on lands that were later purchased by the ADC. "You might be able to look at where that intake was [and] whether it can be used. … It might make a shorter path."

Mukai stressed that what's being proposed is more than just an irrigation project. It's a joint effort by the city and the state to stop effluent flows into Lake Wilson and use the waters for a beneficial purpose.

She argued that with climate change, it's important to use water and wastewater efficiently, "so we are sustainable in the future."

"Recycled effluent is a drought-proof source," she said.

"I think the board would also echo that. … This is an underutilized source," Wicker replied. The ADC's planned acquisition of the Wahiawa reservoir "dovetails to that," he added.

Still, he said that lowering the project's cost at each phase would help in getting support from the Legislature.

Hong noted that the potential water need for the former Galbraith lands is 5.4 mgd. With 1.6 mgd from wastewater and 5.1 mgd from the Wahiawa reservoir once all three phases are done, Hong asked whether the ADC would be able to sideline the Bott Well that now serves as the ADC land's main water source.

Not totally, according to Mukai. Leafy crops may be irrigated with R-1 water, but they can't be finished with it. "You have to finish with potable water," she said. Other than that, the well would be just a backup source, she added.

Hong noted that the well is a very expensive water source, with its huge pumping costs. Whether or how much the proposed irrigation project costs will change before being brought to the Legislature remains to be seen. Mukai said she definitely understood the need for cost savings. "We'll keep that in mind, for sure," she said.

Although his client has given up on trying to grow produce for her distribution company, Hsieh told *Environment Hawai'i* the Galbraith lands do have potential. "If they find a way to get water there, farmers could do really well," he said.

— Teresa Dawson

Dam Dilemma Clouds Possible Purchase Of Critical Water Source for ADC Lands

"We're trying to do big things," state Agribusiness Development Corporation project manager Ken Nakamoto said recently, well aware of the detractors waiting in the wings.

Last month, a consultant for the agency, Brown & Caldwell, unveiled details of a proposed $178 million irrigation system project that would facilitate the agricultural use of recycled effluent, as well as water from the Wahiawa Reservoir, on ADC lands.

Phase 3 of that project would connect the Wahiawa reservoir to a 14-million-gallon reservoir to be constructed on former Galbraith Estate lands in North-Central Oʻahu, providing ADC tenants with more than 5 million gallons of water a day.

Threatening the success of that big thing is not just the estimated cost of Phases 1, 2, and 3, but the instability of the Wahiawa Reservoir itself, as well as the owner's stated inability to make repairs required by the state Department of Land and Natural Resources.

An apparent solution came earlier this year with the passage of Act 218. The act directs the governor's office to negotiate the purchase of the Wahiawa Irrigation System, which includes the reservoir. It also provides $5 million toward that purchase and $21 million for repairs and expansion of the reservoir's under-sized spillway.

The reservoir is owned by Sustainable Hawaii, Inc., and Dole Food Company Hawaiʻi. It is considered a high hazard dam by the state.

According to Carty Chang, chief of the DLNR's Engineering Division, the reservoir is in poor condition, with signs of an unstable embankment. The reservoir can retain up to 3 billion gallons of water. And if the dam were to give way, about 2,500 people living downhill of the reservoir could be affected.

At the October 13 meeting of the Board of Land and Natural Resources, Chang said that a 1978 U.S. Army Corps of Engineers report found that the spillway was undersized. "Forty-five years later, nothing done to fix that spillway," he said. In the meantime, there have been close calls, with evacuation orders being issued by the City & County of Honolulu, he said, adding, "With climate change, it's not a matter of if, but when. We don't want another Kaloko [dam breach on Kauaʻi]. Seven lives were lost."

"The [Wahiawa] dam is anticipated to overtop during storm events approaching the Probable Maximum Flood. The aging concrete spillway structure and main embankment integrity are uncertain and may potentially be compromised during a significant flood event," Chang's report to the board states.

In April 2021, the Land Board fined Dole $25,000 for failing to make improvements ordered by the division and set a schedule for repairs to occur. In May 2022, Dole asked for an extension of its performance deadlines, which the board granted.

The Land Board required Dole to meet nine milestones between 2022 and 2025. Fines would be levied for each missed milestone. According to Chang's report, "Dole successfully met milestones 1, 3, and 4, but was fined $5,000 for missing milestone 2 in January 2023. Milestone 5 on the current remediation timeline is due on November 1, 2023 and requires Dole to submit a dam safety permit application."

With the passage of Act 218, however, Dole decided that it should no longer have to comply with that schedule. In an August 8 letter to DLNR director and Land Board chair Dawn Chang, Dole general manager Dan Nellis wrote, "Now that Act 218 is law, it is no longer appropriate for Dole to do that which is required of the state, and the current state-mandated timelines should therefore be passed. … [T]he WIS [Wahiawa Irrigation System] is 'critical' infrastructure that the state should (and will soon) own to ensure its continued viability. It would also frustrate the entire purpose of Act 218 as leaving the timelines in place would cause the decommissioning of this system and would be catastrophic to agriculture and food production in Central Oʻahu."

The Engineering Branch's Chang recommended that the Land Board deny Nellis's request. He said that Act 218 does not commit the state to acquire the irrigation system or require the Land Board to take any action.

What's more, Dole's performance deadlines cover work to be done on two reservoirs, Helemano 6 and Kemoo 5, that Chang said are not included in Act 218 "and should not be considered for regulatory relief," he stated in his report to the board.

Relieving Dole from any of its dam safety obligations would set a bad precedent, he said. He did offer to allow Dole to pay break up its payments toward the dam safety permit application fee. He also encouraged Dole to release to the state the rights to its studies, planning and design documents for the Wahiawa Dam improvements.

"Dole Food Company Hawaiʻi and their consultant Gannett Flemming have

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made significant progress on their improvement plans for the Wahiawa Dam. The release of rights to the documents prepared by their consultants (i.e., geotechnical analysis, reports, studies, conceptual and detailed design drawings etc.) would assist the State of Hawaii in their due diligence efforts and potentially reduce the time and cost required for this process. Releasing this information would not incur additional cost and would be a good faith gesture," he wrote in his recommendations to the board.

To Dole's statement that the state will soon be acquiring the Wahiawa irrigation system, Chang explained that was simply not the case because the state still needs to complete its due diligence process.

"We just had a meeting yesterday with the ADC. The Phase 1 environmental assessment is not going to be done until June of next year. … Phase 2 would take even longer. We're not even close to making a decision whether the state is going to acquire [the system]," he said.

He continued that Dole claims it spent $1.1 million for its consultant's plans to upgrade the dam. "They said that they didn't want to share those plans unless the state commits to acquiring the property," he said.

"The appropriate thing for Dole to do is take accountability as a dam owner," he said. His report also noted, "Until the WIS is transferred to the state, Dole is still the owner and is responsible and liable for their actions or inactions associated with the Wahiawa Dam. …

"If for any reason the deed of the parcels identified in Act 218 are not filed or recorded with the Bureau of Conveyances by June 30, 2026, Act 218 shall be repealed in its entirety. If Act 218 is repealed, Dole will retain ownership of the WIS. If Dole's remediation timelines are suspended, it is likely that no progress will be made toward bringing the Wahiawa Dam into compliance. This would result in a significant delay to remediate the dam and continue to put the downstream community at risk in the event of a dam safety incident."

Board member Aimee Barnes expressed her disappointment with Dole. "I know that in prior meetings that we discussed this dam, I have asked questions … to Dole on whether they were planning to kick the can and defer maintenance until such time as the state took over. … It seems that's exactly what they're trying to do," she said, adding that she was concerned that the board had been too lenient.

Dole's consultant Trisha Kehaulani Watson testified that despite its disagreement with some of the DLNR's positions, the company would not oppose the Engineering Branch's recommendation to maintain the performance deadlines and fines. However, she asked that the board consider amending the Engineering Division's recommendations to allow for the reimbursement of the costs Dole incurred on its plans to upgrade the dam.

Nellis added, "Dole will go out of business if they have to come up with $25 million [to fix the dam], which is why we went to the Legislature."

Board chair Chang reiterated that the state needs to do its own due diligence and that the Department of Agriculture's Phase 1 environmental site assessment, which is just a literature review, won't be completed unit June 2024. The DLNR's Phase 1 assessment won't be done until May, Carty Chang later added.

"That's kind of the reality. DLNR is in no way saying they're opposing this transfer. … We need to make an informed decision on what are we actually accepting," Chang told Nellis and Watson, adding that the Engineering Division has already determined that the dam is not safe.

Addressing Dole's request for reimbursement, Chang noted that the money was just not available for that, since her department had received only $1 million from the Legislature for its due diligence.

The board then went into executive session to discuss legal matters with the state deputy attorney general. When the meeting resumed, Watson reported that Dole was withdrawing its request for reimbursement and supported the Engineering Division's recommendations.

"We're here to help," she said.

At the time of the board meeting, Dole had completed its preliminary designs to upgrade the spillway and was expected to submit its dam safety permit application soon.

— Teresa Dawson

Wahiawa Reservoir. CREDIT: DEPARTMENT OF LAND AND NATURAL RESOURCES.