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Environment Hawaiʻi

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The Wong Way?

A federal lawsuit against the City & County of Honolulu over development rights increasingly seems to focus on the role an architect now in federal prison might have played in securing – and allegedly sabotaging – development approvals from the city's Department of Planning and Permitting.

Recently, the court agreed to allow the parties to depose the architect, William Wong, and a former staffer with the DPP about their involvement with the development plans at an agricultural condominium property regime on Oʻahu's North Shore.

The lawsuit is just one of several venues where disputes over actions taken by the developer and, later, owners of CPR units are in play. Teresa Dawson's reporting covers the highlights.

IN THIS ISSUE

City Seeks to Dismiss Marconi Claims, Supports Move to Depose Bribery Convicts

On April 1, the City & County of Honolulu filed in federal court a motion to dismiss claims by the Marconi Point Condominiums' developer that the Department of Planning and Permitting improperly decided several years ago that a Special Management Area permit was required for farm dwelling and agricultural warehouse construction.

At the same time, the city has agreed with a recent motion by the developer's Marconi-related companies to remotely depose architect William Wong and former DPP building plan examiner Kanani Padeken, both of whom are in federal prison for bribery.

The companies, all owned by Jeremiah Henderson, III, claim that the DPP had repeatedly assured them that an SMA permit was not needed for proposed farm dwellings on the property. They also noted that the department issued building permits allowing for the exterior construction of eight large agricultural warehouses topped with solar pho-

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The City & County of Honolulu argues that interior work for these agricultural warehouses, especially the construction of bathrooms, warrants a Special Management Area permit.
CREDIT: PETER FOWLER/ENDURE FILMS.

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NEW AND NOTEWORTHY

Forfeiture: Six acres of Kona land acquired by disgraced former Hawai‘i County housing staffer Alan Rudo and his three associates through the use of affordable housing credits acquired by deceit are now being offered for sale. The asking price is $1.139 million.

The property – two lots along Kealaka‘a Street in the Kealakehe Homesteads area – is being sold subject to a 55-year lease to Honua‘ula LLC, which calls for payment of $7,000 a month lease rent, an affordable housing agreement signed by the former landowner, West View Development, and the County of Hawai‘i in 2015, and a development agreement between Honua‘ula and the county in 2021.

Sale of the land by the U.S. Marshals Service was approved by U.S. District Judge Jill A. Otake, who adopted the recommendations of U.S. Magistrate Judge Rom A. Trader.

The three business associates of Rudo who were involved in the acquisition of the land have entered not guilty pleas to the federal charges against them. They have not yet been tried.

After payment of expenses associated with the sale, the proceeds will be held by the Justice Department's Seized Asset Deposit Fund. Should the business associates – Paul Sulla Jr., Gary Zamber, and Rajesh Budhabhatti – be acquitted, the proceeds can be returned to them.

A trial date of September 16 has been scheduled.

Foreclosure: Deutsche Bank National Trust, which holds a mortgage to the Sunset Beach lot owned by James and Denise O'Shea, is seeking to foreclose on the property to recover more than $1 million dollars it says it's owed.

In December 2022, a Stipulated Judgment and Order was filed in a 1st Circuit Court case involving the state's enforcement efforts regarding an illegal seawall the O'Sheas had built on state land in the Conservation District to protect their property.

This unauthorized seawall must be removed by the end of this year. CREDIT: DLNR.

The order requires that by the end of this year, the O'Sheas, or whoever owns the land at the time, remove the unauthorized seawall at their own expense. The O'Sheas would be required to pay the state $52,500 in fines by January 1, 2025 or a further date approved by the Board of Land and Natural Resources "or in the event of a material default," the order states.

Both the state and the bank agree that the fine, which constitutes a lien on the property, is junior to the bank's mortgage.

The O'Sheas have been trying to sell the property for nearly two years. Although it has a tax-assessed value of more than $2.7 million, it's listed for sale for only $1.5 million.

Correction: An item on the ongoing East Maui water lawsuits in our issue last month erroneously stated that recent filings by parties to the cases were all part of one case. The corrected version is available on our website, environment-hawaii.org, and reflects the fact that the recent appeals dealt with two separate cases. We sincerely apologize for the errors.

Quote of the Month

"We believe the individuals behind 'Mālama Marconi' and the 'Mālama Marconi Coalition' are improperly infringing upon the Marconi trade name, and their use of the name causes confusion to the public. The public might otherwise believe that Makai Ranch or the project are affiliated with 'Mālama Marconi' and the 'Mālama Marconi Coalition,' when they are not"

— Ross Uehara-Tilton,
Attorney for Makai Ranch

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NMFS Approves Management Area Beyond EEZ For Pelagic False Killer Whale Population

The Hawai'i-based longline fishing fleet has chafed for years under a management plan that limits the number of animals belonging to the Hawai'i pelagic population of false killer whales that the fleet can seriously injure or kill in the normal course of hauling in the miles-long fishing lines the vessels set out. Should a certain number of false killer whales be seriously injured or killed by the fleet inside the Exclusive Economic Zone, a large portion of the fishing area south of the Main Hawaiian Islands is to be closed to longline fishing for the rest of the year in which the animals are injured.

That number is calculated on the basis of what the National Marine Fisheries Service (NMFS) determines is the number of animals belonging to the Hawai'i pelagic FKW population that can be removed without harming the long-term viability of the population – a number known as the "potential biological removal," or PBR. For the Hawai'i pelagic false killer whale population within the EEZ, estimated to be as low as 1,567 animals, that number has been set at 16.

It goes without saying that the vessel owners and captains are unlikely to report interactions with false killer whales on their own. As a result, NMFS calculates the number of actual interactions by extrapolating the number of interactions recorded by observers to the fleet as a whole. In the past, about 20 percent of the deep-set (tuna-targeting) longline vessels have carried observers. Last year, the percentage declined, to the point that this year, NMFS estimates only 13.5 percent of the fleet will carry observers.

So, multiplying the current estimated PBR of 16 by 13.5 percent (the percentage of longliners carrying observers), NMFS has now set the trigger at 3 observed takes within the EEZ that result in a mortality or serious injury. (For more information on the most recent trigger value and how it was determined, see the notice in the Federal Register of February 23, 2024.)

Changing the Numbers

Until now, PBR has been calculated on the basis of the estimated number of pelagic false killer whales within the EEZ. This was because so little was known about the population outside that area, even though most of the longliners' fishing effort, and most of the observed takes, occur outside the EEZ. As a result, a PBR for the Hawai'i pelagic false killer whale population could not be derived for the entire area fished by the longliners.

For years, the Western Pacific Fishery Management Council and the Hawai'i Longline Association had pressed NMFS to acquire better information on the pelagic false killer whale stocks. If the population were to increase, the thinking went, then so, too, would the number of false killer whales that the fishery could seriously injure or kill over the course of a year.

Last year, NMFS published an updated stock assessment report for the pelagic FKW population, based on ship surveys and other information taken across almost all of the area fished by the Hawai'i-based tuna longliners. That report, still in draft form, states that the minimum population estimate is 4,152 pelagic false killer whales, with 1,531 of that number being the portion found inside the EEZ.

With an estimated population in hand, NMFS could now calculate a new PBR for the pelagic population, which turned out to be 33.

The mortality and serious injury rates, however, are significantly higher than that, according to the stock assessment report. "The estimated mortality and serious injury [in the area outside the EEZ] in 2019 and 2021 were the highest recorded since before the [false killer whale take reduction plan] was implemented, with annual M&SI rates exceeding 60 animals per year," the draft stock assessment report states. Over a period of five years, the average number of M/SI taken annually has been 47, nearly one and a half times the PBR.

The pelagic false killer whales, unlike the much smaller population around the Main Hawaiian Islands, are not protected under the Endangered Species Act. Instead, they fall under the Marine Mammal Protection Act, with recommendations for management issued by a Take Reduction Team. On the basis of the TRT's recommendations, NMFS promulgates rules. Should the TRT be unable to come to agreement on management measures, NMFS does have the ability, on its own, to undertake rule-making.

A false killer whale snagged by a longline from a commercial fishing vessel. CREDIT: NMFS.

GAMMS

Also last year, the National Marine Fisheries Service issued Guidelines for Assessing Marine Mammal Stocks. Under those guidelines, "whenever possible, a single demographically independent population of marine mammals should be designated and managed as a stock." That stock's range "should not be based on anthropogenic boundaries (e.g., political boundaries such as the U.S. EEZ) as such areas do not represent true biological and ecological ranges and are counter to the [Marine Mammal

Protection Act] objective of maintaining stocks as functioning elements of their ecosystems."

Taking this guidance to heart, NMFS biologists Erin M. Oleson, Amanda L. Bradford, and Karen K. Martien prepared a report describing a management area "that reflects what we know of Hawai'i pelagic false killer whale distribution and allows for a more complete assessment of fishery impacts on this stock." The management area "accounts for what is known about the distribution of Hawai'i false killer whales outside the Hawaiian Islands EEZ," they write.

"With an assessment approach currently based on the Hawaiian Islands EEZ, the impact of the deep-set fishery on the portion of the stock outside of U.S. waters cannot be assessed or managed effectively. This report serves to provide the rationale for the proposed management area along with additional datasets available to support this boundary choice."

Last month, the Scientific and Statistical Committee of the Western Pacific Fishery Management Council met and, among other things, considered the new management area for the pelagic false killer whale stock.

The members were not impressed. A press release issued by the council described the SSC's criticisms of the proposal.

"The SSC determined the available scientific information was not suitable for estimating the abundance of the Hawai'i offshore population of false killer whales in areas outside of the U.S. EEZ," the press release stated.

The committee had established a working group to review the expanded area during the meeting. Its report found that the "limited biological data outside of the EEZ were not sufficient to delineate a biologically based area that defines the pelagic stock, or for applying the modeling approach used to estimate the number of animals inhabiting that area." Based on the working group's findings, the SSC recommended that NMFS "not use the approach for any management purpose, and instead recommended prioritizing gathering additional tagging and genetic data outside of the EEZ."

A year ago, another scientific advisory group – the Pacific Scientific Review Group, which advises the National Oceanic and Atmospheric Administration on compliance with the Marine Mammal Protection Act – considered an early draft of the management area report. Two "potential sources of uncertainty" concerned its members: uncertainty over predictions of populations in regions that had not been surveyed; and uncertainty over the "magnitude and influence" of the bycatch of false killer whales by foreign fishing fleets on the high seas."

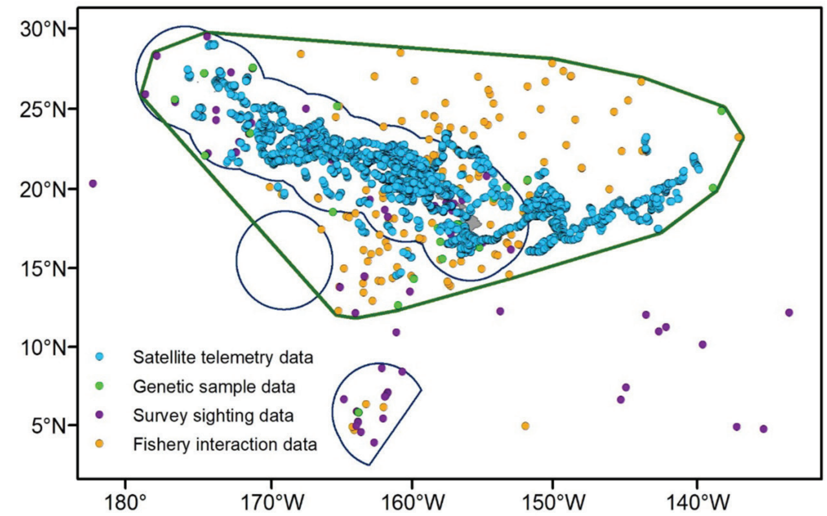

Figure 3. Management area for Hawai'i pelagic false killer whales (green line). The area is defined by a minimum convex polygon surrounding all available satellite telemetry (blue), genetic sample (green), survey sighting (purple), and fishery interaction (orange) locations known or assumed to be part of the Hawai'i pelagic stock including a 35 km buffer. The U.S. EEZ around the Hawaiian Islands and Johnston Atoll is outlined in blue.

The unsurveyed areas, however, which lay west of the EEZ were eliminated in the proposed management area preferred by NMFS since no longline fishing occurs there.

As to the impact of foreign fishing, the authors agreed that foreign fishing effort and bycatch rates are "important to consider as part of a full assessment of human-caused M/SI for this stock." But, they added, estimates of 'hours fished' obtained from Global Fishing Watch "indicate that the magnitude of foreign longline effort near the Hawaiian Islands EEZ is relatively low compared to that of the Hawai'i-based fleet." What's more, the foreign longline vessels fishing nearest to Hawai'i operate mainly to the southwest of the EEZ and, to the east, north of 30 degrees N latitude.

It is unclear at this point what immediate impact the expanded management area for pelagic false killer whales will have on the operation of Hawai'i-based longliners. Until a new PBR is set by NMFS to cover the estimated population within the management area, and until a new rule is set to redefine the trigger for closure of the southern exclusion zone, it would seem that the longline fleet can continue to interact with pelagic false killer whales outside the EEZ with little consequence.

Record Fishing Effort

At the March meeting of the Western Pacific Fishery Management Council, NOAA's Pacific Islands Fisheries Science Center provided an overview of longline fishing by the Hawai'i- and California-based longline fleets in 2023. (About four of the 150 vessels covered in the report are based in California.)

It was a record year, both in terms of the number of sets made (22,954) as well as the number of hooks (67,298,936).

Even so, the number of bigeye tuna hauled in by the fleet continued on a downward trend from the peak catch in 2014. In 2023, just over 197,000 bigeye were caught, as compared to 2014, when roughly 225,000 were landed.

Also in the mix: six takings of false killer whales. Five were outside the EEZ. NMFS had made a determination of M/SI for just one animal – the one taken inside the EEZ. For all the rest, the determination of whether the animal was or was not mortally wounded was still to be determined, even though the earliest interaction occurred more than nine months earlier.

So far this year, there have already been two observed false killer whale takes outside the EEZ. In the first incident, in January, the line was cut and the animal was released with about 13 feet of line, swivel weight, and hook still attached to it. In the second incident, in March, the crew was able to straighten the hook and release the animal. All gear was retrieved.

— Patricia Tummons

Highly Pathogenic Avian Flu A Global Threat to Marine Mammals

Rising seas. Increasing disease threats. Accumulated chemical pollutants in top predators.

All this spells trouble for marine mammals in Hawaiian waters, especially two of the most endangered species: monk seals and the insular population of false killer whales.

At recent meetings in Hawai‘i and California, scientists studying these animals described the threats in detail. Three of the gravest threats are:

- Sea level rise. This has diminished the land available for monk seals to bear their pups. The three main pupping islands at French Frigate Shoals have disappeared and seals are crowding onto other islands.
- Avian influenza. A new variant H5N1 has shown up in marine mammals from Washington state to Antarctica. Experts fear seabirds could carry it to Hawai‘i and transmit it to monk seals, dolphins, and other marine mammals.
- Toxoplasmosis. This parasite, spread by cats, is a leading cause of monk seal deaths in the Main Hawaiian Islands. It is also known to have led to the deaths of spinner dolphins in the islands.

Of these, maybe the most troubling is what is occurring globally with the spread of highly pathogenic avian influenza (HPAI H5N1). In Argentina, an outbreak of avian influenza killed 70 percent of the elephant seal pups born in the 2023 breeding season. Mortality rates were almost 100 percent by early November in the area of Penísula Valdés, where more than 17,000 pups died.In Peru, more than 5,000 sea lions died of the highly pathogenic avian flu, according to a report published by the Centers for Disease Control.

At a meeting of the Pacific Science Review Group, which advises the National Oceanic and Atmospheric Administration on compliance with the Marine Mammals Protection Act, scientists expressed alarm over the prospect of the highly pathogenic H5N1 arriving in Hawai‘i, possibly carried here by seabirds. Elsewhere, in South America, the South Atlantic, and even Antarctica, thousands of birds have died after becoming infected with a highly contagious, highly deadly variety of avian influenza.

In January, the Wildlife Conservation Society issued an urgent warning that the virus threatens wildlife across the globe. “H5N1 now presents an existential threat to the world’s biodiversity,” said Chris Walzer, the group’s executive director of health, in a news release.

“It has infected over 150 wild and domestic avian species around the globe as well as dozens of mammalian species. The bird flu outbreak is the worst globally and also in U.S. history, with hundreds of millions of birds dead since it first turned up in domestic waterfowl in China in 1996.”

The Centers for Disease Control has said that the risk is low that this highly contagious, highly pathogenic avian influenza – (HPAI) – might spread to humans from mammals, even though “a small number of sporadic human cases … have been identified since 2022,” all associated with poultry exposures.

A Hawaiian monk seal and Laysan albatross at the Midway National Wildlife Refuge in the Northwestern Hawaiian Islands. CREDIT: DAN CLARK/USFWS.

However, at least one person in Texas appears to have contracted avian flu from cattle. Herds of cattle in states ranging from Texas to Idaho to Michigan have now been infected with the highly pathogenic avian flu, according to the U.S. Department of Agriculture. The USDA has detected HPAI H5N1 in wild mammals in every state along the Pacific Coast.

The Wildlife Conservation Society’s Walzer noted that globally, the highly pathogenic virus “has now infected many mammals – including foxes, pumas, skunks, and both black and brown bears in North America. Some 700 endangered Caspian seals died from HPAI near Dagestan in 2023…. HPAI H5N1 has arrived in Latin America with devastating consequences.”

Should avian flu arrive in Hawai‘i and infect monk seals, the result could be disastrous. The entire population of monk seals is estimated to be just around 1,600 animals, most of them found in the Northwestern Hawaiian Islands, with around 400 in the Main Hawaiian Islands.

The National Oceanic and Atmospheric Administration does have a disease outbreak plan for monk seals, as well as preparedness plans for other disasters, both natural and human-induced, according to Shanelle Naone, public information officer for NOAA in Honolulu. That plan, she said in an email, “is focused on morbillivirus,” but added, “we are working to adapt these preparedness efforts to HPAI H5N1.” Among other things, she said, NOAA is partnering with the University of California-Davis “to explore and test the utility of bench-top analyzers that are rugged and portable and have the potential to detect influenza in about an hour; these will be particularly useful for remote parts of the species’ range.”

And, since the presence of avian influenza in the islands would likely be seen first among birds, Naone said, “we are working with agency partners who study and surveille avian wildlife. … We also have arrangements to submit monk seal samples to one of the primary diagnostic laboratories that is being used to analyze other pinnipeds in the United States.”

“Our current focus, also in collaboration with other agencies, is on remote areas of the Papahānaumokuākea Marine National Monument, as we are preparing for the upcoming field season. We want to equip field researchers with all the information they need to look for indications of influenza in wildlife and report back.”

The vulnerability of marine mammals that do not rest on land is difficult to assess. But in 2022, a stranded porpoise in Sweden and a bottlenose dolphin were found to have died as a result of H5N1 infection, as well as two dolphins and a harbor porpoise in England in 2023.

A report in *The New York Times* on the 2022 strandings quoted Richard Webby, a virologist at St. Jude Children’s Research Hospital. “Our surveillance activities on a global scale are never sensitive enough to pick up the only two events of this kind,” Webby told the paper. The discovery of avian flu in two different species on two different continents suggests there have “almost certainly” been other cases, Webby was quoted as saying.

Recently, reports have proliferated of stranded whales and dolphins suspected of having been infected with avian flu. In February, an outbreak of H5N1 was detected in the population of wandering albatross on the South Georgia islands, having earlier been detected among brown skua and kelp gulls.

Should the virus arrive in Hawai‘i, it could pose a serious threat to the survival of not only monk seals, but also the endangered insular false killer whale population (numbering fewer than 170 individuals) as well as albatross, other seabirds, and even endangered native forest bird populations.

— Patricia Tummons

Appeals Board Upholds County's Use Of Old Rainfall Data in Approving Variance

Despite years-long drought conditions for much of the island of Hawai'i, the Hawai'i County Planning Department defends its use of 2007 rainfall data as the "best available data."

This was acknowledged by Planning Director Zendo Kern as the county Board of Appeals considered a challenge to Kern's approval of a subdivision in North Kohala. The subdivision had been sought by the owner, Anderson Big Island Investments, LLC, of a 1.4-acre lot proposing subdividing it into three lots. The zoning, requiring minimum lot sizes of 15,000 square feet, allowed for the subdivision, but the county Department of Water Supply could not provide water to more than the one existing lot.

In such cases, the Planning Department's rules allow for subdivisions of up to six lots to be created, so long as there is sufficient rainfall — at a minimum 60 inches a year — to support catchment systems.

In 2007, when data was compiled for the 2011 Rainfall Atlas of Hawai'i, the area of North Kohala where the subdivision is proposed received around 65 inches of rain a year. But a neighbor, Christine Bailey, concerned about last summer's fires on Maui and Hawai'i Island, appealed Kern's decision, noting that much more recent data from the National Weather Service did not support Kern's agreement with the applicant that the site receives more than 60 inches of rain a year.

As Bailey's appeal stated, "the record shown on the official [National Oceanic and Atmospheric Administration] website demonstrates that the average rainfall for the North Kohala area in question was only 46.6 inches for the period 2004 through 2022. In 2021 the rainfall was below 30 inches for the first time on record, and in 2022, the rainfall was below 29 inches. The State of Hawai'i Climate Change Portal notes that, 'since 2008 overall, the islands have been particularly dry.'"

"The [county] rules are not ambiguous in requiring that lots to be served via catchment must have the minimum specified rainfall," the appeal noted, going on to quote Rule 22-4: "all lots to be served by catchment shall have an average annual rainfall of not less than 60 inches. The annual rainfall can be proven by rainfall records at comparable rain gauges or by the USGS rainfall map." There is just one exception, for lots that are at least 20 acres in size and at least four times the minimum lot size allowed by zoning – a condition that does not apply in this case.

Under questioning from Jean Campbell, the deputy corporation counsel representing the Planning Department, Kern defended his reliance on the 2011 Rainfall Atlas as "the standard, best available data that we use for all of our variances. We're not subjective on which ones we pick and choose from. This is the one we use across the board. All of our variances for Rule 22 are based on that."

Campbell asked if it would be unusual for Kern's department to stray from that standard.

"I believe it would be not only out of the ordinary. I believe that it would be subject to an appeal and I would be sitting here feeling very differently because I was using subjective information versus the best standard available data that we have."

Who would decide whether the standard should be updated? Campbell asked.

"That would be mine and that would take some work," Kern replied.

Commenting on the 60-inch rainfall standard for a water variance, Kern suggested he would be inclined to relax it by lowering the threshold for a variance.

He was asked by Whitaker whether the Planning Department had considered updating its rainfall figures.

"Yeah," Kern replied, "you know, sometimes I do contemplate that and I contemplate looking and changing the rainfall data. And my thought around it is generally to lower the rainfall [threshold] amount. There's a big reason why. We need housing. Housing is a huge, huge issue. We have our local children being exported all the time because they can't afford housing.

"One of the biggest impediments to housing is water. The [Department of Water Supply] does not necessarily engage in developing new systems. They work on their systems. They work on increasing some capacity, but you can talk to the director of the Water Department and they say the primary job is to maintain our systems. So in an effort to move forward from a sustainability standpoint as well as a housing standpoint, I would actually contemplate lowering that amount to allow more people to be able to live here and utilize catchment systems."

The Board of Appeals voted unanimously to affirm Kern's decision and deny the appeal.

Tom Giambelluca, lead author of the Rainfall Atlas, was asked whether the county's reliance on data from that source was appropriate, given recent trends.

"The Atlas provides a 30-year mean estimate for the period ending in 2007," he replied. "We have not put out an update for the 1978-2007 mean maps in the Atlas. However, we have developed monthly maps going back to 1920 and continuing up to the present. On our list of high priority tasks is to use the monthly maps to produce annual, ten-year, and thirty-year mean maps for the most recent periods and for other periods.

"The question of what rainfall metric is most appropriate in the planning realm is a little out of my area of expertise. But I will say that while the long-term mean is very relevant, consideration of the year-to-year variability could also be useful. Rainfall is highly variable on all time scales. Using data from only the last few years, for example, is not necessarily a better measure of what the average will be in the coming years than using the long-term mean from an earlier period.

"On the other hand, we know that climate warming is likely to affect weather patterns in the Hawai'i region and might already be affecting rainfall, which would argue against using an average based on data from decades ago."

But, he continued, "I don't fault anyone for choosing to use the Rainfall Atlas mean maps as guidance. We just haven't yet made other relevant rainfall metrics readily available. We hope to do so in the near future."

Jeff Darrow, deputy planning director for the county, was asked about the use of rainfall data that did not reflect current trends.

"We have been working with the state to incorporate their current rainfall data layer for our GIS," he replied, but it has been a process to get approval. It is my understanding that we are close and once incorporated with our GIS, it will provide constant updated rainfall data."

— Patricia Tummons

Marconi *continued from page 1*

tovoltaic panels, without calling for an SMA permit.

They allege that when the DPP finally decided that an SMA permit was needed before further development could occur, the decision coincided with a rift Makai Ranch (one of Henderson's companies) had with Wong over an expensive study Wong said would need to be done before a farm dwelling permit sought by one of the unit owners could be approved. Makai Ranch, which developed the CPR, had hired Wong to facilitate the farm dwelling permit's approval.

Given that Wong and Padaken were years later convicted of federal bribery charges regarding the processing of DPP permits, Henderson's companies claim that corruption was at the root of the DPP's change in position regarding SMA requirements.

The city has countered that the alleged assurances from DPP were not the broad go-ahead the companies made them out to be and that the department has always retained the authority to require an SMA permit if it determines that the possible environmental and ecological effects of the proposed development are significant.

The complaint claimed that the DPP had improperly required an SMA permit before applications for certain building permits and associated roadway and agricultural subdivision applications could be processed.

The court denied the city's initial motion to dismiss the case with regard to Makai Ranch's agricultural subdivision application, but granted it with regard to the building permits and roadway subdivision application. However, the court allowed the companies to amend their complaint to bolster their arguments regarding the latter two subjects.

The historic buildings at Marconi, one of which was recently damaged during renovation. CREDIT: PETER FOWLER/ENDURE FILMS.

Motion to Dismiss

The city's recent motion to dismiss argues that the companies' amended complaint still fails to make their case regarding the permits for the farm dwellings and agricultural structures.

"Defendants initially determined to seek dismissal of Plaintiffs' roadway subdivision claims. Defendants are not conceding the issue, but chose to not seek dismissal of those claims based upon discussions at [a pre-filing] conference [held in January]," the motion states.

The city also chose not to seek dismissal of the claims regarding the agricultural subdivision, but stated that it was not waiving its right to seek dismissal of both subdivision claims at a later date.

With regard to the eight large agricultural warehouses that have been built, the city conceded that in September 2015, the DPP determined that two warehouses and associated PV systems would be SMA-exempt, and then later approved building permits for eight warehouses. The companies applied for a permit for the interior of one of the warehouses that included the building of bathrooms.

However, the city's motion continues, "Makai Ranch now seeks to build multiple luxury farm dwellings and be given pre-application approval for 'interior' permits for its eight finished agricultural warehouses. Under the previous version of Hawai'i Revised Statutes Chapter 205A (the state's Coastal Zone Management law), a single farm dwelling, by itself may not be considered a 'development'. Interior work to warehouses may also, by itself, not be considered a 'development'. However, Plaintiffs' combined aspirations demonstrate that there are plans which would have 'a cumulative impact, or a significant environmental or ecological effect' and therefore the plans are a 'development' for purposes of HRS Chapter 205A. Thus, DPP has told Makai Ranch that it will need an SMA permit if Makai Ranch still intends to develop the Property."

The companies' claim that DPP is "equitably estopped" from denying interior permits for the agricultural warehouses because DPP allowed them to build the exteriors. To this, the city argues that the companies "have not even bothered to apply for seven of the eight interior permits, thus their alleged injury cannot be ripe because there has been no injury."

The city goes on to point out that under the state's Coastal Zone Management Act, the DPP must require an SMA permit for development within the SMA, and that development includes "[p]lacement or erection of any solid material or any gaseous, liquid, solid or thermal waste. . . [c]onstruction, reconstruction, demolition, or alteration of the size of any structure."

"Thus, DPP has always retained the right to require an SMA Permit for the 'interior' permits for the agricultural warehouses. This is especially true because Plaintiffs are planning on building restrooms in the warehouses. Restrooms would necessitate waste water, which is of obvious concern in the SMA. (Empty buildings that have no restrooms would not.) DPP cannot be equitably estopped from requiring an SMA Permit where the nature of the structure would change based upon its interior, even if the exterior structure was allowed without an SMA permit," the city states.

To the companies' claims that the DPP was treating development at Marconi Point Condominiums differently from other agricultural CPRs, the city points out that the examples the companies provided in its amended complaint are projects that "are (1) differently zoned; (2) miles away; (3) different in scope; and (4) not threatening the Laysan Albatross's habitats, a 'near threatened' species." It adds that none of the comparable projects (Waialee condominiums, Kahena Wai estates, and Kealia Farms) have historic buildings on their sites (such as the Marconi Wireless Telegraph Station) or are partially zoned preservation (which the Marconi property is).

"This list is non-exhaustive but demonstrates there are key differences between the Property and the proposed comparators.

"Additionally, this list also demonstrates that there is a rational basis for the disparate treatment, if there even is disparate treatment," the city states.

Finally, the city argues that even if the companies's building permit claims were sufficiently supported, they must still be dismissed because the complaint does not include "an indispensable party," William Wong.

In ruling last December on the city's initial motion to dismiss, the court dismissed the companies' argument that it must construe as true the allegations that the DPP's approval process was "marred by Wong's corrupt pay-to-play scheme," the city states.

Should the court now consider that argument as a reason to deny the city's new motion, the city argued that the companies' amended complaint must also be dismissed for failing to include Wong as a defendant.

"Plaintiffs' claims that there was some corruption which led to their inability to receive building permits in 2016, is wholly reliant upon Wong. Plaintiffs essentially claim that their failure to pay Wong resulted in their permits being cancelled. If that is the case, then Plaintiffs' claims are against Wong, not the Defendants. Thus, Wong is an indispensable party," the city states.

Fishing Expedition?

On May 31, U.S. District Judge Jill A. Otake will hold a hearing on the city's motion to dismiss. Opposition briefs are due on April 16. The city's reply is due on April 30.

If and when Wong and Padeken will be deposed remains to be seen. In the meantime, the companies have filed, but not yet served as of press time, several subpoenas to community groups and others who have either been involved in trying to get greater government enforcement of activities at Marconi Point, or are involved in habitat management.

On March 21, attorneys representing the companies filed subpoenas seeking information from Peter Lenhart, the attorney representing two condo unit owners who are being sued in state court by two of Henderson's Marconi-related companies; the North Shore Community Land Trust and its director, Doug Cole; the Conservation Council for Hawai'i, the Center for Biological Diversity, and the Aloha Marconi Alliance.

The land trust manages a native habitat restoration area adjacent to the condominium property, and the other groups have recently voiced their concerns to government officials, the press and on social media over damages to environmental and cultural areas within the condominium property.

The subpoenas seek a very broad range of documents and information regarding development at Marconi Point, including everything sent to city, state, and federal agencies; internal documents; and correspondence among the community and non-profit groups.

In explaining the reasoning behind the subpoenas, attorney Ross Uehara-Tilton, who filed them with the court, provided some background: "Makai Ranch spent time and money planning the project, all with the understanding that it was SMA-exempt. A lot of the initial infrastructure work, such as paving the roads and installation of some of the water and electrical infrastructure went as expected, and all without any SMA permit. Makai Ranch even successfully applied for a farm dwelling permit on one of the units as a test, to confirm that a farm dwelling could be constructed in the project without an SMA permit. The permit was approved and Makai Ranch could have constructed the farm dwelling, but it withdrew the application after receiving approval because it never intended to build the farm dwelling. Makai Ranch just wanted to confirm it was possible to construct a farm dwelling so that it could tell potential buyers that construction was possible."

He continued, "We think DPP only started treating the project as requiring an SMA permit after Makai Ranch refused to give in to Wong's extortion scheme [regarding a new archaeological inventory survey]. We know Wong wrote at least one letter to DPP to cancel the permit, but we think his interference went beyond this single permit. We think he induced DPP to come up with a way to halt the project, because DPP had never before required a site development plan or an SMA permit until after the falling out with Wong."

With regard to those subpoenas, he wrote, "We understand that there are concerned community members, including the 'Mālama Marconi Coalition.' [The Coalition is also known as the Aloha Marconi Alliance. See the related story in this issue.] We are trying to determine whether these individuals started raising issues with the project around or before the falling out with Wong. We are actually expecting that we won't find anything in response to the subpoenas, because we don't think there was such fierce community concern until much more recently. If community members were raising issues with DPP back then, then it seems possible that DPP could have based its decisions on community concerns, and not on Wong's corrupt influence. But if there wasn't any communication around that time, then it starts to look more like Wong was the cause of the DPP's change in position. As far as we know, CBD and the Malama Marconi Coalition only started raising issues after the recent clearing activities (which were not performed with Makai Ranch's knowledge or direction), and/or the albatross death [that occurred in December]."

It's unclear why information from the Aloha Marconi Alliance/Mālama Marconi Coalition would be sought at all, since the group did not even exist until a few months ago.

Although many of the documents sought from the intended subpoena recipients can or should be able to be obtained via document requests to government agencies, Uehara-Tilton notes, "We have submitted numerous requests to DPP in the past. The DPP has provided some information, but has also withheld documents because of the 'corruption investigation.' We think there are documents out there that may prove the connection between Wong and the SMA issue, or otherwise shed further light on the corruption within DPP, which DPP does not want to turn over. This is one of the claims in the lawsuit—that DPP violated [state Uniform Information Practices Act] by improperly withholding documents. We are trying to understand the full extent of the corruption.

"Now that there is a lawsuit we are expecting DPP to turn over all of these documents soon, but we haven't received anything yet. DPP may continue to fight to prevent disclosure."

He added that it is not only important to obtain information from Wong, "but it is also important for us to obtain the information from the city itself to prove that the city had information that it was unlawfully withholding."

With regard to the city's assertion that Wong is an indispensable party to the case, Uehara-Tilton believes the argument is "just the city's attempt to throw a wrench in the case. Given that Wong is in jail, if he were a party to the lawsuit, that would cause a lot of delay for us. He would have to attend hearings, and the court would likely require the plaintiffs to pay the costs associated with this, meaning the additional time and expense of transporting him to and from the courthouse, providing federal marshals, etc. … If Judge Otake decides that Wong is a necessary party, then all it means is we'll have to amend our complaint again to name him as a Defendant. It doesn't mean the case gets kicked out."

— Teresa Dawson

Developer, Community Spar Over Marconi Trade Name Ownership

Listed under M: **"Marconi.** Beach, surf site, Kahuku, O'ahu. Calcareous sand beach between Kalaeokauna'oa, or Kahuku Point, and Kalaeuila, or High Rock. The beach and the surf site were named after the small community immediately inland. The American Marconi Company set up wireless operations in Hawai'i in 1902 and built their transpacific receiving station here at Kahuku in 1915. Since then, the community that developed around the station has been known as Marconi. The beach is also known as Hanaka'īlio Beach."

That's from the book, "Hawai'i Place Names: Shores, Beaches and Surf Sites," by John R.K. Clark, published by University of Hawai'i press in 2002.

So according to Clark, the area adjacent to the Turtle Bay golf course that includes the Marconi Point Condominiums has been known as Marconi for more than a century.

But the right to the name "Marconi," as it relates to the region, is now being disputed.

The growing concern among community members troubled by the impacts that the property's development have had on environmental and cultural resources culminated in the creation in January of a group calling itself the Mālama Marconi Coalition.

In addition to social media posts, the group sent a letter to the City & County of Honolulu's Department of Planning and Permitting calling for the removal of an iron fence around one of the condo units that was interfering with nesting Laysan albatross, a protected species under the Migratory Bird Treaty Act. It also called on the U.S. Fish and Wildlife Service to investigate the death last December of a Laysan albatross that had become entangled in that fence.

Then something strange happened.

On January 25, Makai Ranch, LLC, which created the Marconi Point Condominiums project more than a decade ago, registered the trade names Mālama Marconi and Mālama Marconi Coalition with the state Department of Commerce and Consumer Affairs.

The original Mālama Marconi Coalition states on its Facebook page that it is "a network of community organizations and individuals advocating for the full enforcement all laws protecting the natural, cultural, historic resources, native ecosystems, and wildlife at 'Marconi RCA' properties and coastline."

The nature of the Mālama Marconi Coalition as registered by Makai Ranch, however, is "supporting conservation, protection of wildlife, clean energy, agriculture, and historic preservation at Marconi Point Condominiums."

The difference between the two mission statements could confuse the public, argued the Center for Biological Diversity in a press release issued March 14. The center is a member of the original Mālama Marconi Coalition.

The release also noted that in addition to registering the trade names, Makai Ranch "reserved certain domain names for URLs containing the names 'Mālama Marconi Coalition' and 'Mālama Marconi' — possibly to prevent the association from continuing its public interest advocacy."

In response to the DCCA registrations and URL reservations, the group filed a petition last month with the DCCA "to protect their coalition's original name from being hijacked by developers."

"This back-door maneuver to snag our name looks like a slimy and under-handed attempt to divert the public outrage over environmental and cultural destruction at Marconi," Maxx Phillips, Hawai'i director and staff attorney at the Center for Biological Diversity, stated in the press release.

On February 17, "to ensure the association could continue its mission of advocacy," the group registered a new name with the DCCA: Aloha Marconi Alliance (as well as Aloha Marconi).

The association said it would use these new names until their petition with the DCCA is resolved.

"We won't tolerate the lack of aloha for our concerned community, native species and their ecosystems," Conservation Council for Hawai'i executive director Jonee Peters stated in the release. "This motivates us all to work even harder to stop the destruction of wildlife habitat and native species."

When asked for a response to the allegations of name-squatting, Makai Ranch's attorney, Ross Uehara-Tilton, conceded that that's exactly what was going on. However, he argued that it was done to prevent confusion, not cause it.

He argued that Makai Ranch owns the trade name/trade mark "Marconi" when used in relation to the specific area of Kahuku. (To support this, he refers to a statement on the DCCA's website, which states, "Ownership of a trade name is acquired by using the name openly and continuously in the marketplace. Many trade names in Hawai'i are not registered with the State. Nonetheless, by using those names in commerce, common law ownership rights are acquired.")

"'Marconi' and/or 'Marconi Point' are not the historical names of this geographic region. The name 'Marconi Point' only came into use as a descriptor when Makai Ranch created the condominium property regime known as 'Marconi Point Condominiums,'" Uehara-Tilton explained in an email.

"I am not an expert in Hawaiian history, but I believe the area was formerly known as Punamano for the nearby Punamano Marsh and the Punamano Spring. In any case, no one has used 'Marconi' to describe this region, until Makai Ranch," he continued.

"We believe the individuals behind 'Mālama Marconi' and the 'Mālama Marconi Coalition' are improperly infringing upon the Marconi trade name, and their use of the name causes confusion to the public. The public might otherwise believe that Makai Ranch or the project are affiliated with 'Mālama Marconi' and the 'Mālama Marconi Coalition,' when they are not. These groups have published false and misleading information about the Marconi Point Condominiums, Makai Ranch, and affiliated entities, causing damage to Makai Ranch's reputation," he wrote.

Uehara-Tilton was referring, in part, to statements suggesting that Makai Ranch had anything to do with the Laysan albatross death or was somehow involved in any illegal land clearing.

"Makai Ranch was the original developer of the project, but the units have largely been sold to third parties. Makai Ranch is not responsible for the alleged environmental and cultural destruction. … Makai Ranch does not object to environmental and cultural advocacy, but is only trying to protect against the spread of false information. …

"Makai Ranch registered the trade names intending to protect its intellectual property and contest use of the Marconi trade name by these other groups. Registration was the first step to pursue these claims," he wrote.

He added, "We do have concerns about the 'Aloha Marconi Alliance; for the same reasons, but we probably need to wait for the outcome of the petition for 'Mālama Marconi Coalition' before deciding whether to try to contest 'Aloha Marconi Alliance.'"

Uehara-Tilton did say that if presented with documentation or information that the region had long been referred to as Marconi (before Makai Ranch came along), "This kind of information might cause us to change our position."

When presented with screen shots from Clark's book on place names, Uehara-Tilton called it "helpful," but did not go further.

— Teresa Dawson

Calls for Enforcement at Marconi Point Finally Result in Several Violation Notices

After years of complaints from members of the public, the Honolulu Department of Planning and Permitting has begun to crack down on illegal farm dwelling and other development at the Marconi Point Condominiums on O‘ahu's North Shore.

In late March and early April, the DPP issued notices for the following violations:

Unit 1, owned by Yue-Sai Kan, has a raised agricultural structure on it that the DPP allowed to be built without permits after Kan promised that it would not require electricity or plumbing. Recent inspections by the DPP found that the structure indeed had been upgraded with electricity and plumbing. Also, two greenhouses and a shipping container had also been constructed without required building permits.

Although Kan's unit is one of the few within the CPR that are allowed a farm dwelling, she has not yet been able to build one. A Special Management Area (SMA) permit application submitted by her consultant last year, seeking to allow for farm dwelling construction and agricultural activities, was rejected by the DPP.

Unit 8, owned by the Mary E. Breen Trust, had an existing agricultural structure illegally converted into a farm dwelling, and two ag structures had been built without permits. Breen's unit is another one that is allowed a farm dwelling, but her applications with the DPP to build one have stalled due, in part, to her failure to submit an agricultural development plan.

The CPR's developer, Makai Ranch, hired architect William Wong to help facilitate the approval of her permit. The fallout from that endeavor has resulted in claims in federal court that Wong and corrupt DPP employees (all now in federal prison for bribery) caused the department to halt further development within the CPR until an SMA permit is obtained. (See cover story.)

Units 9 and **10,** also owned by the Mary E. Breen Trust, had a greenhouse built without the required building permit.

Unit 12, owned by Hui Kawela, LLC, had a two-story ag structure converted to a farm dwelling, a one-story new farm dwelling built, an ag structure fitted with photovoltaic panels, and two shipping containers installed, all without required building permits.

Unit 13, owned by Native Farmland and Security, LLC, had a two-story ag structure converted to a farm dwelling and a greenhouse, shed/office, and shed constructed without required building permits.

In addition to these violation notices, the DPP issued two other violations notices to the Mary E. Breen Trust/Mary Breen (for units 9 and 10), another to Hui Kawela, another to Kan, another to Native Farmland and Security, and two to Sushil and Lorene Garg/Greystone HI Investments LLC (for units 16-19). All of those violation notices were for development within the SMA without the required SMA permit and apparently involved damaged or destroyed wetland areas.

For those violations, the notices stated that violators were subject to a civil fine of up to $100,000, and "any person who undertakes any additional development in violation of this chapter will, upon notice … be subject to a daily fine not to exceed $10,000."

It is unclear whether Kan's notice of violation for unauthorized development within the SMA includes an iron fence she had built that community members say poses a threat to nesting Laysan albatross in the area and should be taken down or replaced with a more benign, symbolic fence. The notice does not specify the problematic developments and DPP spokesperson Curtis Lum told *Environment Hawai‘i,* "Because these are open NOV's we cannot comment much on them."

Also, with regard to the DPP's grubbing violation notice issued to all of the

The Marconi Point Condominiums property. CREDIT: PETER FOWLER/ENDURE FILMS.

owners of coastal units at Marconi Point for unauthorized grubbing of about five acres along the coastline last October, that case has been closed. The DPP had proposed a small fine of $200, plus $100 a day if the violation was not cured.

Lum stated, "That violation was corrected before we could assess fines. So that one is closed."

He did not respond by press time to questions about what mitigation had been done or whether the initial $200 fine had been paid.

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Couple Seeks Dismissal of Complaint, Citing 'Matters of Public Interest'

Wayne and Tara Hu, owners of one of the Marconi Point units that are allowed a farm dwelling, were two of the many people (including former state Sen. Gil Riviere) who had raised concerns with the DPP over the years about some of the construction going on within the CPR.

The Hus laid out their concerns in an August 2023 letter to the developer and its attorneys, and sent copies of that letter to various city, state, and federal agencies that they believed might be able to address some of the matters raised.

Their inclusion of the USDA, which backed a large construction loan for several agricultural warehouses on units owned by the developer's affiliate companies (RCA Trade Center, Inc. and MP Unit 21, LLC), prompted those companies last October to sue the Hus in 1st Circuit Court for damages and injunctive relief.

A mandatory settlement conference has been scheduled for next year, but on March 15, the Hus filed a motion to dismiss the complaint. A hearing on the motion has been scheduled for April 24.

In the motion to dismiss, the Hus' attorney, Peter Lenhart, acknowledged that the 60-day deadline to file the motion after being served the complaint had passed and asked that the Hus be granted an extension due to difficulties they had securing funding for their defense from their insurance companies.

Lenhart argued that the complaint should be dismissed because it violated free speech provisions in the U.S. and Hawai'i constitutions, as well as the Hawai'i Public Expression Protection Act.

Citing a 2006 Hawai'i appeals court decision *(Meridian Mortg. v. First Hawaiian Bank),* Lenhart pointed out that to establish that the Hus wrongfully interfered with the companies' contractual relations, they must show, "1) a contract between the plaintiff and a third party; 2) the defendant's knowledge of the contract; 3) the defendant's intentional inducement of the third party to breach the contract; 4) the absence of justification on the defendant's part; 5) the subsequent breach of the contract by the third party; and 6) damages to the plaintiff."

Lenhart argued that the companies can't establish that there was an "absence of justification," noting that the Hus, indeed, had a social justification for sending their letter to government agencies.

"The Hawai'i State Constitution … makes clear that the preservation of the State's natural beauty and resources, conservation of agricultural lands, and the preservation of a 'clean and healthful environment' are for the benefit of the citizens of Hawai'i, and are, therefore, matters of public interest and concern. There have been numerous articles in *Environment Hawai'i* and *Civil Beat* reporting on issues at the Project related to many of the issues addressed in Defendants' Letter and several community organizations have also raised concerns similar to those of Defendants'. If monies guaranteed by the USDA to build Plaintiffs' eight industrial warehouses were being put to illegal use, then the government should know and take action," Lenhart wrote.

In addition to seeking attorneys' fees, the Hus also asked for "other relief" for what they believe is an abuse of process by the plaintiffs.

"Opposing counsel in a Zoom conference held February 1, 2024, informed undersigned counsel that Plaintiffs were required to file Plaintiffs' Complaint in order to fulfill a 'defense obligation' contained in Plaintiff RCA's loan agreement which required Plaintiffs to defend against allegations that its collateral (i.e., the property secured by its mortgage) had invalid building permits. Opposing counsel's admission makes clear that Plaintiffs' Complaint is nothing more than a façade to appease Plaintiffs' lenders. It is clear that the causes of action in Plaintiffs' Complaint are frivolous, meritless, and brought solely for the purpose of chilling Defendants' free speech and right to petition the government. Defendants' actions in mailing their Letter and requesting investigation into the questionable activities at the Project is not an action ripe for litigation since those actions did not cause or result in a breach of any of Plaintiffs' contracts or result in a business advantage to Defendants.

"Opposing counsels' actions in filing the Complaint was willfully done, by their own admission, without any intention of submitting to the Court a meritorious and serious request for relief. Those offensive actions have wasted the Court's and Defendants' time and resources and have further caused Defendants stress and damage by needlessly subjecting them to substantial attorneys' fees in defending against Plaintiffs' frivolous Complaint," Lenhart wrote.

— Teresa Dawson

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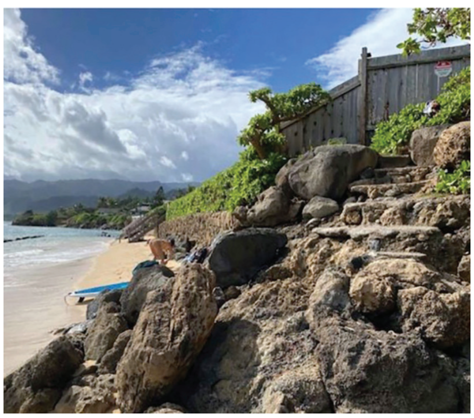
BOARD TALK

Board Approves Easement For Old Revetment in Lāʻie

On March 8, the state Board of Land and Natural Resources approved a 25-year, non-exclusive easement and immediate right-of-entry permit to Western Community Crossroads LC for a 710-square-foot rock revetment in Lāʻie, Oʻahu.

The revetment spans the front of the property held by Western Community Crossroads and that of three other owners. According to a notarized letter from the property's previous owner, the revetment's construction in "the 1962 to 1963 timeframe" predated the establishment of the Conservation District, which would make the seawall a non-conforming use.

The Department of Land and Natural Resources' Office of Conservation and Coastal Lands stated in a September 6, 2023 letter to the applicant that the office was unable to confirm the legality or non-conforming status of the revetment and stairs to the beach. "Consequently, DLNR cannot prove the encroaching rock revetment and stairs are Conservation District violations. Should the OCCL find that the encroaching structures were built without permits, within the Conservation District after 1964, the OCCL may reconsider this finding."



The revetment and stairs at Lāʻie for which the Land Board recently approved a 25-year easement. CREDIT: OCCL.

"OCCL's evaluation criteria would support a disposition request being processed for the encroachment area. The subject revetment's construction date cannot be determined based on the gathered information. Should the OCCL find that the structure has been significantly altered since it was originally constructed, the OCCL may reconsider this finding," the letter stated.

The OCCL also found that removal of the revetment and stairs would "not improve beach resources and could cause property damage without concurrent removal of the entire revetment fronting the three parcels to the south," according to a report to the board by the DLNR's Land Division.

The Land Division "supports this disposition request solely on OCCL's determination that it would support processing of a disposition request," its report stated.

In explaining his office's position, OCCL administrator Michael Cain told the board that on any application for a shoreline structure in the Conservation District, "we keep the burden on the landowner. When there's a violation, that burden is on us."

The OCCL was unable to find any authorizations for the revetment, but noted that a 2007 survey showed the revetment to be mauka of the shoreline, and, therefore, under county jurisdiction.

"On the burden of proof question, this is not an enforcement action," board member Aimee Barnes said.

Cain replied that his office was asked to concur whether the revetment was a non-conforming structure.

"With non-conforming structures, there's not a question of whether I like it or not. I'm obligated to follow the law, which allows for repair of non-conforming structures. … [Current] state law is that we do not armor shorelines where there are sandy beaches unless there's a public purpose," he added.

Board member Riley Smith supported the proposed easement. He said the beach area behaves much differently in other areas where the Land Board has rejected shoreline armoring efforts.

"To me, the message to a buyer is you gotta do due diligence. There may be different circumstances … that are gonna result in different outcomes that may change from time to time. So take your chances when you buy property next to the ocean. … I'm comfortable approving this one because there's a whole lot of documentation here including that letter … that gives a reasonable defense on the timing [of the revetment construction]," he said.

Board member Kaiwi Yoon added that he was glad the reasons for approving this revetment were on the record. "I'm glad that we're now armed to respond [to the community] in a manner that's fair and consistent with the board's actions previous about armoring our coast," he said.

The Land Board approved the Land Division's recommendation to approve the easement and right-of-entry permit, although board member Barnes voted in opposition.

Barnes said that for such a contentious issue as shoreline hardening, she would like to see a higher bar of evidence. "Nothing personal. Just my take on this matter before us," she said.

Should the easement also be approved by the state Legislature, the owners would be required to post a bond covering the cost of the revetment's removal. That's been estimated to be about $23,000.

— Teresa Dawson