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SLAPP Down

A lawsuit intended to punish a Marconi Point couple who complained to public agencies about actions of a developer appears to have been the first legal test of Hawaiʻi's new law providing protections against such Strategic Lawsuits against Public Participation (SLAPP) suits.

And it seems to have worked as intended.

The SLAPP litigation is just one of many of the legal facets associated with the Marconi Point development, where endangered species habitat has been destroyed, protected albatross harassed and even killed, and Conservation lands denuded.

Also in this issue, we review some of the long-stalled Land Use Commission dockets, where the promise of housing is largely unfulfilled.

IN THIS ISSUE

Judge Dismisses Case Brought to Silence Complaints About Warehouses at Marconi

On the morning of April 24, outside the courtroom of 1st Circuit Judge Jon Tonaki, the relief was palpable. Judge Tonaki had just granted Wayne and Tara Hu's motion to dismiss a lawsuit filed against them six months earlier by companies associated with the developer of an agricultural condominium project at Marconi Point on Oʻahu's North Shore.

Last October, RCA Trade Center and MP Unit 21 sued the Hus over a 50-page grievance letter the couple's attorney, Peter Lenhart, had sent on their behalf to the developer's attorneys and various government agencies, including the state Department of Land and Natural Resources, the Honolulu Department of Planning and Permitting, and the USDA.

The Hus own a unit at Marconi Point that is across from eight large agricultural warehouses the companies built on the far side of the 96-acre CPR. Among other things, the Hus' letter complained about the visual impact of those warehouses, alleged improper use of them, and the fact that they were being advertised as industrial spaces.

The letter also complained about off-road vehicles being allowed through the CPR's locked gates and onto the beach, unauthorized tree planting and boundary amendments, and the unpermitted conversion of agricultural structures on other units within the CPR into dwellings.

The complaint and subsequent filings by RCA Trade Center and MP Unit 21, which own the units where the warehouses have been built, suggest that the Hus' letter somehow played a part in the companies' lender, North Avenue Capital, deciding to withhold withdrawals under their $7,883,000 US-

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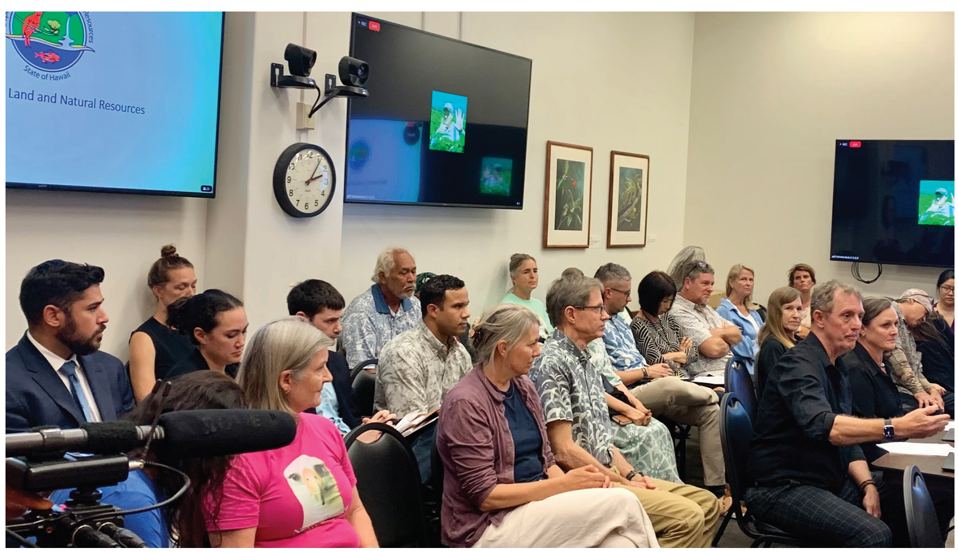

At the Land Board's April 26 meeting, owners of units at the Marconi Point Condominiums, including Wayne and Tara Hu, sat across the room from one of the attorneys who represents RCA Trade Center and MP Unit 21, as well as the project's developer, Makai Ranch.

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NEW AND NOTEWORTHY

Chabad House: Hawai'i County's efforts to force the Chabad Jewish Center of the Big Island to obtain a use permit in order to hold services at a home in Kailua are unlikely to succeed. As we reported in March, the Chabad Center and Rabbi Lei Gerlitzsky sued the county in federal court, alleging the county Planning Department's notices of violations of its rules amounted to a "substantial burden on Plaintiffs' free-exercise rights."

On March 29, the Civil Rights Division of the U.S. Department of Justice filed a "Statement of Interest in Support of Plaintiffs' Motion for Preliminary Injunction."

Referencing the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), the government attorneys write that the plaintiffs "have established a prima facie RLUIPA equal terms violation by identifying unequal zoning requirements in the language of the Zoning Code."

On April 9, the parties filed with the court a proposed order to grant temporary relief to the plaintiff pending settlement, under which the county agreed not to act on any notice of violation or enforce any requirement that religious meetings be permitted. An early settlement conference was scheduled to be held April 30.

(For background, see the article in the March edition of *Environment Hawai'i.)*

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ICA Boating Decision: On April 29, the Intermediate Court of Appeals ruled that the issuance or renewal of six Ka'anapali commercial use permits by the state Department of Land and Natural Resources constitutes an action under the Hawai'i Environmental Policy Act (Chapter 343 of Hawai'i Revised Statutes).

The decision did not address whether a permittee is exempt from preparing an environmental assessment.

Quote of the Month

"[P]eople make money off of the fact that there's an upzoning from Agricultural to Urban or Conservation to Urban. And they don't even have to do anything for the community just to make money off the property."

— *Gary Okuda,*
Land Use Commissioner

Ka'anapali, Maui. CREDIT: DLNR.

Nā Papa'i Wāwae 'Ula'Ula, Randal Draper, and the non-profit West Maui Preservation Association appealed a 2019 2nd Circuit Court final judgment that the DLNR's permitting system was not subject to the state's environmental review process.

According to a press release by the plaintiffs' attorney Lance Collins, "In 2017, West Maui shoreline and Native Hawaiian groups sued the [DLNR] over its permitting system of commercial tour boat operators that launch from Ka'anapali. Of particular concern to the groups was the discharge of wastewater into nearshore waters, the misuse of required public beach access parking at hotels by tour operator customers and the danger of thrillcraft and large vessels striking paddler, surfers and divers."

The ICA found that the permits "facilitated a deliberate and coordinated effort for each permittee to engage in commercial activity in Ka'anapali waters for profit through the use of authorized equipment such as thrill craft and other vessels, procedures and techniques."

The press release adds that victory "is somewhat bittersweet as two of the community members who led the push to get comprehensive environmental review of Ka'anapali tour boat operators have since passed, Randy Draper of Nā Papa'i Wāwae 'Ula'ula and Sharyn Matin of the West Maui Preservation Association."

The ICA vacated the Circuit Court's decision and remanded the case for further proceedings.

BOARD TALK

Contested Case Requests Delay Decision On $3.2M Fine for Marconi Point Violations

On April 26, the state Board of Land and Natural Resources heard presentations from the heads of the Department of Land and Natural Resources' Office of Conservation and Coastal Lands and the O'ahu branch of the Division of Forestry and Wildlife on alleged violations of state laws aimed at protecting the Conservation District and native species.

As a result of recent investigations that began after reports of massive clearing along the coastline at Marconi Point on O'ahu's North Shore last October, DOFAW proposed $1,502,500 in fines for the killing of 300 endangered bees and $15,000 for the killing of a Laysan albatross named Ho'okipa. The division recommended that Marconi Point landowner Sushil Garg; his employee, Benjamin Lessary; and another Marconi Point landowner, Yue-Sai Kan, be held liable for the bee-related fines. Kan alone was determined to be liable for the albatross-related fine. It's alleged that a nesting albatross got entangled in her iron fence while protecting her egg from Kan's landscapers, and then was killed when one of them threw a rock at her.

The OCCL proposed a total of $1,640,000 in fines against Garg and Lessary: $1,590,000 for the removal of 106 heliotrope trees, $15,000 for clearing more than one acre of land, $15,000 for spreading mulch over that land, and $20,000 for removing 40 heliotrope trees on unencumbered state land.

The office also proposed a $15,000 fine against the landowners of the entire Marconi Point Condominiums area for the unauthorized construction of a boundary fence, and a $30,000 fine against Kan, also for unauthorized fence construction.

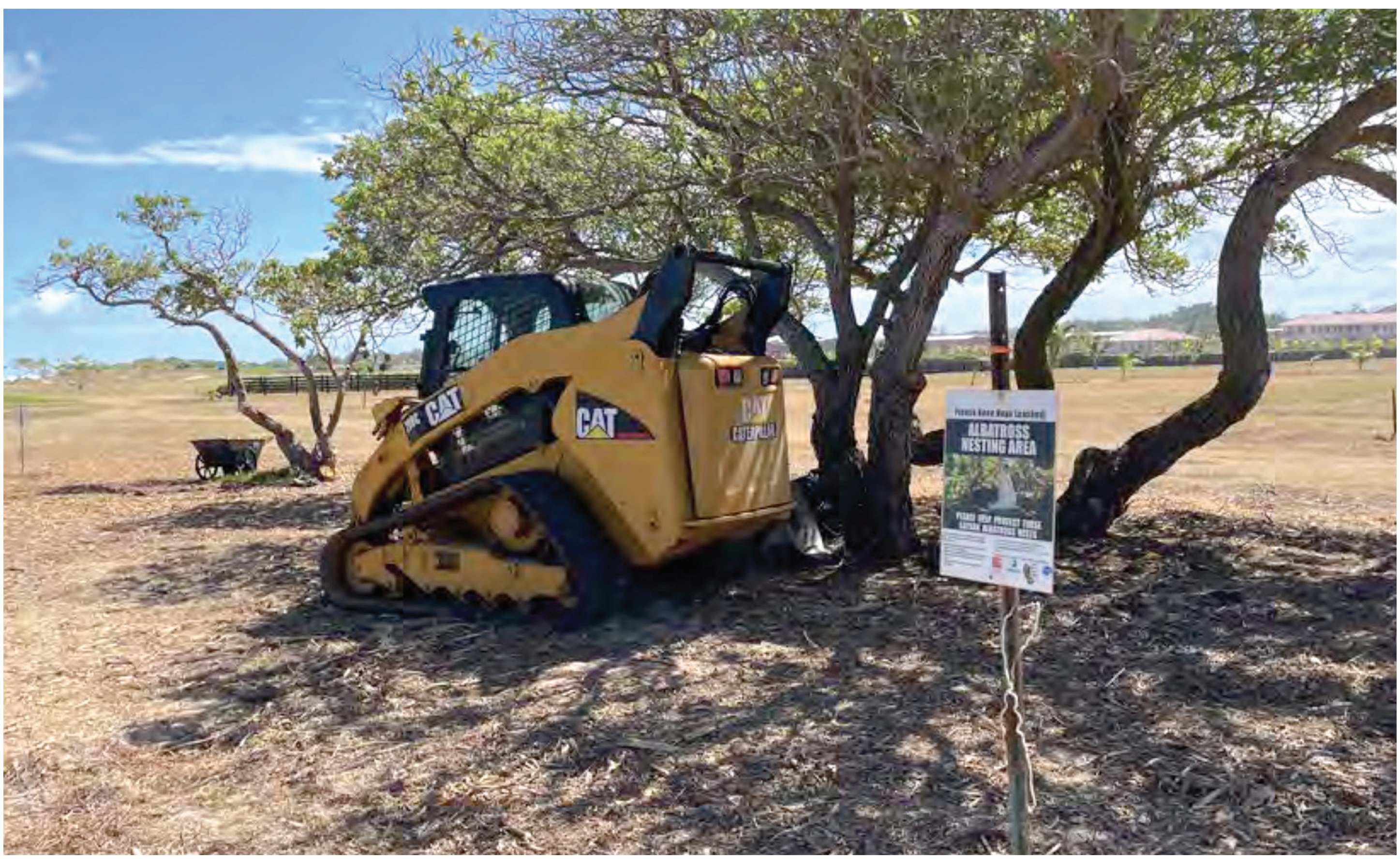
In total, the two divisions proposed fines of nearly $3.2 million.

For the larger of the two DOFAW fines, the division proposed delegating to the Land Board chair the authority to enter into a settlement agreement that would include, at a minimum, the conveyance of a conservation easement covering the cleared bee habitat area (about two acres) to a qualified non-profit organization, permanent DOFAW-approved signage about the rare species that live in the area, and the landowner(s) funding habitat restoration by a third party or reimbursing the DLNR and its agency partners for doing the restoration work.

And for the OCCL violations, staff recommended that the board authorize a new shoreline certification for the coastline to determine where the high wash of the waves now that the dune system has been removed.

Using a drone to survey the coastline, the OCCL was able to confirm that the waves without the vegetation are reaching further inland, office administrator Michael Cain told the board.

DOFAW's Marigold Zoll stressed that the proposed fine for the death of 300 bees was very conservative. While individuals of two species of endangered yellow-faced bees were likely killed by the land clearing, the fines covered only one of them



Heavy earth-moving equipment is parked next to a posted notice that this is an albatross nesting area. CREDIT: DLNR.

(Hylaeus anthracinus), because so little was known about the population size of the other *(Hylaeus longiceps).* What's more, the impact to the *H. anthracinus* population was based on a limited number of survey plots established in a small stretch of coastal vegetation that had been spared.

"We only took counts of animals in those survey plots. We didn't count the other area that had already been impacted. If we counted that area, the number would be 1,100 animals, so we feel like we've been very conservative," Zoll told the board. (At $5,000 per bee, which is what the proposed fine is based on, the fine for killing 1,100 bees would be around $5.5M.)

Both she and Sheldon Plentovich, a biologist with the U.S. Fish and Wildlife Service, stressed how important the cleared area had been to the bees and the albatross.

Plentovich said that on O'ahu, albatross currently nest at Ka'ena Point and there is one nest at the James Campbell National Wildlife Refuge adjacent to the Marconi lands. At Kahuku Point, in a conservation easement area fronting the Turtle Bay Resort and at the Marconi parcel, the nesting population is "small and growing," she said, with 18 nests found this year.

Most of the albatross nest on atolls in Northwest Hawaiian Islands, which are vulnerable to sea level rise. And that makes it really important to protect the birds and their spaces on high islands, she said.

With regard to the bees, Plentovich said there are only three solid populations of *Hylaeus anthracinus* on the island, and the bees killed by the clearing were part of one of them. "So it is significant," she said.

Zoll added, "This [clearing] fragments habitat and makes them more susceptible to extinction."

With regard to *Hylaeus longiceps,* Plentovich said they have been found in only two places. "We just know very little. … We do suspect it was there," she said.

Scuttled

When it came time for the public to testify, attorney Eric Robinson, counsel for Kan, requested a contested case hearing. He noted that a report by the DLNR's enforcement division on the albatross incident had been withheld from the public because of an ongoing investigation. "It's not out yet. It's going to have a lot of important facts. … We're trying to figure out heavy issues about who should bear liability at Marconi Point," he said.

He said his request was for all of the violations Kan was alleged to have committed.

"Do you have any objections to us taking comments?" Land Board chair Dawn Chang asked.

"I know we are not supposed to get into the merits," Robinson replied, adding, "Ms. Kan is saddened by Ho'okipa's death. She's committed to removing the iron fence."

After a break so the deputy attorney general advising the board, Danica Swenson, could make a phone call, presumably to confer with her office, she informed the board, "The only way we can proceed with public testimony is if the petitioners explicitly consent to public testimony."

Attorney David Abitbol, representing the Marconi Point Condominiums developer Makai Ranch, LLC, and attorney Kalani Morse, representing Garg, his companies that own some of the Marconi lands, and Lessary, requested a contested case hearing, as well. Attorney Peter Lenhart also requested one with regard to the boundary fence on behalf of CPR unit owners Wayne and Tara Hu, who objected to the passing of liabilities from Makai Ranch to the recently formed association of unit owners.

Based on Robinson's later statement that he was not authorized to consent to public testimony, chair Chang shut it down and there was no further discussion on any of the Marconi agenda items.

Intent

While public testimony at the Land Board's meeting was forestalled, the board had received a ton of written testimony on the Marconi Point agenda items mostly in support of the staff recommendations.

One testimony in particular by a man named Henry Fong, stood out. Fong identified himself as a former employee of Sushil Garg and his wife, Lorene King Garg, up until April 17.

He said he tended plants for them in the nursery on site and did some of the landscaping. He argued in his testimony against targeting the employees who did the actual land clearing, since the were only doing what they were told.

He said that on three separate visits to the property, he, the Gargs, and Lessary walked the beach, "discussion of clearing all the naupaka and vegetation from the beach fronting their lots so they could get the view of the ocean cam up and being that I had conservation internship at Waimea Valley with KUPU I had some awareness and expressed to Sushil and Lorene that it is illegal to touch or do anything in the Conservation District and the birds are protected and the habitat they live in. … I told them and everyone else if you was to go to court bird [vs.] human the bird will win. Ben also agreed. Lorene's response [was] it's her property and … basically implied she can do what ever she please. Sushil's response [was] it's ok just do it and he will deal with it later."

Wong's testimony contradicts what Sushil Garg told the OCCL's Tiger Mills in a November 14, 2023 email. He said the Marconi lots he purchased had a lot of dead, dry vegetation "which posed a fire hazard given the dry season and high winds often prevalent at Marconi Point. As such, we asked a contractor to clean up all the dead brush in the area. We realize now that they also cleaned up the conservation areas. … We truly regret any miscommunication and the resulting removals in the conservation areas …"

Morse, Garg's and Lessary's attorney, did not respond by press time to requests for comment on Wong's testimony.

The DLNR stated that if the parties who orally requested a contested case hearing submit their required written petitions, "then OCCL and DOFAW will return to the board with a request to hold a contested case hearing. The written testimony that has been received will be part of the case file that will be presented as evidence to the tribunal. The State will have the opportunity to call witnesses from the public during the hearing.

"DOCARE [the DLNR's Division of Conservation and Resources Enforcement] will discuss Mr. Fong's statements with the AGs office to determine next steps."

—Teresa Dawson

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Land Board Denies Public Right To Testify on Marconi Point Issues

At the Land Board meeting on April 26, a score or more of members of the public waited hours outside a standing-room-only boardroom to have a chance to testify on the proposed sanctions of parties accused of destroying critical habitat for endangered species and clearing land.

Their right to testify would seem to be assured in Hawai'i law. Chapter 92 of Hawai'i Revised Statutes says that "boards shall afford all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item. The boards shall also afford all interested persons an opportunity to present oral testimony on any agenda item."

The Marconi Point sanctions were in-

In June 2020, there were reported to be "lots" of endangered Hawaiian yellow-faced bees swarming on this heliotrope tree. The treehouse now been almost completely pruned. CREDIT: DLNR.

cluded on the board's agenda. Both DOFAW and the OCCL had prepared lengthy reports on the extensive clearing that had occurred on the property last fall.

The board's agenda was crowded that day. When it finally came time to hear the DOFAW and OCCL presentations, the staff from those agencies were limited to summarizing their extensive reports, two of which ran to more than 100 pages, and a third that came to 32 pages. The submittals were the product of months of investigation and research.

Yet board chair Dawn Chang sought to hurry along the presentations of Michael Cain, of the OCCL, and Marigold Zoll, of DOFAW. After six minutes of explaining the OCCL charges, Chang told Cain he was "past his time." Zoll was given a similar limit to present her report on the damage to endangered species.

More than 100 pages of written testimony were submitted, uniformly in support of strong sanctions.

But when it came time for public testimony, there was none. After the staff presentations, Eric Robinson, attorney representing Yue-Sai Kan, said that he would be requesting a contested case.

After deputy AG Danica Swenson informed the board that public testimony could only proceed with the petitioners' explicit consent — and Robinson said he could not give it — Chang then said she was going to "close this item, … pending compliance with the rules with respect to contested case hearings."

Chang apologized to the room full of disappointed members of the public who had been waiting hours to testify. "I'm sorry, community members, who have waited so long. No public testimony, because they object. Once there's a request for a contested case hearing we have to close all comments unless they give us approval. I'm sorry, I'm sorry. I appreciate all of your patience."

The board's practice of cutting off testimony once the prospect of a contested case is raised seems to be in direct conflict with Chapter 92.

Lance Collins, an attorney who has researched the issue, noted that when a contested case is requested during an open meeting, "the requester is required to take further action according to the BLNR's rules to perfect their request, by reducing it to writing within a specific time period in order for the request to be validly considered. If they do not do that, then there will be no further consideration of the request.

"So, until that request is perfected, the BLNR cannot be said to be acting in its quasi-judicial capacity," with the associated exemptions from Sunshine Law compliance.

"In my view, terminating public testimony before each person who has signed up to testify has done so violates the Sunshine Law."

The state Office of Information Practices as well as the Attorney General have issued opinions agreeing with Collins.

"Under the Sunshine Law [Chapter 92], boards are required to 'afford all interested persons an opportunity to present oral testimony on any agenda item,'" the OIP wrote in Opinion 18-06. In Opinion 01-06, the OIP quoted the Attorney General's Opinion No. 86-5: "an opportunity to present oral or written testimony must be afforded on any agenda item ***at every meeting*** of all boards."

The DLNR was asked to comment on its practice. The agency stated that it needed to consult with its deputy attorney general, who would not be available until May 1.

— Patricia Tummons

Marconi *continued from page 1*

DA-backed loan, then later — after the lawsuit was filed against the Hus — find them in default.

The companies sought from the court a declaration that the agricultural warehouses could stay and be finished as intended. They also sought an injunction preventing the Hus from "interfering" with the companies' relationships with their lender and the government, as well as damages and attorneys' fees.

The companies claimed the damages they incurred include costs associated with mitigating the effects of the Hus' allegations, "reassuring Plaintiff RCA Trade Center's lender, and otherwise confirming the propriety of plaintiffs' past and anticipated construction activities, both through the declaratory rulings sought in this lawsuit and otherwise," according to their complaint.

According to the companies' attorney, they have "been able to resolve the lender's concern, pending USDA consent to the loan modification. However, the delays have caused damage to Plaintiffs in the form of delays due to the loan modification, additional accrued interest and carrying costs, delays in preparing the warehouses for occupancy by future tenants, and increased costs associated with responding to and addressing Plaintiffs' lender's concerns."

As of press time, no loan modification had been recorded with the state Bureau of Conveyances.

In any case, whether the Hus' letter had anything to do with the loan freeze and subsequent default — and it's not clear that it did — Judge Tonaki found that it was protected speech under the First Amendment of the U.S. Constitution, as well as the Hawai'i Revised Statue 634G, also known as the Hawai'i Public Expression Protection Act.

In sharing their complaints about activities at Marconi Point with government agencies, "Defendants were exercising their constitutional first amendment rights and rights of any citizen. … Under 634G, the complaint should be dismissed," Tonaki said.

Opposition

The Hus' motion to dismiss, filed in March, argued that the issues raised in their letter dealt with matters of public concern and were, therefore, protected under the First Amendment of the U.S. Constitution and HRS 634G.

The companies, in their opposition to the motion, argued that the relevant parts of the letter dealt with the Hus' personal enjoyment of their property, not matters of public interest.

"To shoehorn this case into the scope of Chapter 634G, Defendants now attempt to revise history and recharacterize their grievances as matters of public concern. To support this, Defendants attached several exhibits to the Motion to show that *Environment Hawai'i, Civil Beat,* and the *Star Advertiser* have reported on some issues in the Letter. These articles, save for one regarding the warehouses, do not concern the issues in the Complaint, were mostly published after the Plaintiffs filed the Complaint, and are irrelevant to the Motion …

"The Complaint is far narrower than the laundry list of grievances outlined in Defendants' 52-page Letter," the companies argued. … Each count [in the complaint] flows from a disagreement over the warehouses, the Declaration, and Defendants' *private* concerns over the use and character of the Project by their neighbor. None of these issues are of public concern.

"Defendants point to an online article published on *'Environment Hawai'i.'* The article is titled, 'New Owner at Marconi Point Decimates Coastal Habitat for Native Bees, Birds.' This article has nothing to do with this lawsuit. First, the article speaks of actions of a *new owner,* who is not the Plaintiffs. Second, the article has nothing to do with Defendants' concerns as the Letter does not mention coastal habitats for birds or bees."

(While the Hus' letter does not mention bees, it does list among its many complaints, "allowing people vehicular access to the beach areas for '4-wheeling' in sensitive environmental areas having nesting native birds and turtles.")

Reply

"[T]he Letter includes a mix of both personal impacts as well as many obvious public concerns. … Both public concerns and private concerns can co-exist notwithstanding Defendants' interest in maintaining 'quiet country living,'" the Hus' attorneys wrote in their reply.

They continued, "Many of Defendants' concerns set forth in their Letter as concerns the 8 warehouses are also concerns being expressed by DPP and its demand for [a Special Management Area permit] before they will proceed with further permitting request by Plaintiffs to obtain interior electrical and bathrooms." (DPP is the Honolulu Department of Planning and Permitting.)

"Plaintiffs would not have brought the instant lawsuit if not for Defendant's Letter and their interest in knowing that their Building Permits are valid. Plaintiffs admit that one of the strongest motivations for bringing the lawsuit was to show their private lender that their building permits were 'good'. Plaintiffs claim there is only one article supplied by Defendants that has any relevance to the averments in their Complaint. However, there is substantial evidence of 'public concern' relating to Plaintiffs' warehouses including actions taken by DPP and in other newsletters, articles, t.v. programming, etc. Also, there is nothing that says that Defendants cannot be the first to raise an issue of 'public concern'. … They can be the first to the starting line on a matter of 'public concerns'. Someone has to be the first to 'Ring the Bell'. …

"When Defendants' letter went to the U.S. Dept. of Agriculture and questioned whether federal monies should be applied to fund the construction of warehouses being put to illegal use, that, alone, should also be a matter of 'public concern'. … The issues of increased vehicular traffic, industrial exterior lighting, disposal of human waste in an area not served by public sewers, etc., and commercial and industrial activities on AG-2 zoned land, all are matters of public concern," they wrote.

Dismissed

When it came time to argue the motion, Judge Tonaki was quick to point out that the Hus' motion to dismiss came long after the deadline to file such a motion had passed. That lateness was a problem, he said. And it was one pointed out by the companies' attorneys in their opposition to the motion.

Lenhart, pointing to emails between himself and the companies' attorney Ross Uehara-Tilton, argued that the Hus had been lulled into thinking that they would be given more time to secure insurance funding for their defense. And under the law, a motion to dismiss can be filed outside the 60-day deadline after the initial complaint is filed, if good cause is shown.

The companies' lawsuit was a SLAPP suit (SLAPP standing for Strategic Lawsuit Against Public Participation), Lenhart argued, adding that fundamental rights were at stake.

If the motion were not granted, "First Amendment constitutional rights will be chilled or frozen," he said.

Attorney David Abitbol, representing the companies, reiterated their argument that the relevant issues raised in the Hus' letter were not matters of public concern.

But doesn't any citizen have a right to bring attention to matters they're concerned about, Judge Tonaki asked. "The fact that the [government] agencies were cc'd forms the basis of the case," he said.

Abitbol disagreed, arguing that it was the letter itself.

Judge Tonaki also questioned the declaratory relief sought by the companies, noting that the Hus don't have any permitting power. "How are the defendants the proper party?" he asked.

Abitbol replied that the court could take judicial notice of the existing building permits and "eliminate any controversy between plaintiffs and defendants."

"We can settle what fundamentally is a disagreement … about whether the warehouses should remain," he said.

After hearing Lenhart's explanation for the delay in filing the Hus' motion to dismiss, Tonaki found in their favor.

"The court was initially inclined to rule this was untimely. With the record, the court was unconvinced that good cause was shown," he began. However, he continued that in hearing the arguments, there seemed to have been some understanding that deadlines would be put off until insurance funding was secured.

"The court does find the initial claims by the plaintiffs fall under 634G," he said.

He added that even if he did not grant the motion to dismiss under 634G, he would expect to see from the Hus a motion to dismiss for failure to state a claim or a motion for summary judgment. He noted that he was concerned that the complaint sought relief that he could not grant. "The court would need to hear from the building department," he said.

The final order granting the motion to dismiss, which was being prepared as of press time, will include the plaintiffs' payment of the fees and costs the Hus incurred in their defense.

A First?

The decision in the Hus' case is one of the first, if not THE first, under the revised version of the Hawai'i Public Expression Protection Act passed by the 2022 Legislature.

According to Denise Antolini, a retired professor and associate dean at the University of Hawai'i William S.Richardson School of Law, the previous version was limited to public "testimony," a term that had been "strictly construed by our courts in a prior situation. So the original law simply did not function as intended because the terms were too narrowly written."

Antolini helped draft the current version of the law, after the group she was involved with, Save Sharks Cove Alliance, was counter-sued in 2019 for $13 million by developer Hanapohaku LLC in response to the group's lawsuit opposing a Special Management Area permit issued by the City & County of Honolulu.

The court in that case found that the group's lawsuit was not protected by the HPEPA, because it was not testimony. Although the countersuit was settled for zero dollars, the case fueled the successful efforts to revise the Act.

— Teresa Dawson

New LUC Effort Seeks to Jump-Start Stalled-Out Housing Developments

In all the hand-wringing over the lack of affordable housing in Hawai‘i, the state Land Use Commission is often held out as the whipping boy. Obtaining approvals for redistricting land into the Urban District can be a long and involved process. But at a recent meeting of the commission, LUC executive officer Dan Orodenker rebuffed that criticism.

A review of past Land Use Commission dockets, he said, revealed that "there are approximately 40,000 to 65,000 housing units that were promised but are unbuilt on various projects all around the state." That led to the decision to initiate an effort to hire someone "to go out and find out why these projects aren't moving and what we can do to help them move, to be proactive in trying to get units built that we've already approved," he added.

"If we could build 45,000 units over the next several years, it would make a big impact."

In November, former commissioner Arnold Wong was brought on to facilitate this effort as the LUC's new "development coordinator."

"We hired Arnold to take on this role, not only because he had a good understanding of how the commission works, being a former commissioner, but also because he has a good understanding of how the private sector works, how the Legislature works. He has good connections in state and county government as well."

Orodenker said the initiative had already logged some successes, citing a project in Kihei that had been stalled over the failure of the developer and the Hawai‘i Emergency Management Agency (HIEMA) to agree on the siting of an emergency siren.

"Certain things are just not getting done for various reasons," Orodenker noted. To move projects that have already had approvals along, "we're working with state and county agencies to ensure we can get these projects built. We've established a working relationship with the Commission on Water Resource Management, HIEMA, the Hawai‘i Housing Finance and Development Corporation, and the Department of Health, to name a few, to help developers get things moving."

Orodenker said that Wong was focused at the moment on five projects on Kaua‘i, representing several thousand housing units, as well as five projects on Maui, one on Lana‘i, and one on O‘ahu. "Add all these up, we're looking at 10,000 to 15,000 units," he said.

Pulelehua

One of the stalled Maui projects called out by Orodenker is Pulelehua. "We were working very hard on Pululehua for a while, Orodenker said, noting that it stalled out "because of the water situation on Maui."

When it was approved, in 2006, water was determined not to be limited. In the decision and order for the redistricting, the LUC found: "In the Lahaina region, the Honolua and Honokowai aquifers serve as a source of water for area wells. … The current pumpage from the aquifers by area wells is substantially below their sustainable yield. The commission on water resource management has not designated either aquifer as groundwater management areas."

"Certain things are just not getting done for various reasons."
— Dan Orodenker

Over the next 10 years, none of the 882 units promised were built. In 2016, Maui Land & Pineapple sold the land to a company headed by Paul Cheng, a Texas-based entrepreneur who claims a history of successful real estate developments, but who also has a federal fraud conviction on his record.

In 2020, the LUC approved amendments to the original decision and order, allowing for the development of up to 1,000 housing units, including some ‘ohana units on single-family lots, plus 800 multi-family units. Of the latter, 300 were to be rented out as affordable under county guidelines, while 100 were to be sold as affordable.

Cheng testified that he had the financial resources to develop the project. His company, Maui Oceanview LP, he said, is a partnership "between ANICO-EAGLE and USA Infrastructure Investments, LP, of Texas. ANICO-EAGLE is a subsidiary of the American National Insurance Company … with over $26 billion in assets. … USA Infrastructure Investments is a Paul Cheng-owned development company based in Texas." ANICO-EAGLE "typically finances such construction needs with either construction financing or equity financing," Cheng told the LUC.

Despite the claim of deep pockets to support the development, Cheng lobbied the Maui County Council for help with financing of 60 units in the first phase of development, consisting of a total of 100 multi-family units for purchase at prices deemed affordable for households earning up to 120 percent of the area median income. He was given a subsidy of $18 million.

Then, in 2022, the Commission on Water Resource Management designated West Maui groundwater and surface water as water management areas. Existing users need to obtain permits for their ongoing uses, while new users – such as the Pulelehua development – are at the back of the line. If they are able to obtain permits at all, it is only if there is sufficient capacity remaining after existing users receive their permits.

(*Environment Hawai‘i* asked the public information office for the Department of Land and Natural Resources, the administrative home of the Water Commission, the status of any request for a water allocation for this project. No response had been received by press time.)

Following the Lahaina fires, Cheng sought an additional $50 million to support the project, which has been revised now to include 1,060 affordable rental units, 100 affordable single-family homes, and 100 homes for sale at market rates. In October, the County Council adopted a resolution in support, urging the administration of Mayor Richard Bissen to expedite a grant of the funds to Cheng. As of last month, no additional grants had been made to Cheng.

At a council meeting in April, the county's housing director, Lori Tsuhako, was asked about the release of funds from the earlier $18 million grant. Tsuhako said less than $400,000 had been distributed. "Right now, we are working with the developer to address some regulatory issues and until those regulatory issues are satisfied, the department will not reimburse the developer any further," she was reported to have told the council.

Pu‘ukoli‘i

Just down the road from the Pulelehua is an area mauka of the Ka‘anapali resort that has been approved for urban development since 1993. The original plan called for construction of 1,300 units of housing, with 60 percent of them being affordable. In 2009, landowner Ka‘anapali Land Management Corporation, successor to Amfac, received approval to reduce the number of homes to 940, of which just over half would be in the affordable range.

Since then, some of the roadway improvements called for in the 1993 order from the LUC have been built, but, as reported in the December 2023 edition of *Environment Hawai'i,* not one unit of housing has been erected.

Land adjacent to a lot proposed for a hospital, but not included in the LUC redistricting order, is being considered as a temporary home site by the Federal Emergency Management Agency. According to an environmental assessment prepared in January, about 214 temporary shelters would be erected with FEMA paying for the materials, shipping, and labor, in addition to installation of necessary infrastructure.

The environmental assessment made no mention of the availability of water for the housing. An inquiry about water availability was made to the Department of Land and Natural Resources' public information office, but was not answered by press time.

The LUC had scheduled a status report on the Pu'ukoli'i development for May 8.

View of the Ho`ohana Solar installation, looking toward Pearl Harbor. CREDIT: HO'OHANA SOLAR.

Royal Kunia II

Last month, the Land Use Commission met to receive an update on plans to develop Royal Kunia II, a 500-acre area redistricted by the LUC in 1993. It was also considering a proposed amendment to change the deadline by which certain infrastructure improvements (irrigation water and electricity) would be available to a 150-acre agricultural parcel that was conveyed to the state earlier this year as a condition of the boundary redistricting.

Developer Herbert Horita was the original petitioner. The project called for 800 single-family units, 1,200 multi-family units, 123 acres of light industrial uses, an 18-hole golf course, a public park, and a school site.

In the years since, ownership changed. By the early 2020s, Haseko Royal Kunia II, LLC, had acquired 211 acres of land on which it now states it intends to erect 1,850 housing units. RK II, LLC, a subsidiary of Jupiter Holdings – a Delaware-organized, California-based investment company – had acquired the 123 acres intended for light-industrial and commercial development. No longer was any golf course being considered. Instead, a 161-acre tract was approved for the solar farm being developed by Ho'ohana Solar. Reports submitted by Haseko and RK II confirmed their intention of moving forward with development of the housing and commercial projects. Also, Ho'ohana Solar reported that it had complied with conditions set a decade ago that it provide the infrastructure improvements up to the boundary of the 150-acre ag park.

At the April LUC meeting, commissioners heard from a nearby resident (a subcontractor to Haseko) who wanted to see the project move forward. In addition, Chris Delaunay, a representative of Pacific Resource Partnership, vouched for Haseko, mentioning several of the projects that it had developed over the years.

That prompted a comment from commissioner Gary Okuda. "That's basically what the commission was being told 30 years ago," he said, noting that he had reviewed the LUC's prior findings in the docket. Back then, he said, the LUC was told that "we have a really good developer here, Herbert Horita. He has a track record of building projects, projects for local people, where they can live and raise families. This project is gonna create jobs, be a positive thing for the community.

"And then here we are, 30 plus years later, and we're hearing the same thing. Based on your experience and your organization's experience, what can the Land Use Commission do to make sure that when housing is being promised and jobs for local people are being promised, it's actually going to take place and we're not going to be here 30 years later" with the same situation. Maybe a bond should be required? Okuda asked.

Delaunay replied, stating that he was in favor of the project moving ahead and had no knowledge of earlier endorsements of the project.

Okuda returned to the issue of stalled-out projects in later questioning. With three – possibly four – different landowners now having taken on responsibility for moving forward with the project first laid out some 30 years ago, what could the LUC do to ensure that the projects it approves are actually undertaken?

Curtis Tabata, attorney for Haseko, was the first to face Okuda's grilling.

"Do you agree that the decision and order, the findings of fact, and the conclusions of law [in LUC redistricting approvals] are encumbrances on title?" Okuda asked.

Tabata agreed.

"That means that whoever goes and obtains an interest in the property … is subject to and has to follow those encumbrances, correct?"

Again, Tabata agreed.

Okuda continued with his argument that even though Haseko owns only one part of the overall project, the encumbrances on the title mean that Haseko is on the hook to see that the entire development, as anticipated in the 1996 amendment to the original decision and order, is completed.

"So," Okuda said, in the 1996 amended decision, "there was a list … of what the land use plan consisted of… It provided for the construction of 1,250 single-family residential units… How many of those single-family units have been built as of today?"

None, Tabata acknowledged.

"There's a statement that there would be 750 low-density apartments… How many have been built as of today?"

Again, none, Tabata replied.

And has any development occurred on the 123.7 acres that are approved for light industrial use, Okuda asked.

This portion of the project isn't to be undertaken by Haseko, Tabata noted. Still, "I don't think so," he said.

The LUC also called for eight acres to be set aside for a school and 11 acres for a public park, Okuda pointed out. Tabata agreed that these elements also had not been satisfied.

But Tabata defended his client against any suggestion that Haseko was speculating or had any intention other than developing the land, even if no vertical construction had yet occurred. "We do have all the effort and money Haseko has spent after they acquired the land," he said. "We are not land-banking here. Haseko is a developer, not a land banker. There's too much overhead to just be sitting on the land. They need to develop, build, and sell."

Terry Lee, representing RK II Partners, owner of the area designated for light-industrial development, was up next. He told the commission that to a great extent, his client's ability to move forward "piggybacked" on Haseko's development.

"We know how we want to develop our roughly 124 acres," Lee said. "The problem we have is the timing. … We have pending with the [Honolulu Department of Planning and Permitting] a subdivision application for 37 acres, phase 1 of our development. Unfortunately, as part of that application, we're piggybacking on a subdivision application by Haseko," which would put in the needed roadway – something that Haseko has said won't be done until 2026.

"Well, the DPP needs to first approve that subdivision application before it can continue processing our subdivision application. So our ability to develop our project is heavily dependent on Haseko completing certain things and we are in discussions with Haseko. … I don't want to get into the nitty gritties of our contractual disagreements. … We're hopeful we'll work something out with them."

Lee then went on to mention "one other housekeeping matter." Back in 2004, he said, the LUC effectively inoculated his client from any threat that the land it now owns could be reverted to Agriculture, even if the other owners fail to live up to their commitments. At that time, the then-owner, HRT, negotiated an understanding with the state that if HRT were to purchase the 150 acres for the ag park, the acreage now owned by RK II Partners could not be downzoned, even if the rest of the development was subject to reversion.

"In other words," Lee said, "it's sort of protected from that downside risk."

But, Lee continued, "the ultimate order that came out of the commission is somewhat vague … It would be helpful if the commission can clarify for us the legal effect of that order."

Dan Giovanni, chairman of the commission, noted that this would have to be taken up at another time. "This is a bit more than a housekeeping matter. … If you want clarification, you need to file a petition for a declaratory ruling," he said.

Then Okuda began to press Lee on the same issues he raised with Tabata. Did Lee agree that the conditions in the LUC boundary amendment approval "became and are encumbrances on title?" he asked.

Lee agreed, acknowledging that an encumbrance is binding on successor landowners.

> *"What can the Land Use Commission do to make sure that when housing is being promised .. it's actually going to take place?"*
>
> **— Gary Okuda**

"Your client succeeded to a portion of the property. So in other words … if for some reason Haseko doesn't perform its obligations, then there's a reasonable argument that can be made that … your client might have to satisfy those obligations," Okuda said.

Lee answered that this was a legal risk, but it could be obviated should the LUC grant the petition for declaratory relief his client might be filing.

"But as things stand right now," Okuda said, one could argue "that your client would be responsible to carry out the obligations of Haseko if Haseko doesn't perform."

Lee: "I would agree with that."

Kona Vistas

This project, just south of Kailua-Kona village, received LUC approval four decades ago. Approximately half of it was developed – 215 single-family lots, all market-rate lots, no affordable – and then the work stopped.

About eight years ago, the undeveloped portion, consisting of around 70 acres, was sold and the new landowner, Kona Three, has been working with the county to relaunch the project.

It hasn't gone well.

The county's Leeward Planning Commission has not yet forwarded to the County Council a recommendation on Kona Three's request to allow it another decade, at least, to complete the project. Concerns have arisen over historic and cultural sites, traffic, drainage problems, and a number of other issues. Community opposition has been fierce, as the LUC members heard when the commission held a status hearing on the project in February.

Much of the discussion among commissioners concerned how the county and developer were proposing to fulfill the requirement in the original decision and order (in 1984) that 10 percent of the housing be affordable under county guidelines. Kona Three had inherited this obligation, amounting to 22 affordable units, when it purchased the undeveloped lands that were part of the original Kona Vistas project.

In addition to those 22 units, should the county approve Kona Three's plans to develop 450 housing units on its 70 acres, the affordable quota would now be 20 percent, in keeping with changes to the county's affordable housing law. That would make the developer on the hook for a total of 112 affordable units.

Commissioner Gary Okuda wanted to know just how many of those units would actually be built, given the county's past history of allowing developers to get off the hook for affordable housing through the purchase of affordable housing credits. The practice has come under the County Council's critical scrutiny following disclosure of abuse of that system, with the admitted connivance of a former county housing staffer.

How committed is your client to actually building the affordable units? Okuda asked Daryn Arai, the planning consultant for Kona Three. "I don't want to get into this amorphous area about, 'Oh, but we got these housing credits that are floating around,' and the next thing I know a bunch of people are indicted by a federal grand jury in Honolulu."

"The best thing I can tell you at this time," Arai responded, "the actual number of affordable units to be constructed is dependent on the number of units they are able to successfully place upon the land." And this, he added, could not be known until the owners go through a long process of site engineering, grading, roads, infrastructure, and the like. "All these things could have an effect on the actual number of units that gets placed on the ground. It's the number of units on the ground that determines the total affordable units."

But, Okuda asked, "What assurance, since we've waited 40 years – what assurance do we have that 20 years from now … that the community is gonna still see the same situation, except it's going to be with a new owner who comes in and gives us commitments that, 'yeah, we're going to do it right.'"

"The only assurance I can give you is that nothing will happen if the entitlements are not kept in place" by the county, Arai replied.

Okuda turned his attention to Michael Matsukawa, the attorney representing Kona Three.

"What are we to do on the commission where we seem to have these cases where applicants, landowners, make these promises to the community and we don't see compliance?"

he asked. He noted that a former commissioner – Dawn Chang, now head of the state Department of Land and Natural Resources – “started suggesting that maybe the applicant should be required to pull a performance bond so that if the infrastructure is not put in, we go to the bonding company, make the bonding company go and pay for it. If affordable housing is not put in, we go to the bonding company, make them pay for it.”

Matsukawa responded by saying that all of the owners of the 200-plus houses in the already developed portion of the Kona Vistas subdivision “have deed covenants that their properties are subject to the [affordable] homes being produced.”

He later elaborated: “As to Mr. Ohigashi’s question, he raises a good question as to who holds the burden for the 22 units… The condition was recorded and appears in every deed to every lot. They all have this exception, that the lot owner accepts the condition as an encumbrance on his or her title. So I guess we’re all tied together in the effort to get the 22 lots done.”

Commissioner Lee Ohigashi asked Michelle Ahn, the deputy corporation counsel advising the county Planning Commission: “What happens if the zoning isn’t approved?”

Assume, Ohigashi said, that, for some reason, the community enrages all the council people, the council people say, ‘hey, we’re not going to do this anymore.’ What happens to the 22 houses?”

Ahn began to reply, but Ohigashi cut her off. “You can write a brief about my comment, I really don’t care. But what happens to the 22 houses?”

LUC Chair Giovanni then gave Ahn the floor.

“The county has to approve this rezoning amendment and their concern is not limited to what would satisfy LUC conditions from a 1984 decision. They might have other considerations, such as not having all the poor people in one corner of the development. As we go through the county process, there might be other considerations.”

Ohigashi repeated: “My question still stands. What happens?”

Jeff Darrow, deputy director of planning for the county, was the one to reply. “To be honest with you, I don’t know. Basically, they won’t have a zoning ordinance, which won’t allow them to continue with their project. We have 215 built houses. Does [the responsibility for the affordable units] fall on the backs of the owners of these 215 houses? Does it fall on the petitioner who purchased a portion of the property? Does it fall on the previous developer – whether they’re around or not, I’m not sure.”

(For details on the project, see the articles in the November 2023 edition of *Environment Hawai‘i.)*

Kehalani-Pi‘ihana

When a LUC-approved project has multiple owners, as is the case in the Royal Kunia project as well as others, and the burden of following through on the promises made falls on all of them, individual owners may petition the LUC for relief in the form of bifurcation. This involves having the LUC separate out the requirements associated with their particular piece of the development from the obligations imposed on others.

Maybe the most egregious example of an effort to bifurcate a development can be seen in central Maui, where, 34 years ago, landowner C. Brewer Properties LLC obtained redistricting of two widely separated parcels – one of 545 acres, lying west of Wailuku town; the other one consisting of 79 acres in an irregularly shaped parcel north of ‘Iao Stream. Over succeeding years, various parties took title to the land.

Among other things, the Land Use Commission’s original decision anticipated 2,400 units of housing, 600 of which – all affordable – would be built on the smaller area, while three/eighths of the units in the Kehalani area would be affordable. Development and sales of homes and lots in the larger area would, commissioners anticipated, provide the landowner with the capital required to build the affordable housing on the Pi‘ihana tract, described as having “physiographic characteristics” that made development and construction more expensive. As chair Jonathan Scheuer put it, “it was cheaper and easier to first develop the Kehalani project area, and income from that would be used to finance the development of affordable housing in the Pi‘ihana project area.” Other infrastructure tied to the Pi‘ihana project include a bridge across ‘Iao Stream and roadway and drainage improvements.

In 2013, two subsidiaries of a California-based investment company purchased the undeveloped land in both parcels. RCFC Kehalani, LLC, took over the mauka portion (called the Wailuku project in reports to the LUC) and RCFC Pi‘ihana, LLC, took over the land along ‘Iao Stream (the Pi‘ihana project).

While housing subdivisions and a commercial center had been built in the Wailuku project area, the Pi‘ihana project was largely undeveloped. Eventually, RCFC Pi‘ihana divested all its holdings to a company, Wailuku Plantation, LLC, owned by Vernon Lindsey, whose history of development projects on the Big Island and Maui is characterized mostly by failure. Lindsey paid around $2 million for the land.

In 2019, both companies approached the LUC with the idea of bifurcating the project. By late 2020, the Office of State Planning, Maui County, Wailuku Plantation, RCFC Kehalani, and several individuals to whom Lindsey had already sold off small parcels of land signed off on a stipulated agreement endorsing the idea, with Wailuku Plantation initiating the actual petition for bifurcation. Responsibility for various improvements called for in the original LUC decision would, under the stipulated agreement, be apportioned to either RCFC Kehalani or Wailuku Plantation. Both Wailuku Plantation and RCFC Kehalani were to file statements of costs for developing the remaining conditions relating to their respective lands. In addition, the Pi‘ihana landowners were to provide “information to verify the financial capability to complete the Pihana Project District development.”

At a hearing on December 30, 2020, the LUC learned from Jason McFarlin, the attorney representing Lindsey, that, in fact, his client did not intend to develop the Pi‘ihana land at all and would instead be seeking to have the land revert to the Agricultural District.

“This project district requires hundreds of millions of dollars,” he said, money that his client doesn’t have.

The Land Use Commission voted to deny the petition to bifurcate and ordered the parties to engage in ongoing discussions. They were not to return to the commission “until evidence of (1) financial capability is filed with the commission; and (2) the responsibility for various conditions and requirements is resolved, given the information received at this hearing.”

The parties have yet to report back to commission.

(For more on this project, see the articles in the February 2021 edition of *Environment Hawai‘i.)*

‘Aina Le‘a

A dispute over a proposed development of 3,000 acres in the South Kohala district of the Big Island led ultimately to the state Supreme Court decision that left the Land Use Commission largely unable to enforce any conditions it might attach to specific development approvals.

More than 35 years ago, the LUC approved the redistricting of 1,000 acres from the Agricultural to the Urban land use district. The overall project included another 2,000 acres that surrounded the Urban land on three sides. The specifics of the project changed a bit over time. Ownership changed quite a bit.

In 2005, the LUC approved amendments to the project proposed by the then-owner, Bridge ʻAina Leʻa. The project now included 1,924 housing units, with at least 385 to be affordable under the county definition. When an environmental impact statement preparation notice was published two year later, the proposed development now consisted of more than 3,200 housing units in the Urban core as well as a commercial center and a 40-unit lodge. Five golf courses would straddle the boundary between the Urban and Agricultural lands. In the Agricultural section of the development, Bridge proposed 863 lots intended for large single-family residences. The LUC never endorsed that proposal, however.

In 2009, Bridge found a developer, DW ʻAina Leʻa, LLC, that was to erect the affordable units, all of which were to be ready for occupancy by November 17, 2010. As a show of good faith, in the face of growing skepticism by the commissioners that the deadline would be met, DWAL agreed to have at least 16 of the affordable units completed by March 31, 2010.

When the LUC made a site visit after that deadline passed, none of the townhouses was completed, causing the LUC to vote to revert the 1,000-acres of Urban land to the state Agricultural District.

That reversion was overturned by the 3rd Circuit Court and, on appeal, the reversion was upheld by the state Supreme Court. The court determined that, because there had been "substantial commencement" of work on the project, the LUC had no power to revert without going through all the hoops of a redistricting petition.

Since then, the LUC has been had to rely on counties to enforce conditions imposed in redistricting orders.

Meanwhile, there has been little additional work on the ʻAina Leʻa site. The current landowner, ʻAina Leʻa, Inc., a successor to DWAL, has faced nearly insurmountable financing challenges, has gone through bankruptcy, and has lost portions of its proposed development lands through court-ordered foreclosure.

The situation is in flux, but it is likely that eventually the petition area will be held by several different landowners. Will this result in a petition for reversion, for bifurcation, or for an amendment to the existing decision and order of the LUC?

Most likely, the answer won't be known for years to come.

(Environment Hawaiʻi has reported extensively on the ʻAina Leʻa development.)

— Patricia Tummons

Members Explore Ways to Push Compliance with LUC Conditions

The term of Honolulu attorney Gary Okuda on the state Land Use Commission has ended. But even as his time on the commission was running out, his frustration with developers who do everything but develop seems to have increased, even as the commission's ability to enforce conditions has been hobbled.

It was on full display at the February meeting of the commission, which was conducting a status review of a project proposed some four decades ago for the Kona area of Holualoa. It was half-built, with most of the planned market-rate homes being developed. Things stalled. The land changed hands. And now the new (since 2015) owners are trying to complete the project, though in the years since initial approvals were granted by Hawaiʻi County, circumstances and community sentiment have dramatically changed.

After hearing testimony from dozens of residents voicing their frustration with traffic, drainage, and concerns over claimed cultural and historic sites, Okuda expressed his frustration with both the slow pace of development as well as the commission's limited powers of enforcement.

Referring to the Supreme Court's decision in the ʻAina Leʻa case, Okuda said: "DW ʻAina Leʻa says we have no power to revert once substantial commencement is set forth. And that makes sense. If a piece of property is better suited for urban development, then, yeah, it should be urban.

"But the court also warned about the fact that the property that has been given these entitlements, rezoning – if improvements or promises are not kept to the community, what that allows is land speculation.

"In other words, people make money off of the fact that there's an upzoning from Agricultural to Urban or Conservation to Urban. And they don't even have to do anything for the community just to make money off the property.

"The frustration I have – we're seeing these dockets where all these promises have been made, 20, 30, 40 years ago. And you see transfers of title of property. I don't see any evidence that these were charitable transfers. It looks like there's consideration passing hands, and we're faced with a housing situation that just gets worse and worse and worse.

"So I'm trying to see whether or not, in addition to, or as a supplement to reversion, which might not be the most appropriate measure, maybe the thing to do is to force landowners to live up to their promises by means of a specific performance lawsuit. And if they can't comply with the court order, maybe we should have contempt of court proceedings after that, and daily fines for not complying. And maybe then they'll come to the county and do what they're supposed to do with the county."

Okuda went on to suggest that the Su-

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preme Court might be liberal in its grant of broad community standing to bring such litigation. "The Supreme Court has said in many cases … that environmental types of cases have broad community standing, so almost any interested person in the community can bring the lawsuit," he said.

"I'm not advocating lawsuits, but just looking for an additional tool so we at the commission don't have developers come back to us and say, 'Yeah, we didn't comply with your conditions, but we did a little bit of work, so, like Bridge 'Aina Le'a, you can't touch us.' And the counties aren't enforcing these conditions – for example, we see non-agricultural activities on Agricultural lands, but we have no power to do anything about it.

"So I'm just seeing whether the law prohibits specific performance as an additional tool to make people live up to their promises in the community."

In a 2020 hearing on the Kehalani-Pi'ihana development on Maui, Okuda suggested to the Maui County deputy corporation counsel, Michael Hopper, that the county does not have to simply accept it when a developer sells off land without performing on the commitments in redistricting orders.

"Would you agree it's not unreasonable to hold the developer entities responsible … for the obligations they should have known with due diligence follow from a Land Use Commission order?"

"The fact that a landowner, somebody who has an obligation, gets rid of an asset doesn't necessarily absolve that person from obligations to perform on the obligations that they should have performed.

"For example, isn't it true that under the Uniform Fraudulent Conveyance Act, if you own a corporation, and you know the corporation has obligations, and you intentionally don't perform the obligations and you drain the corporation of its profits, there still might be in fact personal liability against corporate owners.

"Sometimes the obligation not only runs with the land, but it might even follow when you get rid of the land."

Former commissioner Dawn Chang – now head of the Department of Land and Natural Resources – often proposed the idea of requiring developers to post performance bonds to ensure compliance with LUC conditions of redistricting.

In one of her last meetings as a commissioner, she again posed the prospect of requiring a bond to Randall Sakumoto, the attorney representing RCFC Kehalani. "Would your client be willing to post a bond" for the value of outstanding commitments on the Kehalani portion of the C. Brewer docket? she asked.

"Frankly, I don't believe a bond will be necessary or the cost would be justifiable," Sakumoto responded. "I can't make any commitment for my client without having a discussion with them on that point."

Chang then added, "It's just that, in a lot of – not only this project, but other projects – the public comes forward to us and says these conditions have not been met. And then there's a foreclosure or a bankruptcy and they never get met.

"In the future, I will want to perhaps include as a condition the placement of a bond to ensure that these kinds of conditions are met, because in the absence of that, there's no guarantee that the public will get the benefit of those conditions."

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At LUC, It's Lawyers Out, Developers In

The make-up of the Land Use Commission is changing. Two attorneys and a planner are leaving. Their replacements have backgrounds in construction and development.


Gary Okuda

Gary Okuda, an attorney holding an at-large seat, left on April 28, owing to term limits.

Lee Ohigashi, an attorney holding the Maui seat on the commission, will see his term expire June 30.

George Atta, a planner and former director of the Honolulu Department of Planning and Permitting, will see his term expire. He was not reappointed.

The Legislature confirmed all four of the nominees of Governor Josh Green. They are:

Nancy Carr Smith. She began serving as an interim appointee last August and was confirmed this legislative session to fill out the Hawai'i seat until June 30, 2025. Smith has a background in real estate. Her husband, Riley Smith, serves on the Board of Land and Natural Resources.

Miles Miyasato. Miyasato is a past executive director of the Hawai'i Operating Engineers Stabilization Fund. He will hold an at-large seat when his term begins on July 1. His term will expire on June 30, 2025.

Ken Hayashida. Hayashida is an engineer and president of KAI Engineering. His term as O'ahu member will expire June 30, 2028.

Bruce U'u. U'u has worked for the Hawai'i Regional Council of Carpenters. His term as the Maui representative to the LUC will expire June 30, 2028.

— Patricia Tummons