

Environment



Hawai‘i

a monthly newsletter

Preset Reset

After years of fighting in contested cases, in court, and before the Board of Land and Natural Resources to retain the right to preset dozens of lounge chairs on a strip of oceanfront land that was created to be used as a public beach, the owner of the Kahala Hotel & Resort has stopped.

Last month, the Land Board lauded Resorttrust Hawaii, LLC's decision to remove all of its preset and stored equipment from the 1.28-acre parcel it has rented from the state for decades. But some members balked at the company's request to continue maintaining and landscaping the property for free.

After More Than A Decade of Fighting, Kahala Resort Abandons Chair Presetting

I am pleased to see that Resorttrust Hawaii, LLC has finally thrown in the towel (into the towel caddy placed on its own land)," wrote David Kimo Frankel in his testimony to the state Board of Land and Natural Resources last month.

For years, Frankel, along with Honolulu resident Tyler Ralston, has fought before the board and in court to get the company, which owns the Kahala Hotel & Resort, to manage the adjacent oceanfront parcel as the public beach it was meant to be when the state allowed the resort to improve the beachfront area in the 1960s.

While the resort initially created a large sandy beach on the state parcel, much of it was eventually grassed over and used by the resort for weddings, part of a restaurant, rentable cabanas and preset lounge chairs, and storage.

As Frankel argued in his testimony, "None of that was legal." The permit au-

thorizing Resorttrust to use the state parcel allowed for recreation and maintenance, not commercial use.

Neither the Department of Land and Natural Resources' Land Division nor the Land Board, however, ever found the company to be in violation of its month-to-month revocable permit that had been renewed annually for decades.

"Instead," Frankel wrote, "it was City enforcement action that led to the removal of the restaurant and cabanas. That was an improvement, but the hotel continued to preset chairs and exclude the public. Moreover, Tyler Ralston and I have repeatedly provided evidence that Resorttrust Hawaii, LLC was not complying with the terms of the permit. But DLNR staff refused to acknowledge the obvious."

On January 24, in response to a recommendation by the Land Division to grant an

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The land fronting the Kahala Hotel & Resort a few years after the lagoon was dredged and the state land fronting the resort filled. CREDIT: 2022 ICA APPEAL RALSTON V. BLNR AND RESORTTRUST HAWAII, LLC.

Environment

Volume 35, No. 4



Hawai'i

a monthly newsletter
October 2024

NEW AND NOTEWORTHY

Vacation Rentals on Ag Land: The Hawai'i Supreme Court has issued its decision in a long-festering dispute over vacation rentals of houses built in the state Agricultural land use district. They're not allowed, the court ruled, upholding the finding of the Land Use Commission and affirming the Hawai'i County ordinance, passed in 2019, that bars short-term rental of houses on Ag land where such uses did not exist before the state Land Use Law was passed in 1976.

The plaintiffs argued that because state law doesn't specifically prohibit rental of farm dwellings or set a time limit on such uses, short-term rentals should be allowed. But, Chief Justice Mark Recktenwald wrote in the unanimous opinion, "that narrow view of the statute, which would allow for the subversion of the purpose of HRS Chapter 205, cannot stand."

Environment Hawai'i

421 Ka'anini Street
Hilo, Hawai'i 96720

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

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

Production: Mark Taketa

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ISSN 1050-3285

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"There is no indication either in the statute's text or its legislative history that the Legislature intended to allow for farm dwellings to be used as short-term vacation rentals untethered from agricultural purposes. Rather, transient accommodations are antithetical to the Legislature's intent," the court ruled.

Near the end of the decision, the court went out of its way to distinguish the manner in which it gives deference to administrative decisions from that of the U.S. Supreme Court. "These days, the United States Supreme Court seems determined to ensure that 'settled law easily unsettles,'" the Hawai'i high court wrote, referring specifically to the case of *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*.

"Under Chevron, the reviewing court would, upon close inspection, ask if Congress had 'directly spoken to the precise question at issue.' If it had, 'that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' If the statute was silent or ambiguous as to the question at hand, the court would defer to the administrative agency's reasonable interpretation of the statute. ...

"Under Chevron, agencies had the ability to allow experts to, within reason, make the rules. Now, the U.S. Supreme Court considers itself and other federal courts the experts on exceedingly complicated areas of American life. ... We do not believe the expertise of courts outstrips that of the agencies charged with implementing complex regulatory schemes on a day-to-day basis. In Hawai'i, we defer to those agencies with the na'auao (knowledge, wisdom) on particular subject areas to get complex issues right."

Green Apologizes: More than a year after Gov. Josh Green and Dawn Chang, chair of the Commission on Water Resource Management, removed Kaleo Manuel from his post as the executive officer for CWRM, Green apologized.

Manuel, falsely accused of not allowing stream water to be used to fight fires that devastated Lahaina, was reassigned to a different

division within the Department of Land and Natural Resources. He was briefly reinstated, but resigned in December.

At the 2024 Native Hawaiian Convention last month, Green said, "We hurt Kaleo deeply and I feel a great sadness that I was a part of that.... I feel terrible and I humbly apologize."

In late August, Green announced the appointment of Manuel's replacement, Ciara Kahahane. His press release noted that she speaks Hawaiian and has knowledge of the Lahaina area.

Despite that, the commission's seat reserved for someone with expertise in Native Hawaiian water use has been vacant since July.

Green is supposed to select the commissioner from a list of at least three nominees, and a list of four candidates was given to him in February.

In August, acting CWRM director Dean Uyeno said that the selection process needed to be restarted after "issues arose" with some of the nominees. Last month, Katie Roth, head of CWRM's planning branch, said that two of the four people on the list had dropped out. The law requires the governor to make the selection from a list of at least three people, she added.

On September 30, some 70 groups and individuals submitted a letter to Green, urging him to fill the seat immediately.

The governor replied with the following statement:

"I am keenly aware of the heightened importance of filling the CWRM loea vacancy. We are following due process of law after applicants withdrew their names from consideration in the previous application period, leaving a number of applicants for consideration that did not meet legal requirements."

He went on to say that a nominating committee would now review applications "and interview applicants to nominate a list of at least three individuals." Applications are to close October 11.

False Killer Whales, Seabird Avoidance Among Issues at 200th Wespac Meeting

Last month's meeting of the Western Pacific Fishery Management Council, an agency of the federal government that has no other source of funds than the U.S. taxpayer, began this way:

William Sword, a council member from American Samoa and chair of the council, opened the meeting with a lengthy prayer to the Christian god, asking for his guidance and help in the coming days.

Shaelene Kamaka'ala, a council member from Hawai'i who receives payment for each day she participates in council meetings, read a statement acknowledging the cultural history of the place (Honolulu) where the meeting was being held and describing Hawai'i as being "illegally occupied" by the United States government.

Kitty Simonds, long-time (48-year) executive director of the council, reported the receipt of a \$1.7 million grant under the Inflation Reduction Act, to be used for studying the impacts of climate change on fisheries and fishing communities in the region.

And with that, the 200th meeting of the council was off and running.



False Killer Whales

For years, the Hawai'i-based deep-set longline fleet has carried observers on around 20 percent of all boats engaged in fishing at any given time. The observers are there to report on interactions with protected species, especially false killer whales.

Reports from observers are used to estimate how many false killer whales the fleet interacts with. With one-fifth – 20 percent – of the fleet's activity observed, the number of reported interactions is multiplied by five to arrive at an annual estimate of the total number of interactions. This estimate is then used to assess whether the fleet is approaching or has exceeded the number of interactions with animals belonging to the pelagic false killer whale population allowed under the take limits set by the National Marine Fisheries Service, in accordance with the Marine Mammal Protection Act.

In 2024, however, the percentage of vessels carrying observers has fallen to 13 percent. And for 2025, NMFS announced on September 20, the rate will be just 7 percent.

The change, NMFS said, was being made "because the cost of the observer program

continues to increase, and we anticipate 2025 funding will be insufficient to support the 2024 coverage rate in the Hawai'i deep-set longline fishery."

By reducing coverage, NMFS said, it will be able to maintain coverage rates of 100 percent in the shallow-set fishery (targeting swordfish) and of 10 percent in the American Samoa longline fishery.

As the level of observer coverage drops, so, too, does the number of incidents of mortality or serious injury (M/SI) that the fleet is al-

doing that, and officials aren't even acknowledging the problem to us," Phillips said. The Marine Mammal Protection Act, she added, "requires monitoring and specifies that the monitoring must obtain statistically reliable estimates of incidental mortality and serious injury. There's no express minimum, but 7 percent is woefully inadequate.

"Meanwhile, false killer whales continue to suffer and die in terrible ways, and the numbers show things need to change."

Conservation groups aren't the only ones



Hawaiian false killer whales. CREDIT: NOAA.

lowed before a large swath of fishing grounds south of the Main Hawaiian Islands is closed off. For the 13 percent level, the trigger value for closure of the Southern Exclusion Zone was set at 3 M/SI takes. NMFS has not yet announced a trigger value for SEZ closure at the 7 percent observer coverage rate, but unless there is some dramatic upward shift in the estimated population of the pelagic population of false killer whales, it is likely that the trigger value will be 1 or 2 takes per year, or possibly three takes over two years.

In July, four conservation groups sent a letter to NMFS Pacific Islands Regional Office to express their concerns over the apparently increasing take of false killer whales by the longline fleet. Maxx Phillips of the Hawai'i office of the Center for Biological Diversity, one of the groups, told *Environment Hawai'i* that the response to date has been "crickets."

"The law says the agency has to do more to protect these marine mammals, but it's not

concerned about the low rate of observer coverage. At the recent meeting of the Western Pacific Fishery Management Council, Eric Kingma, executive director of the Hawai'i Longline Association, voiced his dissatisfaction with the move, which "complicates everything," he said. "We need to focus on increasing observer coverage," since the reductions "just increase the uncertainties."

"You won't find many fisheries pushing for more observer coverage, but we are," he said.

So far this year, NMFS reports two takes of false killer whales by the deep-set longline fishery. As of late September, no determination had been made as to the level of injury the animals sustained.

(For a fuller discussion of the take of pelagic false killer whales, see the article in the April 2024 edition of *Environment Hawai'i*, "NMFS Approves Management Area Beyond EEZ for Pelagic False Killer Whale Popula-

tion.” For details of the letter to NMFS, see the August edition, “Increased Takes of Pelagic False Killer Whales Prompt Conservation Groups to Warn NMFS.”)



Tori Line Tests, Part II

Last year, the Western Pacific Fishery Management Council changed its rules regarding the deep-set longline fishery to allow vessels to use tori lines as a method to deter interactions with albatrosses. The tori lines, consisting of long poles with streamers that are placed near the fishing lines as they are set out, are thought to interfere with the ability of albatross to see and snatch bait from the hooks.

Tests of the tori lines deployed on vessels in the deep-set fishery, which targets tuna, showed their effectiveness. Earlier this year, the council sponsored tests of the tori lines used on longline vessels targeting swordfish, which are caught at much shallower depths.

Existing rules require that the baited lines are set at dusk or at night and that the bait is dyed blue, to make it less visible to birds. Fishers have complained that dyeing the bait is a bother. In addition, time restrictions on setting lines reduce “operational flexibility” of the shallow-set fleet.

But results of the tests conducted between February and April were conclusive. According to a write-up of the results released in August, the tori lines were not “an effective seabird bycatch mitigation measure in this trial compared to the use of night-setting with blue-dyed fish bait.”

“Albatrosses were [about] 37.6 times ... more likely to be captured when paired to tori-lines were deployed compared to the night-

sets (with blue-dyed fish bait).

“Albatrosses were [more than] 1000 times ... more likely to contact a baited hook when paired tori-lines were deployed compared to the night-sets (with blue-dyed fish bait).

“Albatrosses were [more than] 3000 times more likely to attempt to contact a baited hook when paired tori-lines were deployed compared to the night-sets (with blue-dyed fish bait).”

One reason for the dramatic difference in effectiveness of the tori lines on deep-set vs. shallow-set vessels suggested by the study is the different locations the fisheries operate in. The shallow-set fishery, the study says, “operates at higher latitudes than the deep-set tuna longline fishery and is generally subject to higher wind conditions, which we found can increase seabird bycatch risk – perhaps because seabirds are more agile and able to access baited hooks during stronger wind conditions, or because tori-lines are less likely to be maintained adequately over the set-deployment footprint where baited hooks are vulnerable to scavenging seabirds”

While tori lines may be of little value in the swordfish fishery, there was general agreement at the recent Wespac meeting that the requirement to use blue-dyed bait also was not helpful – and was actually a nuisance, inasmuch as it required crew members to dye bait instead of helping out with other duties. The council voted to support experimental fishing trials to determine the effectiveness of blue-dyed bait.



What’s in a Name?

The Pacific Remote Islands Marine National Monument has a descriptive name. But last

year, President Biden signed a memorandum that, among other things, called on the secretaries of Interior and Commerce to select a new name for the monument, in collaboration with “Indigenous language experts, Native Hawaiian organizations, and other representatives from Indigenous Peoples with ancestral, historical, and cultural connections to the area.”

Malia Chow, branch chief of the Habitat Conservation Division of the NOAA Fisheries Pacific Islands Regional Office, described the process of deciding on a new name at the meeting last month of the Fishing Rights of Indigenous Fisheries Standing Committee of the Western Pacific Fishery Management Council.

The John McCain National Center for Environmental Conflict Resolution, a part of the Udall Foundation, a nonpartisan agency of the Executive Branch of government, surveyed a number of groups and individuals from cultures throughout the Pacific. Its report noted that “Most participants felt generally negative about the current name.”

“While some individuals thought Hawaiian names could be appropriate for the Monument or the islands and ocean areas in and adjacent to the Monument, a few cautioned against using Hawaiian since most of the Monument lies within Micronesia,” the Udall Foundation report stated. “These participants felt that Micronesian perspectives are often not valued or even excluded by the U.S. Government.”

Following that, at the FestPAC (Festival of the Pacific Arts and Culture) held in June in Honolulu, Narrissa Spies, a conservation planner with the Fish and Wildlife Service, gave a presentation on the renaming project to participants. Chow and others interviewed Pacific Islanders to obtain their thoughts.

The conclusion was that the word “Remote” should be excluded, since it’s not really remote from many of the Pacific Island cultures. Also, “choosing one indigenous language over others” could be harmful. Most important, perhaps, was the overall consensus that since the monument is a construct of the U.S. Government, it should have an English name.

The final recommended name, Chow said, is “Pacific Islands Heritage Marine National Monument.”



Cultural Take Of Green Sea Turtles

For decades, Simonds and other council members have been trying to find some way



A molting Black-footed Albatross reaches for bait during fishing operations. CREDIT: NOAA FISHERIES.

to allow for the cultural take of *honu*, or green sea turtles – a species that enjoys protection under the Endangered Species Act.

Last month, in the meeting of the Fishing Rights of Indigenous People Standing Committee, Simonds hinted that at the full council meeting, the national sea turtle coordinator from the NMFS would be making a presentation on the topic. “In particular,” she added, “it’s our understanding that there’s now renewed interest in captive rearing of green sea turtles.”

But a few days later, when NMFS turtle coordinator Stacy Hargrove made her presentation, she was anything but encouraging when it came to the prospect of raising sea turtles in captivity.

What’s most important is the survival of subadults and adults, Hargrove said, discounting the effectiveness of nurseries or headstarting, which focuses on the survival of hatchlings. “A small decrease in the survival of older turtles can quickly overcome any potential benefits of headstarting,” she said, citing a study on the subject published in 1996 (“Models to Evaluate Headstarting as a

Management Tool for Long-Lived Turtles,” by Heppel et al, in *Ecological Applications*). With just one in 1,000 hatchlings surviving the 30 years it takes to reach sexual maturity, focusing on the first year of a turtle’s life is unlikely to be effective, she noted.

Hargrove mentioned the several captive-rearing projects that had been undertaken for green, loggerhead, and Kemp’s Ridley turtles elsewhere. Then she listed some of the drawbacks. Such projects fail to address the threats the species face in the wild. They can have negative environmental impacts, including the generation of large quantities of wastewater. They can foster disease, aggression, and even cannibalism among the captive animals. They are costly and distracting – and, in the end, there is “very low survival to reproductive age, and decades for any potential benefits to be realized.”

Finally, she pointed out that the Endangered Species Act calls for captive rearing to be “used as a recovery strategy only when other measures employed to maintain or improve a listed species’ status in the wild have failed, are determined to be likely to fail, are shown

to be ineffective in overcoming extant factors limiting recovery or would be insufficient to achieve full recovery.”

The council continues to seek ways to circumvent treaty obligations with Latin American countries, designed to protect sea turtles, and federal regulations. On the last day of its meeting, the council voted to have staff “request a presentation from the proper resource people on the process and impacts of federally recognized tribes for potential recognition of the indigenous peoples of the U.S. Pacific Islands to address exclusion of these peoples from federal regulations, among other potential options.”

The motion confused some of those present, who wanted to know if the problem to be addressed was the exclusion of Pacific Islanders from federal programs, as the language of the motion could be read to say. That misunderstanding was quickly dealt with, as one of the council members explained, frankly, that the purpose was to allow the cultural harvest of sea turtles.

— Patricia Tummons

Board *continued from page 1*

easement for drainage pipes running from the resort across the state parcel and into the ocean, Ralston stated in written testimony that when the Land Board last renewed the permit in December 2023, “Resorttrust leadership sat before you and claimed that they follow the terms of RP S-7915. In actuality, they violated the terms of their RP on every of the many days I visited Lot 41 in 2023 before the BLNR meeting and every day after the BLNR meeting, by presetting many more than the 70 lounge chairs allowed by the terms of the RP.”

Ralston had planned to show photographs and video supporting his claims at the board’s January 26 meeting, but the easement matter was withdrawn from the agenda.

Less than a month later, Frankel stated in his testimony to the board last month, he and others noticed that the hotel had stopped presetting and storing chairs on the state parcel.

“The towel caddy has now been moved back on to the hotel’s property. The area looks so much better now,” he wrote.

Then on August 12, counsel for the resort sent a letter to the DLNR asking that the permit area be reduced from about 1,400 square feet to 64 square feet to accommodate just a beach shower, and that the monthly rent be similarly reduced from \$1,485 to zero.

“The new revocable permit, if approved today, would be a passive use of the land,

with no preset items allowed by the Board, no commercial activities, full public access, landscaping at RTH’s cost, and provision of liability insurance protecting the State. Land Division has no objection to the gratis rent considering the actual expense spent by RTH to maintain the grounds that is open to the public. ... The applicant has not had a lease, permit, easement, or other disposition of State lands terminated within the last five years due to non-compliance with such terms,” district land agent Barry Cheung stated in his September 26 report to the board recommending the approval of the downscaled permit, which would go into effect after the current revocable permit expires at the end of the year.

Although Frankel supported the termination of the old permit that allowed for the presetting of dozens of chairs, he argued that even more should be done to make the property more accessible to the public. Specifically, he recommended that some hedges on opposite sides of the property be removed. “Doing so would be an invitation to members of the public to sit there. (Who goes to the beach to site behind a hedge?),” he wrote.

Ralston added in his written testimony, “While the hotel has done a reasonable job at maintaining the landscape in the areas fronting the hotel where their guests are most likely to view, RTH has severely neglected any maintenance on the Western end of the par-

cel where their guests are least likely to view and where the public is most likely to view as they walk toward the East.

“Notably, the Western groin is littered with exposed, broken-off PVC irrigation lines, rusty rebar sticking out the ground, large concrete rubble chunks several feet across, and dislodged, broken black plastic landscape border edging. The adjacent island has many yards of several types of synthetic geo-textile fabric used in landscaping lodged in the boulders, long lengths of now-defunct gray-bar electrical conduit broken off on both ends just laying around, as well as other trash and human-made debris. RTH has not been maintaining the Western groin and island in compliance with the terms of RP S-7915, and the DLNR land agent responsible for paying attention to this has chosen to look the other way for many years.”

Both Frankel and Ralston asked that the new permit include terms that explicitly limit use of the parcel to non-commercial/maintenance purposes.

Compensation

In justifying his division’s recommendation not to charge rent using the parcel, Land Division administrator Russell Tsuji explained to the board, “If we were to get the property back, we would not maintain it at all.” He added that Resorttrust would maintain lia-

bility insurance for the property that would protect the state from any claims.

Attorney Onaona Thoene, representing Resorttrust, testified that the company spends \$50,000 to \$60,000 a year maintaining the land.

Resort vice president and manager Joe Ibarra added that he expected an estimate from a landscaping company by the end of the day on the cost to remove the pipes that Ralston had identified. He said the work would probably be done by the end of the year.

With regard to Frankel's recommendation to cut back or remove the hedges, Thoene said, "We respectfully decline. Some of the hedges appear to serve as erosion control."

She said "maintenance" under the new permit should include landscaping, irrigation, and lighting.

In discussing a motion by board member Vernon Char to approve the staff's recommendation (with amendments to clarify that the permit was for maintenance and landscaping, including irrigation, sand raking, and lighting), board chair and DLNR director Dawn Chang and board member Aimee Barnes expressed their discomfort with forgoing rent.

While the only permanent fixture of the resort's would be the shower, the permit area spans about 1.3 acres.

"Even if we didn't maintain it, the hotel would maintain it," Chang said. "It's open to the public, but also it is a benefit to your guests," she told Ibarra.

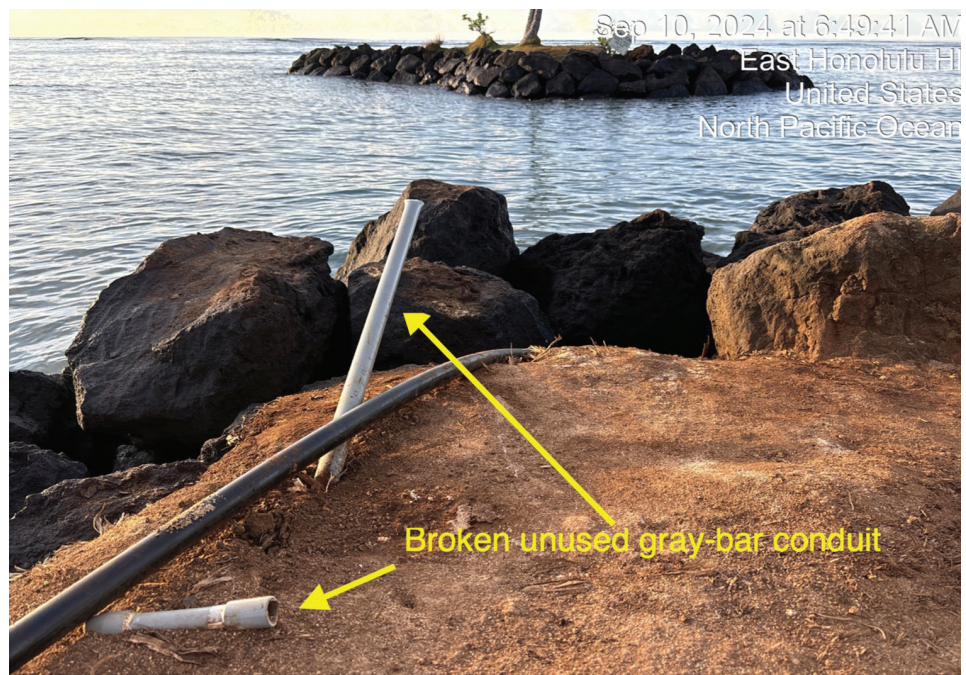
She continued that the money generated from the rental of state property goes into the Land Development Special Fund, which supports the department's monitoring, enforcement and other management efforts in other areas.

"That is my difficulty with just having it gratis. I would support some kind of amendment. \$1,400 (roughly the current rent) is approximately \$17,000 a year. It's not in my view an insurmountable expense for the hotel," Chang said.

Board member Riley Smith, however, seemed to support the idea of not charging rent. He recounted how, at a resort on Hawai'i island, which he represents, resort staff are "the first responders if something happens. ... The benefits to the community and the response time more than makes up [for the lack of rent]," he argued.

"I think they would do that anyway," Chang countered.

Barnes added that she was concerned about the precedent that would be set if the board approved the recommendation as is. "Providing compensation for the use of state



Some of the debris that Tyler Ralston and David Kimo Frankel asked to be cleaned up from the permit area.
CREDIT: TYLER RALSTON.

lands is something that a good actor should be willing and eager to do. ... I have a concern about offering this gratis. There are a lot of things that a lot of folks do that then may be brought before us as evidence of why they deserve to have their RPs gratis going forward," she said.

She suggested that maybe the board could meet somewhere in the middle and charge half the rent that the resort has been paying.

Chang wanted the rent to at least cover the DLNR staff time to prepare submittals to the board and to enforce permit conditions. Also, she said, charging rent for the use of public lands, even those that are open to the public, "sends a message to the public there is some consideration, even though we're receiving a benefit."

"We're a little bit in a place where we've gotten so used to bad actors that when we have a good actor, our bar is so low," Barnes said.

After Ibarra said he would be willing to consider a reduced rent, rather than gratis, the Char amended his motion to include a monthly rent of \$750. With that, the board unanimously approve the motion.

Easement

Just before taking up the Resorttrust permit, the board unanimously approved a recommendation from the Land Division to grant the company a 12,700-square-foot perpetual, non-exclusive easement for three drainage lines that have run from the hotel through the state property since the early 1960s. Two

of them are outfalls from the resort's lagoon, which receives the resort's air conditioning cooling water. A third is for storm stormwater.

Fair market rent for the easement would be a one-time payment determined by appraisal.



Proposed Restrictions on West Hawai'i Pāku'iku'i

On December 18, a prohibition on the take of pāku'iku'i (Achilles tang) from the West Hawai'i Regional Fishery Management Area, approved by the Land Board in 2022, will sunset.

At the board's September 26 meeting, the DLNR's Division of Aquatic Resources recommended extending the moratorium on the fish — which is targeted for food and by the aquarium industry — to 2026. The division also recommended establishing a pāku'iku'i fisher registration program to capture catch data and, once the moratorium ended, implementing a bag limit of four per person per day through 2036.

The division asked the board's permission to hold public hearings on these proposed amendments to Hawai'i administrative rules.

Back in 2022, the Land Board had approved a daily bag limit of five per person, despite concerns from DAR and then-board chair Suzanne Case that the population in West Hawai'i could not sustain that level of take.

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LUC Rejects Agreement Intended To Help It Deal with Water Issues

Last May, the state Land Use Commission received an update on plans to develop about 1,000 houses on land near Lahaina, Maui. The LUC had first approved a project in this area three decades ago. In the intervening decades, ownership changed, as well as plans. But nothing had been built to bring the proposed Pu'ukoli'i Village any closer to completion than it had been back in 1993, when the LUC gave its blessing to the project.

As *Environment Hawai'i* reported in June, at the meeting where the LUC heard that update, representatives of the developer, Ka'anapali Land Management Corporation — as well as members of the LUC itself — seemed to blame the state Commission on Water Resource Management for the long delays.

LUC Chair Dan Giovanni said at the time, “Seems like we’re prepared to move forward with this valuable project ... but it’s all hung up with this water issue.” He went on to accuse CWRM, wrongly, of having made “a generalized priority to prioritize all the existing applications before they would consider something new.” In fact, as it turned out, the developer had not applied for any water use permit at all.

Brian Lee, another member of the LUC, asked why the LUC had to defer to CWRM: “If CWRM is going to be the obstacle, why are we deferring to them without any examination?”

With the Land Use Commission’s apparent — and astonishing — ignorance of the constitutional and statutory role of the Water Commission on full display at that meeting, a decision was made to have members of the Water Commission staff provide the LUC with an informational briefing on the responsibilities and programs of CWRM.

This was done on July 10, when several members of the CWRM staff briefed LUC members on the constitutional and statutory roles of the Water Commission.

At that meeting, commissioner Nancy Carr Smith wanted to know why CWRM would allow streams to flow unimpeded into the ocean. Recently CWRM staffer Ayron Strauch, of the Stream Protection and Management branch, met with members of the public in Waimea, she said. “The audience had a lot of different feelings about what should happen with the streams that go through Waimea and go down to the ocean. Some seemed to think that the

water should just flow,” she continued. “Others think that it should be used upstream because when it just flows, it ends up in the ocean and it’s really causing a lot of issues to our reef and the fish.

“My husband and I go swim every weekend down at Wailea Bay. It’s been really bad this year because of the storms we had and the runoff. So what is the commission’s view on the stream water affecting coral reefs?”

Alexa Deike, legal fellow with CWRM, explained that streams in Hawai'i are very flashy, so what Carr Smith was describing is more a flash-flood event associated with high rain events. “The commission is very cognizant of the impacts on nearshore environments, coral reefs, and it is working closely with the Division of Aquatic Resources,” Deike said. “But also, for native wildlife, fish life, we need water to be flowing in the streams.” Mauka-makai stream flow, she said, was one of the public trust issues that the Water Commission is charged with protecting. Later on in her presentation of the constitutional mandates that CWRM must carry out, Deike noted that “maintenance of water

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Board *continued from page 6*

Before the September board meeting, Case submitted written testimony against DAR’s proposed new bag limit of four (she preferred a daily take of one) and recommended that the moratorium should be extended to 2027, not 2026. In her written testimony, she stated, “There is **no scientific basis** yet to support this catch limit, and while there does need to be some catch limit, a limit of four per day **risks extirpation** of pāku'iku'i locally and regionally in Kona. ...

“There is no data yet on the fundamental question that must inform a bag limit: what rate of pāku'iku'i extraction will be equal to or less than the replacement rate of the population! No monitoring of the impact of the moratorium over the past two years, no information on extraction levels, no studies indicating what a healthy recovered population would look like.

“DAR’s own surveys show further declines in abundance, size and even presence of pāku'iku'i.”

After a presentation by DAR staff showing how population densities of the fish have steadily declined over the last decade or so,

board member Aimee Barnes said she was struck by just how little is known about the population dynamics. She asked how adaptive management will play into “the idea of picking a number today ... for a future that, at the very least, seems to be highly uncertain.”

DAR fisheries program manager Dave Sakoda said, “We see this as a precautionary approach. We do hear a lot from fishers that we shouldn’t take management action in the absence of scientific justification. In this case, we feel there should be a reduction in take. ... We do intend to adaptively manage as we learn more about what’s driving these trends.”

He said the division planned to try to gather more data on the fish during the extended moratorium.

“I know you guys are always walking a fine line. It’s a knife edge trying to balance the different interests here. But at the end of the day it’s not going to be in anybody’s interests if these populations plummet and cease to exist,” Barnes said, adding, “We really rely on you to give us the science so that we can make the tough decisions and often bear the brunt

of people’s unhappiness when we do that. I just would really encourage you to set aside what you think is maybe gonna make people happy and tell us what you think is really necessary to make sure that this is something that’s around for our future generations.”

DAR biologist Chris Teague then explained, “If you set the bag limit too low, I feel that you would be likely to see a number of fishers not complying at all. ... If we get buy-in from fishers on that number, then they’re more likely to abide by the rules and we’d get more compliance. That’s kind of what we were worried about setting it too low. That’s how we landed at that four, was in talks with the community members at those public scoping meetings.”

Board member Riley Smith moved to approve taking the proposals out to public hearings, with a modification that the daily bag limit be zero, rather than four. The board unanimously approved his motion.

—Teresa Dawson



Waikoloa Stream. CREDIT: CWRM.

in its natural state” was one of the four specified public trust purposes.

Katie Roth, head of CWRM’s planning branch, added that the Department of Land and Natural Resources’ Division of Forestry and Wildlife was involved with protecting and restoring upslope watersheds, “and that does play a role in erosion, sedimentation issues as well. ... In re-establishing stream flow we do want to make decisions in coordination with agencies like DOFAW, in understanding what projects or initiatives they may have in the watershed, whether that’s invasive species removal of animals, reforestation efforts, fencing efforts – all of those things that keep soil on the landscape.”

In describing the constitutional role of the Water Commission, Deike pointed out that although other agencies may have overlapping jurisdiction in some areas, CWRM is the primary guardian over freshwater use and management. “These constitutional mandates and duties do apply to other state and county agencies,” she noted, “so whatever we are mandated, as primary guardian, also applies to the LUC or the PUC [Public Utilities Commission] and the counties as well.”

As Deike was describing the way in which the Water Commission issued water use permits in areas that are designated water management areas, LUC chair Giovanni asked, “So this – I don’t know what to call it – this set of rules came before us in a very recent case having to do with new development on West Maui. And I’d like ... you to elaborate on the current state, because we were confused. Because existing water users have one year to reapply or apply to secure their original, or some form of water use permit. And that anybody else that never had water before has to wait until that process is completely finished and cannot even apply.”

“This may have been how we handled permits prior, but in the case of Maui, we have taken existing and new use permits at the same time,” Deike replied. “I assume you’re referring to the Pu’ukoli’i development –

“A couple,” Giovanni said.

“Those developments could come into us at this time with new use permit applications,” Deike said, “but we have not received a water use permit application from those.”

“So is there any sense of – I understand they can submit the application, but internally, within CWRM, is there any priority established in addressing those applications, whether it’s for an existing use or for a new use?” Giovanni asked.

“The way we are going to tackle all the water use permits in the Lahaina aquifer sector area is we’re going region by region, and our intent is to start with the region where those particular developments are located, in the Honokawai aquifer,” Deike said. “We have already reviewed all of the existing use permits and there is one new use permit as well. If we were to get a new use permit [application] at this time, we would address it at the same time.”

Commissioner Bruce U’u, whose term on the LUC had begun just 10 days earlier, seemed to think CWRM should be doing more. “We’re lacking serious housing on Maui,” he said. “Is there anything we can do to help aid our island back, in building, whether it be existing uses or new uses? Is there anything CWRM is doing to bring us back to some normalcy? ... I understand that sugar cane was very thirsty, and there is none. I understand that we need stream flow – but at what cost? Housing, maybe? ... You said there’s no priority for housing. But I know stream flow, I know people who have lo’i, lo’i farms. They have a lot of water, discharging to the ocean, like Commissioner Carr Smith

brought up. And how does that equate to not having housing? I’m just trying to figure out how we balance bringing some housing back. Everyone on all islands is saying, CWRM, Land Use Commission, and now I’m joining the crowd. How can we assure our own people, our island. You’re the guardians of public trust, but also at the same time protect and manage for future generations. And just to let you guys know, our people are leaving. So I’m just trying to understand ... your job is to balance that, right? And I see a lot of stream use going in the ocean, which is fine, but I don’t see that equating towards housing, or how we can utilize different waters, injection wells, whatever we need to come up with some solutions. Everyone on Maui is waiting for a few solutions and some guidance. I watched the last meeting. There’s a lot of confusion from Ka’anapali Land, what they said, and what I heard here, it’s major confusion. ... It’s like we’re not even on the same page, that’s for sure.”

Deike responded, thanking U’u for bringing up alternative water sources. “The threatened water resources in the Lahaina area that is something that was already on the radar in the late 1970s. We avoided designation early on, when we could have gotten a handle on it. But I appreciate you bringing up alternative water sources. Only when we require water use permits can we require water users to use alternative sources, which would be R-1 water, for example.

“In Honokowai, where we’re already over sustainable yield, we’re using groundwater to water golf courses, to irrigate landscaping of hotels and luxury homes. If we could substitute those irrigation needs with R-1 water, we could free up water to go to housing developments. ... The other missing piece, which is not CWRM’s kuleana, is water source development. Maui County has not developed any new sources. It was always traditionally very dependent on the plantation systems, on surface water. ... We’re still allowing Maui County to completely dewater a stream to use for drinking water in Lahaina.

“With climate change, conditions are getting more dire. You have diminishing rainfall, you have diminishing stream flow. So when your drinking water is dependent on stream water, you’re going to run into trouble.”

As the presentation by CWRM staff was concluding, Roth offered to the Land Use Commission elements that she suggested the LUC should consider in making its decisions. These included changes in water availability – including changes brought about by climate change, the end of plantation-era sugar cultivation, invasive species, updates to sustainable yields, and changes in the interim instream flow standards. The LUC should also be mindful of

designation of water management areas and the requirement to give priority to public trust uses, she said.

Roth went on to suggest ways in which coordination between the LUC and CWRM might be improved. At present, she said, when an issue comes before the LUC, it is the Office of Planning and Sustainable Development that coordinates the official state response. The OPSD asks the DLNR and other agencies for comment. The Land Division of the DLNR then asks all the DLNR divisions for comment. "As you can see, there's a lot of things that can get lost in that process. We may or may not receive that petition or receive your request for comment ... in some cases, because it's disguised on Land Division letterhead, it may not trigger for us that it's a Land Use Commission issue.

"Can that consultation process be improved upon? I don't think there's anything that precludes our agency from working with LUC staff... If there are specific questions that need to be answered, we are happy to do that and we will make that a priority."

Roth went on to suggest that, "in certain cases, CWRM should be the entity representing its comments rather than OPSD. Not to say anything negative about OPSD, but it is challenging with some of these issues. It's difficult, but I think it would be better if one person from CWRM staff could attend a hearing. This is one of the things I noticed when I looked at the LUC recording of the meeting in May."

Amending the LUC's rules to specifically include consultation with CWRM might be a formal way of addressing this, she said. Alternatively, she added, the LUC and CWRM might agree to a non-binding Memorandum of Understanding that would set forth terms of consultation.

The Water Commission has agreements with other agencies, such as the Public Utilities Commission, Roth noted, which set out in a specific way opportunities for collaboration. "It's something new we've done in the last few years to articulate the importance of interagency collaboration," she said.

CWRM Weighs In

About six weeks later, on August 20, the Commission on Water Resource Management considered a staff proposal to authorize its chair, Dawn Chang, to enter into a memorandum of understanding with the Land Use Commission setting forth terms of collaboration between the two agencies. A draft MOU accompanied the staff proposal.

CWRM's planning branch manager, Roth, provided commissioners with the background to the proposal. "In the last few months, there've been a number of petitions, action

items before the Land Use Commission in which conversations about the role of the Water Commission – our process, protocols, policies, and our engagement and involvement in land use decisions – have come up," she said.

"What we've learned from that experience is that our current engagement process, in terms of the LUC asking CWRM for input on various petitions and actions items is probably not sufficient."

Roth explained the cumbersome process by which the LUC would obtain input, if any, from the Water Commission. The Office of Planning and Sustainable Development, a party to every LUC docket, is charged with putting forth the official position of the state, and it generally does this by asking state agencies for their comments or concerns before developing the state's position, which it represents before the LUC.

The Department of Land and Natural Resources, to which the Water Commission is administratively attached, receives the OPSD queries. The DLNR's Land Division then sends to each of the several DLNR divisions and the Water Commission a brief summary of the issue for which the OPSD is seeking comment. And this cumbersome process, Roth told the commissioners, "is probably not sufficient. ... There's a lot of ways that things can get lost," including things that "have a direct effect on stuff happening at the Water Commission."

"In speaking to LUC staff, we decided an MOU might be the best way to resolve some of those issues. We've laid out in the MOU things that we agree to do. None of it is binding. It's basically just a promise to work more collaboratively together."

Dan Orodener, the LUC's executive officer, spoke to the issue. "In the past, we have relied on representations of the petitioners" with respect to the availability of water, he said. "We have found that sometimes those representations have not been factual, but more 'we hope' situations. This has resulted in a couple of projects that have not been able to come to fruition because they claimed that they had water and they didn't. So our resources go to fostering those projects, and then we find they can't be built.

"This is our intent, to have a closer working relationship with staff at CWRM to find out if there are issues with regard to water before we approve a project... so that we may have the ability to address them when we put conditions on our decisions and orders."

The MOU, he said, "is purely so we can access information, share information. It has nothing to do with decision making. It's just to provide this commission and our commission with information necessary so they can render decisions.

CWRM member Lawrence Muike asked, "Why can't you guys just talk to each other?"

Roth responded, saying that having something in writing would give "future staff, who may come and go, something to reference – a promise or commitment to share information. I don't see why that hurts anyone to have that in writing."

Orodener added, "We found that information doesn't get disseminated in a timely manner." When the OPSD seeks comment from the DLNR, he said, "they send it to DLNR and it goes to the Land Division and the Land Division disseminates it to all – sometimes it takes so long that we don't get a response in time. Sometimes the OPSD does not recognize the same issues that we do, so direct communication with CWRM staff takes out the middleman."

Chang then mentioned her experience as a member of the Land Use Commission: "For me, one of the major problems wasn't so much the initial application, but sites remaining dormant for like 10 or 15 years, so that conditions that were placed on the approval 10, 15 years ago may have changed dramatically. New development has occurred, other uses, but at times they're relying on the same information they relied on 20 years ago to make decisions today. And, so, those for me were the more problematic ones – ones that come back on a reconsideration, or there's a new developer, new owner who now wants to amend some of those conditions."

Orodener agreed. "That's part of the reason why we want to open this line of communication," he said. "Because 20 years – for instance, take the Lahaina area. Twenty years ago, the water situation there was much different than it was 30 years ago, and it's different now. And we approved projects 30 years ago that still haven't been built. So if they do come forward now, we need to reassess the water situation. We have one project completely dead and stalled in the Lahaina area because they can't find water."

Chang was skeptical. "Sometimes, from a legal standpoint, once you have it in writing you're going to be bound by that. It's easier – something not in writing gives you more flexibility."

"If the commission is uncomfortable with having something in writing," Orodener replied, "the process is not going to stop. We will still communicate with CWRM staff."

"You guys were already doing that?" Chang asked.

Roth responded. "We haven't been until about a month ago," she said, again explaining that the paperwork CWRM gets from the Land Division "may just have the title of the item or petition without details or background information."

Orodenker added that the LUC was also now having to deal with the effect of recent Supreme Court decisions. “A lot of the concern comes from our obligations under the Public Trust Doctrine and *Kapa’a Kai*, which under recent Supreme Court cases have been further expanded.” (*Kapa’a Kai*, which dealt with an LUC decision back in the 1990s, basically said that state agencies may not delegate to others the obligation to protect the rights of Native Hawaiians. More recently, the Supreme Court held that all agencies must conduct an analysis of proposed actions in light of *Kapa’a Kai* before rendering decisions.)

“We can’t use the excuse that nobody brought evidence forward anymore,” Orodenker said. “We actually have to take the initiative.”

Jonathan Likeke Scheuer, a former LUC chair who advises the Department of Hawaiian Home Lands on water issues, came forward to testify. While stating that he had not planned to weigh in on this matter, he nonetheless provided extensive extemporaneous testimony, based on his prior experiences at the LUC.

“I observed many instances, because I had a background in water resources management, where petitioners would come in and claim certain things about water availability or not, and I knew them to not be completely factual. Often... staff members from OPSD would just say nothing, even when questioned, until finally being asked if they had talked to the Water Commission staff. ‘No, you haven’t.’

“One of the things this has left us with, and this is acknowledged in the [Water] Commission’s own document, the Water Resources Protection Plan, particularly in the setting of sustainable yields, but also in other areas, there’s more land entitled in the state of Hawaii in all four counties if fully built out than there is water available to do it. So it’s certainly helpful to the LUC to know water availability... but it’s also helpful to you, too. Because you get involved in trying to adjudicate and allocate water resources in areas where now there’s excessive demand on that resource.

“This is not even in sight, keeping in mind that projects were approved when sustainable yields were higher, before the impacts of climate change were recognized. Some of the practical ways in which it might help – and I actually don’t have a particularly strong belief whether this is a great idea or something that could be passed on, but one of the practical ways a more formalized way would help you – you, as the Commission ... only have the power to require dual water lines in designated water management areas. You can say you need to install dual lines, you need to use recycled water in this part and potable or surface water in this part. But in non-designated areas you lack that power. The Land Use Commission, however, has the

power as a condition on an entitlement to say, as a condition for your getting approvals to do this, you are required to hook up to the nearest wastewater treatment plant and install a dual system on your property, which would mean that the water resources that you’re entrusted with protecting will have a better shot of being properly allocated.”

Scheuer went on to say he appreciated Chang’s concerns about putting things in writing. But, he added, “it seems like the history of ignoring the relationship between the Water Commission and Land Use Commission hasn’t necessarily gotten us to a good place. I’d rather put it in writing and fail rather than continue on current path and hope it works out.”

Chang suggested that the agreement be that any agreement she would sign off on be brought back to the full commission for its approval and be reviewed by the Office of Attorney General. She also wanted to have a copy of the draft be provided to the Office of Planning and Sustainable Development.

With that, commissioners voted to approve the staff recommendation, giving Chang authority to work out details of a MOU with the Land Use Commission.

Thumbs Down at the LUC

On September 5, the Land Use Commission was presented with the draft MOU, again with the proposal to delegate to the LUC chair, Dan Giovanni, the authority to finalize it following talks with his opposite number at the Water Commission.

The draft MOU, made available on the Land Use Commission website, now included a prefatory statement, stating that the purpose of document “is to establish an agreement for further cooperation between” the two agencies. “Water is Hawai’i’s most important natural resource. Its protection and preservation require [sic] coordination between various agencies and entities. As the state approaches the limits of its water resources and demands for housing and new developments increase, careful consideration and more effective coordination between land use and water planning is needed.”

Ahead of the meeting, the LUC received written testimony from Ana Tuiaosopo, representing the Operating Engineers Local Union No. 3, and David Arakawa, on behalf of the Land Use Research Foundation. Both were opposed to the proposed MOU.

Tuiaosopo’s testimony stated, “We understand the need for greater coordination with the different commissions within the state, but this MOU would give one commission preference over other commissions and state departments.”

Arakawa was present at the meeting to elaborate on his group’s opposition to the MOU, which he described as “another attempt

at a power grab by the Water Commission.” This MOU, he said, was in keeping with past episodes of the Water Commission attempting to expand its powers, citing House Bill 1088 in the 2023 legislative session (vetoed by the governor) and proposed changes to the LUC’s rules that he said had been rejected by the LUC in late 2023.

(House Bill 1088 would have authorized CWRM to declare water shortages and emergencies. Although the bill was part of the administration’s legislative package, Governor Green vetoed it, stating that sufficient emergency powers already existed in the laws establishing the Water Commission. The proposed change in LUC rules to which Arakawa referred would have required petitions that come before the commission to include certification by the Water Commission that issues related to water availability are addressed and mitigation measures are identified. Last November, the LUC voted to suspend action on the rules for three months, at the request of the Office of Planning and Sustainable Development.)

There was no need for the MOU, Arakawa said, stating that the real problem was “due to an internal problem at DLNR or CWRM – one department or division not talking to another.”

He went on to say that the MOU was not necessary, “because departments should be communicating with each other anyway, and the current EIS process and the LUC district boundary review process provide ample opportunities for input.”

Arakawa concluded, “We believe the MOU would expand impermissibly and perhaps unconstitutionally the powers and duties of CWRM in relation to the LUC.”

Katie Roth joined the discussion, emphasizing that the information sharing anticipated went well beyond commenting on particular projects, but also touched on updates to sustainable yields, declines in water resources due to climate change, and other issues that come before the Water Commission – “things like that that are not officially part of a formal review process, but are things that we feel are important for us to communicate on, to be more proactive in our engagement, given the nexus between land use planning and water resource management.”

Commissioner Carr Smith suggested that the reason the LUC didn’t understand water issues was the fault of the Water Commission. “Isn’t it your kuleana to respond [to notices received via the Land Division] and, if appropriate, bring matters to our attention or be at our meetings to testify?”

Roth replied that CWRM was not always getting notice via the DLNR Land Division. While CWRM was trying to work out issues

with the Land Division, “this MOU is intended to add an additional layer of insurance that we are understanding and aware of issues before the LUC,” she said.

Katia Balissiano with the OPSD said that her agency would sometimes try repeatedly to obtain comment from agencies before presenting the state’s position to the LUC. “But we respect the internal processes agencies use to generate comments,” she said. “We believe those internal routing processes are intended to keep managers aware of policy decisions and staff workloads. We understand that it’s for record-keeping, consistency of requests and responses, it helps managers assess staff performance and knowledge, and it confirms that responses are correct and complete when, you know, it passes through this process and perhaps different people have to review something before it gets formally to the OPSD. And then as we collect information from the various agencies, because we’re the ones who represent the state’s position, sometimes we need to work with the agencies to reconcile different perspectives, and we do that, and everything that we find we send along to the LUC as part of our testimony. So that is the process that’s used.

“Whether this MOU would help, we’ve not been party to the conversations pertaining to this MOU, so perhaps those conversations can go on. But we’re under the impression that there are, as Ms. Roth says, no statutory obligations associated with this MOU. I guess we’d be concerned if CWRM shares preliminary information with LUC staff and it’s later revised when it comes up through standard DLNR channels that there may be conflicting information out there. But we trust that CWRM, DLNR, LUC staff would bring us into those conversations in a timely manner so that we can be party to it and do our job before the LUC in representing the state’s interest.”

Giovanni noted that CWRM said that this process is broken. “What is the process by which you get information from CWRM? You’re not getting in directly, we’re hearing that.”

“DLNR has many divisions,” Balassiano said. “We’ve been instructed by DLNR’s chair to send things to DLNR and, as Ms. Roth suggested, it goes to the Land Division and then it goes to another six, seven different entities for their comment. So unless DLNR tells OPSD that they would like to have the correspondence sent to them directly, we are abiding by what we’ve heard from DLNR.”

Giovanni asked if it might be possible for OPSD to send correspondence directly to CWRM, eliminating the middleman.

Yes, Balassiano said, adding that it was not clear an MOU would be needed for that. “We would be happy to work out something ...

to see if there’s a different routing system that could be used,” she added.

Carr Smith observed that the OPSD seemed to give agencies ample time to respond to requests for comment. “If people don’t respond, that’s their problem, not really OPSD’s or LUC’s,” she said.

Orodenker then reminded the commission of the background to the discussion of an MOU in the first place. “I think you have to look at why this whole thing evolved,” he said. “There was some criticism in a couple of periodicals about the fact that the Land Use Commission didn’t seem to be able to understand and have all the information in front of it with regard to water. Which is why we asked CWRM to make the presentation. And as the chair stated earlier, water is very important. It’s part of our public trust obligations. That’s why we had CWRM come and talk to us, to explain to commissioners how their processes worked. There are a number of ways to improve the situation. The MOU is just one way to do it.”

Commissioner Brian Lee voiced his objections to the MOU, which he said circumvents existing authority, deliberation, and chains of custody and command. “An MOU adds additional liability,” he said. “There’s already processes in place. An MOU can make us run afoul of established authority and procedures,” he said. “If the problem is in internal routing, that’s not our problem.”

Carr Smith moved to deny the MOU and withhold any authority of the chair to work any further on it. Commissioner Lee seconded.

Commissioner Michael Yamane supported the motion, but added that he appreciated the presentation by CWRM and wanted to leave the door open to hearing more from them.

“Whether we invite them quarterly, or our staff comes up with a way to work with them, and somehow get that information to the commissioners – we need to come up with some kind of solution,” he said.

Chair Giovanni commended CWRM and Roth specifically for trying to address the real problem of a lack of communication between the agencies. “Let me very strongly encourage OPSD to tell this commission, when it comes before us, how this issue has been addressed,” he added. “I want to make sure that if we flag an issue” concerning water management “that it doesn’t get lost ... that it makes its way to CWRM so we can have their input and feedback before we make any decision.”

With that, the LUC voted unanimously to reject the MOU.



Amended Financial Statements

In our June article on the LUC, we noted that Commissioner Carr Smith had not mentioned her husband’s income on her 2024 financial disclosure form, filed in April.

On June 15, both Nancy Carr Smith and her husband, Riley Smith, a member of the Board of Land and Natural Resources, filed amended financial disclosure statements. The amended statements of both now include spousal income – in the case of Riley Smith, income from Lanikai Properties (ranging between \$150,000 and \$250,000), and in the case of Carr Smith, income from Aloha Kohala Realty, LLC (ranging from \$100,000 to \$150,000).

— Patricia Tummons



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Marconi Developers Press City To Produce DPP Documents

On September 25, plaintiffs in a federal lawsuit against the City & County of Honolulu that alleges corrupt Department of Planning and Permitting employees stymied development at Marconi Point filed a motion to compel the production of documents.

The parties have been fighting in U.S. District Court over whether the Honolulu Department of Planning and Permitting rightfully determined that a Special Management Area permit needed to be obtained, or at least applied for, before more development could continue within the roughly 100-acre project known as the Marconi Point Condominiums.

Attorneys representing the project's developer Makai Ranch, LLC — as well as related entities Marconi Farms, LLC; MP Unit 21, LLC and RCA Trade Center Inc. — stated in a memorandum that their requests for production related to 1) documents related to the FBI's investigation of corruption within DPP, and 2) electronically stored information (ESI) and e-mail correspondence. (Within the last few years, five DPP employees have been sentenced to federal prison for bribery.)

The plaintiffs' original lawsuit alleged that the DPP had violated the Uniform Information Practices Act when it denied their requests for similar records. They sent their renewed request, as part of the lawsuit, on February 24.

The request for electronically stored information included all documents and information from 2005 to the present resulting from searches of "any electronic device or service or site owned or controlled by Defendants, including but not limited to any computer, tablet, local area network, hard drive, back-up driver, server, portable device (such as a thumb-drive), cloud storage system, cellular telephone, website, e-mail account, or

instant message account (such as Slack, Microsoft Teams, Skype, etc.)." The plaintiffs provided 77 initial proposed search terms — mostly names of unit owners or government officials combined with Makai Ranch, Marconi Point, Marconi, or SMA — with additional terms "to be provided following review of initial production."

An April response from John Dubiel, deputy corporation counsel for the city, states that the city "objects to this request to the extent that it is vague, ambiguous, overly broad, compound, irrelevant, and seeks information that is not proportional to the needs of the case, and/or to the extent that the information sought is unobtainable from some other source that is more convenient, less burdensome, or less expensive. The City further objects to this request to the extent that the information sought is protected from discovery by attorney-client privilege, and/or work-product doctrine."

A declaration from plaintiff attorney Ross Uehara-Tilton counters that based on discussions with Dubiel, Uehara-Tilton believed that the city was refusing to provide the FBI-related documents because multiple city employees "may have independently transmitted documents directly to the FBI, and Defendants believed it would be too burdensome to search the records of individual employees to determine which records had been sent."

The memorandum, which Uehara-Tilton signed, added that the city could and should identify the employees responsible for collecting and turning over records and ask them to search their records. "Defendants could also easily conduct a search of their electronic records, cross-referencing, for example, the names of the FBI investigators assigned to the case (e.g., Special Agent Eli Miranda), or even the search term 'FBI.' Any of these efforts would at least be a start

toward providing responsive documents, but Defendants have not made even a minimal attempt at producing a response," he wrote.

Regarding the electronically stored information, Uehara-Tilton stated that, as of the date of his filing, the city had produced 245 pages of e-mail correspondence that "appear to consist of only e-mail correspondence among William Wong [an architect sentenced to federal prison for bribing DPP employees], Jason Dadez, Jocelyn Godoy, and Kanani Padeken, [convicted DPP employees] most of which is unrelated to the subject property, and which only appears to cover time periods between 2019 and 2020."

To fulfill the plaintiffs' request, Uehara-Tilton stated that the city was relying on an outside technology vendor and, "according to Mr. Dubiel, the outside vendor was unable or unwilling to complete the search in a timely manner."

Uehara-Tilton stated that after he suggested issuing a subpoena to the vendor, Dubiel informed him that the city was unwilling to disclose the vendor's name.

"Counsel understands that the ESI search parameters are extensive, and that it could reasonably take the Defendants some time to search and compile responsive documents. However, it has been over 5 months since the Defendants' written response, over 3 months since the parties' initial meet-and-confer regarding the Defendants' deficient production, and zero additional documents have been produced, and Defendants have refused to commit to any timeline for producing the responsive information," he wrote.

U.S. District Judge Wes Reber Porter ordered that the city's response or opposition must be filed by October 10, and any reply must be filed by October 24.

—Teresa Dawson