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Environment Hawai'i

a monthly newsletter

An Historic Fail

The protection of buildings that were part of an unprecedented global communication system at the time of their construction was supposed to be assured by an agreement that placed conditions on development.

But so far as *Environment Hawai'i* has been able to learn, the agreement has not worked to protect much of anything at Marconi Point. Shifting land titles have led to shifting blame. The state agency that is supposed to ensure it is carried out is itself notorious for its own history – of delays and inefficiencies.

Unless one or another of the agencies – federal, state, or county – that has a role to play in executing and enforcing agreements on historic sites steps up, the most prominent structure that gave Marconi Point its very name may be doomed.

IN THIS ISSUE

Agreement Tied to Marconi Loan Is Unmet; Future of Ag, Historic Structures Are in Question

The eight agricultural warehouses that stand out like sore thumbs within the Marconi Point Condominums property on O'ahu's North Shore are massive and, except for one of them, indefinitely empty.

Whether they will ever start storing the fertilizer, seed, and other agricultural elements they were originally envisioned to hold remains to be seen.

Most of the warehouses were built with a $7.8 million USDA-backed loan from North Avenue Capital, which stepped in to fund their construction after the initial lender backed out of the project.

The larger 100-acre agricultural condominium project in which the warehouses — collectively known as the RCA Trade Center — are located lies within the city's Special Management Area and the state and national historic site boundaries of the Marconi Wireless Telegraphy Station.

Because of the area's historic designation, when the warehouse project's developer, RCA Trade Center, Inc., sought the USDA-backed loan several years ago, the project became subject to review under Section 106 of the National Historic Preservation Act.

In accordance with that act, the USDA Rural Business Cooperative Service determined in March 2020 — and State Historic Preservation Division concurred the following April — that based on their location within the Marconi Wireless Telegraphy Station Historic District and potential visual effects to the contributing elements, the proposed agricultural warehouses would have

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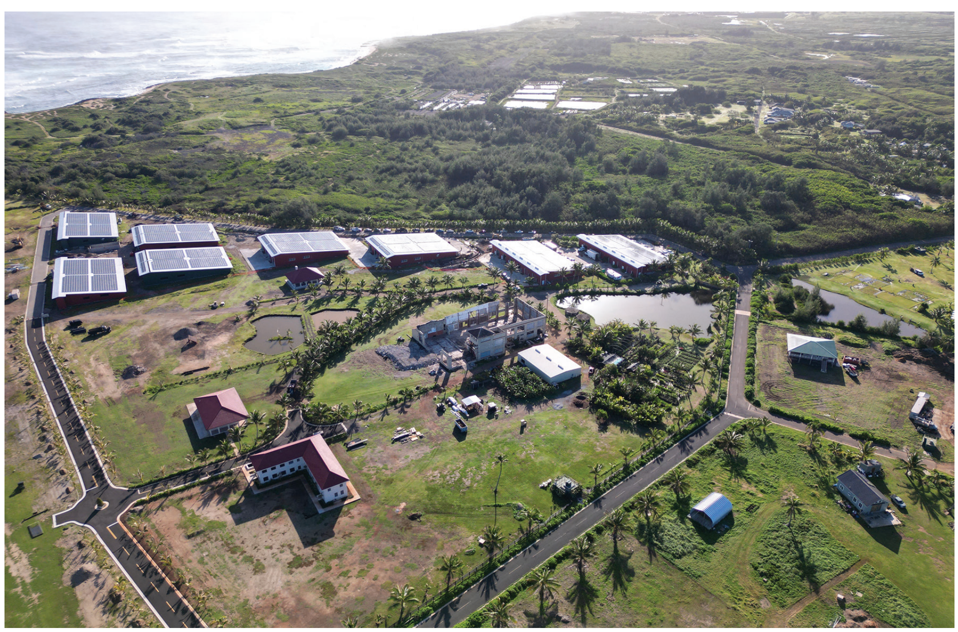

2024 photo shows recent changes to historic buildings (red roofs, large hollowed structure).
CREDIT: PETER FOWLER/ENDURE FILMS.

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NEW AND NOTEWORTHY

Discovery Harbour Verdict: A long-running lawsuit over development rights in the South Point area of Discovery Harbour was decided last month in favor of the developer, South Point Investment Group, LLC. Third Circuit Judge Henry Nakamoto found that the properties owned by SPIG, including a golf course and several commercially zoned lots, were not subject to any of the restrictive covenants of the Discovery Harbour Community Association.

One of the principals of SPIG, Gary McMickle, told *The Hawai'i Tribune-Herald,* "We want to go 'old Hawaiian,' adding that plans for a high-end resort floated decades ago were not going to be pursued.

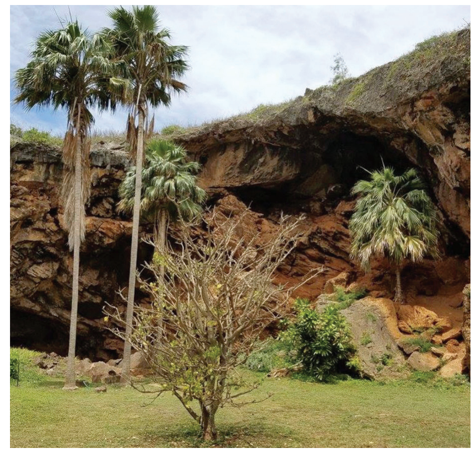
The community association has appealed Nakamoto's judgment to the Intermediate Court of Appeals.

Meanwhile, another lawsuit SPIG brought against the association in 2018 is still being litigated. In that case, SPIG says that it was damaged by defamatory remarks the association's officers made in meetings held by the county to develop the Ka'u Community Development Plan. "SPIG's right to develop a hotel and commit the commercial lots to other commercial uses is protected by the U.S. Constitution, the Constitution and laws of the state and county agencies relevant to the permitting of the proposed uses," the complaint states. All the lots in the entire Discovery Harbour community remain in the state Agricultural land use district. The Ka'u Community Development Plan land use policy map calls for the lots to be designated either Rural or Low Density Urban.

(For details on the lawsuit, see "Homeowners' Association Is Sued by Ka'u Developer with Big Plans," in the April 2018 edition of *Environment Hawai'i.)*

Makauwahi Cave: Visitors to the Grove Farm website (grovefarm.com) are informed that it "is committed to preserving its historic sites and areas which are rich in cultural significance. We believe that understanding, embracing, and preserving historic sites leads to a richer community and better quality of life."

One such site celebrated on the company's website is the Makauwahi Cave Reserve. "This rich scientific site began to be discovered in 1992 by Dr. David and Lida Pigott Burney," Grove Farm states. "Since the Burneys' initial discovery, Makauwahi Cave has become internationally recognized as a model for paleoecology and its application on restoration and learning activities."



CREDIT: MAKAUWAHI CAVE RESERVE/FACEBOOK.

Notwithstanding the website's praise for the Burneys' work, they left the site on October 31. In a statement, they announced they were retiring from their roles in fundraising and managing the site. "Uncertainty over Grove Farm's future plans for the property prompted the company's officials to tell the Burneys and their staff that no more grant-funding can be sought because the company did not wish to have any 'encumbrances' on the property." A federal grant of $2.3 million for conservation initiatives as well as a state grant of $260,000 for community forestry were lost as a result.

A year ago, the Burneys' lease for the cave was put on a month-to-month basis. The Burneys kept the site open to tours and for carrying out previous grants for nearly a year after that. But now, "all the money is spent, and as people in our mid-70's, we can't afford to dip into our personal saving to keep it going while Grove Farm decides what to do with the place."

Environment Hawai'i asked Grove Farm about its plans for the cave. No response was received by press time.

Quote of the Month

"Should a storm come through, your house is toast. That's the problem. It's not the board or me trying to be unfair. This is a matter of life and safety."

— Kaiwi Yoon, Land Board

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Lawsuits Against Oil Companies Wend Slowly Through the Courts

In 2020, Honolulu and Maui brought suits in the respective circuit courts of their counties against petroleum companies that have operated in Hawaiʻi for decades. The lawsuits allege that the companies knew for a very long time that the use of their products would bring about catastrophic climate changes.

The oil companies sought to remove the cases to federal court. When that effort failed, they moved for dismissal. When that failed, they sought relief from the state Supreme Court, which, on October 31, 2023, denied their appeal, allowing the cases to move forward.

Two of the defendants – Sunoco (parent of Aloha Petroleum) and Shell – have filed petitions for writs of certiorari with the U.S. Supreme Court, asking the court to overturn the Hawaiʻi Supreme Court's decision. Shell's petition presents two questions: "1. Whether claims seeking damages for the effects of interstate and international emissions on the global climate are beyond the limits of state law and thus preempted under the federal Constitution," and "2. Whether the Clean Air Act preempts state-law claims predicated on damaging interstate emissions." Sunoco's petition asks just one question: "Whether federal law precludes state-law claims seeking redress for injuries **allegedly** caused by the effects of interstate and international greenhouse-gas emissions on the global climate." (Emphasis added.) Those petitions are still pending.

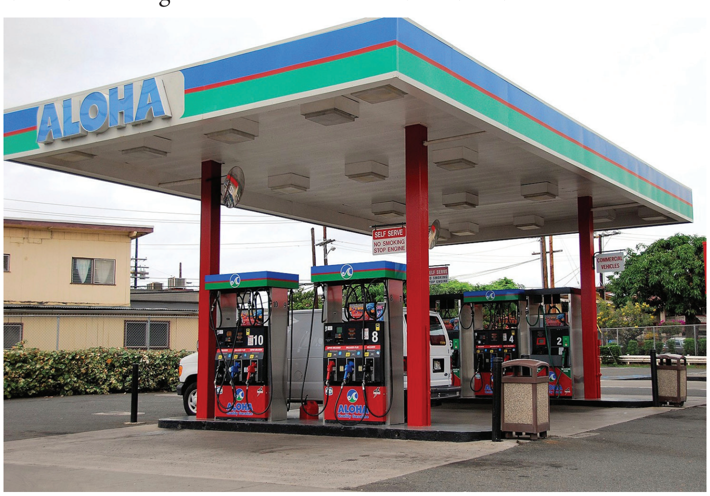
As the lawsuits moved through state courts, Aloha Petroleum brought a suit in federal court against the companies that had insured it. The parent company of the insurers, AIG, had denied Aloha's demand that it defend Aloha against the claims of Maui and Honolulu, citing exclusions for release of pollutants in two policies, issued in the 1980s. Aloha argued that the pollution exclusions applied only to pollutants on premises, not product liability – which is the theory underlying the county lawsuits.

Most of the federal case hinges on just how to define "accident" and "pollutant." To clarify this, the federal court asked the state Supreme Court to rule on two "certified questions." First, does an '"accident" include the reckless conduct of the insured? Second, are greenhouse gases "pollutants," as defined in the pollution exclusions contained in the policies.

Last month, the Supreme Court issued its ruling. As to the first question, the court found in Aloha's favor, determining that "accident" included reckless conduct. "AIG's policies cover an 'occurrence.' The policies define an 'occurrence' as an 'accident.' 'Accident' is undefined. The counties' lawsuits allege Aloha acted recklessly – it knew of climate risk but emitted – and misled the public about the dangers of emitting – greenhouse gases anyway."

As to the second question, the justices found in favor of AIG. "AIG argued that Aloha's conduct was intentional," they wrote, "therefore the counties' lawsuits do not raise an 'occurrence' under the policies. Aloha understood climate science, so climate-caused damage was expected, not fortuitous, AIG said. Plus, the policies' pollution exclusions bar coverage for the lawsuits' claims."

After a lengthy discussion of whether greenhouse gases should be considered pollutants in the traditional sense of the word, the justices agreed that they should be. "Traditional environmental pollution has three main features: (1) the release of a damaging substance, (2) into the environment, (3) that causes harm because of its presence in the environment. These attributes align with what insurance industry drafters intended, what 'contaminant' means, and what a policyholder expects. Also, these features match the plain meaning of pollution," the justices opined, citing *Black's Law Dictionary.*



An Aloha gas station. CREDIT: WIKIMEDIA COMMONS.

"Greenhouse gases, including carbon dioxide, produce 'traditional' environmental pollution. Aloha's gasoline produces GHGs. These gases accumulate in the atmosphere and trap heat. Because they are released into the atmosphere and cause harm due to their presence in the atmosphere, GHGs are pollutants."

Following the release of the Supreme Court's decision on the two questions, Aloha and AIG were instructed to submit to the court a status report, setting forth their respective positions in light of the Supreme Court's ruling.

Aloha attorneys locked onto a statement in that ruling purporting to describe the issue before the federal court: "Whether Aloha is ultimately entitled to a defense under the [1980] policies is a question for the [federal] District Court. To award coverage under those policies, the District Court must find that the counties' complaint alleges property damage during the policies' coverage period."

Aloha's attorneys go on to cite language in the counties' complaints referring to property damage. "As such," they conclude, "given the Hawaiʻi Supreme Court's ruling that greenhouse gases cause damage to the environment upon being released into the atmosphere, there are sufficient allegations of property damage taking place during the two AIG policy periods (1986-1988) to trigger a duty to defend under those policies. Accordingly, Aloha requests that the District Court set a supplemental briefing schedule on cross motions for summary judgment regarding Defendants' duty to defend Aloha under the two AIG policies at issue."

AIG attorneys, on the other hand, honed in on the Supreme Court's answer to the second certified question, finding that greenhouse gases are indeed pollutants. This, they say, means that "the next steps in this matter are straightforward – the Court should grant the AIG Insurers' motion for partial summary judgment and deny Aloha's motion for partial summary judgment."

If Aloha disagrees with the court's finding, they write, "it can appeal that determination to the Ninth Circuit when final judgment is entered in favor of the AIG Insurers."

Meanwhile, in state courts, litigation in both the Maui and Honolulu cases has been on hold as the appeals run their courses.

— Patricia Tummons

PUC Presses Launiupoko Water Company To Explain Users' High Consumption Rates

The Public Utilities Commission wants to know why some customers of the Launiupoko Water Company are consuming frankly outrageous amounts of potable water. And so, on October 17, it sent formal requests for information to LWC, laying out in detail the mismatch between what LWC had anticipated its customers would be using when LWC first sought to be recognized as a publicly regulated utility back in 2003, and what the actual consumption rate has been in recent years.

The information requests are part of the proceedings initiated late last December, when the water company brought to the PUC an application to approve an increase in rates charged to its customers. In June, the PUC determined that the company should file an amended application in light of the fact that the company's initial justification for the increase anticipated using some of the additional revenues to pay off outstanding debt that the PUC did not sanction in advance.

That amended application has yet to be filed.

But the PUC is evidently concerned that the difficulties that Launiupoko Irrigation Company has had providing non-potable water to its customer base – a base that is largely shared with LWC – have led to soaring drawdowns of potable water among LWC's customers.

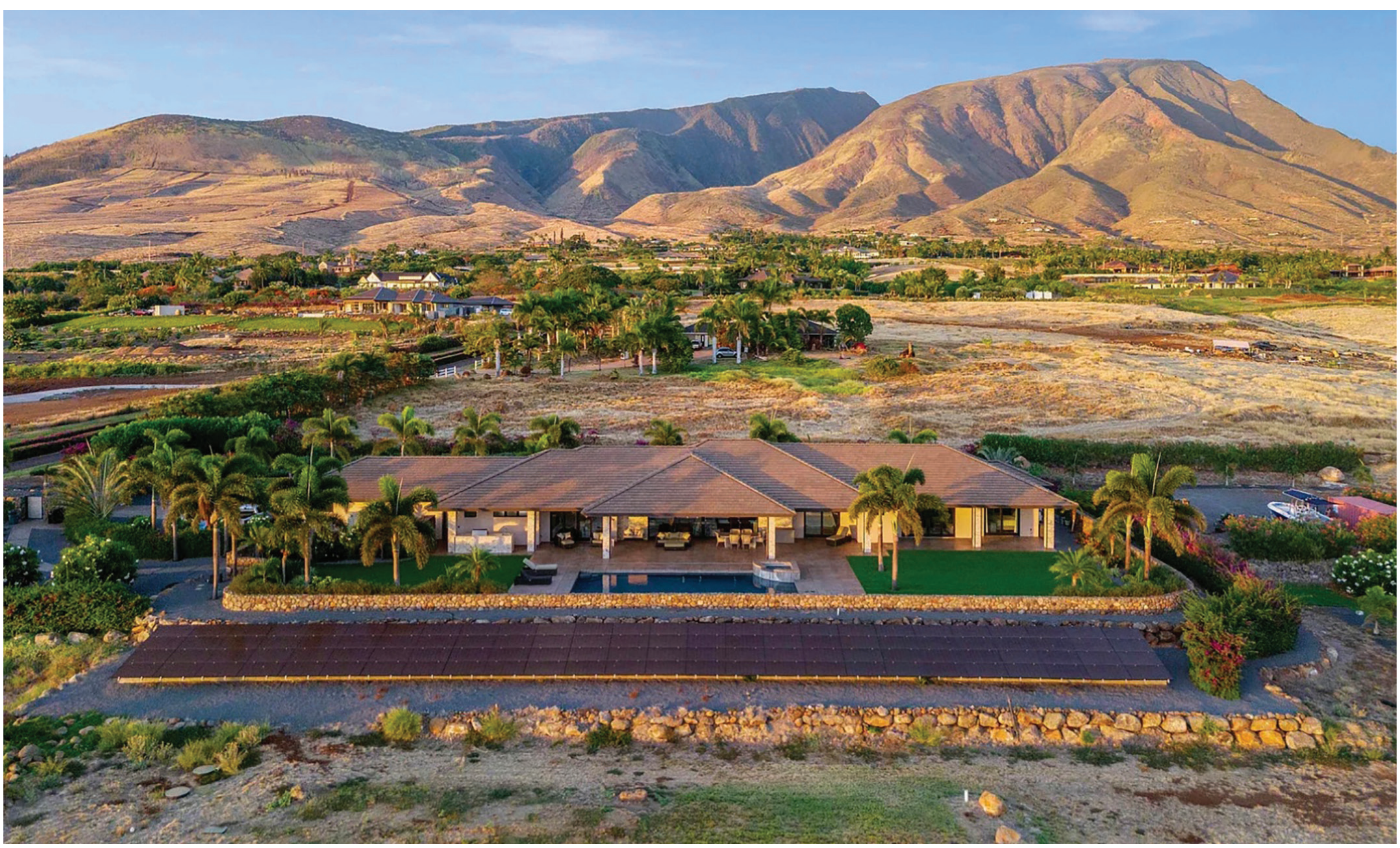
The first set of questions in the October 17 filing deals with the topic, "LWC's historical water demand and its goals for water conservation." This seeks to explore the difference between what LWC was predicting customers would use in 2003 and what actual use is today.

In 2003, the PUC notes as background, the company expected customers would use about 1,200 gallons of potable water per day. And this, the company added, "would be the same whether customers built on a 2-acre, 5-acre, or 15-acre parcel."

The PUC asks: "LWC reasoned that because LIC [the irrigation utility] would provide non-potable water for landscaping, that dual LWC/LIC customers would rely on inexpensive non-potable water for irrigation. LWC further explained that it expected 'the same number of people will live on a lot, regardless of its size' and that '[a] typical single family home is estimated to average between 500-600 gallons per day without irrigation use.' Further, LWC stated that '[a]ny swimming pools are assumed to be included in the 1,200 gallons per lot per day.'"

Three years later, when LWC sought a rate increase, the average use was just 614 gpd – a fact that was explained by Glenn Tremble, an officer of the company, as resulting from customers "minimizing their use of potable water and … using non-potable water for such things as yard irrigation." Tremble later on said he had re-evaluated customer usage and had found it to be even lower: 496 gallons per day. An expert retained by LWC testified that the company's rates had been set high "to discourage users who use water excessively and indiscriminately, and to encourage conservation."

In a filing last spring, when the water company was urging the PUC to approve this recent rate request, it said that it was going to be sending notices to its customers to reduce their use of potable water for irrigation purposes "to ensure the continued availability of



A farm dwelling at Launiupoko. CREDIT: MLS LISTING.

water for domestic use and fire suppression and control."

By this time, potable water consumption of the average rate-payer had increased from 705 gallons per day, in 2017, to 1,991 gpd.

The PUC notes that the company's use of water was now subject to regulation under the state Commission on Water Resource Management, which in 2022 had found the Lahaina aquifer sector to be a designated ground and surface water management area. Given this, the PUC "seeks more information about LWC's approach to water conservation and management to assist with the commission's future adjudication of LWC's amended application." Specifically, it wants the company to "discuss any factors that LWC believes may have led to increased average customer potable water demand" in the period from 2007 to 2017, when usage ramped up from 496 gpd to 705 gpd, and also to describe factors that "may have led to such high increases in LWC customer water demand from 2017 to present."

Referring to a parcel-by-parcel chart showing the water consumption of individual rate-payers submitted by the utility to the Water Commission as part of the utility's application for use permits, the PUC asks to what extent the figures shown in that chart "reflect any increased demand for LWC potable water due to" the irrigation company's "operational challenges." (Those "operational challenges" as well as the high consumption rates have been described in recent editions of *Environment Hawai'i.)*

What might "reasonable consumption levels" be? the commission asks. Also, "please include an explanation of reasonable consumer potable water consumption levels based on both the presumption that LIC may return to full operational capacity and on the presumption that LIC does not return to pumping ground water."

Five of the LWC's customers "report consumption levels exceeding 10,000 gpd," the PUC notes, "with the top water user reporting 19,067 gpd."

"Please analyze the water usage of these top five LWC customers, and please explain, to the best of LWC's knowledge, the following: …

"i. What factors contribute to the consumer's high rate of potable water consumption? Please include any discussions of pools, landscaping, agriculture uses, or any other features that distinguish these parcels from more modest water users.

"ii. If the consumer engages in agricultural activity, please elaborate on the type of agriculture…

"iii. Does the consumer operate a transient vacation rental, short-term rental home, and/or bed and breakfast on the parcel…?

"iv. Has LWC ever sent any notices to the consumer or engaged in any individualized discussions with the consumer about ways to reduce the consumer's water demand? Please provide or summarize if so."

The second set of questions deals with the way in which the water company is enforcing its own rules relating to water consumption, as set forth in the tariff rules that were approved by the PUC as part of the company's original application to operate as a publicly regulated utility.

Those rules include the conditions under which the company can take on new users; when it should impose special conservation measures in order to forestall water shortages; when it can refuse to grant service or discontinue service to protect against "fraud, abuse, or unauthorized use of water;" what to do when "negligent or wasteful use of water" exists on any premises, and conditions where the company can refuse service to customers "where the demands of the consumer will result in inadequate service to others."

The PUC asks the utility to explain how it is enforcing those rules and to provide a list of instances where water use has been restricted. Also, has the company received complaints about "negligent or wasteful use of water?" Has it ever issued notice to customers for such waste? Has it ever discontinued service as a result of negligent or wasteful use of water? Does it regularly monitor for such waste?

A third set of questions deals with the utility's involvement – or lack of it – in the county's water planning process.

Did the utility participate in meetings or other opportunities to engage with preparation of the county's Water Use and Development Plan or its Water Shortage and Conservation Plan?

Did it notify its customers when the county has declared water shortages?

Does the utility "regularly monitor drought conditions in Launiupoko as determined by the National Integrated Drought Information System or other authority?"

Responses to the information requests are due by November 8.

Revised Financial Statements

As *Environment Hawai'i* has reported, the Public Utilities Commission has informed both Launiupoko Water Company and Launiupoko Irrigation Company that it would not approve the repayment of loans extended to the companies by majority owner Peter Martin in the calculation of rate increases they are seeking.

Yet in the semi-monthly financial reports that the irrigation company has had to submit to the PUC, there appear hold-backs, to the tune of around $50,000 a month, for repayment of those loans.

After *Environment Hawai'i* reported on these hold-backs in our September edition, intervenors in the irrigation company rate case asked for clarification.

On September 26, attorneys for LIC filed a response, stating that the profit-loss statements were "set up to comply with IRS rules" that "require reporting of accrued debt until it is properly written off."

They noted that LIC had withdrawn its request for approval of the Martin loans in June, following the PUC's disallowance of Martin loans in the water company rate case.

The loans, the lawyers said, "do not impact the rate case numbers in this case since LIC has not included interest expense for the loans in LIC's revenue requirement. … Thus, [the intervenors'] request that the PUC not consider interest is gratuitous."

In any event, LIC "is willing to revise the bi-monthly P&L reports submitted to the PUC to an Earnings Before Interest and Depreciation and Amortization ('EBIDA') format," LIC explained. An attached spreadsheet showing profit and loss adjusted to excluded interest and depreciation shows positive income in some months, with a net overall positive income so far in 2024, due, the attorneys say, "to cessation of pumping."

"[A]ny additional cash from positive income has been used to pay down LIC's aging receivables and is insufficient for normalized operations requiring the pumping of groundwater. … [The exhibit] clearly indicates how the temporary rate increase money has been spent and that it is insufficient to cover energy costs and the operational costs required to pump groundwater."

The EBIDA spreadsheet shows that by excluding depreciation and shareholder interest (the Martin loans), Launiupoko Irrigation Company had a net profit of $111,996 for the nine months from January to September.

On October 4, Glenn Tremble, secretary/treasurer of LIC, informed the PUC that the company "is in negotiations with the parties in an attempt to settle the issues in this case. We … are hopeful that we can achieve a positive outcome in the near future."

Parties to the case include homeowners' associations and traditional and customary users of stream water affected by the irrigation company's diversions.

— Patricia Tummons

Appellate Court Upholds Forfeiture Of Kaua'i Vacation Rental Permits

Twice last month the Intermediate Court of Appeals has found in favor of the County of Kaua'i's law governing the renewal of non-conforming permits to operate transient vacation rentals outside of designated resort zones.

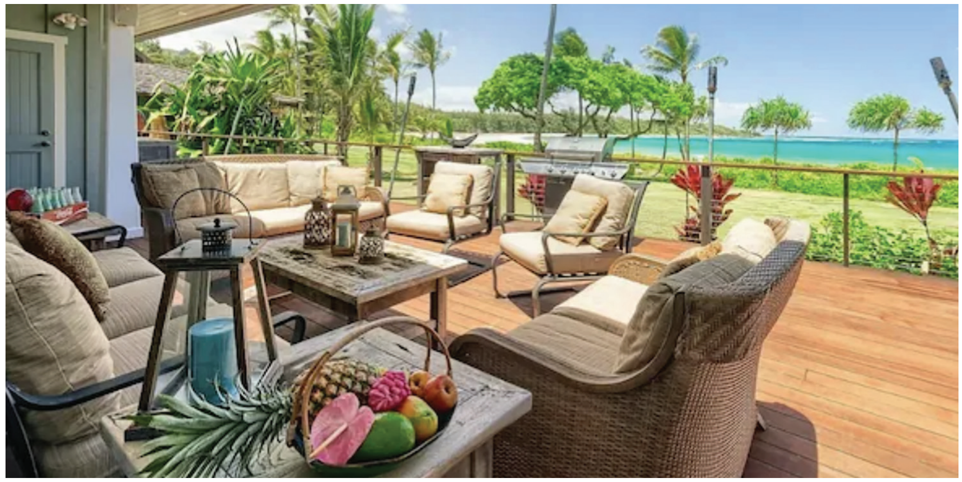
In one case, it reversed the decision of 5th Circuit Judge Kathleen Watanabe finding that Kaua'i County had improperly cancelled the certificate that allowed Elizabeth Kendrick and Joe Chaulklin to operate a transient vacation rental from a single-family residence they owned in Anahola, called the Ginger Beach House.

In the other, it upheld the same judge's decision affirming the Planning Department's cancellation of the TVR certificate held by Elizabeth and Stephen Rigotti allowing vacation rentals of their property in Wainiha.

As background, in 2008, the county banned TVRs outside of specified visitor destination areas, but it did allow holders of lawful certificates to continue operating as a non-conforming use. They were required to renew the certificates yearly. In 2010, the county enacted another law that made denial automatic if the application for renewal was submitted late or incomplete.

In 2014, the Planning Commission adopted an interpretive rule that, despite the ordinance, allowed the Planning Department to accept late renewal applications for up to 30 days beyond the renewal deadline. TVR owners filing late were assessed a penalty of $1,500 in addition to the annual fee of $750.

In 2017, another interpretive rule was adopted, this one eliminating any chance of late applicants retaining their TVR certificates.



The ad for the Kendrick/Chaulklin Ginger Beach House on VRBO includes this photo of the view to the ocean. The ad describes it as a "posh Anahola beachfront estate" that sleeps 10. CREDIT: VRBO.

The Kendrick and Chaulklin Case

Evidence submitted to the court showed that Kendrick and other TVR certificate holders were reminded of this impending rule change by email in February 2016.

In that email, Planning Department staffer Mike Laureta informed non-conforming TVR operators that he was giving them fair warning. "[F]rom here going forward," he wrote, "if you're 1 day late, the department will issue you a forfeiture notice. If you don't run your business in a professional manner and forget to timely renew, no excuse will be good enough."

When, in December 2016, Kendrick and Chaulklin timely renewed their certificate, they were reminded of the next renewal deadline of December 12, 2017. And, again, the letter accepting their renewal pointed out that late applications would result in automatic forfeiture of their certificate. "Should your renewal be at least one (1) day late, you will be served with a Cease & Desist and Notice of Forfeiture," the letter stated.

But when the renewal deadline for 2017 came around, the application wasn't postmarked until December 15 and wasn't received by the Planning Department until December 20. The Planning Department cancelled the certificate and denied the renewal application.

Chaulkin and Kendrick contested the decision and the full Planning Commission then held a contested case hearing. It upheld the Planning Department's action.

On December 20, 2018, Kendrick and Chaulkin sued in Circuit Court. In August 2020, Watanabe issued her ruling, finding that the denial was improper and instructing the Planning Department to issue them the TVR certificate for 2017 and following years. Among other things, Watanabe based her ruling on the fact that the county did not post the change in interpretive rules on its website until 2018 and determined that the plaintiffs' due process rights were violated inasmuch as she found the county had inconsistently applied the ordinance and interpretive rules of the Planning Commission.

The county appealed. On October 25, the ICA issued its ruling, reversing the lower court's decision and affirming that of the Planning Department and Planning Commission.

The Rigotti Case

A mere five days later, the ICA ruled on a similar case involving the untimely renewal of a TVR certificate.

This litigation came before Watanabe on July 30, 2019, some seven months after the Kendrick/Chaulkin case, although Watanabe issued her final ruling on it (upholding the Planning Department) on April 1, 2020, four months before issuing her ruling in the Kendrick/Chaulklin case, on August 4, 2020. (The Kenrick/Chaulklin litigation was delayed by an effort to have the case heard in federal court, which eventually remanded it back to the 5th Circuit.)

In this second case, involving the Rigottis, the paperwork to renew their TVR certificate was submitted one day late. The Rigottis claimed a storm had prevented them from the timely submittal of their renewal application by the deadline and argued, among other things, that an emergency proclamation by Gov. David Ige, suspending the effect of some laws, also applied to the ordinance and rules relating to TVRs. The Rigottis challenged the Planning Department's decision in a contested case hearing before the Planning Commission, which denied their appeal. They then sued in 5th Circuit Court, claiming, among other things, the decision to revoke their TVR certificate violated their constitutional due process rights.

Neither the lower court nor the ICA was swayed. "Notwithstanding the flooding that hindered (but did not completely prevent) the filing of the renewal application in the final days before the deadline, there was nothing in the record evidencing that the renewal application could not have been filed well before the deadline," the ICA noted in its decision.

The Rigottis' vacation rental is no longer advertised on VRBO. The Kendrick/Chaulklin property remains on the VRBO site.

— Patricia Tummons

Marconi *continued from page 1*

"adverse effects" on the site. (Four buildings - a hotel, an administration building, a power house, and a manager's house – as well as six other minor features are considered to be the district's contributing structures.)

During the process to secure the loan, all ground-disturbing work on the first three warehouses stopped "pending the outcome of RCBS' consultation with the Hawaiʻi State Historic Preservation Division and completion of a Memorandum of Agreement to mitigate adverse effects, which would include resumption of construction work in accordance with a SHPD-approved archaeological monitoring plan," according to the USDA.

In August 2021, a final MOA was signed by representatives of the USDA, SHPD, the Advisory Council on Historic Preservation, RCA Trade Center, Inc., Marconi Station, LLC, The Marconi Hotel, LLC, North Avenue Capital, and the Historic Hawaiʻi Foundation.

Under the MOA, Marconi Station and The Marconi Hotel, which at the time owned the units containing the contributing historic buildings and features, were required to complete an Interim Stabilization Plan (ISP) and a Historic Preservation and Treatment Plan (HPTP) "for the **contributing resources,** including the historic buildings and associated structures and features" (emphasis added).

The MOA required that the ISP be completed before the city's issuance of final Certificates of Occupancy for seven of the eight agricultural warehouses.

The timeline to complete both plans was pretty tight: The Marconi companies were to submit draft plans to SHPD and the Historic Hawaiʻi Foundation (a consulting party) within 90 days from the execution of the agreement. SHPD and the consulting parties had 30 days to review and provide written comments on the draft plans. After receiving those comments, the companies had to submit revised plans within another 90 days, and SHPD and the consulting parties had another 30 days to either accept the new plans or provide additional comments. Revised plans, if any, would be submitted to SHPD and the consulting parties for another 30-day review period.

If SHPD failed to provide the companies with a formal response to "the entirety of the draft ISP" within 30 days, the agency would be deemed to have accepted the ISP and the companies "may proceed to complete the final ISP and begin implementation … when all permits have been issued or exemptions obtained," the MOA states. The same deadline applied to the HPTP.

The ISP was required to include the following: 1) a historic structure report, 2) an engineering report, 3) a review of compliance with historic preservation standards and guidelines, 4) identification of required permits, processes and timelines, and 5) a preliminary construction cost estimate and timeline from a general contractor.

The hotel as it stands today. The inset photo shows how it looked in 2021.
CREDIT: PETER FOWLER/ENDURE FILMS, HISTORIC STRUCTURES REPORT.

Parties to the MOA signed it in late-July and early-August of 2021. The agreement appeared to have been executed on August 18, which would put the deadline to submit the draft plans at mid-November 2021.

No draft plans were submitted then, or ever, according to documents provided to *Environment Hawaiʻi* by SHPD in response to a Uniform Information Practices Act request.

Gaps

What communications the Marconi companies had with SHPD following the MOA's execution is unclear. But on October 27, 2023, Michael Danhour, vice president of Makai Ranch, sent a letter on Marconi Station letterhead to then-SHPD administrator Alan Downer and SHPD's Stephanie Hacker that included a status update on the MOA.

Danhour stated that he wrote on behalf of the two Marconi companies, which were both owned by Makai Ranch owner Jeremiah Henderson.

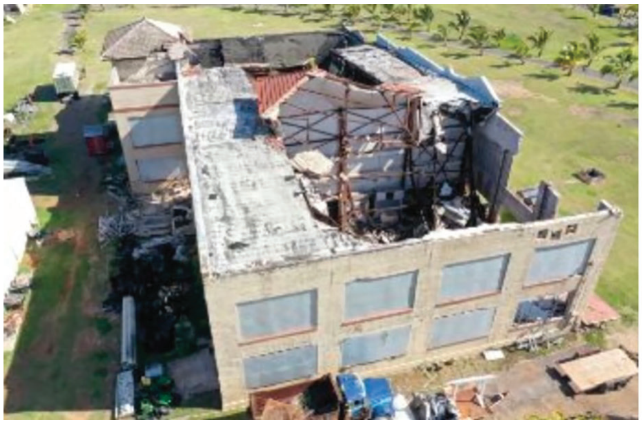
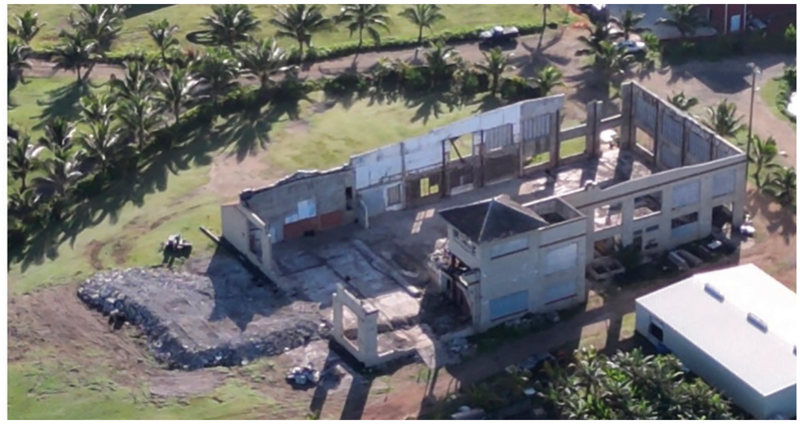
"This letter is to inform you that the Property [that contains the historic buildings] was sold on May 11, 2022 to Greystone HI Investments, LLC and to update you as to the status of the MOA from its execution date through date of the sale of the Property to Greystone, the status of the RCA Trade Center, Inc. construction project, and other relevant activities within the MWTS Historic District," he wrote.

In accordance with the MOA, the update states, the Marconi companies installed orange mesh construction fencing around the warehouse sites and sent written and photographic verification via email to SHPD on April 22, 2022.

"[T]he interim protection fencing will remain in place until removal is approved by SHPD in accordance with stipulations detailed in an accepted Interim Stabilization Plan or Preservation Plan," it states. It also describes the companies' efforts to ensure proper archaeological monitoring and reporting of all ground-disturbing work done within the warehouse project area.

Under the **Deliverables** section of the update, it states that the companies are providing work they completed before the sale to Greystone: 1) a September 8, 2021, Historic Structure Report, 2) a January 14, 2022, Engineering Report, 3) a draft of the permitting list and timelines, and 4) a draft letter from the companies' contractor regarding construction costs and timelines.

The update notes, "Greystone was as-

The power house in 2021 (left). The same building in 2024 (right). CREDIT: HISTORIC STRUCTURES REPORT, PETER FOWLER/ENDURE FILMS.

signed development rights and assumed the obligation in the MOA related to Units purchased including the four historic buildings."

'Contributing Resources'

The historic structures report by Professional Real Estate Inspectors found that all four buildings considered by the MOA to be contributing resources were in bad shape. From best to worst: The manager's residence, the administration building, the hotel, and the power house. The manager's house still looked like a house, while large sections of the power house had caved in. The hotel's basement was filled with 4-5 feet of standing water, "likely to be water penetration from the water table on site," the report states.

"The general overall condition of all of the buildings was between poor and inaccessible due to falling hazards. There was extensive structural damage observed at primary and secondary structural materials, curtain-walls and interiors," the report states.

The 2022 Engineering Report by Structural Focus notes that it was intended to fulfill the MOA's requirement for an engineering report. (The MOA states, "A Structural Engineering report and plans will be provided by a licensed Structural Engineer considering the existing condition and mitigation requirements to comply with the ISP such as a shoring plan to stabilize all structural elements of the contributing resources, including roof, walls, windows, basements or other areas with stabilization concerns.")

Among other things, the report recommended vertical shoring and lateral bracing for all four buildings, installing a sump pump in the hotel basement with an automatic sensor to remove the groundwater, encasing the hotel's severely damaged concrete chimney to prevent falling, and waterproofing the roofs of the administration building and manager's residence.

With regard to the power house, the report states that the walls were "at risk of more damage because of their connection to the partially collapsed roof framing. If the collapse were to progress, the walls connected to the framing could be further damaged as they are 'dragged' down by the weight of the framing." It recommended bracing with timber or steel struts on temporary footings and attached to a "hook" connection on top of the existing concrete walls. In addition, the report states, "steel or timber 'straps' are to be installed on the exterior walls at the corners, anchored to the walls with epoxied bolts and stitched together with steel straps. In addition, the lateral bracing should be installed to stabilize that one area of the western elevation where the concrete wall has significantly failed due to out-of-plane loading (or as collateral damage as a result of the roof diaphragm failure) and leaning toward the interior of the building.

"Improvements to the waterproofing of this building are not recommended as it would be hazardous to attempt installation."

These recommendations never made their way into a draft or final ISP. It does not appear that these reports were provided to SHPD before Danhour's October 2023 update.

Even so, Greystone proceeded with work inside the core historic district.

On January 3 of this year, *Civil Beat* carried an article by Kirstin Downey, "Unauthorized Demolition Occurs At Historic Marconi Telegraph Site On North Shore."

"Civil Beat drone footage captured video of excavators discarding parts of the interior of the original 1914 power station, once the world's largest wireless communications center," the subhead reported. The article goes on to note that the Historic Hawai'i Foundation had received reports in the previous two months of "heavy construction equipment rumbling in and out of the property."

Civil Beat's drone footage shows that not only were the historic buildings being worked on, the exteriors, at least, of the hotel, the manager's residence and the administration building appeared to be fully restored (although the hotel's chimney is missing). The fragile power house, however, looked like what was left of its roof had fallen in and the building's interior had been cleared.

A state Department of Land and Natural Resources representative stated that the department, of which SHPD is a part, was investigating and could not comment further.

Since then, however, the department has not given any hint of its findings or sign that it would be pursuing a violation case.

The City & County of Honolulu's Department of Planning and Permitting, however, issued two notices of violation on January 8. One is for renovations and repairs to existing historical buildings without the required building permit and the other is for partial demolition of a historical building and "ag exempt structures doing electrical and plumbing without the required building permit."

Greystone, owned by tech entrepreneur Sushil Garg, has until December 9 to cure the DPP violations.

Although *Environment Hawai'i* asked

A 2021 survey found that the Marconi hotel's basement was filled with 4-5 feet of groundwater. CREDIT: HISTORIC STRUCTURES REPORT.

SHPD for documents relating to its violation investigation regarding the Marconi buildings, the agency provided none. It also did not say by press time whether the division was withholding the documents or whether any even existed.

It also did not respond to questions about whether SHPD had determined there was ever a final ISP.

Occupancy

If no interim stabilization plan is ever approved or deemed approved by SHPD, what does that mean for the mammoth multi-million-dollar RCA Trade Center, given the MOA's condition that no Certificates of Occupancy shall be issued for seven of the warehouses until an ISP is done?

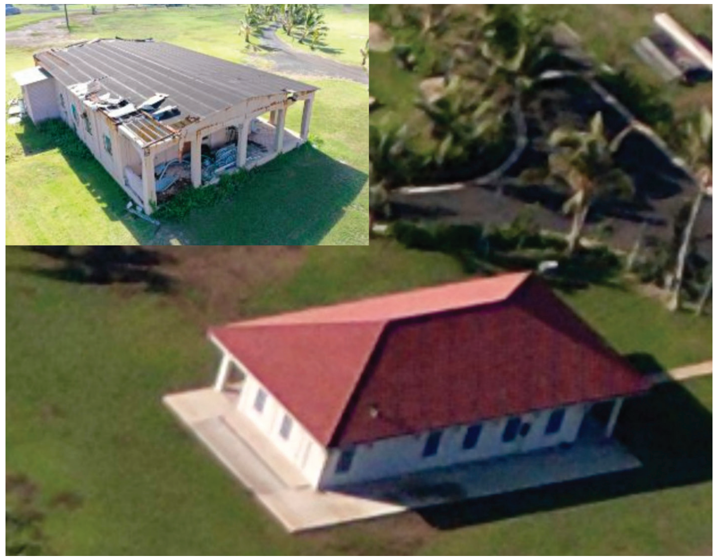
And how might an ISP apply to the historic structures that already appear to have been restored? *Environment Hawai'i* awaits SHPD's response about the ISP determination.

With regard to the first question, attorney Ross Uehara-Tilton, who represents Jeremiah Henderson's companies, does not see that the MOA condition is an impediment to occupancy of the warehouses once they are completed.

To date, except for the first warehouse, the DPP has approved permits to build the exteriors, but not the interiors of the other seven. Henderson's Marconi-affiliated companies never applied for interior permits, as they are in the midst of a federal lawsuit fighting against the DPP's determination that further development within the Marconi Point Condominiums requires a Special Management Area review and, possibly, an SMA permit.

In an email to *Environment Hawai'i,* Uehara-Tilton identified the DPP's position concerning the SMA, and not the MOA, as the obstacle. He also appeared to suggest that there need not be a plan to stabilize the historic buildings in order for the warehouses to be occupied. This despite the fact that the MOA states that the interim stabilization plan is for the historic district's "contributing resources". According to Appendix J of the MOA, the contributing resources include only the hotel, the administration building, the manager's residence, the powerhouse, a reservoir, a well, a chimney foundation, fuel tank foundations, and a guy wire foundation.

Uehara-Tilton stated that the MOA is "binding on the entire condominium project, including the historic structures and the agricultural warehouses on Units 20-27 (Unit 20 is completed and Units 21 through 27 are under construction). But since the historic structures are located on other units, most of the compliance obligations will fall to the owners of units containing the historic structures. There are no historic structures to stabilize on our units, so basically our stabilization plan would say that we won't be touching any historic structures and they will be protected/stabilized using temporary construction barriers to prevent access to the other units."



The administration building today. The inset shows what it looked like in 2021.

He went on to state that because his clients don't have permits to complete the interiors of the seven remaining warehouses, they have not applied for any Certificates of Occupancy for them "and thus have not completed any final stabilization plan. We do not see the MOA as an impediment and can and will comply with its requirements prior to applying for final Certificates of Occupancy, once we resolve the building permit issue. My clients negotiated and agreed to the terms of the MOA, which was a condition of receiving their construction loan, and so that is always something my clients have always intended to comply with.

"One of the basic arguments in our lawsuit against the City is that it was improper for them to fully permit (interior and exterior) construction of the first warehouse, and to permit exterior construction of the remaining 7 warehouses, and then decide after the first warehouse was fully completed and the exterior of the 7 remaining warehouses was completed, that an SMA permit would be required to finish the interior of the remaining 7 warehouses. If an SMA permit was really required, they should have required it before issuing any building permit. Isn't it strange for the city to say you can build 8 huge warehouses, but after you've finished pouring the foundations and building the roof and walls, they say you can't install any lights on the inside? That is the current impediment—not the MOA."

However, earlier this year, counsel for the DPP stated in a motion to dismiss some of Henderson's companies' federal lawsuit claims, that the agency "has always retained the right to require an SMA Permit for the 'interior' permits for the agricultural warehouses. This is especially true because Plaintiffs are planning on building restrooms in the warehouses. Restrooms would necessitate waste water, which is of obvious concern in the SMA. (Empty buildings that have no restrooms would not.) DPP cannot be equitably estopped from requiring an SMA Permit where the nature of the structure would change based upon its interior, even if the exterior structure was allowed without an SMA permit."

Attorney Kalani Morse, who represents Greystone, did not respond by press time to questions about what the company has done to meet the MOA obligations and what the effects on the warehouses might be if no ISP is done.

— Teresa Dawson

For Further Reading

- "Developer Sues City for Holding Up Permits, Subdivision at Marconi Point," July 2023;
- "Claim that Marconi Point Developer Is Exempt From SMA Permit Need Is Disputed by City," October 2023;
- "O'ahu Community Calls on Agencies To Step Up Enforcement at Marconi Point," February 2024;
- "Calls for Enforcement at Marconi Point Finally Result in Several Violation Notices," April 2024;
- "Judge Dismisses Case Brought to Silence Complaints About Warehouses at Marconi," May 2024.

Marconi Lawsuit Parties Agree to Delay Action on Motion Seeking DPP Documents

Plaintiffs in a federal case alleging that public corruption stymied the development of agricultural lands on O'ahu's North Shore have backed off from their demand that the City & County of Honolulu produce documents they requested in February.

Attorneys representing the city and Department of Planning and Permitting director Dawn Apuna, as well as those representing four companies associated with the developer of the Marconi Point Condominiums, signed a stipulation on October 18, asking the U.S. District Court to extend the deadline by which the companies have to respond to the city's opposition to their September motion to compel the production of documents.

They proposed a new deadline of November 14.

The plaintiffs have alleged that the DPP, which has recently seen a handful of its employees convicted of federal bribery charges, was prompted by former consultant William Wong to sit on or deny building permits that condominium unit owners had applied for. Like the DPP employees, Wong also went to prison for bribery.

The documents the plaintiffs have sought — first via a request under the Uniform Information Practices Act and then again as part of the federal case — were chosen because they are believed to be able to help suss out how, if at all, corruption played a part in the DPP's decision that further development at Marconi Point required a Special Management Area permit.

The city produced some of the documents requested. However, those pertaining to the FBI's corruption investigation into DPP, as well as certain emails and electronically stored information regarding dozens of Marconi-related search terms, were still outstanding when the companies filed their February motion to compel.

On October 10, counsel for the city filed its opposition memo. Even though the city believed the voluminous document requests were unreasonable — especially since the case had been narrowed to exclude claims regarding building permits and focus only on roadway and agricultural subdivision permits — it proceeded to respond. However, it ran into technical difficulties retrieving electronically stored information.

Some of the emails and other data, the city reported, had been damaged or lost. The city's Department of Information Technology was able to restore some of that and provide it to the plaintiffs.

"Defendants continue to work on the issue and if there are no more technological issues, hope to provide the remaining data by the end of October. … To date, Defendants have provided approximately 10,000 pages of emails and their attachments to Plaintiffs," the city's counsel wrote.

While the city promised to continue to try to meet the plaintiffs' requests, it made clear its disdain.

"Plaintiffs have not even bothered to claim that the requested documents are 'relevant to any claims or defenses in this litigation.' Plaintiffs have only made the conclusory statement that 'WILLIAM WONG and [former DPP building plans examiner] KANANI PADEKEN, have direct ties to the disputed issues in this case.' Plaintiffs have not shown how any emails or other documents involving either Wong or Padeken relate to Plaintiffs' claims. The permits which Plaintiffs claim were affected by Wong have since been issued," the city states.

It continues, "What is relevant to Plaintiffs' claims is whether a final discretionary action took place such that they would have been able to demonstrate a vested right to their permits without first obtaining an SMA Permit. What ***is not*** relevant to those claims is DPP's internal communications regarding the various requested permits."

The companies' original complaint included claims that they had vested rights to building permits and agricultural and roadway subdivision permits and, therefore, did not need to apply for an SMA permit for further development within the nearly 100-acre condominium project. Last December, U.S. District Judge Jill A. Otake granted the city's motion to dismiss claims regarding the roadway subdivision and building permits. An amended complaint filed this past summer seeks a court declaration regarding just the roadway and agricultural subdivision permits.

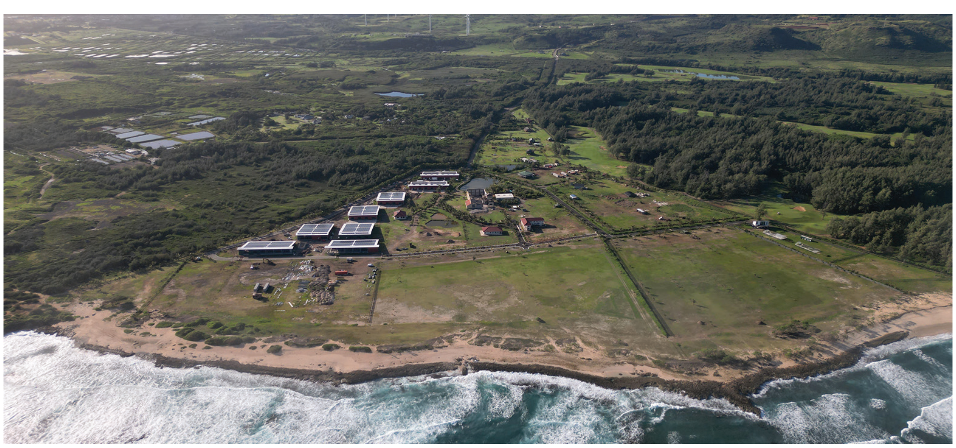
With regard to the requested documents, the city argues that the companies have failed to show how corruption within DPP relates to either the remaining claims or the dismissed claims.

"Since the inception of this case, Plaintiffs have been searching for evidence that they have a vested right to acquire various permits without first obtaining an SMA Permit. It is unlikely that anything outside of official communications from DPP or the City and County of Honolulu to Plaintiffs, would actually be relevant to Plaintiffs' claims of vested rights. Mr. Wong's actions did not affect Plaintiffs. In fact, the two permits over which Mr. Wong had any control have since been issued. Defendants are nonetheless attempting to comply with Plaintiffs' requests and should not be punished for having computer issues, even if it has taken a long time for the issues to be resolved," the city stated.

The city conceded that because it is a government entity subject to the state's Sunshine Law, it must comply with disclosure requirements. "This is the reason that Defendants, regardless of the relevancy of Plaintiffs' requests, are attempting to comply with Plaintiffs' discovery requests," the city stated.

Two days before it filed its opposition memo, the city provided the companies with additional responsive documents it was able to recover. City counsel also informed the plaintiffs' attorneys that even more, which were still under review, would be available by October 31 and that "it appears the additional documents he has received from Defendants constitute a complete production in response to Plaintiffs' request."

— Teresa Dawson



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

BOARD TALK

East Hawai‘i Landowners Are Fined For Conservation District Violations

On October 11, the state Board of Land and Natural Resources voted unanimously to fine Juan and Judith Silva $85,000 for unauthorized modifications to a single-family residence and placement of accessory structures within their 11.8-acre property in the Conservation District of North Hilo.

In August 2001, the Land Board approved a Conservation District Use Permit (CDUP) requested by the property's previous owners for the establishment of agricultural uses, the construction of a work shed, a shade house, a water catchment system, and other improvements. With an amendment to the permit in 2004, the owners had until February 24, 2006, to complete those improvements. No plans were ever submitted to the DLNR.

An August 2005 site visit by the staff with the DLNR's Office of Conservation and Coastal Lands found that the shed authorized by the CDUP had been converted into or was built to be a single-family residence.

The landowner paid $650 and secured an after-the-fact CDUP from the Land Board to cover a house of 413 square feet, plus a 368-square-foot porch and a 286-square-foot carport. The total area of the residential features would be 1,067 square feet.

The Silvas bought the property in 2020 for approximately $550,000 and proceeded over the next few years to expand the residence to 3,390 square feet and to make other unauthorized improvements. They then tried to sell the property for $1,249,000 in late 2023.

"Soon after the marketing of Parcel 044 began, OCCL received inquiries from potential buyers of the parcel," an OCCL report to the Land Board states. The office issued a notice of alleged violation on February 5 of this year.

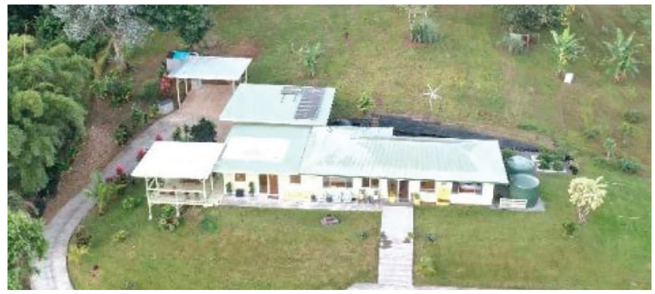
The Silvas responded in March, stating that they wanted to pursue an after-the-fact permit for the modifications.

The OCCL reported to the Land Board, "Cursory conversations with the State of Hawai‘i Department of Health Wastewater Branch note that the unauthorized improvements made to the SFR [single-family residence] potentially would have triggered the need to convert or upgrade the dwelling's individual wastewater treatment system. It appears no applications or authorizations to upgrade the individual wastewater treatment system have been received or issued according to the Department of Health Wastewater Branch."

The OCCL continued, "It has been OCCL's position to discourage speculative activities in the Conservation District. Speculation often leads to an increase in the intensity of land uses on the area or land, and these activities do not often align with the purpose of the Conservation District. Given the above information regarding unauthorized improvements made to Parcel 044, its SFR, and the parcel's potential valuation, staff has concerns about the message this may send to speculators and developers of Conservation District lands if the landowners are allowed to seek ATF authorizations for their unauthorized improvements."

At the October 11 board meeting, the OCCL recommended imposing a maximum fine of $85,000 fine for the various unauthorized improvements. The office added that the Land Board could either require removal of the unauthorized modifications or allow the Silvas or a future owner to submit an application for an after-the-fact CDUP.

OCCL administrator Michael Cain reported that in addition to ignoring Conservation District rules, the Silvas failed to obtain building permits from Hawai‘i County. He noted that a county website describes the house on the property as still being 1,067 square feet.



Silva residence in North Hilo. CREDIT: DLNR.

Judith Silva admitted that they had the additions made but asked the board to grant an after-the-fact permit and to reduce the fines.

"We were told part of [the property] was Conservation, but I didn't know which part. We have 11 acres. … The structure was already there. We added where it was already flat. … To us, we didn't do any damage," she said.

Board member Kaiwi Yoon, an architect, said he found it hard to believe the Silvas did not know where the Conservation District was. (Cain reported later that the entire property is within the Conservation District.) Yoon also did not understand how

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Board Talk *continued from page 11*

no building permits were ever applied for.

"I don't buy ignorance. To build anything anywhere, any state in the United States, you need a building permit. Before we get to the after-the-fact permit … you got some larger issues to deal with. Your house is a non-conforming structure. I'm not sure how you want us to negotiate. In my mind, there is no negotiation. We have a non-compliant structure. … We cannot put ourselves in a legally untenable situation," he said.

He continued, "There are building codes for a reason. … Should a storm come through, your house is toast. That's the problem. It's not the board or me trying to be unfair. This is a matter of life and safety."

Board member Riley Smith, who represents the Big Island, made a motion to approve the fines and to require the removal of the unauthorized improvements.

"I'd like to add, I would ask when this decision is finalized, the county property tax office be informed of the numerous violations on this property," he said.

Yoon seconded the motion.

Before the board voted, Judith Silva asked, "There's no way we can make this legal?"

"Neither of you are licensed in any building trade or field. No one is going to say, 'OK, looks good,' because they're liable. Then insurance companies are liable," Yoon said.

Judith Silva then asked whether the board would consider cutting the fine in half.

Cain then informed her that the OCCL's recommendation regarding removal of the unauthorized structures allowed the Silvas to "use your fines as credit against cost of removal."

After Smith's motion was amended to require monthly updates from the Silvas on compliance, the board approved it.

— Teresa Dawson

Moloa'a Well Update

In our September 2024 cover story, "Abandonment of Water Well Permit Highlights Problematic Growth at Moloa'a Ag Subdivision," we reported that on October 5, dozens of tenants within the Moloa'a Hui agricultural subdivision on Kaua'i would be cut off from the well water that they had relied on for years.

Jeffrey Lindner, who held a state permit for the well, had decided he no longer wanted to keep it, given the exorbitant costs and liabilities involved in managing a dilapidated potable water system.

The Moloa'a tenants pleaded with the Land Board at its August 23 meeting to somehow require Lindner to keep operating the well at least until December, when the neighboring Moloa'a Irrigation Cooperative was expected to have its own well operational.

The tenants —among them farmers, residents, and businesses —claimed that being cut off from water before then would be devastating.

Last month, Lindner stated in an email to *Environment Hawai'i* that the Moloa'a Irrigation Cooperative managed to bring its own well online on September 26.

"Although the farmers don't have to worry about losing their crops, there are a lot of legal issues left to resolve. Why didn't MIC, funded by the state, inform Moloa'a Hui farmers as to the real status of the water well construction rather than leave them in the dark, and then create hysteria from what I was doing to get them to testify against us at DLNR? Why was the money coming from the state used to purchase the water tank and well in MIC's name? The water system is clearly owned by landowners. What right did the county have to approve a subdivision without potable water? …

"Our pipeline is still blocked from MIC placing their meter in our distribution line, preventing us from serving other locations with irrigation water," he wrote.

He continued, "The crisis was averted, mainly for [the Kaua'i Department of Water]. It is generally understood that the water department would have been responsible for hauling water day and night if the Moloa'a Hui system had failed to come online."

With regard to some of the lingering legal issues, Lindner's company, Moloa'a Farms, LLC, years ago sued the Association of Apartment Owners for Moloa'a Hui I and II, the presidents of those associations, Moloa'a Hui Lands, Inc., and its president and CEO over water delivery obligations that were established when the agricultural subdivisions were created.

The Intermediate Court of Appeals found in August that the water dispute should be resolved via mediation, rather than in the courts. Late last month, however, the AOAO and other defendants filed applications with the state Supreme Court for a Writ of Certiorari.

— Teresa Dawson