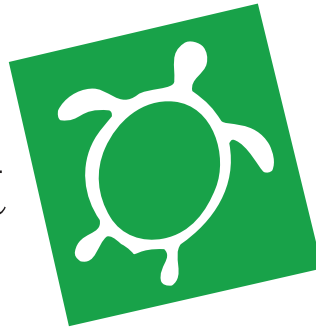


Environment



Hawai'i
a monthly newsletter

Water Fails

The appointment of Hinano Rodrigues to the position of Ioea on the Water Commission was a shock to most of the people who closely follow the ups and downs of water policy in the state.

That his selection capped a particularly fraught nominating process adds to the growing concerns over his fitness for the post.

Governor Green's angry defense of his choice, accompanied by charges of ideological bias to all who oppose it, doesn't do anything to oil the water.

The ethics complaint filed against Rodrigues underscores the dangers inherent in conducting the interview process in secret.

Finally, the very process of interviewing candidates outside of public view may itself be unlawful.

Shame on all who were involved in this.

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Newly Appointed Water Commissioner Is Subject of Ethics Commission Complaint

On October 29, Governor Josh Green announced the appointment of V.R. Hinano Rodrigues to fill the spot on the Commission on Water Resource Management reserved for an expert in Hawaiian culture and traditions. Within a week, a complaint alleging numerous ethical violations was filed against him with the state Ethics Commission.

For a dozen years, Rodrigues was chief of the History and Culture Branch of the State Historic Preservation Division, an agency of the Department of Land and Natural Resources. He retired about a year ago, according to the complaint.



V.R. Hinano Rodrigues. CREDIT: OFFICE OF THE GOVERNOR.

The violations listed in the complaint relate to the ways in which Rodrigues allegedly breached specific prohibitions detailed in the Code of Ethics, enumerated in Part II of that chapter.

All of the specific violations included in the complaint have to do with Rodrigues' ties to Peter Martin, owner of a majority interest in a number of companies whose developments in West Maui have generated controversy.

Travel

"Sometime between July 8, 2020, and January 13, 2021," the complaint states,

"Rodrigues disclosed in an email to other [State Historic Preservation Division] employees ... that he is a close family friend of Peter Martin. ... Rodrigues stated it would be improper for him to comment on Martin's entities' applications and requests to SHPD. Rodrigues stated to SHPD staff that he 'won big' during a trip to Las Vegas with Martin over a Christmas holiday."

If Martin paid expenses of Rodrigues during this trip totaling more than \$200, Rodrigues would be required to report it, under Section 84-11.5. During his tenure with SHPD, Rodrigues filed no gift disclosures with the Ethics Commission.

After retiring from the state, the complaint says, "It is well known in the community that Rodrigues left SHPD in December 2023 to go work for Martin or his related commercial entities in some capacity." The governor has stated that Rodrigues' critics should look at his resume, which might disclose Rodrigues' post-retirement employment history. That resume has not been made public, as of press time.

Nonprofit Lease

Even before retiring, Rodrigues was president of an organization that received a cost-free lease of land in Olowalu owned by a Martin-controlled company. The organization, The Reorganized Olowalu Cultural Reserve, filed articles of incorporation with the Department of Commerce and Consumer Affairs on July 8, 2020. Rodrigues was identified as its president and agent.

According to the complaint, the organization, doing business as Kipuka Olowalu, "is known in the community to be a nonprofit organization affiliated with Martin's commercial entities."

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Environment

Volume 35, No. 6



Hawai'i

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NEW AND NOTEWORTHY

Kona Three Goes Down: The long and fraught controversy over a housing development proposed more than 40 years ago just south of Kailua-Kona seems to have come to an end. On November 20, the Hawai'i County Council voted down a bill on first reading that would have given the landowner and developer, Kona Three, LLC, ten more years to finish the development. The vote was 7-1.

Had it been approved, the developer's consultant, Daryn Arai, said it would have added 450 units of much-needed housing. Michelle Galimba was the only member of the council who seemed swayed by this promise. All other councilmembers seemed concerned by the lack of infrastructure, traffic, flooding concerns, and the presence of cultural and historic resources.

The bill will come up again for a second, final council vote. The outcome is unlikely to change,

given the strong sentiment within the community and in the council against the project.

Meanwhile, the area proposed for development – around 70 acres – has been nominated for purchase by the county through the county's Public Access, Open Space, and Natural Resources Preservation program.

Dick Cox: We note the passing of Richard Cox, a member of the very first Commission on Water Resource Management. He died at his home in Manoa on August 2, at the age of 103.

A civil engineer, he worked for both McBryde Sugar and Alexander & Baldwin, but he also had a keen interest in environmental issues. He was a charter subscriber of *Environment Hawai'i* and a generous supporter of our work over the years. He also served as president of the Conservation Council for Hawai'i. In the area of the arts, he and his brother Doak established the Award for Excellence in the Visual Arts at the Honolulu Museum of Art.

Seabird Suit: On November 19, the Conservation Council for Hawai'i and the American Bird Conservancy sued Maui County and Hawaiian Electric to protect endangered and threatened seabirds from being distracted or disoriented by streetlights on Maui and Lāna'i.

The lawsuit seeks to protect the endangered 'ua'u (Hawaiian Petrel), the threatened 'a'o (Newell's Shearwater), and the endangered



A Newell's shearwater. CREDIT: BRENDA ZAUN / U.S. FISH & WILDLIFE SERVICE.

'akē'akē (Hawai'i's unique population of the Band-rumped Storm-petrel), according to a press release by Earthjustice, which represents the two groups.

"All three species leave their nests at night, using the moon and stars to navigate out to sea and back. They can become distracted and disoriented by artificial lights, causing them to circle and eventually fall to the ground from exhaustion (known as 'fallout') or strike other human-made structures. Once grounded, the birds cannot become airborne, and typically die of predation, starvation, dehydration, or vehicle strikes. The largest remaining 'ua'u colonies nest near the summit of Haleakalā on Maui and at Lāna'i'ihale on Lāna'i," the release states.

The utility owns and operates the streetlights on the two islands, while the county "dictates the parameters for streetlight operation on county roads. Under the Endangered Species Act, both the county and Hawaiian Electric are liable for harm to these seabirds, and both must secure permits for unavoidable harm and develop habitat conservation plans for the species," it continues.

The lawsuit comes just weeks after the groups reached a three-year agreement with the utility, under which it commits to several new measures (i.e., diverters to make the power lines more visible, \$480,000 a year for monitoring and enhancement of 'ua'u habitat) to reduce the risk of harm to 'ua'u and 'a'o by power lines on Maui and Lāna'i.

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Quote of the Month

"Courts have generally recognized that cross-examination of scientific facts is often an exercise in futility."

— *Melissa Goldman,*
deputy attorney general

The Fraught Process of Selecting the Loea

Hawai'i law provides for an unusual – in Hawai'i, at least – process to select members of the state Commission on Water Resource Management. A special four-person committee considers applicants for vacancies on the commission. Two of them are named by the governor, one by the Speaker of the House, the fourth by the president of the Senate. No qualifications needed, and no public announcement of the members.

This committee then interviews candidates for the vacancy and selects at least three names to forward to the governor, who selects his nominee from that list.

The meetings of the nominating committee are public, after a fashion. But the interviews it conducts with applicants are carried out in the open only if the applicant agrees.

This year, the ending of the term of commissioner Neil Hannahs in June put the process on full display. Hannahs held the seat reserved for a person knowledgeable about traditional and customary rights exercised by “descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778.”

With Hannah's departure, the governor needed to fill this seat, whose occupant is often referred to as loea in Hawaiian. A nominating committee interviewed candidates in late January and early February, eventually coming up with a list of four people deemed qualified for the position: Hannah Springer, a respected Hawaiian cultural practitioner, Lori Buchanan, a longtime community activist from Moloka'i, Makahiapo Cashman, on the staff of the University of Hawai'i School of Hawaiian Knowledge and an expert taro farmer, and Kimo Falconer, a former Pioneer Mill supervisor who now runs a coffee plantation on Maui.

Hannahs left CWRM on June 17, by which time Green still had not selected a replacement from the list given him earlier in the year. Then two of the four people on the list dropped out.

Instead of selecting one of the remaining two candidates to occupy the loea seat, Green restarted the selection process *de novo*, stating that he needed at least three people on the list of candidates.

The move was harshly criticized by dozens of organizations, but the process went forward. Applications were due in September, with three of the four candidates on the original list once again throwing their hats into the ring: Cashman, Springer, and Buchanan.

The fourth candidate on the February list

submitted to Green – Falconer – didn't reappear. Instead, he turned up as one of the two members of the new nominating committee appointed by Green. (The other members were Donna Kiyosaki, a civil engineer and one-term CWRM commissioner, appointed by Green; Tim Johns, a former CWRM chair, appointed by Sen. Ron Kouchi, and Summer Kaiawe, attorney with Watanabe Ing, appointed by Rep. Scott Saiki. Both Kiyosaki and Kaiawe were appointed to the earlier nominating committee that presented the governor with the first list of candidates.)

The committee met on October 21 and 22 to interview 10 applicants. Even before the meeting started, one applicant withdrew – Moses Haia, an attorney who for years worked with the Native Hawaiian Legal Corporation. On the first day the committee met, another candidate – “Candidate A” – didn't show up for the interview.

Of the 10 candidates listed on the committee's agenda, just six had names associated with them. In addition to Buchanan and Springer, there were Lani Eckart-Dodd, Dana Okano, Cashman, and Haia.

The list of persons whose names were forwarded to Green has not been made public. But among them must have been one of the unnamed candidates: V.R. Hinano Rodrigues, until recently the head of the State Historic Preservation Division's History and Cultural Branch. On October 29, Green issued a press release announcing his appointment, praising Rodrigues's “exceptional communication and conflict resolution skills.”

‘Privacy Concerns’

Deputy Attorney General Colin Lau advised both nominating committees. At the outset, he gave members a brief overview of the rules they needed to observe, including, he said, the state Sunshine Law.

As Lau explained it, if an applicant wished to be interviewed in private, the committee would need to vote to go into executive session, citing to Chapter 92-5(a)(2). This provision in the Sunshine Law spells out one of the few exceptions to open meetings, relating specifically to privacy concerns. Under this exception, boards or commissions may close meetings to the public “to consider the hire, evaluation, dismissal, or discipline of an officer or employee.”

Lau went so far as to provide the committee with what he described as “magic words” — a script with the precise language of the statute that the committee would need to

include in a motion to enter into executive session in order to comply with the Sunshine Law.

But the Sunshine Law privacy exception that Lau cited to only applies to officers or employees of public agencies. It does not extend to volunteers, as five of the seven CWRM members are. As described in Chapter 174C, the statute that established the commission, the appointed members “shall serve without compensation.”

In fact, the Office of Information Practices issued a formal opinion in 2005 as to the ability of non-employees to enjoy shelter under the privacy exclusion of Chapter 92. That



The nominating committee. From left to right: Donna Kiyosaki, Tim Johns, Summer Kaiawe, Kimo Falconer. CREDIT: YOUTUBE.

opinion, involving appointments made by the Kaua'i mayor to county boards, found that “because an individual nominated to a board or commission will not be serving for pay or compensation, a nominee cannot be considered a ‘hire’ for purposes of invoking the exemption in Section 92-5(a)(2).” (See OIP opinion No. 05-04.)

That same opinion mentions the salutary effect that public vetting of candidates for boards and commissions can have, referring to an opinion letter the OIP issued in 1991 (Op. Ltr. No. 91-8). Any privacy interest “is outweighed by the public interest in application information concerning successful applicants or nominees because such information ‘sheds light upon the composition, conduct, and potential conflicts of interest of government board and commission members.’” The quote is taken from the Chapter 92F-14(b)(4).

As subsequent events showed, shedding light on potential conflicts of information during the vetting process would almost certainly have been a healthy thing.

Process Concerns

The issue of the closed-door interviews of candidates was raised soon after the first nominating committee met.

On February 18, the *Honolulu Star-Advertiser* carried an opinion piece submitted by Kekai Keahi, Ke'eumoku Kapu, and Archie Kalepa, all of them involved in protecting water resources on Maui.

"At this moment, a nominating committee is evaluating more than a dozen applications to fill this crucial seat on the Water Commission," they wrote. "It concerns us that the nominating committee itself lacks significant expertise in Native Hawaiian water management practices and has not truly engaged the public in the evaluation process. The committee has not disclosed the names of any potential nominees and the majority of the interviews have been held in executive session, outside of the public eye.

"The committee has asked for public testimony, but we cannot provide meaningful input when we do not know the identities or qualifications of those being considered for this crucial seat."

In April, with no selection having been made, the three made another appeal to the governor via an op-ed carried in the *Star-Advertiser* of April 25. "We implore the governor and Senate to confirm a loa who will set Lahaina and Hawai'i on a path toward true healing and recovery," they wrote. By this time, the names of candidates forwarded to the governor had been made public. Three of them – Springer, Buchanan, and Cashman – were described in the article as loa, experts in Hawaiian custom and tradition. Falconer's name was conspicuous by its absence.

"Please move past politicking so that our people can focus on healing," they urged the governor. "We deserve at least that. Ola i ka wai!"

Time passed. Hannahs' term expired. And still no appointment was made.

At the Hawai'i Conservation Conference in late July, Kapua Sproat, a University of Hawai'i Richardson School of Law professor and director of Ka Huli Ao Center for Excellence in Native Hawaiian Law raised the issue.

On August 5, Leina'ala Ley, an attorney with Earthjustice, wrote Green and Dawn Chang, CWRM chair, urging the immediate appointment of any one of three people on the list: Buchanan, Springer, or Cashman. She reminded them that the loa seat "serves important dual functions, providing technical expertise to the commission as well as an important mode of community outreach and trust-building." She even raised the prospect of legal action to force Green to make a selection, reminding him that this is a non-discretionary duty.

"Unfortunately, the Green administration is currently at risk of a mandamus action compelling appointment because the Native

Hawaiian Practitioner seat is unfilled and the administration has not taken any action to make an appointment in the five plus months since the nominating committee finalized its list," she wrote.

By August 14, Green had reinitiated the nominating process. Concern over his reasons for doing so grew, to the point that a letter signed by more than 70 individuals and groups urged him either to select "one of the remaining, highly qualified applicants presented by the nominating committee in February," or, if the selection process "must be restarted, ensure that members of the nominating committee themselves possess sufficient knowledge of Native Hawaiian water rights and practices ... to adequately assess whether applicants for this loa seat meet the letter and spirit of the statutory requirements for this appointment, and solicit advice from community leaders and organizations." Signing onto the letter were organizations ranging, alphabetically, from ACLU Hawai'i to Wisdom Circles Oceania and 350 Hawai'i.

Green was unmoved. The nominating committee met October 21 and 22.

The Meetings

One of the first members of the public to testify was Marti Townsend, regional engagement specialist for the Mid-Pacific office of Earthjustice.

"The convening of this second nominating committee ... has no basis in law," she stated. "The statute is clear. The nominating committee must deliver a list of at least three candidates to the governor, which it did in February. ...

"For no reason, the governor did not name a nominee at that time. He waited nine months. No explanation. No action.

"At some point in this inexcusably long delay, two candidates withdrew their names from consideration and instead of fixing this problem and immediately choosing a nominee from this list, Governor Green instead convened this nominating committee — you all — to compile a new list, presumably with candidates more to his liking.

"Outrageous! This is political gamesmanship over our water. Even if the governor has the purest intentions, his decisions to one, claim that the candidates list is stale and then, two, convene this new nominating committee sets an extremely dangerous precedent. Any future governor can now point to this very meeting today as an example and justification for tossing a properly promulgated list of candidates for the Water Commission and starting the whole process over again.

"My concern is heightened by the fact that James Falconer is now on this nominat-

ing committee when he was previously a candidate on the February list. I don't understand how this can be okay. It does not meet the expectations of the public.

"It looks, it smells like a sham. ...

"Please don't do this. Do not be complicit in this slow-motion undermining of our Water Code," she said.

Immediately following Townsend's testimony, the committee entered into executive session to consult with its attorney, Lau. Lau had left the meeting room immediately after his instructions to the committee, saying he would be available for consultation if they had any questions.

Two and a half hours later, the committee was back in session, apparently having never been able during that time to reach Lau.

Johns, who had been selected as the committee's chair, asked Falconer if he had anything to say. He declined.

Johns then stated, "I'm going to assume we're legal."

Of the three candidates whose interviews were set for that day, only two – Eckart-Dodd and Candidate B – were questioned by the committee, with just Eckart-Dodd agreeing to have her interview be in open session.

The following day, the committee interviewed Buchanan, Okano, and Cashman. Then two students from Ke Kula Kaiapuni 'o Kekaulike on Maui were allowed to testify.

Both Bella Kualani and Kalima Garcia spoke out against the reconvening of the nominating committee,

Kualani specifically called out the appointment of Falconer, whom she said was an unsuitable choice. "Are you educated with Hawaiian knowledge to rightfully choose a nominee for the loa position?" she asked him.

"I believe not. Mr. Falconer ... has a long legacy of going against traditional Hawaiian management in Lahaina. He was the last luna of Pioneer Mill and now owns Maui Grown Coffee, which diverts water from Maui Kōmohana streams and many taro farmers. ...

Referring to his inclusion on the list of four nominees selected in February, she asked whether this wouldn't be a conflict of interest, to give him the power to choose the next loa.

Garcia noted that she and her classmates had written to the governor, asking him to appoint someone from the original list. "We spoke about this at the Native Hawaiian Convention. Clearly Governor Green has not listened to our concerns."

"Do what is pono. Select a true loa," she urged the committee.

On October 29, Green announced his selection as loa: V.R. Hinano Rodrigues.

— Patricia Tummons

Ethics Commission Complaint *continued from page 1*

Seven days after the organization was incorporated, it received that dollar-a-year lease of land owned by Olowalu Elua Associates, LLC, a Martin-controlled company. Signing on behalf of Olowalu Elua was Martin, identified as its manager. Signing on behalf of Kipuka Olowalu was Rodrigues.

Section 84-14, relating to conflicts of interest, provides that no employ is to take “any official action directly affecting ... a private undertaking in which the employee is engaged as legal counsel, advisor, consultant, representative, or other agency capacity.”

Running Interference

The ethics complaint alleges that Rodrigues “retained SHPD government records at his personal residence or other location after he left the employ of the state.”

“Rodrigues utilized his state position, confidential information obtained through the state position, and/or appeared on behalf of Martin-entitles less than a year after resignation,” it states.

If true, this would violate the prohibition on the use of confidential information in Section 84-11. It also would seem to violate restrictions on post-employment in Section 84-18. That section restricts the ability of former employees to “disclose any information that is ... not available to the public” that the employee gained in the course of his or her official duties. It also prohibits the employee from using such information for his or her own benefit or the benefit of anyone else.

Paragraph (c) of that section prohibits former employees within 12 months of their separation from an agency from representing “any person or business for a fee or other consideration, on matters in which the former employee participated as an employee or on matters involving official action by the particular state agency ... which the former employee had actually served.”

The complaint describes Rodrigues’ involvement in several instances in which the determination of how the discovery of Native Hawaiian remains or burial sites on lands owned by Martin-controlled entities were to be handled.

The first instance cited in the complaint begins in 2021. It had come to the attention of the Maui Lana’i Burial Council that the burial treatment plans had not been completed for three sites in the Lahaina area where skeletal remains had been discovered. Ke’ea-muoku Kapu and his ‘ohana had informed the council of this by letter dated October 30, 2020. Two of the three sites remained had remained open to the elements since their dis-

covery — one of them for nearly 20 years.

In January 2021, the council chair, Dane Maxwell, visited the site, accompanied by Chris Nakahashi of SHPD in place of Rodrigues. Rodrigues had informed SHPD’s Andrew McCallister, the complaint says, that he “would be recusing himself from participating in the site visit and anything related to the burial sites because he has an ethical issue due to his relationship with the landowner, Peter Martin. He further stated that they are friends who spend the holidays together.”



Stone structures atop disturbed burials were put in place with no authorization from SHPD.

In February, the burial council considered Kapu’s “Complaint of Burial Treatment and Preservation Plans for Burials Identified in the Ahupua’a of Paunau.” Among other things, Kapu testified he had observed stone structures built in the area atop previously identified burial sites.

Kapu and the Kapu ‘ohana and two burial council members accused the landowner, Wainee Land & Homes, LLC, Hope Builders, Inc., and West Maui Land of “knowingly failing to stop work in the immediate area and failing to report the discovery of a burial site... [and] knowingly building a stone structure on top of a previously identified burial site.” All the businesses are controlled by Martin.

Back in November 2020, the Office of Hawaiian Affairs expressed its concerns over several issues, including the lack of archaeological oversight during the construction of a waterline by the Launiupoko Water Company. Not until May 11, 2021, did SHPD administrator Alan Downer respond. He informed OHA that if it wanted to discuss this further or had questions, it should reach out to Rodrigues.

The burial council then arranged a site visit involving SHPD and the DLNR’s Division of Conservation and Resource Enforcement — its police force — to visit the stone structure built over a burial, despite no required consultation or approved burial plan. Martin participated in the site visit as well. According to the complaint, “Martin admitted to the violation verbally during the site visit and expressed his apologies. Rodrigues unilaterally decided, while on site, SHPD would not be pursuing the violation or penal-

ties against Martin despite the requests of the recognized descendants and MLIBC.”

The second instance relates to burials disturbed during the construction of the Olowalu Mauka Subdivision. On April 6, two burial sites were disturbed. According to the complaint, West Maui Land “did not stop when the excavator hit human remains, and dug through two distinct burial sites.”

A review of the project by Andrew McAllister, Maui archaeologist with SHPD, discovered several problems with the permitting of the archaeological consultant hired by WML, including void and reissued permit applications, incorrect information, no field work report, and other errors, the complaint states. In email chain appended to the complaint, numerous violations, on the part of the contractor, the consultant, and Maui County, are discussed.

“On June 1, 2023, Rodrigues unilaterally determined to preserve the human remains in place and issues a letter directly to the developer without signature from the SHPD administrator,” the complaint states. “Rodrigues also accepted a burial treatment plan ... despite SHPD’s McCallister inform-

continued on the bottom of page 6

Green Attacks Critics of Rodrigues as Ideologues

News of the selection of Hinano Rodrigues was not welcomed by many of the same groups who had pushed to have the governor pick a candidate from the two remaining on the original list forwarded to him in February.

In an interview that Hawai'i News Now reporter Daryl Huff had with Green the day after the Rodrigues' appointment was announced,



Governor Josh Green (official photo).

Green was defiant and harshly criticized the groups opposed to the selection of Rodrigues, as well as the senator who will be presiding over his confirmation hearings when the Legislature is next in session.

"Let them see this person's resume. It's fantastic, you know. This is someone who has committed years and years of service in the field and by the way grows his own taro, for gosh sakes," he said. (Rodrigues' resume has not been made public.)

Sen. Lorraine Inouye, who chairs the Senate Water and Land Committee and who will be presiding over Rodrigues' confirmation hearings, was also interviewed by Huff. She was skeptical about his background: "One needs to have some water resource management background," she said. "Certainly from my standpoint it doesn't seem like this gentleman is qualified. I can't understand why the governor is already upsetting the community and not fulfilling the requirements of that seat."

Green repeatedly described his critics as ideological with a singular focus on restoring streams. "I would ask those who bring an ideological position to instead trust that people are actually going to try to work in good faith," he told Huff. As for Inouye and other senators, he suggested they "talk to the individual, find out where they're coming from, long before lobbing a little hand grenade behind their back."

"Let me frame this for everyone so they understand the position I was placed in," Green said, speaking to the loea selection process. "We had four names, right? One person was

not Hawaiian enough for others, okay? That's what happened. The second person got afraid because they were attacked before they were even chosen, leaving only two people – who are excellent people but neither of them were either going to be confirmed by the Senate or capable of getting what we needed to get done for streams, for housing, for our next iteration of fire protection."

He referenced Rodrigues' 12-year tenure in the History and Culture Branch of the State Historic Preservation Division, but described the political headwinds he will likely face. "Because of people's ideology, he is already going to be challenged. They haven't even heard this guy speak for one moment about what he would do, and he's from Wailuku. He's a taro farmer, for gosh sakes. Let's call it a small miracle that we found someone who can grow taro and also has some cultural experience."

"I think people need to calm down the ideological wars and instead of trying to just get their way, work with me. ... I'm trying to move the ball to help protect people and improve their lives, in this case on Maui," he said.

— Patricia Tummons

Ethics Commission Complaint *continued from page 5*

ing other SHPD staff, [West Maui Land], and SCS [the archaeological consultants] these archaeological interpretations are incorrect and a violation occurred when WML failed to stop work when excavating the trench."

McAllister raised his concerns about Rodrigues' actions to SHPD administrator Downer and the archaeology branch chief, Susan Lebo. "They declined to investigate the violation," the complaint says. "Lebo informed McAllister she had received a cease-and-desist letter regarding his concerns that a violation had occurred," it continues. "McAllister created a file of SHPD violations relating to Rodrigues and Martin-commercial entities and put that file on the SHPD server. McAllister later resigned from SHPD."

The last item included in the complaint alleges that Rodrigues organized protests against a plan to establish a temporary landfill site at Olowalu to hold debris from the Lahaina fire of August 2023. "It is well known in the community that Martin owns land at

Olowalu that he has previously attempted to redistrict in order to construct residential development and that Martin has financial interests in preventing the [temporary debris site] from being located in Olowalu," the complaint states.

Next Steps

Once a complaint is filed, the Ethics Commission staff reviews it. The commission may be asked to authorize a formal investigation by issuing a Resolution to Investigate. This allows the commission to subpoena witnesses and documents.

Commission investigations are confidential and the commission "does not apprise the public (including the complainant) regarding the status of any ongoing investigation," its website states.

For a more detailed description of the Ethics Commission's procedures in reviewing complaints, see its website: <https://ethics.hawaii.gov/what-we-do/>.



Another Ethics Complaint

Andrew McCallister, the source for much of the information in the complaint against Rodrigues, is now himself the subject of an ethics complaint.

According to a report in *Civil Beat*, the complaint was filed by the principal of Scientific Consultant Services, Michael Dega. The complaint alleges that McCallister, who resigned from the State Historic Preservation Division last April, now works for a consulting firm whose work he used to oversee. If verified, this could be a violation of the state's ban on state employees going to work for private firms whose work they oversaw within a year of their departure from the state payroll.

Among its many clients, SCS was retained as the archaeological consultant for West Maui Land, the Peter Martin-controlled company that in 2020 was trenching a water line that uncovered Native Hawaiian burials.

— Patricia Tummons

State Supreme Court Hears Arguments On Whether ICA Erred in East Maui Case

“What more due process do you want?” Hawai'i Supreme Court Justice Todd Eddins asked David Kimo Frankel last month.

Frankel is the attorney representing the Sierra Club of Hawai'i in a lawsuit over the state Board of Land and Natural Resources' approval in 2020 of revocable permits for the continued diversion of East Maui streams through 2021, as well as the board's denial of the group's request for a contested case hearing on those permits.

The group has argued that the amount of water that the Land Board has allowed to be diverted is excessive and deprives a dozen East Maui streams of water for most of the year.

When the Land Board approved those permits at its meeting in November of that year, Frankel testified to the Land Board for 18 minutes about the Sierra Club's concerns with them. The Land Board added conditions to its approval to address some of those concerns. And just two months earlier, a trial before the Environmental Court over similar objections the Sierra Club had to the same permits issued for 2019 and 2020 had concluded.

“On this record, we hold that BLNR's rules and procedures for its November 13, 2020 meeting, Sierra Club's participation in the 2020 trial of the 2019 Sierra Club lawsuit, and the short duration of the permit continuations provided reasonable protection from the risk of an

erroneous deprivation of Sierra Club's members' protected interest in a clean and healthful environment,” the Intermediate Court of Appeals stated in its April decision vacating rulings by the Environmental Court in 2021 and 2022 that modified the diversion permits granted to Alexander & Baldwin, Inc., and East Maui Irrigation Co., LLC. Those modifications included significantly reducing the amount of water the Land Board had allowed to be diverted under the permits.

The ICA found that then-Environmental Court Judge Jeffrey Crabtree had improperly determined that the Sierra Club was entitled to a contested case hearing and exceeded his authority in modifying the permits. As result, the Sierra Club was not entitled to attorney's fees, it found.

The ICA's ruling, however, was not unanimous. Judge Karen Nakasone dissented. In her dissent, she stated that she did not agree that the Sierra Club's participation in the trial was “an adequate alternative procedural safeguard, where the Environmental Court judge, who was the same judge that presided over the 2020 trial, specifically found otherwise. The Environmental Court found that this case involved ‘some significantly different facts’ from the 2020 trial; that ‘the permits at issue covered the year after the trial’ and ‘[t]hings change with time’; that Sierra Club had ‘new evidence on the permit renewals — information and issues

which apparently arose after the trial’; and that ‘[t]he new information and issues are relevant and are not insignificant.’”

“Here, the specter of floodgates of contested case hearings creating annual fiscal and administrative burdens for every future water permit continuation is speculative and premature, since we cannot presume that a contested case hearing will be requested in every similar case, or that BLNR would be required by due process to grant such in every case,” she wrote.

On November 21, the state Supreme Court heard oral arguments over whether the ICA got it wrong.

Opposing Positions

In the application to be heard before the Supreme Court, Frankel listed a number of factors that differentiated the circumstances surrounding the permits granted for 2021 from those of previous years.

He noted that after the trial in 2020, the Department of Land and Natural Resources' Division of Aquatic Resources “determined for the first time that four streams from which A&B has been authorized to divert one hundred percent of the baseflow should be a high priority for stream restoration.”

Also, he continued, a new quarterly report on water use by the companies showed that “much less water was needed than previously estimated.” What's more, a settlement agreement EMI co-owner Mahi Pono had entered into with regard to a contested case hearing before the Water Commission over diverted stream water from Na Wai 'Ehā was not included in the 2020 trial, but “demonstrated that it is reasonable to require the lining of reservoirs,” Frankel argued. (Na Wai 'Ehā refers to the four streams that drain into central Maui.)

“Moreover, the permits are for a different year,” he continued. “A&B proposed to take 38 percent more water from east Maui streams in 2021 than it had been taking in 2020. Finally, DLNR's staff recommended a new definition of ‘waste’ that would exclude system losses and evaporation. The recommendation was inconsistent with [the Commission on Water Resource Management's] approach. The Sierra Club highlighted the Orwellian definition. Even the results of trials can be set aside when ‘newly discovered evidence which by due diligence could not have been discovered in time’ becomes available.

“Similarly, a contested case hearing was required despite the August 2020 trial because of



East Maui irrigation system. CREDIT: WATER RESOURCE ASSOCIATES.

the newly available evidence **and** because it was a new decision for a new year.”

In contrast, attorneys for the Land Board argued in support of the ICA's decision, stating the Sierra Club received ample due process on its opposition to the permits “during a weeks-long bench trial ... between identical parties, in which Sierra Club raised nearly identical issues and sought to vindicate nearly identical interests.”

“And despite the opportunity, Sierra Club failed to advance meaningfully different arguments than it had at trial in both its petition for a contested case hearing and its public testimony at the Board's November 13, 2020, public meeting on the RPs' 2020 continuation.”

The Sierra Club had argued that under Hawai'i Revised Statutes Chapter 205A, also known as the Coastal Zone Management Act, the Land Board should have considered the effects the stream diversions would have on ecological values. Because of the board's duties under the act (in addition to state laws regarding land dispositions and environmental reviews), the group argued that it was entitled to a contested case hearing. The state, and the ICA, disagreed.

The act “did not define Sierra Club's alleged right to a clean and healthful environment here. And any risk of erroneous deprivation of Sierra Club's alleged interest in the absence of *additional* trial-like proceedings on the 2021 RPs was outweighed by the governmental interest in avoiding duplicative and burdensome proceedings. The environmental court thus erred by granting Sierra Club's ... appeal from the Board's denial of its Petition. The court also exceeded its appellate jurisdiction by prejudging the outcome of the contested case and modifying the RP conditions based on Sierra Club's preferences rather than remanding to the Board for further proceedings. ...

“Sierra Club's self-described right to ‘cross-examine’ DLNR staff and scientific evidence the staff collects, interprets, and reports finds no support in the law and would have been inappropriate under these facts. First, none of the cases cited in the Application support Sierra Club's self-proclaimed right in this case. And second, [m]any courts and commentators have concluded that cross-examination of scientific witnesses' such as staff of the CWRM or DAR, ‘is often, if not always, an exercise in futility.’ ... Thus, even if a property interest was established, the lack of possible value to be gained from cross-examination weighed *against* granting the Petition and supports the ICA's decision affirming the Board,” the board's attorneys wrote.

Court Questions

During Justice Eddins' questioning last month about due process, he told Frankel, “They're making the point you just had a trial two months before ... You actually argue for about 18 minutes, they say. I argue that was pretty effective.”

Frankel countered that a contested case hearing would have enabled the Land Board to ascertain “the truth of the matter,” including “new evidence” that arose after the trial, such as the findings by DAR about the natural resource value of some of the diverted streams.

Eddins then noted that the Land Board had considered that new evidence when it approved the permits for 2021.

Frankel argued that the Sierra Club should have had the opportunity to ask DAR whether there was any value in restoring flows to certain streams. “That's the kind of thing, with evidence taken under oath, all parties cross-examining, the truth can come out.”

“Evidence showed A&B, they needed less water than they claimed,” he added.

In response to similar questions from Justice Vladimir Devens, Frankel explained how the Sierra Club did not have time to line up scientific experts to address the new information before the Land Board voted on the 2021 permits. The group also did not have the opportunity to question A&B, he said.

Chief Justice Mark Recktenwald asked about the appellate court's position that the Coastal Zone Management Act did not affect the Land Board's ability to renew the water permits. “I guess they're trying to argue issues addressed in the context of mountain streams were tangential and did not give rise to a contested case hearing,” he said.

Frankel replied that the CZMA applies to all land in the state.

“It applies to the board. The ICA said, essentially, only Part 3 [of the act] is applicable, when things are very near the shoreline, in the [special management area] or shoreline setback area,” he said, adding that Ch. 205A-2A, which lists the objectives and policies of the act, “shall apply to all parts, not just Part 3.” (One of the objectives of the CZMA is to “[p]rotect valuable coastal ecosystems, including reefs, from disruption and minimize adverse impacts on all coastal ecosystems.”)

Frankel also noted in his filings that Part 4 of the CZMA provides: “(a) In implementing the objectives of the coastal zone management program, the agencies **shall** give full consideration to ecological, cultural, historic, esthetic, recreational, scenic, and open space values, and coastal hazards, as well as to needs for economic development,” and “(b) The objectives and policies of this chapter and any guidelines en-

acted by the legislature **shall be binding upon actions** within the coastal zone management area by all agencies, within the scope of their authority.”

“That's sort of a mauka-makai concept incorporated in 205A. ... The streams connect mauka to makai,” Devens said.

“Exactly. Yes, your honor,” Frankel replied.

When Eddins pointed out that “due process is not a fixed concept” that necessitates a contested case hearing, Frankel replied, “When property interests are implicated, you have a right to a hearing.”

Judge Clarissa Malinao, sitting in for recused Justice Lisa Ginoza, asked whether the Land Board's decision on the 2021 permits redefining water waste was a constitutional violation.

“It is inconsistent with their public trust obligations. There is a public trust duty to ensure water goes to public trust purposes. When it's wasted, it's not fulfilling that mandate,” Frankel replied. If all system losses are not considered waste, “then there's nothing else left in the definition of waste and that is extremely problematic and this is one of the issues we wish to explore in the context of a contest case hearing,” he added.

He argued that in modifying the permits to maintain diversions at the status quo, Judge Crabtree “crafted a remedy in light of BLNR's denial of the Sierra Club's constitutional rights.”

Frankel added that A&B and the Land Board cannot complain about the modifications, since they themselves asked Crabtree to modify the permit expiration dates.

“It was in A&B's interest for the court to modify BLNR's decision because if it had not, if the court had invalidated the permits, A&B would not have been entitled to any water whatsoever. It's really hypocritical of them to condemn the court for modifying,” Frankel said.

“What about their argument [about] the court substituting its judgment for that of the BLNR? They should have just remanded, sent it back?” Devens asked.

“In that case, the constitutional violation would have gone unabated. A&B would have been allowed to take even more water and we would have been in the same situation of Na Moku back in 2001: asking for a contested case hearing, not having it, and then taking more and more water,” Frankel replied, referring to the group Na Moku Aupuni O Ko'olau Hui, which decades ago asked for a contested case hearing on the diversions from East Maui, but never got one.

“That's the problem. What the court did, which was genius, it preserved the status quo. It didn't use those words, but basically, it looked

at what Mahi Pono, A&B, EMI had been taking and said, 'OK, you can use a little bit more, but no more.' ... It preserved the status quo until a contested case hearing was completed," he said.

Counterpoint

Deputy attorney general Melissa Goldman's oral argument focused on two key points: 1) that the Sierra Club was not constitutionally entitled to a contested case hearing, and 2) that even if it were, the Environmental Court exceeded its jurisdiction by "modifying permit terms that were not before it based on an undeveloped record to advanced one party's interest over inclusive policies reflecting public input and agency expertise."

"Due process, as Justice Eddins just recounted, is not a fixed concept," she said. The Sierra Club had ample opportunity to be heard and there was "no showing that additional procedures would be meaningful," she said.

Justice Devens said, "It's one thing to express views. It's another to be cross-examined," adding that the Sierra Club wanted its opportunity to be heard to be meaningful.

He raised the issues of the new treatment of system losses and the four diverted streams that DAR had identified as high priority streams.

Goldman conceded that the DAR information was new but said that the Sierra Club mischaracterized what it was.

"Doesn't that really support their argument? You're fighting over what this meant or that meant," Devens said. He added that the Sierra Club learned of DAR's opinions through a report to the Land Board issued less than a week earlier. "They have five to six days to get an expert. That's not practical," he said.

Goldman noted that the Hawai'i Supreme Court has held that the public meeting process can be sufficient even though the public is given limited speaking time and there are no cross-examinations.

"What matters is if there was erroneous deprivation," she said.

Justices Recktenwald and Eddins pressed Goldman about the DLNR's and Land Board's decision to not characterize system losses as waste for the 2021 permits.

Goldman replied that the DLNR's position had always been that system losses were reasonable. During the trial, "we argued reasonable system losses do not constitute waste and then [DLNR] staff defined the term waste in its subsequent staff submittal."

"Didn't CWRM have concerns? Didn't CWRM say that systems losses exceeded 20 percent and that didn't comport with best practices?" Eddins asked.

"I think we're getting a little bit lost in the

weeds. The bigger picture is it's under CWRM's jurisdiction to address those kinds of issues, not the board," Goldman replied.

Eddins replied that he understood the distinction she was making but suggested that a new definition of water waste seems like the kind of information that the board might need to "turn it over, shake it up, to see what it really means. I know you made 27 new conditions, some addressed Sierra Club's concerns. When you look at that water waste issue ... it seems that is sort of significant new evidence to take a look at."

To this, Goldman said, "Courts have generally recognized that cross-examination of scientific facts is often an exercise in futility."

"Really?" Recktenwald interjected. "I just – cross-examining experts about scientific facts is, I'm sorry, an exercise in futility?"

Goldman explained that she was merely quoting a case she had cited in her briefs.

"I suppose it depends on the skills of the cross examiner," Eddins said.

"I'm trying to understand what I did for all those years in private practice, I guess," Recktenwald added.

He continued, "It can be frustrating. It can be slow. There can be ambiguity. There can be different points of view. But in the end, that's exactly why you have a test of cross-examination. So the finder of fact can come to a determination. If anything, that cuts in favor of a contested case hearing."

Goldman, however, argued that the burden of duplicative proceedings outweighed any possible benefit of a contested case hearing. She later added that cross-examination is not required by due process.

Eddins recounted how the permits for the East Maui stream diversions had not ever been fully examined in a contested case hearing before the Land Board.

"When you're looking at what procedures are necessary to satisfy the Sierra Club's due process rights, is it appropriate to look at [them] in the context of 20 years of annual RPs?" he asked.

Goldman replied, "I think the larger context about this entire dispute we could talk about for hours. ... Sierra Club had already had full process through a trial to explore many of those issues and had ... a Sunshine meeting."

She concluded that the Environmental Court exceeded its jurisdiction by modifying the permits "without finding board error or abuse of discretion. ... It made findings on an undeveloped record and it substituted its judgment for that of the agency."

Trisha Akagi, the attorney representing A&B and EMI, made similar arguments that a contested case hearing was not necessary to deal

with the new evidence.

The exclusion of system losses from the definition of waste, for example, "was thoroughly discussed at the August 2020 trial," she said, noting that the Land Board's decision to incorporate that new definition into its permit approval was merely an attempt to clarify that not all system losses are waste.

Even so, Justice Sabrina McKenna argued that the new issue of defining waste to exclude system losses and evaporation was worth taking another look at.

"I respectfully disagree that cross-examination of expert witnesses is a waste of time," she said.

She added that even though it is the Water Commission's exclusive jurisdiction to set the amount of water that needs to stay in streams, the Land Board "also has an obligation to try to save our water as much as possible."

Akagi argued that the Environmental Court "would have needed to at least to have made a predicate finding of clear error to modify a factual determination by BLNR. Specifically, in order to modify the cap, the Environmental Court would have had to make a determination that the BLNR's cap was clearly erroneous."

On this point, McKenna later argued that, "perhaps it didn't use the words 'clearly erroneous,' but it did find that there was an error not to have a contested case hearing because constitutional rights were being violated. Sounds like clear error."

"Exactly," Frankel replied.

Recktenwald then asked Frankel for his take on the concern over "an endless parade of contested case hearings, year after year after year, that really are not accomplishing much especially as that body of work grows?"

Frankel cited other issues where similar worries were raised (geothermal, Red Hill) and no endless parade of contested cases followed. He then added, "If the BLNR properly fulfills its public trust duties, there's not going to be request for contested case hearings. That's what this is all about. The board has abdicated its duties for decades. The Sierra Club is asking the board to do what it needs to do. ... It needs to make sure that important questions are answered, that water is not wasted whether using terms like 'system loss.'"

The court did not rule on the case by press time. The Land Board is expected to vote on permits for 2025 this month. It denied a recommendation from its chair last month to enter into a contested case on a proposed long-term disposition for the water.

— Teresa Dawson

Marconi Companies Appeal Dismissal of 'SLAPP' Suit

RCA Trade Center, Inc., and MP Unit 21, LLC, are not letting go of their lawsuit against a couple that complained last year about large warehouses erected near its home within the Marconi Point Condominiums project. The companies hope to convince the Intermediate Court of Appeals that the couple's accusations of wrongdoing with regard to the warehouses are false, personal grievances, and not matters of public concern.

Therefore, they argue, their lawsuit seeking damages, a declaration that the warehouses can stay, and to squash any further meddling from the couple should not have been dismissed under Hawai'i's Public Expression Protection Act by 1st Circuit Judge Jon Tonaki earlier this year.

In the opening brief of their appeal, however, the companies admit that even their lender believes that something is amiss with the warehouse development on their property known as the RCA Trade Center.

They note that the lender, North Avenue Capital, received a copy of an August 29, 2023, complaint letter the couple's attorney sent to the companies' attorneys and copied to various government officials and agencies, including the USDA. The bank's receipt of that letter, via the USDA, "commenced a chain of events that ultimately led to RCA's lender declaring RCA to be in default."

The companies state that their lawsuit against condo unit owners Wayne and Tara Hu was filed, in part, to allay the concerns of North Avenue Capital, which had placed a hold in early October 2023, on draws from the loan.

Filing the lawsuit later that month, however, didn't stop the bank from declaring on December 14, 2023, that RCA was in default "despite RCA's efforts to satisfy the lender that RCA's project is in compliance with all applicable laws," the brief states.

"RCA's position is that its lender should not have withheld draws and should not have declared RCA to be in default because RCA was in full compliance with all zoning and building restrictions related to the warehouses," the brief states.

The companies do not explain what applicable laws the bank believes the companies have not complied with. They do acknowledge that there is a related federal case that they, along with other related companies, have filed against the City & County of Honolulu over its requirement that further development within the condominium project undergo a Special Management Area review. During the course of that case, the city has argued that an SMA review preceding construction of the warehouse interiors might be warranted, given that

restrooms are anticipated.

Even so, the companies lay the blame for the bank's decisions and subsequent delays at the Hus' feet.

"RCA is being damaged by Hus' conduct because it has caused delays to RCA's construction project. RCA is incurring additional carrying costs and loan interest accrual due to RCA's inability to draw from the loan, and because of the now year-long delay in completion of the warehouse buildings for occupancy," the brief states.

(Although not listed as related litigation, in a federal case against a supplier of warehouse building components, the companies are also blaming the provision of what they say were shoddy materials for construction delays.)



Free Speech Rights

In his April 24 decision on a motion to dismiss filed by the Hus in March, Judge Tonaki stated that the Hus "were exercising their constitutional First Amendment rights and rights of any citizen. ... Under 634G [the Hawai'i Public Expression Protection Act], the complaint should be dismissed." He also awarded the Hus attorneys fees and costs.

The 52-page grievance letter that the Hus' attorney, Peter Lenhart, sent to the companies' counsel covered a wide range of complaints the couple had with the development and management of the agricultural condominium project.

"Since the purchase of their Unit 11, you have, in our view: 1) breached the purchase contract entered into with the Hus; 2) violated Hawai'i condominium law; 3) violated state and county land use, zoning laws, and building permit laws and ordinance; 4) violated Honolulu county building permit ordinances; 5) violated federal and state environmental laws; and 6) violated the project's condominium governing documents," Lenhart wrote, going on to list more than two dozen examples.

Those examples included, "allowing and condoning the construction of illegal septic/wastewater tanks," "allowing construction of improvements at the project without first meeting State and Federal Historic Architectural and Archeological guidelines given the site's designation as a 'National Historic Landmark,'" and "allowing people vehicular access to the beach areas for '4-wheeling' in sensitive environmental areas having nesting native birds and turtles."

Given the scope of their complaints, they

sent copies of the letter to the state Department of Land and Natural Resources' Division of Forestry and Wildlife and State Historic Preservation Division, the Honolulu Department of Planning and Permitting, the state Department of Commerce and Consumer Affairs, Honolulu City Council member Matt Weyer, the U.S. Fish and Wildlife Service, and the USDA.

That last agency had backed the \$7.8 million loan from North Avenue Capital for the construction of the agricultural warehouses within the agricultural condominium project. And upon receiving Lenhart's letter, the bank inquired about some of the claims regarding the warehouses. Among other things, the Hus claimed that the warehouses were being improperly advertised for industrial — not agricultural — use, and that they had been used for non-agricultural purposes, such as weddings, craft fairs and social gatherings.

While the plaintiffs' attorneys argued that the Hus' letter focused mainly on private concerns with the development of the Marconi Point Condominiums, and, therefore, was not covered under the HPEPA, Tonaki countered, "Doesn't any citizen have a right ... to bring attention" to the government matters of concern?

"The fact that the agencies were cc'd forms the basis of the case," he said.

In appealing his decision, the companies argue that Judge Tonaki should not have found that the Hus had a good reason to miss the 60-day deadline by which a motion to dismiss under the HPEPA must be filed.

The Hus had filed it more than a month and a half late, but Lenhart argued that the couple believed it had more time because the companies' attorneys had given the impression that there was no rush to proceed with the case until the Hus secured insurance coverage for their legal fees.

Judge Tonaki was convinced that the Hus had been "lulled" into believing they had extra time.

In their brief appealing Tonaki's decisions, the plaintiffs' attorneys write, "RCA does not claim that Hu should be prevented from petitioning the government. Rather, RCA's claim is that, despite Hu's objection, RCA was permitted to construct the agricultural warehouses on its Property. Merely copying government agencies on the demand letter does not transform the parties' dispute into protected speech and insulate Hu from the underlying dispute."

They continue, "Even assuming the Circuit Court correctly determined that the motion was timely filed (or that there was good cause to excuse Hu's untimely filing), the Circuit Court was still required to analyze: (1) whether the



Documents Dispute

complaint covers matters of public concern, (2) whether RCA has established a viable cause of action from a prima-facie perspective, and (3) whether RCA established a legally viable cause of action. ...

"The Circuit Court erred with respect to each phase of this analysis, either by not undertaking any analysis at all, or by misapplying the analysis."

"To shoehorn this case into the scope of Chapter 634G, Hu attempted to recharacterize the letter as raising matters of public concern. Hu attached several exhibits to the Motion to show that *Environment Hawai'i*, *Civil Beat*, and the *Star Advertiser* have reported on some issues also in the letter. ...

"Hu points to these irrelevant news articles that, save for one article about the warehouses, do not overlap with the issues here. The fact that there may be issues of public concern related to the activities of other owners within the Project, or related to matters that are not raised in Hu's letter, does not automatically transform all disputes related to the project into matters of public concern. The letter focuses exclusively on Hu's own personal grievances and contractual disputes and seeks relief in favor of Hu, individually. The matters are exclusively of private interest. Hu failed to show that HPEPA applies, and to the extent the Circuit Court concluded that the Complaint is a cause of action related to issues of public concern, the Circuit Court was erroneous in its ruling."

With regard to whether the Hus had good cause for the late filing of their motion to dismiss under the HPEPA, the plaintiffs argue that Tonaki's order "disregards both parties' discussion of insurance coverage, and instead cites RCA's verbal extension of Hu's answer deadline as 'good cause' for allowing the untimely motion. ...

"Section 634G-3(a) imposes a strict sixty-day statutory deadline to file a motion to dismiss, and there is no provision whereby the statutory deadline can be 'extended' by agreement of the parties. Under Haw. Rev. Stat. 634G-3(a), the sixty-day deadline to file a motion to dismiss is only extended by the filing of an amended complaint, or upon motion granted by the court."

They add, "Hu's reliance on an illusory hope of insurance coverage is not good cause. Thus, the Circuit Court erred in finding that the pending insurance coverage determination constituted good cause to excuse untimely filing of the motion."

They ask that the ICA remand the case with instructions for the Circuit Court to deny the Hus' motion to dismiss.

(For more background on this, see our May 2024 cover story, "Judge Dismisses Case Brought to Silence Complaints About Warehouses at Marconi.")

On November 14, companies involved in the development of agricultural lands at Marconi Point on O'ahu's North Shore renewed their efforts to compel the Honolulu Department of Planning and Permitting to provide documents that they argue may prove their claims that corruption — not a genuine desire to protect the Special Management Area — was at the root of their permitting delays.

Attorneys representing the companies in a federal lawsuit against the DPP filed a motion to compel on September 25. The city filed its opposition on October 10.

On October 18, counsel for both sides signed a stipulation to extend to November 14 the deadline for the companies to respond. The city was expected to produce a significant amount of the requested documents by October 31, which it did.

According to a November 14 memorandum in support of the September motion to compel, attorneys for Makai Ranch, LLC; Marconi Farms, LLC; RCA Trade Center, Inc.; and MP Unit 21, LLC argued that what the city had provided was incomplete.

"Plaintiffs' theory of the case is that Defendants refused to approve Plaintiffs' applications for building permits, and agricultural and roadway subdivisions, after Plaintiffs refused to pay 'consulting fees' to William Wong. Wong was paying bribes to Defendants' employees, and when Plaintiffs refused to pay, Wong used his influence to cause Defendants' employees to delay Plaintiffs' project. Defendants now claim that the reason for the delay is their determina-

tion, after issuing exterior building permits for Plaintiffs' agricultural warehouses, that an SMA permit would be required to complete interior construction. Plaintiffs believe that Defendants' change of position is pretextual," the memorandum states.

(It should be noted that the original lawsuit filed in May 2023 by the companies argued that they had vested rights to building permits and for roadway and agricultural subdivision approvals. However, the court later dismissed the building permit claims, among other things, and on June 24 of this year, the companies and the city filed a stipulation that included the dismissal of the companies' building permit claims and the city's withdrawal of its motion to dismiss the complaint.)

In its complaint, the companies asked the DPP for copies of all documents and communications it shared with the FBI and/or other federal or state investigative law enforcement agencies regarding investigations into Wong and DPP employees Wayne Inouye, Kanani Padeken, Jocelyn Godoy, Jason Dadez, and/or Jennie Javonillo.

"Each of these individuals were a target of the federal corruption investigation, and eventually pled guilty and/or were convicted for bribery in the course of their employment with Defendants (or in the case of Wong, in the course of his interactions with Defendants). As a result, Plaintiffs believe it is *highly probable* that DPP has documentary evidence in its possession or control that led to the convictions, and that evidence must have been turned over for the FBI as part of its investigation.

"The outstanding documents relate to communications, such as e-mail correspon-

continued on page 12



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Marconi Updates *continued from page 11*

dence between Defendants' former employees and Wong, which would tend to connect Defendants' convicted former employees and Wong to Plaintiffs' project," the memorandum states.

The day after the companies renewed the motion to compel, all parties in the case submitted a proposed joint stipulation with the court to "continue discovery and dispositive motions deadlines."

As later directed by the court, the parties on November 25 jointly requested that the court push the trial date from May 19 to September 1, "or as soon thereafter as the Court's calendar allows, and extend all pre-trial deadlines which occurred after November 18, 2024, based on the new trial date."

The non-jury trial is now set for August 25. The new deadline to file dispositive motions is March 28. A settlement conference is scheduled for April 29.



Historic Structures

Last month, we reported on documents provided by the State Historic Preservation Division regarding compliance with a Memorandum of Agreement that was required as part of a \$7.8 million USDA-backed loan for several large warehouses at Marconi Point.

Those documents showed that the terms of the MOA — designed to protect the contributing resources of the Marconi Wireless Telegraphy Station historic district — have not been complied with. Even so, the current owner of those resources, which include four buildings, proceeded to renovate them without necessary approvals from SHPD or the Honolulu Department of Planning and Permitting. In the process, the roof of the large powerhouse building collapsed.

The DPP issued notices of violation last year for the unauthorized work, but so far, SHPD has issued none.



The historic Marconi Wireless Telegraphy Station buildings (right) and the RCA Trade Center (left).

CREDIT: PETER FOWLER/ENDURE FILMS.

The MOA requires that one of its deliverables, an interim stabilization plan, be completed before the DPP issues any certificates of occupancy for seven of the eight warehouses that make up what is known as the RCA Trade Center.

According to an attorney for the companies that own the warehouses, they do not plan to prepare such a plan for the historic structures. Even though they signed the MOA, they transferred their obligations to meet its requirements to the new owner of the lands on which the historic structures sit.

That new owner, Greystone HI Investments, LLC, is working on resolving the situation with the DPP and SHPD, according to its attorney, Kalani Morse.

Morse reported in an email to *Environment Hawai'i*, "With respect to the notices received from DPP, Greystone's architectural and compliance teams have been working with DPP to ensure compliance and resolution of the pending notices of violation. Given the encouraging progress made thus far on our end, DPP recently indicated that there are no immediate timing concerns with respect to the repairs being made and the permit work in progress. ...

"With respect to the MOA, Greystone's team has also been working directly with SHPD to determine how to best memorialize

the historic restoration work on the structures and finalize approvals for the restoration work in progress."

He added that Greystone and its owner, Sushil Garg, "are committed to restoring the Marconi station back to its former historic glory, in accordance with all applicable standards and in consultation with all the relevant agencies and organizations that were parties to the MOA.

"With respect to certificates of occupancy for RCA Trade Center and their construction and MOA compliance obligations, we are not privy to those details. Our limited understanding is that things are on track and that completion of their construction is delayed pending their litigation with the City and County over SMA permits that are now being required in the middle of construction. We do not possess any information regarding their lawsuit, their dealings with DPP, the agencies review of their MOA compliance obligations, or the status of their certificates of occupancy."

Questions to SHPD about the status of the ISP, violation investigations, and discussions with Greystone on remedies did not receive a response by press time.

—Teresa Dawson