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A Contested Contested Case

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua`a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

Article XII, Section 7 of the Hawai`i Constitution leaves no doubt as to the rights of native Hawaiians. But exercising those rights does not always come easily.

A recent opinion of the Intermediate Court of Appeals spells out just how far the Board of Land and Natural Resources has fallen short of the mark in carrying out its constitutional obligations to native Hawaiians. Not only did it incorrectly place upon them the burden of proof in a challenge to a permit award, the ICA found, it then failed to respect their property interests when it denied them a second contested case.

While the events in question occurred more than four years ago, the problems noted in the ICA opinion must not be allowed to stand.

IN THIS ISSUE

ICA Vindicates Hawaiian Group's Challenge Of Permits Granted to Archaeological Firm

A challenge to permits allowing a consulting company to conduct archaeological activities in Hawai'i was upheld last month by the Intermediate Court of Appeals. The decision by the ICA reversed the decisions of a Maui judge in cases brought by the nonprofit group Mālama Kakanilua and two individuals, Clare Apana and Kaniloa Kamaunu – collectively, Mālama.


Clare Apana

The appellants had participated in a contested case hearing on a 2020 permit sought by Archaeological Services Hawai'i, Inc. (ASH). In February 2021, the board adopted the hearing officer's recommendation. Then, two months later, the board approved a 2021 permit to ASH, rejecting a contested case request made for that permit by Mālama.

While the ICA opinion is a rebuke to the Board of Land and Natural Resources, it has little practical effect, since the two permits that were challenged have expired.

However, it sheds light on an episode – or series of episodes – that calls into question the interest or ability of the State Historic Preservation Division (SHPD) of the Department of Land and Natural Resources and the BLNR to carry out their statutory duties to respect and protect the constitutionally protected rights of Native Hawaiians.

The Contested Case

For years, Mālama Kakanilua and its members have been concerned over the disturbance of Hawaiian burials by housing, hotels, and other commercial developments in Central Maui. These include the Grand Wailea resort and on the Central Maui sand dunes, a golf course, a Safeway store, and the Maui Lani subdivision, among other things. Often these developments have employed ASH to carry out the archaeological surveys and subsequent monitoring.

Concerned that the archaeological monitoring carried out by ASH was insufficient, in September 2018, Mālama Kakanilua, Apana, and Kamaunu asked SHPD to grant them

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Mālama Kakalinua protest signs at a construction site on the Central Maui dunes. CREDIT: MĀLAMA KAKANILUA.

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NEW AND NOTEWORTHY

Water Commission Nominees: After months of controversy, Hinano Rodrigues has withdrawn his nomination to fill the loea seat on the Commission on Water Resource Management from consideration by the state Senate.

The loea seat must have "substantial experience or expertise in traditional Hawaiian water resource management techniques and in traditional Hawaiian riparian usage," according to a Department of Land and Natural Resources press release.

Last October, Gov. Josh Green nominated Rodrigues, a former employee of the state Historic Preservation Division and a close family friend of Maui developer Peter Martin.

Many, especially people concerned with water rights for traditional and customary Hawaiian practices, criticized the nomination for being illegal and political. Earthjustice filed a lawsuit against Green on behalf of some of them.

According to a press release from Earthjustice, after Rodrigues's withdrawal, "the Green Administration announced that a third nomination process would be conducted to produce yet another illegal list of nominees. Kalo farmers and other kia'i wai practitioners from across the Hawaiian Islands called foul once again. The governor's office received hundreds of phone calls, emails, and direct messages over various social media platforms demanding that the governor name someone from the original nomination list.

"The law does not allow a governor to repeat the nominating process over and over, like a magic 8 ball, until he receives a candidate to his liking. … This two-step nomination process is meant to ensure that management decisions are not influenced by the wants of the politically well-connected," Earthjustice attorney Harley Broyles said in the press release.

After Rodrigues' withdrawal early last month, Green announced that he would be nominating Hannah Springer to fill the loea seat. Springer was one of those on the governor's original list.

Turtle Take: On March 26, the Western Pacific Fishery Management Council issued a press release stating that it would advise the Trump administration of the council's Endangered Species Act concerns. Those include proposed critical habitat designations for corals and the council's longstanding push to have the ban on indigenous harvest of green sea turtles lifted.

A green sea turtle swims in the waters off O'ahu. CREDIT: NOAA.

"The Council will request a review of these issues within the Administration's policy framework and [executive orders]. Council members supported efforts to rescind or revise unnecessary regulations, aligning with the Administration's focus on reducing regulatory burdens," Wespac said.

A day later, the state Department of Land and Natural Resources issued its own press release aimed at beefing up protection of Hawai'i's protected sea turtles, or at least making it easier for resource managers to pursue violation cases.

The news release included gory images of the remains of a green sea turtle stripped of its shell. Hawaiian green sea turtles are listed as threatened under the ESA.

The images came from a Facebook post, "which can't be verified for its veracity," the release states.

"The problem for federal and state law enforcement agencies is, the incident was not reported to them directly, which makes it difficult for officers to build a case and pursue prosecution. … The person who witnessed the dead, shell-less turtle is encouraged to follow-up by contacting either DLNR, FWS, or NOAA law enforcement to provide more information.

To report suspected violations: Download the DLNRTip App on your Apple or Android Smart Phone, or call the DLNR 24-Hour Hotline: 808-643-DLNR (3-5-6-7), the NOAA Marine Wildlife Hotline: 888-256-9840, or the FWS Hotline: 1-844-FWS-TIPS (3-9-7-8-4-7-7), or visit https://www.fws.gov/wildlife-crime-tips.

Quote of the Month

"[W]e simply don't have the resources to follow up to make determinations on why we haven't received a monitoring report after we approved the monitoring plan."

— Alan Downer, former State Historic Preservation Division administrator

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Editorial

Land Board Must Exercise Oversight of SHPD

o'ver-sight' (ō'vĕr-sīt), n. **1.** Watchful care; superintendence; general supervision; management. **2.** An overlooking or something overlooked; omission or error due to inadvertence.

An odd word, oversight. Its two meanings are the very opposites of each other.

In the case of the Board of Land and Natural Resources' oversight of the agency under its roof that is constitutionally charged with protecting Hawai'i's cultural and historic patrimony, only the second of these two definitions applies.

Perhaps no agency has been castigated by developers and planners more than the State Historic Preservation Division, whose foot-dragging in approving development proposals is legendary. SHPD is where plans go to die.

Less well known but equally significant, maybe more so, is the inability of SHPD to supervise the performance of archaeological firms entrusted with identifying areas and resources that are sacred to native Hawaiians and monitoring work that occurs in those areas.

SHPD's failure in this area was laid bare in seven days of testimony in a 2020 contested case hearing over the agency's award of annual permits to one of around two dozen archaeological firms that work in Hawai'i. Under SHPD rules, any archaeological firm that works in the state has to obtain a permit to do so, valid for one year. The only requirement is that the firm have on staff someone with at least a master's degree in archaeology.

As our cover story details, the SHPD administrator acknowledged he has no way of knowing whether the permitted firms are current with the reports that need to be submitted for each project they are involved with, since reports are generally required only after a project is completed.

Nor do members of the public – especially native Hawaiians – have any formal way of lodging objections to the award of permits to firms whose activities in the field have raised their concerns. In the three decades that *Environment Hawai'i* has been reporting on the Land Board, the issue of SHPD's approval of an archaeological firm's permit has been on the agenda for a board meeting just once: April 9, 2021. And that was only because the board needed to dispose of a contested case request involving a firm working on Maui and could hardly do so without at the same time voting on the issuance of an archaeological permit.

As the recent opinion of the Intermediate Court of Appeals makes crystal clear, the Land Board does have authority over SHPD. It should begin exercising that authority responsibly, and there is an easy way to begin to do this. Each year, the Department of Land and Natural Resources' Land Division presents to the board requests for renewals of the revocable permits it proposes to issue to tenants of state land. This gives both board members and members of the public the chance to ask questions or raise concerns about particular permits. SHPD could be required to do the same – present the Land Board with the list of archaeological firms wanting to be permitted to do work in the state the following year.

Of course, in the case of the revocable permits for tenancy on state land, there's the additional requirement that permittees be current on rent payments. At present, the only requirement for an archaeological permit is the name of a qualified archaeologist.

This, too, could be easily addressed. SHPD rules could be amended to add a requirement to the permit conditions that any firm seeking a permit submit status reports on every project it has been contracted to do work on. At the very least, such a requirement could inform SHPD if the firm has submitted the required reports within the specified time frames. A more stringent requirement would be to make permits contingent on archaeological firms being up-to-date with all required reports.

Until the Land Board exercises more oversight (sense 1) of SHPD, giving members of the public an opportunity to weigh in on the performance of the agency itself as well as the companies it allows to conduct archaeological work, the exercise of its constitutional obligations to protect native Hawaiian rights and resources will continue to be an oversight (sense 2).

One of several sites where native Hawaiian burials have been relocated near the Maui Lani Safeway. CREDIT: MĀLAMA KAKANILUA.

The seven long days of hearings in the contested case involving SHPD, Archaeological Services Hawai'i, and Mālama Kakanilua may still be viewed on the Land Board's YouTube channel. The ICA opinion of March 21 is available on the website of the Hawai'i State Judiciary: https://www.courts.state.hi.us.

Kakanilua *continued from page 1*

a contested case "on any consideration [of] ASH's request for amendment of its permit or application for a new permit from SHPD." The firm's failure "to ensure proper archaeological monitoring, handling of iwi, and professional qualifications of its staff caused injury to their constitutionally protected traditional and customary practices," they attested in a later lawsuit.

On October 3, SHPD denied their request, alleging they failed to identify "any property interest you may have in ASH's permit." The petitioners replied, pointing to language in their original letter describing their property interests as descendants of people who inhabited the islands in 1778 and as practitioners of traditions and customs whose practices would be affected by the proposed uses of the Central Maui lands.

SHPD did not respond to the group's request for reconsideration. On January 11, it issued a permit to ASH for 2019.

On February 5, 2019, Mālama, Apana, and Kamaunu appealed to 2nd Circuit Court, naming as defendants the SHPD administrator and ASH. Judge Joseph Cardoza issued a final judgment on June 28, requiring SHPD to hold the requested contested case.

The SHPD administrator did not hear the case. Instead, the Land Board undertook the proceeding. It appointed a hearing officer, attorney Lou Chang, who heard the case over seven days in September 2020. ASH was represented by Paul Horikawa. The petitioners had no legal representation.

The hearing, available for viewing on YouTube, covers a number of issues, including whether the ASH archaeologist of record, who worked full-time for the U.S. Navy on O'ahu, could fulfill duties as the archaeologist in charge of the Maui projects; the care with which contractors were required to follow prescribed practices; and ASH's compliance with reporting requirements.

Chang made his report in November, recommending denial of the group's request and award of the 2020 permit. In February 2021, the Land Board adopted his recommendation to deny the petitioners their request.

Once again, Mālama appealed to 2nd Circuit Court.

The 2021 Board Meeting

Meanwhile, ASH had applied for a 2021 permit. Mālama had already notified the DLNR that it would be asking for a contested case hearing on any decision to grant the permit.

On April 9, just two months after the BLNR adopted the hearing officer's recommendations, the agenda for the board meeting included an unusual item: SHPD's then-administrator, Alan Downer, was asking the board to approve issuance of a 2021 permit to Archaeological Services Hawaii. In the three-plus decades that *Environment Hawai'i* has followed Land Board actions, SHPD had not brought permits of this sort to the board for approval. The agenda did not include any mention of the group's request for a contested case. The SHPD submittal to the board referenced a contested case request only as a possibility, asking the board to "Determine any request for contested case. SHPD recommends denial." The request had been made October 24.

Before the board could begin discussing the merits of issuing the permit, deputy attorney general William Wynhoff acknowledged this omission. "I've been remiss and slow on the trigger here. There is a contested case [request], so before we do any discussion, the board should deal with the contested case request. My apologies."

Apana objected to the fact that the agenda did not mention the contested case request, stating that her testimony would have been different had she known this. She went on to argue the need for a second contested case, describing the earlier hearing as unfair. "You have not fulfilled your duty to protect our rights. … This particular firm does not proceed with following the law, showing reverence to sacred and historic property, and respecting people like myself who have every right to be consulted. They absolutely refuse to consult us," she said.

Noelani Ahia, a board member of Mālama and a recognized cultural descendent of the Central Maui sand dunes complex where ASH has done much of its work, described how evidence relating to ASH's performance had been given to the group only after the close of the contested case hearing, but still before the BLNR had voted to accept the hearing officer's recommendation.

"At the end of the contested case, the hearings officer asked Mālama Kakanilua to compile a list of reports that had not been turned into SHPD by ASH, putting them in violation," she said. She went on to describe the difficulty she had acquiring such a list.

"I sent an email on September 30 to the SHPD library. In the past, before COVID, I could just go to the SHPD library on Maui… and I could pull whatever documents I needed, but COVID posed a huge barrier to that. On top of that, at the same time Maui's librarian retired. So I sent an email to the DLNR main librarian and she responded back very quickly."

Ahia said she was told she could have an appointment on October 7, but five days before that, she was informed that SHPD had decided her request would be treated as a request under the state's Uniform Information Practices Act. "They wanted to charge us thousands of dollars for these documents," she said.

Eventually, the group was able to review the documents, she continued, at which time they came across a letter signed by Alan Downer to ASH stating that 35 reports were outstanding and had never been turned in.

"Now, mind you, it may sound like it's just a report, but when we go look at another project that's going to be built and the current archaeologist tells us they found nothing during their [archaeological inventory survey] and that was 10 years ago, then they did sand mining, we're like, yeah, but where's the report? How do we know what was found during monitoring if there's no report?

"This is why the reports are important. They inform the work that goes forward. And so not having those reports is significant to us as a community trying to protect burials."

Ahia said that the letter was brought to the board before the board made its decision to accept the hearing officer's findings, "but that evidence was not allowed to be argued."

No one on the Land Board followed up with questions about the missing reports to Downer, ASH owner Lisa Rotunno-Hazuka, or ASH attorney Paul Horiwaka, although all were attending the meeting.

The motion to deny the contested case request was made by board member Chris Yuen. "What we've heard mostly on this contested case request is that folks are dissatisfied with the result of the first contested case hearing," he said in arguing for his motion. "They have a judicial appeal on that, so that gives them due process with respect to how the first contested case hearing was conducted. … The interests of people who are concerned about iwi, which I greatly respect and are very important, are protected by the SHPD, the burial councils, and all those legal means that exist to protect iwi that are not being – are not dealt with by the question of having contested case hearings over the licensing … of archaeological firms." The board approved the motion unanimously.


Lisa Rotunno-Hazuka

Discussion on the request by SHPD to award ASH an archaeological permit for

2021 went over much of the same ground covered in the contested case discussion.

When time came for board action, no member seemed eager to make a motion. Finally, Jimmy Gomes moved – "with reservations" – to approve the staff recommendation that ASH receive an archaeological permit for 2021. When the final vote was in, only member Kaiwi Yoon withheld his approval, abstaining.

An Appellate Rebuke

The appeal of the contested case outcome and the appeal of the award of the 2021 permit to ASH were both heard by 2nd Circuit Judge Kirstin Hamman.

On January 6 and February 8, 2022, she issued her decisions in the cases, upholding the Land Board actions in the contested case and in the issuance of a new ASH permit. Mālama then brought both cases to the Intermediate Court of Appeals, naming as appellees the Land Board and the SHPD administrator, and naming ASH as defendant-appellee.

It took three years, but last month, the ICA issued its opinion. It rejected Mālama's argument that SHPD, and not the BLNR, should have properly heard the contested case. It also did not agree with the group's contention that the BLNR exceeded its authority when it approved the 2020 permit. On a third point – that ASH's principal investigator was derelict – the ICA once more did not concur.

But it did conclude that "(1) in the contested case … BLNR erroneously placed the burden on Mālama to prove ASH LLC failed to comply with its permit conditions for calendar years 2015-2017; and (2) Mālama were entitled to a contested case on ASH LLC's 2021 permit because of BLNR's procedural error in the contested case for the 2020 permit."

"Mālama argue – and BLNR, the administrator, and ASH LLC don't contest – that Mālama have a property interest in protecting iwi kupuna (native Hawaiian burials) under article XII, section 7 of the Hawai'i Constitution. And ASH LLC's activities under an archaeological permit could impact Mālama's constitutionally protected interest," the ICA found.

The group's opposition to ASH's permit "alleged that 'ASH fails to perform its archaeological services work in compliance with the conditions set forth'" in SHPD rules, specifically the rules requiring timely reports. In the contested case hearing, Downer testified that SHPD did not have a way to ensure permittees complied, while Lisa Rotunno-Hazuka, owner of ASH, asserted that even if ASH was delinquent in some reports, it was not the only archaeological consultant remiss in this regard.

The hearing officer concluded: "The record presented in this case reflects that reports have been submitted to SHPD by ASH and ASH acknowledges that some reports have not been submitted or were submitted late. The record in this case does not present information sufficient to identify, distinguish, or establish which kind of report(s) were submitted or which kind of report(s) have not been submitted."

The appellate court took note of the fact that, as Noelani Ahia had informed the Land Board, SHPD did not provide Mālama with a copy of the letter to ASH detailing overdue reports until weeks after the hearing officer had made his recommendation. The court's opinion provided details. The March 21, 2018, letter to ASH principal investigator, Jeff Pantaleo, followed up on an earlier letter from SHPD to ASH on February 2, that requested "information regarding the status of each SHPD-approved archaeological monitoring plan (AMP) prepared under your SHPD issued archaeological permit for the period 2015-2017.'"

The March letter included a spreadsheet listing 37 archaeological monitoring plans that had been submitted but "for which SHPD has no record of receiving an archaeological monitoring report (AMR)." For each of these, SHPD was asking about the status of fieldwork, whether the project moved forward without ASH conducting archaeological monitoring, and, if the project was completed, documentation of when the ARM report had been submitted for SHPD's review. A second spreadsheet inquired about the status of revisions SHPD had requested to two draft monitoring reports.

In the contested case hearing, Downer had testified that reports were the principal means by which SHPD determines if archaeologists are following the law. The court noted, this, quoting from the hearing transcript: "He then said, 'the problem we have is that for the most part we are never – we don't know when the work is completed. So we know every year a number of projects which we never get reports on, we don't know whether that's because the report was never prepared or the project never moved forward, and we just – we simply don't have the resources to follow up to make determinations on why we haven't received a monitoring report after we approved the monitoring plan."

Downer continued: "At the moment there's very little consequence. As I said, we have very little capacity to tell whether a report is simply overdue or whether the underlying project that would have led to the monitoring never occurred."

"On this record," the ICA wrote, "we conclude the hearing officer – and thereby, BLNR – erred by placing the burden on Mālama to prove that ASH LLC did not comply" with its permit conditions.

"BLNR has an affirmative duty to preserve and protect traditional and customary native Hawaiian rights, … such as protecting iwi kupuna. BLNR acknowledges that 'if ASH violated the terms of its permit, the Board still retains the discretion to revoke it or not issue a new permit.'"

Yet, "After being made aware of SHPD's March 21, 2018 letter to ASH LLC questioning the status of 39 archaeological monitoring reports for 2015-2017, BLNR should have required ASH LLC to prove its compliance with [SHPD rules] for at least those three permit years, or to show good cause for noncompliance. Having not made that inquiry, BLNR breached its affirmative duty to preserve and protect traditional and customary native Hawaiian rights go protect iwi kupuna."

For these reasons, the ICA concluded that the contested case order "was made upon unlawful procedure inconsistent with BLNR's duty" under the state Constitution and statutes.

'Unlawful Procedure'

The ICA opinion then goes on to discuss the BLNR's denial of a contested case hearing for the 2021 permit for ASH.

After recapping the discussion at the BLNR meeting where the contested case hearing request over the 2021 permit was denied, the ICA reviewed the circumstances under which contested cases are mandated.

"BLNR must hold a contested case hearing when required by law," the ICA noted. "Once a party shows it has a constitutionally protected property interest, the second step involves a balancing test to determine whether a contested case is required to protect it."

That balancing test involves weighing the private interests that will be affected and the risk of an erroneous deprivation of the interest, versus the government's interest, "including the burden that additional procedural safeguards would entail."

"Here," the ICA opined, "the contested case order was made upon unlawful procedure inconsistent with BLNR's affirmative duty under [Article XII, Section 7 of the Hawai'i Constitution]. Preventing another erroneous deprivation of Mālama's constitutionally protected property interest outweighs the burden another contested case may place

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Nani Mau Gardens: Half a Century Of Special Permit Amendments

In October 1973, the state Land Use Commission approved a special permit allowing for a commercial arboretum on about 23 acres of land in the state Agricultural District in the Panaewa area about three miles south of Hilo, on the eastern coast of Hawai'i Island.

More than 50 years later, the LUC is questioning the extent to which the series of garden owners have complied with conditions attached to the permit. It has asked for a status update from the latest owners at the commission's scheduled April 23 meeting.

At the time the LUC issued the first permit, the arboretum had already been developed but a special permit was needed since what was being proposed was a commercial activity not specifically allowed under the state land use law, Chapter 205 of Hawai'i Revised Statutes. The owner, Makoto Nitahara, wanted to charge admission to the arboretum and also sell agricultural products on site.

The county Planning Commission had already given its approval to the request but had imposed a condition limiting sales to agricultural products only.

Nine years later, Nitahara, operating his arboretum as Nani Mau Gardens, sought to amend the special permit in order to have "individual shops for the sale of locally produced agriculturally-oriented products, a small gift shop, and a snack shop." This, Nitahara said, would "provide an outlet for the display and sale of handiwork of local craftsmen, and provide a central location in which tourists can observe various local products." At the time, the only structures identified on the property were a single-family house, a garage, and a 3,840-square-foot metal building that housed the arboretum office.

The LUC approved the requested amendment but specified that "cooking food on premises and unrestricted sale of tourist items are not reasonable and unusual uses of the Agricultural District" and would not be allowed under the special permit.

That was the camel's nose under the tent.

In 1987, Toyoma Garden Hawai'i Corporation, the new owner of Nani Mau Gardens, came in with another amendment request. Somehow, the metal building had grown to 5,000 square feet, which the owner was seeking permission to increase to 10,360 square feet, including a second floor, and the number of garages had doubled to two.

Also included in the permit amendment request were conditions allowing the sale of "limited types of cooked or processed food on the premises…similar to the type of cooked and/or processed food offered at a '7 Eleven' store."

The county Planning Commission recommended approval of the amendment. On February 18, 1988, the LUC issued its approval of the amendment. A "snack facility" may be operated during business hours – but not a kitchen or restaurant – so long as the owner "satisfies all applicable county and state sewage, health, drainage, water, and building requirements." In addition, the owner was to provide the state and county with annual progress reports "until all of the conditions of approval have been complied with."

The very next year, the county and state were presented with yet another request to amend the special permit – this time by adding some 33 acres to the operation. The expansion area would include an equestrian trail and horse stables, a museum, a new pavilion, an area for picnics and barbecues, and an area where produce would be sold. The owner also wanted to delete the restrictions on food sales and to be allowed to open a restaurant on the second floor of the expanded main building, which was under construction at the time.

The restaurant, seating up to 120 guests, would be an extension of the current operations of the garden, which, the owner said, included "special ceremonious functions like a wedding." The dining facility would be available for "post-ceremonial gatherings." "Local patrons" would not be excluded, the application stated, but "it should be emphasized that the principal market of this restaurant is group tours."

Hours of operation for all the facilities would remain unchanged: 8 a.m. to 7 p.m.

In anticipation of increased traffic, the owner was required to improve the intersection of Makalika Street and the Belt Highway.

On October 31, 1989, this third amendment to the original special permit was approved by the LUC.

Throughout the 1990s and into the 2000s, the amendments continued to come:

- **Fourth amendment, 1991:** The owner sought to add a leased five-acre parcel to the permit area through 2000, allowing for stockpiling and storage of construction-related materials on three acres but also two acres of forest trails; expand hours of operation to 11 p.m.; increase the area where retail sales could take place; open up a second access onto the county's Makalika Street "for special events parking;" and expand the main building to 25,000 square feet. The final amendment approved by the LUC allowed the five-acre addition; expanded hours of operation only on occasions where special events were occurring; and agreed to the requested larger commercial areas.
- **Fifth amendment, 1993:** This time the owner wanted extended deadlines for performance of conditions of previ-

Kakanilua *continued from page 5*

on BLNR. Mālama were entitled to a contested case hearing on the calendar year 2021 permit application under the circumstances presented here. The circuit court was wrong to affirm BLNR's denial of Mālama's request for a contested case hearing."

In conclusion, the ICA found that the Land Board "erroneously shifted the burden to Mālama to prove that ASH LLC didn't comply with its … permit conditions for calendar years 2015-2017. That was not consistent with BLNR's affirmative duty to preserve and protect traditional and customary native Hawaiian rights to protect iwi kupuna… Because of this, Mālama were entitled to a contested case on ASH LLC's calendar year 2021 permit application."

— Patricia Tummons

ous amendments, including landscape buffers and road improvements. The owner cited "unfavorable economic conditions" in asking for the time extensions, which were granted.

- **Sixth amendment, 1994:** The owner sought to remove the leased five-acre lot from the permit area; extend by five years the time to make the intersection improvements; add a nine-hole pitch-and-putt golf course on at least 12 acres of the garden; and delay other improvements. The landowner also stated that he was proposing rezoning part of the expansion area of 33 acres into one-acre ag lots that could be sold for residential development, providing capital to carry out the other improvements that had been delayed. The time extension was granted. The owner was told to remove the "pitch-and-putt" area from the special permit area and to remove the one-acre lots from the permit area as soon as the rezoning was approved.
- **Seventh amendment, 1998:** This deleted the 30 or so acres that were at one point intended to accommodate the pitch-and-putt course and the development of one-acre house lots, since rezoning for that purpose was accomplished.
- **Eighth amendment, 1999:** The landowner was requesting once more a time extension for the improvements to the intersection of Makalika Street and the Belt Highway. Once more, a five-year extension was granted by the LUC in August 1999. Less than four months later, Toyoma Gardens sold the property to Nani Mau Inc., owned by Kenneth Fujiyama.
- **Ninth amendment, 2005:** This deleted altogether the condition to complete improvements to the intersection of Belt Highway and Makalika Street. It also allowed operations to extend to 11 p.m. for special events and limited commercial activities to the 25,000-square-foot building plus coin-operated machines and "mobile vendors."
- **Tenth amendment, 2009:** This amendment was to "convert the existing salon building" and an existing maintenance building to allow their use by a charter school. The existence of the beauty salon on the property was not authorized by any prior amendment nor was the construction of the maintenance building proposed for school use. (Records maintained by the Department of Commerce and Consumer Affairs suggest the salon began operations in 2004 and went out of business sometime in 2009.) The Windward Planning Commission recommended approval, conditioned on operation of the charter school limited to hours between 7 a.m. and 4 p.m., with exceptions allowed for special school events, which were allowed until 10 p.m.

A non-working fountain and pool.

That tenth amendment was the most recent, but it does not reflect many changes that have occurred on the property since then. In 2011, Fujiyama – unable to keep creditors at bay for the several properties he or his companies owned, including the Naniloa Hotel in Hilo and the franchise for the Volcano House in Hawai'i Volcanoes National Park – lost the gardens to Glory Nani Mau, which acquired the 22 acres where the buildings and gardens are sited for $2.2 million. The principal of Glory Nani Mau is Yee Shum Severson, also known as Helen Koo.

In 2016 Connections charter school relocated out of the garden buildings. In 2018, the buildings were occupied by Kua o ka La charter school, whose campus in Puna had been consumed in the lava flows. Connections had been paying Glory Nani Mau at least $10,000 a month from July of 2012 through the end of 2015, according to a lease recorded with the state Bureau of Conveyances. No similar lease has been recorded for the occupancy of Kua o ka La.

Also, at some point following the tenth amendment, a church took up residence on the grounds – a use that would seem to require yet another amendment to the special permit. The church, Overcoming Faith Center, continues to hold services in garden buildings. One of its pastors, Seaula "Jr." Tupa'i, ran for lieutenant governor on the losing Republican ticket in 2022. In 2024, he was a candidate for Hawai'i County mayor, receiving 11 percent of the primary vote.

Planning consultant Sidney Fuke, in a letter to the county planning director last month, said that the church used "an existing 3,500+/- square foot structure" and held services several times a week. He acknowledged that the church's use of the property is not authorized under the special permit. The landowner "has a month-to-month rental arrangement with the church and has informed the church that its use will be terminated or suspended upon receipt of notice of violation from the county."

Jeff Darrow, the county planning director, was asked whether he intended to notify Nani Mau Gardens Group that church use of the property was not authorized. No reply was received by press time.

In 2022, the main garden area was sold for $4.275 million to Nani Mau Garden Group, whose principal, Zengdi "Cindy" Cui, is an executive with an investment managing company, Launching Pad, LLC. A few months later, the 33-acre as-yet undeveloped area to the north of the garden sold to 521 Makalika Estates, for $1.15 million. The two member/managers of that LLC are Cui and Severson.

— Patricia Tummons

New Owner Wants to Rezone and Subdivide, Then Obtain New Special Permit from County

For more than 15 years, the regulatory environment under which the Nani Mau Gardens operated has been unchanged. In recent months, however, activity to change that environment has started up at a pretty fast clip.

At present, the 23 acres that make up the garden campus is split zoned. Just over 10 acres of the site – the easternmost portion – are zoned A-1a, where any future subdivision cannot create agricultural lots smaller than one acre. The remaining 13 acres, which includes the buildings used by the Kua o Ka La charter school, is zoned A-10a.

Last August, the non-profit organization that supports the charter school, Hoʻoulu-Lahui, applied to the county to rezone the 13 acres to A-5a. The application included a map that depicted a proposed subdivision of the 13-acre portion of the garden zoned A-10a into two smaller lots. One lot, of five acres, would house the school. The remaining eight-acre lot would continue to house the garden buildings, a building used by a church, and the several gazebos and other areas used for the special events the garden frequently hosts.

There are, of course, another 10 acres making up the garden lot. These were placed into the A-1a zone in 1995, when the garden owner was hoping to subdivide and convert the area into residential "ag" lots. According to the application, this rezoning "went stale after conditions of the [rezoning] ordinance were not met." "The current project does not propose any use of the A-1a zoned area," it continues.

After the rezoning and subdivision, the application states, the school-affiliated non-profit would purchase the five acres from Nani Mau Garden Group, LLC. Kua o ka La (KOKL) "currently leases the 5-acre portion of the subject property containing the school facilities. … The landowner … has entered into a legally binding agreement with Hoʻoulu-Lahui to subdivide the property … and then sell the approximately 5-acre parcel to Hoʻoulu-Lahui. … The requested change of zone from A-10 to A-5a is necessary to effectuate that agreement," according to the application.

The Hawai'i County Windward Planning Commission heard the rezoning proposal on March 10. Dozens of letters of support were submitted, including from the mayor and other elected representatives. A number of people testified in person, all in favor. The commission voted unanimously in support of the proposal, which now goes before the County Council.

The building used by the church on Nani Mau grounds.

Should the council approve the rezoning, the subdivision be effected, and the school-affiliated nonprofit purchase the five-acre parcel, the state land use law still requires the school to obtain a special permit. Schools in the agricultural district are not called out as a specific allowed use and need therefore to obtain a special permit.

But no longer would the LUC be the issuing agency for the special permit. Special permits for areas that are 15 acres or more, such as that for Nani Mau Gardens, have to be issued by the Land Use Commission. But those for areas less than that can be issued by the counties. Until and unless the rezoning and subdivision are a done deal, the operation of the garden and the school are allowed only under the terms of the special permit first issued by the Land Use Commission in 1973. The only way out of the special permit requirement would be to apply for a boundary amendment, moving the land out of the state Agricultural District and into the Urban or Rural district.

One of the conditions of the existing special permit is the filing of annual reports. In recent months, the LUC has been trying to identify those holders of permits and owners of lands that have been redistricted who are delinquent in providing those reports.

On January 29, the LUC's executive officer, Daniel Orodenker, sent a letter to Kenneth Fujiyama of Nani Mau, Inc., informing him that the required annual reports for the special permit issued in 1973 had not been filed since 2011. The LUC was not aware that Fujiyama had lost his ownership interest in the garden more than a decade ago.

Sidney Fuke, planning consultant for the current landowner, replied to the LUC letter on February 6. Fuke argued that under one of the conditions of the tenth amendment to the original special permit, the county planning director could, upon a finding that the permittee had complied with all conditions, do away with the annual reporting requirement.

"Relative to this requirement, [Nani Maui Gardens Group] was under the understanding that an annual progress report was no longer needed," Fuke wrote, referring to a letter dated May 16, 2011, from then-county Planning Director B.J. Leithead-Todd to then-LUC executive officer Orlando Davidson.

On February 14, Orodenker responded, stating that the condition did not give the county planning director "power to waive or remove" the condition. "That decision," he continued, "rests with the state Land Use Commission through a petitioner-generated motion to modify or delete conditions. This will require authoritative evidence from the appropriate state and/or county agencies substantiating compliance with each of the conditions. Until such time as a motion to modify or delete conditions for this docket has been approved, compliance with all of the conditions of the special permit, including an annual progress report, are still required as the Land Use Commission has the obligation to assure Decisions and Orders are being complied with."

The LUC has scheduled a status update on the special permit for April 23.

— Patricia Tummons

BOARD TALK

Land Board Grants 65-year Lease For O'ahu's First Resilience Hub

Last month, the Department of Land and Natural Resources's Land Division recommended granting a 10-year lease for nearly five acres in the back of Hau'ula to the nonprofit Hui O Hau'ula.

The organization has spearheaded efforts spanning more than a decade to build a resilience hub in the community that could also serve the rest of Ko'olau Loa, which is extremely vulnerable to natural disasters, with the single, coastal road connecting the small towns to the rest of the island eroding in many places.

According to a Land Division report to the Board of Land and Natural Resources, Ko'olau Loa is the only district on O'ahu that lacks a designated hurricane shelter. The closest one is Kahuku Elementary School, which sits within an area designated as having a minimal flood hazard.

"Therefore, there is a compelling need for the Ko'olau Loa community to have the critical lifelines that can be provided through the resilience hub: safety and security, food, water, shelter, health and medical services, energy, communications, transportation and waste management technology," the report states.

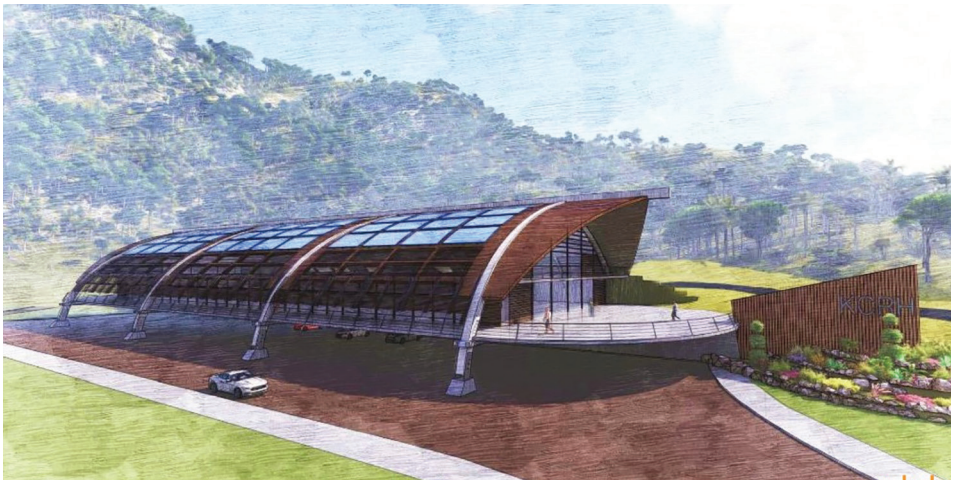
In March 2023, the Land Board granted the Hui a three-year lease for "community services and activities purposes." The lease helped the Hui raise funds to build the hub and also gave the group time to complete the state's environmental review process.

An environmental assessment for the hub — including a three-story shelter and structures for storage and community activities, among other things — was completed last July.

"Through their hard work, HOH has applied for and obtained several grants for the Resilience Hub totaling approximately $6,000,000 from various organizations and government entities. In addition, with the help of a grant from the [City & County of Honolulu], a 40-foot container was placed on-site that is filled with 1,500 five-gallon buckets (family-size) of dehydrated food that is stored onsite for emergencies/disasters. HOH has applied for and been awarded several federal grants and is awaiting the status of the award amount. However, recent changes at the federal level have created uncertainty as to whether HOH will receive funding," the Land Division report continues, referring to widespread efforts by the Trump administration to slash federal funding.

At the Land Board's March 28 meeting, Hui executive director Dotty Kelly-Paddock testified that the group was very focused on constructing a building that can protect people from Category 5 hurricanes.

"This property is so perfect for us," she said of the state parcel located well out of most flood zones. Although a portion of the property would be vulnerable to an "extreme tsunami," the shelter will be constructed in a safer, mauka corner of the lot, according to the EA.



An artist's rendering of the primary hub building. CREDIT: ENVIRONMENTAL ASSESSMENT.

"In the meantime, we're also going to be growing agroforestry there for our communities" and a medicinal garden, as well as building traditional Hawaiian hale that have already been permitted by the city, she said.

"With all the disruption in Washington, we just lost our 2025 earmark, which was another $5.5 million. We applied for a [2026] earmark. Hopefully, we can get that and continue the construction, but a long-term lease is really critical when working with funders," she said. She asked that the board make the lease effective as soon as the 10-year lease documents are completed and not wait until the three-year lease expires next year.

"Now is a very critical time to say to funders we have a long-term lease, a 10-year lease. They look at that as part of deciding whether or not they will provide the funding," she said.

To this, Land Board chair and DLNR director Dawn Chang asked whether the Hui would need a lease for longer than ten years.

"I would say yes. … Eventually, we hope to have 60-65 year lease," Kelly-Paddock replied.

Chang noted that the title of the agenda item gave the board the flexibility to issue a longer-term lease.

Board member Kaiwi Yoon seemed to support the idea. "I think we all would support a longer-term lease given the instability of what's going on in Washington. Our nonprofits here need long-term dispositions in order to secure adequate funding."

Kelly-Paddock said that should the group's application for federal funding in 2026 fall through, the Hui still has HUD funding that's good for eight years.

"We will still have some funding to start the horizontal infrastructure in '26 … water, electric, and sewage," she said.

Board member Aimee Barnes made a motion to approve a 25-year lease. Member Vernon Char seconded the motion. After a brief board discussion that included asking Kelly-Paddock what term she would prefer, Barnes amended her motion to set the term at 65 years.

Board member Riley Smith noted that for a lease that long, the board typically requires a removal bond. "There might be some issues we might be concerned with," he said. He added that he was comfortable with requiring the posting of the bond not at the start of the lease, but after 20 years, and the motion was amended to incorporate that idea, as well.

The board unanimously approved the amended motion.

"This is so very helpful," Kelly-Paddock said. Because Hau'ula's will be the first resilience hub on O'ahu, she said that the Hui is documenting its steps on the way "to share the 'ike (knowledge) with other small communities."

At Kuaihelani (Midway Atoll), marine debris technician Ford Stallsmith carries a large piece of derelict fishing gear out of a dense seabird colony. CREDIT: ANDREW SULLIVAN-HASKINS.

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Nuisance Algae Complicates Debris Removal in Monument

The hard work of finding, hand-cutting, and removing the tons of marine debris that collect on atolls within the Papahānaumokuākea Marine National Monument has gotten harder with the spread of the nuisance algae *Chondria tumulosa.*

Discovered at Manawai (Pearl and Hermes Atoll) in 2016, the previously undocumented, mat-forming macroalgae has since been detected at Kuaihelani (Midway Atoll) and Hōlanikū (Kure Atoll). It's blanketed hundreds of acres of reef, "smothering vast swaths of coral colonies," according to a state Department of Land and Natural Resources website.

"When NOAA divers first detected the alga in 2016, it grew in low abundance, not yet widespread. In three years, the alga had grown into abundant mats of over 100,000 square feet each at Pearl and Hermes Atoll, outcompeting the species typically living in these ecosystems," a NOAA website adds.

"Researchers have not yet determined if *Chondria tumulosa* was introduced from another region," it continues, quoting the monument's deputy superintendent, Randall Kosaki, who asks, "Is it a native species that was just completely overlooked until it went berserk at one atoll, or was it an accidental human introduction from somewhere else?"

Because of this uncertainty, researchers aren't yet calling *C. tumulosa* invasive, "instead opting to call it a 'nuisance' species for its invasive-like qualities," the site states.

Although *C. tumulosa* has more recently been detected in the Marshall Islands, the alga has not yet been found in the Main Hawaiian Islands. And resource managers want to keep it that way.

According to an October 2024 DLNR summary of efforts, "A joint collaboration of federal, state, and private partners created a plan to test Chondria's ability to spread to the main Hawaiian Islands via marine debris removed from the monument." Experiments were done to see if the algae died if it simply dried out for long enough.

Since 2022, the nonprofit Papahānaumokuākea Marine Debris Project has received permits from the Board of Land and Natural Resources and the monument's management board to disentangle animals (Hawaiian monk seals, sea turtles, and seabirds) trapped in marine debris within the monument, and to remove the debris.

"Over the last four years, our organization removed over 1 million pounds of marine debris, 80 percent of which was derelict fishing nets," PMDP executive director and co-founder James Morioka told the Land Board last month, as it entertained a recommendation from the DLNR's Division of Aquatic Resources to issue a new permit to the organization for disentanglement/debris removal activities this year.

"When the fishing nets land on the coral reefs, it tends to suffocate the corals like a tarp on grass, so everything beneath will end up dying and will not provide shelter or food for fish that are really important to our native food web," he said.

Under this year's permit, his organization is expected to remove 100 tons of marine debris from the monument. In past years, PMDP brought the debris collected back to Honolulu, where it was burned at the H-Power plant.

"Currently, PMDP mitigates [the potential spread of *C. tumulosa*] by avoiding removing debris from areas with *C. tumulosa* growth and, when the debris is removed, thoroughly bleaching all of the material to ensure that no invasives are accidentally picked up and brought back alive to O'ahu. However, this is dangerous for the crew, as the sloshing of large amounts of bleach in containers mid-journey creates a potential chemical hazard to those working on the boats," the October 2024 DLNR summary states.

So far, researchers have not found a better way to kill the algae before PMDP makes its return trips back to O'ahu.

Morioka, who managed the debris removal projects in the monument before PMDP took over from NOAA, told the board that in years past, "If we identify the algae on the net or the surrounding habitat, we have to move to an alternative location, so we leave the net in place. Unfortunately, last year we disentangled and rescued two green sea turtles and had to leave the net in place. One of my biggest concerns is these nets will continue to trap animals and to kill animals and it's going to continue to disrupt the coral reef ecosystem and kill the coral reef beneath it. But it also serves as vector for spread. So once these fishing nests become loose from the reef, they become these floating masses of this invasive algae which can then get sucked into the current, convergence zones and bring it back to the Main Hawaiian Islands."

He assured the board that PMDP has a "rigorous biosecurity plan to ensure that this

The Papahānaumokuākea Marine Debris Project team atop the 70,800 pounds of marine debris they collected during their most recent mission at Kuaihelani (Midway Atoll). CREDIT: ANDREW SULLIVAN-HASKINS.

algae doesn't come back to our reefs."

Nets from the islands that are infected by the algae are removed and put into marine debris storage bins. The nets are bleached "at a 10 percent solution for four hours, because that's the only known [way] to kill this algae. Once the nets are treated, that there's absolutely no chance of this algae surviving, then

A coral skeleton peeks out from a *Chondria tumulosa* algal mat. CREDIT: TAYLOR WILLIAMS/UNIVERSITY OF HAWAI'I.

we neutralize and dilute this bleach solution, go three nautical miles offshore over one thousand feet deep … and we're able discharge the water overboard into Papahānaumokuākea assuming that it's neutralized. … Once it hits the big, deep ocean, it kind of dissipates and dilutes into nothing. But this method is extremely caustic and toxic for our staff. It's been really, really difficult to work with. But this is what we have to do to ensure and safeguard the Main Hawaiian Islands and so we're going to continue to do so," he said.

Even so, DAR had concerns about the biosecurity plans as originally proposed — especially with regard to work planned at Kuaihelani — and it had not yet approved a supplemental biosecurity plan by the time the board met to decide on the permit. DAR recommended dividing the plan covering this year's three removal trips into three parts, to allow some work to proceed if DAR was still reviewing a plan for one of the trips.

"This year at Kuaihelani, in April, we're proposing to remove nets for the first time with this *Chondria tumulosa* on there," Morikawa said.

PMDP is choosing to remove all debris at Kuaihelani, regardless of the presence or absence of invasive algae, "due to the hazards it poses to wildlife and the potential risk of nets remobilizing and drifting to another island or atoll," the organization stated in its responses to questions posed by DAR that were included in DAR's submittal to the Land Board.

Debris collected at Kuaihelani in April will be left on the atoll and not be brought to Main Hawaiian Islands for months, if at all.

Morioka said the nets will be either studied to identify other ways to kill the nuisance algae or be treated with bleach solution before being brought to Honolulu on a later trip.

For the debris that does get shipped back, "everything is craned off whole and trucked to H-Power Covanta to make sure it does not get into our waterways and conquer the reefs here," he said.

The Land Board unanimously approved the permit.

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Novel Survey in NWHI To Fill Chondria Data Gaps

In addition to approving the permit for marine debris removal in the Papahānaumokuākea Marine National Monument, the Land Board also approved a research permit to University of Hawai'i doctoral student Keolohilani Lopes, Jr. to conduct monitoring of *C. tumulosa* in the nearshore waters of Manawai and Lalo (French Frigate Shoals).

Later this year, Lopes and his team plan to deploy small Uncrewed Marine Systems (sUMS) — FloatyBoats and submersible RangerBots — to autonomously map *C. tumulosa* and collect images and other data.

Also, automated underwater covert cameras and hydrophones will be weighted and set in sandy areas surrounded by reefs six hours a day to "conduct presence absence videos of marine species and how they relate to the sound scape and disturbances. More specifically, this passive hydrophone/camera will be used to compare the soundscapes between areas with *C. tumulosa* and areas without," his permit application states.

Lopes plans to create a "ChondriaBot" program that will use computer vision technology to identify and map the algae.

"The extent of *C. tumulosa* is a major gap in knowledge for PMNM resource managers that the ChondriaBot program aims to fill. ChondriaBot systems rely solely on camera systems and other passive imaging technologies and will not directly contact the substrate. Ancillary data collected by these sUMS are salinity, depth, temperature, and eDNA collected on filter paper. The eDNA approach will consist of a passive filtration technique designed by UH graduate researcher, Patrick Nichols. These sUMS are developed by Queensland University of Technology, where it was rigorously field tested for several years, and adapted for this specific purpose by Mr. Lopes, for the University of Hawai'i at Mānoa," the application continues.

Opportunity and weather conditions will dictate where the equipment will be deployed, but the team anticipates mapping several acres a day near the fringing reefs, "where small boats find it too dangerous to access," it states.

While the Chondria detection program runs on "AI/Machine Learning" that has achieved 86 percent overall accuracy in computer model runs, Lopes plans to test the system by reviewing all of the video collected in the monument to "manually track *C. tumulosa* occurrences against the computer vision detections," it states.

— Teresa Dawson

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Supreme Court to Hear Decades-Old Seawall Violation Case

Was it just repair and maintenance of a nonconforming structure that didn't require permits? Or did Elizabeth and Michael Dailey build a brand-new seawall, using components of their old revetment, in violation of Conservation District regulations?

After bouncing back and forth from the Board of Land and Natural Resources to the lower courts, this matter will finally be decided by the Hawai'i Supreme Court, nearly 20 years after the Daileys fortified the revetment fronting their beachside lot in Mokuleia on O'ahu's North Shore.

On March 4, the high court accepted the Daileys' writ of certiorari.

In a June 2022 contested case hearing decision and order, the Land Board found that in 2006-2007, the Daileys demolished their old rock revetment and built a new seawall makai of the shoreline. The wall was taller and denser than the revetment had been, and as a result, would erode the beach more quickly, the board found.

The order called for the Daileys to be fined and required them to remove the seawall fronting their property.

The Daileys filed an appeal with the Environmental Court. In May 2023, Judge Jeffrey Crabtree granted a motion by the Land Board to dismiss the appeal.

He agreed with the board's argument that under state law, appeals regarding the Conservation District must go directly to the Hawai'i Supreme Court unless an exception is met. The 2022 contested case over the Dailey seawall "did not arise from a shoreline setback determination," he found, and, therefore, was not an exception.

In his findings of fact, Crabtree described some of the case history:

"Sometime in the mid-to-late 1960s to 1970, then-landowner Fred Dailey (husband and father respectively to Elizabeth Dailey and Michael Dailey, but since deceased), stacked loose rocks and boulders in a sloped configuration … on the makai side of the property to protect the Appellants' land and home from high surf damage and beach erosion.

Photos taken in July 2007 of the Dailey seawall and portions of the revetment that were not improved.
CREDIT: ENVIRONMENTAL ASSESSMENT FOR SHORELINE SETBACK VARIANCE.

"Approximately thirty-five years later, in 2005, winter surf and waves acting against the rock pile caused some of the rocks to fall onto the beach on the makai side of the revetment, triggering public complaints….

"Both an emergency conservation district use permit application by the Daileys and an enforcement case were opened with the Department of Land and Natural Resources' Office of Conservation and Coastal Lands," he wrote

The OCCL denied the emergency CDUP application. Among other things, the agency determined that the Daileys had failed to prove the revetment was a repairable, nonconforming use, legally built outside of the Conservation District.

But because the OCCL was not able to determine that the revetment *wasn't* a nonconforming use, the agency dropped its enforcement case.

"Beginning in 2005/2006, the Daileys engaged in self-help (i.e., without any approvals or permits) regarding the fallen rock pile. Rather than repairing the rock pile back to or close to its original condition, the Daileys built a new and substantially different seawall largely on top of the 1970 rock pile," Crabtree continued.

"Based on the Daileys' construction of the new seawall, which continued through 2006/2007, the OCCL opened a new conservation district violation case," he wrote.

He noted that in a prior appeal – which, in retrospect, should have been heard by the Hawai'i Supreme Court – the Environmental Court had found that "observations by staff supported the BLNR's finding that the highest wash of the waves in 2007 actually topped the seawall," and that "there was sufficient evidence to support the BLNR's finding and conclusion that the new 2006/2007 seawall was makai of the then-shoreline.

"This meant the new 2006/2007 seawall was within the conservation district and DLNR's jurisdiction. Therefore, a variance or other authorization from the BLNR was required before building the new-and-different 2006/2007 seawall," he wrote.

Attorneys representing the Daileys have countered in court filings that during the contested case hearing, the DLNR "failed to provide any expert or expert report that quantified or measured the revetment's height, depth, width, or dimensions." They argued that the Land Board's finding that the seawall work "ultimately caused major changes to the rock pile" was "completely unsupported," as was the board's finding that the 2006-2007 work was a new structure.

In a summary disposition order issued last May, the ICA upheld Crabtree's decision to dismiss the appeal. Although the Daileys asked that the courts transfer the case to the Hawai'i Supreme Court, the Environmental Court and ICA argued they did not have that authority.

The Daileys then appealed to the high court, which granted cert last month.

— Teresa Dawson