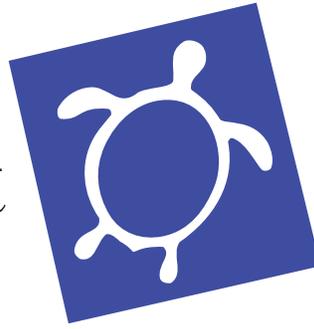


Environment



Hawai'i

a monthly newsletter

Judgment Day

It has been nearly three years since the United States attorney for the district of Hawai'i announced indictments in a case involving the corruption of a Hawai'i County housing staffer and the schemes of three other men to use the county's affordable housing credits to enrich themselves — to the tune of more than \$10 million.

Now, at long last, the three men who — unlike Alan Rudo, the county employee — did not plead guilty to charges of fraud are going to face a jury.

Our cover article looks at some of the pre-trial motions concerning the limits of what can and cannot be considered in the jury trial, set to begin May 12 in the federal courthouse of Honolulu.

Also in this edition: updates on water issues before the Public Utilities Commission and a look at recent Land Board decisions.

Before County Housing Fraud Trial, Motions Seek to Delimit Evidence

In the weeks leading up to the trial of three men accused of defrauding the County of Hawai'i by scheming to acquire and then resell affordable housing credits, the U.S. District Court for the District of Hawai'i has seen a flurry of pre-trial filings by both the federal prosecutor's office and the attorneys for defendants Paul Joseph Sulla Jr., Gary Charles Zamber, and Rajesh P. Budhabhatti. According to statements from the U.S. Attorney's office, their schemes netted them close to \$11 million.

Jury selection in the trial is set to begin May 12. Following that, all parties have agreed that the trial will probably last 14 days. The prosecutor anticipates it will take eight days for the government to make its case. Attorneys for the defendants estimate they will need about two days each.

Most of the pretrial filings have to do with efforts to limit the evidence or argu-

ments that will be argued at trial, or motions in limine.

Here's a rundown of several disputed issues.

Sulla's Reprimand

Can the government mention at trial the fact that the Office of Disciplinary Counsel reprimanded Sulla for lying in state court?

In early April, Sulla filed a motion in limine seeking to prevent the government from mentioning the reprimand he received from the Hawai'i Supreme Court's Office of Disciplinary Counsel (ODC) in March 2023.

Environment Hawai'i asked the ODC for a copy of the reprimand. The response: "Our office issues public and private reprimands. Only public reprimands are made available to the public. Our office is unable to even confirm the existence or non-existence of private

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The affordable housing in Waikoloa built on one of the properties acquired by the defendants using affordable housing credits. CREDIT: COUNTY OHCD.

Environment

Volume 35, No. 11



Hawai'i

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May 2025

NEW AND NOTEWORTHY

In Memoriam: On March 5, Jonathan Starr passed away in Woodstock, New York. He will be remembered in Hawai'i for his advocacy for clean water and clean government. He chaired the Maui County Planning Commission and the Democratic Party, served on the Commission on Water Resource Management, the Maui Water Board, and the community associations of Kaupo and Wailuku, among many other organizations.

Starr and his wife, Helen Nielsen, lived in the Kaupo area of Maui for two decades before relocating to New York.

We also remember Chuck Prentiss of Kailua, O'ahu, who passed away on April 14. Among his many contributions to the community, he was for years a member of the Kailua Neighborhood Board, past president

of Hawai'i's Thousand Friends, served on the state Environmental Council, and was instrumental in the campaign to protect Kawainui Marsh.

Tim Tunison, for years a biologist working at the Hawai'i Volcanoes National Park, died in Volcano on March 5.

Finally, we note, belatedly, the passing of Jon Giffin, who died May 1, 2024. Giffin worked most of his career as a forester with the Department of Land and Natural Resources.

The contributions of Tunison and Giffin to our understanding of and protection for native species are far too great to list here. Yet everyone working in the conservation field in Hawai'i, as well as everyone enjoying our native forests and parks, owes them a debt of gratitude.

agricultural subdivision requirements) indicated that the agency was involved in illegal rule making and, therefore, allowed for the reinroduction of the companies' building permit claims that had been dismissed by U.S. District Judge Jill A. Otake.

On March 28, Magistrate Judge Wes Reber Porter denied the companies' motion to amend, finding that they "were not diligent in discovering the basis for amendment or in seeking amendment once the basis for amendment had been discovered. Therefore, Plaintiffs fail to meet the 'good cause' standard required."

Porter also rejected the companies' arguments that the U.S. Supreme Court's 2024 decision in *Loper Bright Enterprises v. Raimondo*, which calls on courts to "not defer to an agency interpretation of the law simply because a statute is ambiguous," and to now "exercise their independent judgment in deciding whether an agency has acted within its statutory authority," supported their amendment request.

The *Loper* decision overturned the decades-old "Chevron" doctrine, which directed courts to defer to an agency's interpretation of laws that are vague or silent on a certain issue.

"Plaintiffs' concern that [Otake] conducted a Chevron analysis that must now be revisited under *Loper* is entirely misplaced," Porter wrote. "Further, *Loper* was decided on June 28, 2024, nearly a month before the deadline to amend the pleadings expired on July 23, 2024. Plaintiffs could have moved to file an amended complaint based on *Loper* before the deadline expired, but Plaintiffs chose not to. And the Court is not convinced that the 'new evidence' somehow makes *Loper* applicable to this case. Rather, Plaintiffs allowed the deadline to expire and waited more than six months before seeking amendment based on *Loper*," he wrote.

On April 11, the companies filed their objections to Porter's order and asked judge Otake to set it aside.

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Marconi Update: In March, we reported that companies owned by Jeremiah Henderson, III that have been involved in the development of Marconi Point on O'ahu's North Shore had sought to amend their federal complaint against the City & County of Honolulu and its Department of Planning and Permitting for a third time.

The companies had argued that "new evidence" provided by the DPP during discovery (an email chain among DPP officials regarding

Quote of the Month

“Zamber lacks a good-faith basis to rely upon advice of counsel, given the ‘counsel’ is a co-conspirator.”

— *U.S. Assistant Attorney Mohammad Khatib*

PUC Adds Preferential Ag Rates to List Of Issues in Launiupoko Water Case

Since December 12, 2023, Launiupoko Water Company, Inc., has been involved in a case before the state Public Utilities Commission, seeking approval for increased rates for its sale of potable water to its customers on agricultural lands in West Maui that once made up part of Pioneer Sugar's plantation.

A year later, in December 2024, following the filing of numerous information requests from the PUC and the state Division of Consumer Advocacy and responses from LWC, the company filed an amended application, which was accepted as complete by the PUC on January 21.

The two parties involved in the case – Launiupoko Water and the state Division of Consumer Advocacy (by law a party in every PUC docket) – then submitted a stipulated agreement on a procedural schedule and a statement of issues to be considered in the rate case. In February, the PUC accepted the stipulation.

The statement of issues came down to a series of questions about the reasonableness of LWC's projected expenses, rates of return on equity, soundness of revenue forecasts, and the like.

As to the procedural schedule, once the application was accepted as complete, the commission has six months from the date it was received – December 20, 2024 – to consider the application and come to a decision.

Nearly all the customers of Launiupoko Water are also served by Launiupoko Irrigation, which provides nonpotable water for irrigation. The former provides water from groundwater sources while the latter relies mainly on streams to provide non-potable water for irrigation. Both companies are owned and ultimately controlled by Peter Martin.

LIC does have a source of groundwater, but it has used that source sparingly, avoiding the expense of pumping. Instead, LIC has allowed its customers to use potable water whenever stream water is scarce or altogether unavailable.

Written comments from two customers brought to the commission's attention the problems that this has caused them.

Barry and Irene McPhee have farmed 13 acres of land for 21 years, they wrote. "Today, and for the past seven years, we have seen our water rates rise dramatically while the water supply has become increas-

ingly unreliable, to the point that we don't see how we will be able to continue to operate our farm.

"A great deal of the time, during long periods of drought in West Maui, we receive no irrigation water at all from Launiupoko Irrigation Company and we are forced to use potable water to keep our farm alive. LIC could pump water from their auxiliary supply to the reservoirs; however, they choose not to until the rate increase before this commission is granted..." (LIC has its own rate hike request before the PUC, pending since June 2020.)

"We ask the commissioners to please give consideration to Launiupoko utility customers with legitimate agricultural activity. We face being ruined between Launiupoko Irrigation Company not providing reliable Ag water, forcing us to increase potable water usage, and Launiupoko Water Company applying to hugely increase the cost of high-volume potable water usage. Please address this situation."

Jeff and Sue Anderson, owners of Two Dog Farm, submitted similar comment,

saying they, too, had experienced cutoff of irrigation water and had to supplement it with much more expensive potable water.

"By dramatically increasing the cost for large potable water usage, you would be penalizing small farmers for the unreliable water supply from Launiupoko Irrigation. In fact, it would incentivize Launiupoko Irrigation to cut ag supply even more often to force users to use more potable water at a super high rate through their jointly owned Launiupoko Water Company."

The PUC appears to have taken the farmers' concerns to heart. In an order issued April 3, the commission on its own amended the statement of issues, adding the question: "Should LWC establish a preferential rate for qualified agricultural activities within the scope of this proceeding or a future proceeding?"

The order goes over the constitutional protections for agricultural activities and the legislative framework. In 2008, the order notes, the Legislature enacted a law giving the PUC authority to establish preferential rates for customers of potable water

Top 20 High-Volume Customers of Launiupoko Water Co.

High Usage Customer Rank	Average Usage based on Previous 3 Months		
	Gallons per Month	Number of gal. per month above C. of Maui Ave. Demand of 18,600 gal. per month	Percent above C. of Maui Monthly Demand
1	1072170	1053570	5564%
2	812857	794257	4170%
3	649312	630712	3291%
4	597042	578442	3010%
5	589385	570785	2969%
6	520075	501475	2596%
7	381048	362448	1849%
8	378556	359956	1835%
9	374142	355542	1812%
10	365673	347073	1766%
11	334923	316323	1601%
12	322562	303962	1534%
13	301497	282897	1421%
14	272743	254143	1266%
15	271811	253211	1261%
16	269043	250443	1246%
17	267973	249373	1241%
18	261707	243107	1207%
19	241460	222860	1098%
20	241348	222748	1098%

CREDIT: STATE CONSUMER ADVOCATE.

companies engaged in agricultural activities. The same law gave the PUC authority to “develop appropriate criteria for qualification” of agricultural customers.

“Upon receipt of a bona fide request for preferential rates for potable water to be used for agricultural activities, and proof that the customer engages in agricultural activities, a public utility shall provide proposed preferential rates for potable water to be used only for qualified agricultural activities to the [Commission] for approval,” according to Hawai'i Revised Statutes § 269-26.5, cited in the PUC order.

“All such rates ... shall be subsidized by the potable water rates charged to other customers of the public utility if required as determined by the [Commission],” the statute continues.

Exactly what counts as agricultural activity is described in the law: “a commercial agricultural, silvicultural, or aquacultural facility or pursuit ... including the care and production of livestock and livestock products, poultry and poultry products, apiary products, and plant and animal production for non-food uses...”

In applying for the rate hike, Glenn Tremble, representing LWC, was asked about establishing preferential rates for agricultural uses. Tremble replied that the company supports such rates, but that the company “believes that non-potable water should be the primary source of water for agricultural use.” He went on to list “a number of aspects of the statute that need to be worked through to avoid unintended consequences.” These include questions about what qualifies as agricultural activity, “how much of a subsidy can the utility impose on other customers,” “does the request comply with the Commission on Water Resource Management requirements,” the “unintended consequences” of subsidized rates, “as well as a number of other issues.” He suggested that these questions “may best be done in a rate case post bona fide request, or a separate document.”

Furthermore, LWC attorney Craig Nakanishi stated in response to information requests from the Consumer Advocate that preferential rates would require verification and allocation of how much water the ag activity should receive, then monitoring compliance. “All of which presents administrative and operational challenges to LWC,” he said.

In any event, “Launiupoko area infrastructure was built with a dual distribution water system” and LWC’s system was not designed for irrigation, he claimed.

But the arguments against preferential

ag rates did not prevent the LUC from adding this to the statement of issues.

The March order notes that the area served by LWC is “zoned for agriculture and private land owners must submit farm plans as a requirement of applications for a building permit.” While testimony suggests there are legitimate farms among LWC customers, “many LWC customers likely do not engage in qualified agricultural activities on their properties, but instead enjoy large luxury residences with pools, water features, and lush landscaping, with any agricultural features being incidental.

“While LWC points to the customers’ ability to draw irrigation water from affiliated utility LIC, there is no legal support for that argument. The Legislature established authority to implement a preferential rate for potable water for agricultural activities, without any reservations or conditions about the availability of non-potable water for the same purposes,” the PUC order states.

“Further, LWC cannot rely on directing customers to instead use non-potable water from affiliated utility LIC, especially given that LIC has not provided consistent service to the dual customers of LIC and LWC, and while there is no guarantee that LIC rates will remain more affordable than LWC rates.

“Thus, it is consistent with state policy for LWC to establish a potable water rate structure that promotes the intended land use, i.e., lots that are used for the predominant purpose of commercial farms ... and it is in the public interest for such owners of luxury residences to subsidize qualified agricultural activities as contemplated” by statute.

The PUC order acknowledges that at this late stage in the process, developing a preferential rate for agriculture “may be procedurally complicated ... thus setting a preferential water rate ... may need to be the subject of a forthcoming docket. However, in the interest of administrative efficiency, the commission amends the statement of issues governing this proceeding to expressly include consideration of establishing a preferential rate for agricultural activities and accompanying tariff rules in hopes that the parties may be able to reach an agreement within the scope of this proceeding or otherwise agree on initiating a new docket.”

On April 11, the Division of Consumer Advocacy weighed in with its recommendations on the overall rate hike request.

With respect to the development of a preferential rate for agricultural uses, the Consumer Advocate’s statement of posi-

tion reads: “While LIC service remains suspended, the Consumer Advocate is open to exploring possible solutions like an LWC preferential agricultural rate. However, the threshold issue of whether to establish such a preferential agricultural rate is unfortunately hard to opine on unless and until a reasonably detailed proposal is provided by LWC.”

The statement of position included an analysis of the factors that LWC used in arriving at its proposed rate increases. It determined that the water volume rate structure did not encourage conservation, and so recommended modifications to address this. In the case of high-volume water users – above 40,000 gallons per month – LWC had proposed charging \$2.42 per 1,000 gallons. The Consumer Advocate recommended increasing this to \$4.63.

Included in its position statement is a table showing the consumption of the 60 largest water consumers among LWC’s 375 customers and the percentage by which the usage exceeded the Maui County average. The highest-volume customer used 1,072,170 gallons per month, averaged over three months. That was 5,564 percent above the average demand in Maui County of 18,600 gallons per month. The 60th-ranked customer of LWC consumed 98,769 gallons per month, still 331 percent above the Maui average.

The Consumer Advocate disagrees with LWC’s proposed rate of return, cost of debt, and return on equity. While LWC’s consultant used a utility proxy group of large companies to arrive at its recommended rates, the Consumer Advocate compares LWC to other small utilities in Hawai'i. The result is a significant lowering of all three rates. Instead of a return on equity of 14 percent that LWC has proposed, the CA recommends 9.35 percent; for debt, 5.33 percent vs. 8 percent; and overall rate of return, 7.34 percent vs. 11 percent.

LWC had proposed an increase of \$429,197, or 48.4 percent, in its overall revenue. But after providing its analysis of the utility’s justification for that increase, “the Consumer Advocate hereby states that ... LWC’s proposed revenue requirement is overstated.” It recommends a number of adjustments that would result in an increase of just \$245,800 in total revenues over the current rates.

LWC was to submit its response by May 2. The PUC must issue its final decision by June 20.

— Patricia Tummons

Maui Land & Pine Hikes Water Rates, Leading to Complaint With PUC

Kapalua, the resort community on Maui's west side – dominated by hotels, condos, luxurious second homes inside gated subdivisions, and golf courses – depends on water. And nearly all of that water, potable and non-potable alike, comes through systems owned by the Maui Land and Pineapple Company, Inc. (MLP).

Last September, MLP notified one of its customers, TY Management Corporation, Inc., that it would be increasing the rate that TY would be charged for watering the two golf courses it owns. Initially, the proposed increase was five times what TY had been paying for non-potable irrigation water from streams. In late November, MLP informed TY that it had lowered the proposed increase, which would now be 3.43 times the current rate (going from 49 cents per thousand gallons to \$1.68).

In that same letter, MLP's chief financial officer, Wade Kodama, included a chart showing rate hikes proposed for other customers. Hawai'i Water Service, which provides potable water from groundwater sources to Kapalua businesses and residents, would see a rate hike of 81 percent, going from \$2.99 per thousand gallons (kg) to \$5.42/kg. The Maui County Department of Water Supply would see a similar rate hike (\$2.97/kg to \$5.42/kg) for well water. For surface water, the rate to the county would increase from 30 cents/kg to \$1.75/kg.

On December 11, attorneys for TY wrote to the state Public Utilities Commission, asking the PUC to "take jurisdiction over and begin regulating the potable and non-potable water sales being made by Maui Land & Pineapple Company, Inc. ... Furthermore, TY Management requests that the PUC direct Maui Land to promptly file an application with the PUC for a certificate of public convenience and necessity (CPCN) ... and direct Maui Land to suspend all increases in its rates for water sales until Maui Land has been issued a CPCN for such services that includes PUC approval of Maui Land's rates, charges and rules and regulations governing the provision of such services."

The PUC replied in late January, informing TY that the proper way to move forward was to file with the commission

"a formal complaint, informal complaint, or other application or petition for legal relief."

On March 6, Arsima Muller and Robert Strand, attorneys for TY, filed a formal complaint with the PUC.

Attached to the complaint was the PUC's own letter to Wailuku Water Company in 2006. WWC, which is corporately descended from a plantation irrigation system, had been selling water to a number of landowners without a CPCN.

"MLP's non-potable water sales are similar to those of the Wailuku Water Company, over which the PUC has taken jurisdiction and whose application for a CPCN ... is currently pending before the PUC," Muller and Strand wrote. "The commission should, likewise, take jurisdiction over MLP and mandate that it obtain a CPCN and submit its rates, charges and rules and regulations for commission approval."

MLP and WWC are alike in another respect as well: water distributed by both companies comes from sources that are under the jurisdiction of the state Commission on Water Resource Management. In the case of WWC, the PUC has suspended action until all issues relating to water permits and interim instream flow standards (IIFS) are resolved. In the case of MLP, the Water Commission has barely begun the process of issuing water use permits.

On April 15, the PUC returned the complaint to TY, stating that it did not comply with the commission's rules concerning notices to other parties, among other things. TY was given until May 16 to submit a corrected complaint.

Meanwhile, Hawai'i Water Service filed a notice of intent with the PUC on April 4, stating that it would soon be filing a rate increase request. "The operating costs for the Kapalua Water and Wastewater divisions have increased since their last rate case due to a number of factors, including, but not limited to, capital investment in plant and increases in operating and maintenance expenses," the letter stated. Hawai'i Water Service purchased the utilities from Kapalua Water Company and Kapalua Waste Treatment Company, both wholly owned subsidiaries of MLP.



Wailuku Water Rate Case before PUC: Opened in 2008; Suspended Ever Since

Included among the attachments to TY's letter to the PUC was a notice that the commission had given in 2006 to Wailuku Water Co. Like MLP, Wailuku Water is a legacy of the plantation-era water systems on Maui and, like MLP, Wailuku Water provides water to the owners of the former plantation lands. Again, like MLP, Wailuku Water was charging its customers for the water without benefit of a PUC certificate of public convenience and necessity (CPCN).

In February 2008, Wailuku Water applied for the CPCN but has not – yet – received it. At the time of the PUC's letter and for years thereafter, Wailuku Water was a party to the state Commission on Water Resource Management's contested case over interim instream flow standards and rights to waters of Na Wai 'Eha, the four streams of central Maui that fed into the company's water system. In January 2009, the PUC suspended further action on the docket, stating: "The commission finds suspension reasonable and necessary in this instance because, until the CWRM allocates water to Applicants [Wailuku Water] and approves of Applicants' usage, the commission will be unable to determine whether Applicants are fit, willing, and able to provide the proposed non-potable water distribution service."

The Water Commission issued a decision on water permits in 2021 and, in early 2022, WWC asked that the Public Utilities Commission lift the suspension order it had imposed. The suspension effectively prohibited WWC from increasing any rates to its customers so long as it was in place.

WWC argued that the Water Commission's award of an "existing use permit for system losses" satisfied conditions for removal of the suspension.

However, the 2021 order of the Water Commission had been appealed to the state Supreme Court, which, in June 2024, issued a 134-page decision, remanding certain issues back to the Water Commission.

In August 2024, the PUC asked the parties to provide a status update.

Once more, WWC urged the PUC to lift the suspension, arguing that the conditions for removing it had been met since 2021. “For over fifteen years, Applicant has faithfully continued to operate and maintain the water system to serve its customers, despite the suspension order not permitting Applicant to raise rates or add any new customers. ... As a result, Applicant has suffered water delivery system operating losses of approximately \$2.85 million through 2021, due in part to the inability to increase rates, and the magnitude of this loss has only grown since then,” wrote Doug Codiga, attorney for WWC.

The rate case is still suspended.

Meanwhile, in January 2022, WWC signed an agreement with Waikapu Properties, LLC, for the sale of its Waikapu Stream distribution system. (Waikapu is one of the four streams of Na Wai Eha.) The following

month, WWC sought permission from the PUC to sell the system. Proceeds from the sale would allow WWC to make necessary upgrades to the remaining elements in its distribution system, Codiga argued.

But the PUC has yet to decide on that request, too. One of the complications is the question of whether Waikapu Properties would itself need to obtain a CPCN. WWC insisted that this should not be a problem.

“WP’s land ownership and business operations are focused on the entitlement and development of the Waikapu Country Town development,” Codiga said, adding that it had agreed to continue serving the six kuleana properties without charge.

Codiga’s most recent filing in this case was in December 2024. Since then, no further entries have been made to the docket.

— Patricia Tummons

For background, the following reports published in *Environment Hawai'i* may be helpful:

- “Wailuku Water Co. Sells Ditch Water Without Consent of Utilities Commission,” December 2007;
- “Wailuku Companies Seek PUC Approval to Serve Existing, Future Water Users,” November 2008;
- “Bills Seek to Secure Water Resources via Transfers of Lands, Irrigation Ditches,” March 2020;
- “Hui Argues Maui Ditch Owner Flouts Water Allocations for Taro Growers,” October 2021;
- “High Court Finds Water Commission Failed to Justify ‘Status Quo’ Stream Flow Standards,” July 2024.

All articles are available at www.environment-hawaii.org.

Trial *continued from page 1*

discipline as it is confidential.”

The government’s filings, however, broadly describe the reprimand.

According to the government’s motion asking the court to allow use of the sanction as evidence, “the ODC determined that there was clear and convincing evidence that on February 13, 2019, Sulla made misrepresentations to the court during a hearing in the land dispute case of *John D. Prebula v. Toby James Mazzie*. ... The ODC found that Sulla falsely stated to the court ... ‘I didn’t record any deed. There is no deed recorded by me. All this was done before our office got involved.’ In fact, as Sulla admitted to the ODC, he had drafted and caused the referenced warranty deed to be filed in 2014. Although Sulla claimed his misrepresentations to the court were ‘mistaken and unintentional,’ the ODC determined that he had violated Hawai’i Rule of Professional Conduct 8.4(c), which provides: ‘It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.’”

In arguing for the admissibility of Sulla’s reprimand, the government describes the evidence as material. “It helps establish that Sulla knowingly agreed to join a conspiracy and knowingly participated in a scheme with the intent to defraud the county of its right to Rudo’s honest services. Similarly, the ODC reprimand further tends to establish that Sulla’s involvement in the conspiracy and scheme was not just some mistake or accident, but rather that he chose to engage in a conspir-

acy and scheme to defraud with Rudo and his codefendants. ... Second, the evidence is contemporaneous in time to the charged conduct. Sulla’s false statements to the court occurred within the conspiracy period. Third, the evidence is based on disciplinary records provided by the ODC following their investigation, which exceeds the evidentiary standard necessary for admission [under federal rules of evidence]. Fourth, Sulla’s lies to an officer of the judicial branch of county gov-

“The defendant here attempts to unfairly constrain the prosecution, before any evidence has been presented at trial.”

— U.S. Government

ernment in a land dispute is closely related to his misstatements and omissions to an executive agency of the same county relating to the South Kohala, Kailua-Kona, and Waikoloa properties in this case. In fact, Sulla’s misstatement regarding who recorded the deed in the Prebula matter mirrors a false warranty deed presented to the [county Office of Housing and Community Development] that enabled Plumeria to acquire the Waikoloa property by misrepresenting the company as a non-profit.” (Plumeria is the name of a company that was involved in one of the three schemes that led to the federal indictments.)

The ODC has also been looking into Sulla’s activities with respect to this case. “The United States intends to offer certain portions of Sulla’s written statement to the [ODC] in relation to this case,” the trial brief states. “Specifically, on October 27, 2022, Sulla submitted a letter and a ‘Factual Statement of Paul J. Sulla’ to the ODC in response to its inquiry into Sulla’s indictment in this case. Portions of that letter and factual statement will be offered into evidence through the FBI agent who subpoenaed the business records from the ODC.”

The government’s proposed list of witnesses includes the ODC’s chief disciplinary counsel, Bradley R. Tamm.

In an April 21 hearing on various pre-trial motions, U.S. District Judge Jill A. Otake held off ruling on whether the ODC reprimand may be used as evidence. She ordered the government to provide Sulla with a list of statements to the ODC investigators that it intends to offer at trial.

The ODC has also been investigating Zamber, according to reporting in the *Hawai’i Tribune-Herald*. In an article published October 2, 2023, reporter John Burnett writes that the ODC had filed motions with the state Supreme Court in September, “seeking instruction ... about how to respond to a federal subpoena seeking testimony or documentary evidence in the cases against Sulla and Zamber. The motions noted that disclosure of a portion of what is being requested requires high court authorization because the records ‘are in whole or in part

confidential pursuant to the Rules of the Supreme Court of Hawai'i."

No Kickbacks or Bribes?

Gary Zamber asked the court to disallow the government from using the terms "bribe" and "kickback" except when they refer to payments made as part of a quid pro quo agreement before an official act is taken. As the basis for the request, Zamber's attorney refers to a Supreme Court decision, *Snyder v. United States*, which holds that bribes are payments "made or agreed to before an official act," whereas "gratuities are typically payments made to an official after an official act as a token of appreciation."

Zamber goes on to point out that "none of the wires" – wire fraud is one of the charges – "alleged in the [second superseding indictment] occurred before Rudo's alleged corrupt acts began. This means that the government must demonstrate that *all* of the payments necessarily were post-act payments for a pre-act agreement."

The government's reply took note of the fact that *Snyder* addressed "a statute uncharged in this case concerning misconduct inapplicable to this case. ... This is a bribery case. ...

"The defendant here attempts to unfairly constrain the prosecution, before any evidence has been presented at trial, by seeking to categorically exclude evidence and references, and doing so by pointing out that gratuities — which are not charged or at issue in this case — cannot be prosecuted under 18 U.S.C. § 666 — which is not charged or at issue in this case."

Judge Otake denied Zamber's motion on April 21.

No Victim-Blaming

In one of its several pre-trial motions, the government asked the court to "preclude victim-blaming, that is, leveling allegations, making argument, or presenting evidence that the Hawai'i County Office of Housing and Community Development (OHCD) was negligent or otherwise acted improperly in administering the county's affordable housing policy."

But the motion hardly flatters the county. "It is well-established that the negligence of a victim in failing to protect against or discover a fraudulent scheme is not a defense to a defendant's criminal conduct," the government continues. "Therefore, the defendants cannot point at any failure or inability of the OHCD to prevent or discover the crime as an excuse for their own misconduct and should be precluded from doing so through argument or cross-examination — or any other means — at trial."

In response, Zamber's attorneys urged the court to deny the motion. A "central premise of the charges ... is that, but for the bribe to Rudo, the county would not have awarded the defendants any [affordable housing credits] and would not have transferred land to them because they never intended to build affordable housing, they never built any affordable housing, and Chapter 11 of the Hawai'i County Code does not permit the award of AHCs until the affordable housing is built."

In support of this argument, they point out that the report of the county auditor in 2023 "explains how and why many of the premises of the government's case are not, in fact, true," including the claim that a developer cannot earn credits before construction is completed. "It would be unfair to prohibit the defense from challenging such a prejudicial premise or argument," they write.

Judge Otake denied the government's motion as moot.

Argument on the 'Merits'

The government also asked the court to prevent the defendants from arguing at trial that the projects they were involved in may have been selected by the county on their merits.

"It is difficult to imagine a more prejudicial piece of proposed evidence than the [memorandum of plea agreement]."

— attorneys for Gary Zamber

After citing several precedential cases, the government states: "[I]t is not a defense to honest services fraud and bribery that the development proposals were or would have been a benefit to the county. ... The illegal conduct ... is the agreement to pay a bribe in return for some official action, and the government is not required to demonstrate that the official action would be harmful to the public. It is also no defense that the action was beneficial to the public."

Zamber's counsel filed a memo in opposition. "The constitutional right to present a defense includes challenging the government's case," they wrote. "In Mr. Zamber's case, it means, *inter alia*, challenging the government's assumption that the defendants bribed Mr. Rudo. This includes presenting evidence and argument that the county awarded the affordable agreements to the defendants not because of bribery, but rather on their merit or for reasons unrelated to bribery."

Judge Otake denied the government's

motion, meaning the defendants can argue the merits of their proposals.

An Abandoned Plea Agreement

When the government announced the charges against Rudo, in June 2022, it was also working on a plea agreement with Budhabhatti. Now the government wants to use statements Budhabhatti made as evidence in trial.

In a signed memorandum of plea agreement, the government states, Budhabhatti admitted that "he is guilty of conspiring to commit honest services wire fraud."

Budhabhatti and his attorney met with prosecutors in May 2022, the government says in its motion to the court, and agreed to plead guilty. His appearance to enter a guilty plea was set for August 1. But before that hearing, Budhabhatti changed his mind and decided instead to go to trial on the charges.

In the memorandum of plea agreement, the government says, Budhabhatti agreed that if he were to withdraw the guilty plea, statements in the plea could be used against him at trial: "any admission of guilt that he makes by signing this agreement ... may be used against him. ... The *only* exception to this paragraph is where the defendant fully complies with this agreement but the court nonetheless rejects it." This, the government argues, constituted a waiver of protection that would apply under federal rules against self-incrimination.

In its trial brief, the government also describes Budhabhatti's proffer agreement. "That agreement," the government states, "provides that after proffering with the government, should Budhabhatti proceed to trial and testify materially contrary to, or otherwise present a position materially inconsistent with the proffer, 'the prosecution may use the statements and other information provided by Rajesh Budhabhatti during any proffer session, and all evidence obtained directly or indirectly from those statements and information, to examine or impeach [him] if [he] testifies and to rebut any evidence or argument offered by or on behalf of [him] in any proceeding.'"

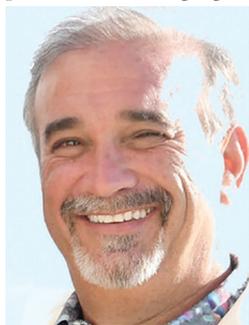
Statements made in the proffer, quoted in the government's trial brief, include: "Budhabhatti noted that Rudo's job for the Luna Loa deal was to get [affordable housing credits] from the county which they planned to sell to raise the \$1,000,000 needed to acquire the [DRH] property." (DRH refers to D.R. Horton Homes, which owned land in Waikoloa Village.)

Also, "Budhabhatti stated he knew it was wrong to give Rudo any money from the Luna Loa deal. [He] would disguise emails to

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Rudo, Co-Defendants Conducted 'Test Run' Of Fraud Scheme in 2014, Prosecutor Says

Years before Hawai'i County housing official Alan Rudo became involved in the affordable housing schemes that led eventually to federal charges against him and three other individuals, the federal prosecutor is alleging that Rudo and two of



Alan Rudo

the other men charged were involved in a "test run" of their scheme. Rudo pleaded guilty in 2022; jury selection in the trial of the others is set to begin May 12 in U.S. District Court in Honolulu.

The outlines of the "test run" appear in a brief that the U.S. Attorney's Office filed with

the court last month, stating that it was intending to admit evidence of that "test run" at trial.

"On May 20, 2014, two tax deeds were recorded for the conveyance of two one-acre parcels of land in Kea'au ('the Parcels') to [Rajesh P.] Budhabhatti," the brief states. Budhabhatti is one of the three defendants facing trial this month.

The brief goes on to say that five months later, Budhabhatti registered a business with the state called EHRI LLC, of which Budhabhatti was manager. On October 6, 2014, Hawai'i County entered into an affordable housing agreement (AHA) with EHRI, "upon the advice and recommendation of Alan Rudo," according to the brief.

Under the terms of the AHA, EHRI was to build at least two affordable housing rental units on the land, and in return, the county

awarded the company four excess affordable housing credits (AHCs), the federal prosecutor states.

One month later, on November 6, on the advice of Rudo, the county "approved an Agreement for Assignment of Affordable Housing Credits" between ERHI and Renaissance Development, LLC, according to the information in the prosecutor's notice. Budhabhatti signed for EHRI, and in return for the credits, EHRI received \$68,000.

"As previously agreed, Budhabhatti paid [co-defendant Gary] Zamber and Rudo a portion of the proceeds from that sale with Rudo's portion constitution a bribe or kick-back in exchange for his official acts related to ERHI," the prosecutor alleges.

— Patricia Tummons

Trial *continued from page 7*

Rudo's county email address by claiming to need technical assistance from Rudo on affordable housing deals."

The government acknowledges that some of Budhabhatti's statements tend to implicate his codefendants. "The government will assure that the statements are sanitized," it says in the trial brief, adding that the government's witnesses will be advised to make no reference to Budhabhatti's statements about his codefendants.

Budhabhatti's attorney, Salina Kanai, objected to the use of the abandoned plea agreement. The government refused to accept her client's digital signature, preferring to have a "wet" signature, she noted in response to the government's motion. "[T]he digital signature was not accepted by the government as 'signing' the plea agreement and thus does not trigger the waiver provision" that the government mentions in its motion. The plea agreement, she continues, "should be construed narrowly to simply allow, at most, ... the use of the agreement's factual admissions only to rebut any contrary testimony adduced from Budhabhatti in the event he testifies."

Zamber's attorneys asked the court to deny the use of Budhabhatti's plea agreement at trial, stating, "It is difficult to imagine a more prejudicial piece of proposed evidence than the [memorandum of plea agreement]." Were it to be introduced at trial, they continue, "it would squarely implicate Mr. Zamber

in a conspiracy under Mr. Budhabhatti's alleged versions of events."

Judge Otake denied the government's motion. Budhabhatti's plea agreement cannot be used as evidence.

No Sham, No Shell

Budhabhatti's attorney, Kanai, asked the court to bar the use of the words "sham" and "shell" to describe the several companies the defendants used to carry out their plans. She also objected to the government's use of a witness, Monica Gould, to explain what shell companies are and what constitutes money laundering — a charge that Sulla faces.

Although by press time, the defendants had not presented their trial brief, Kanai did suggest in another motion that at trial, they may give evidence to "demonstrate that the companies (all or some of them) were legitimate and legal entities, which were fully intended to play a role in the development of various properties."

The government argued that whether the companies were fraudulent or legitimate was "not an element of honest services wire fraud.

"However, the government's evidence that the defendants intended to deceive the county and use sham corporations to both give the appearance of legitimacy and hide the involvement of Alan Rudo is relevant to their motive to bribe Rudo. If the scheme was not consistent with, at the very least, the

spirit of the Affordable Housing Agreements ... it stands to reason that they would want to bribe one of the public officials who plays a central role in drafting and approving the relevant Affordable Housing Agreements. Therefore, any evidence the government is able to present that the entities used by the defendants were not legitimate, even partially, is certainly relevant and should be admitted."

Judge Otake granted in part and denied in part Budhabhatti's motion. No information was available at press time to further describe her ruling.

Reliance on Counsel

In a meeting on March 28 to discuss jury instructions, "counsels for Zamber and Sulla each indicated that their clients intended to assert an advice-of-counsel defense," the government states in its trial brief.

"It appears that Zamber intends to argue that he relied on Sulla's legal advice as a defense to the alleged honest-services fraud conspiracy and scheme. For his part, Sulla intends to argue that he relied on the advice of his former attorney, Michael Green, as a defense to the money-laundering charge."

Quoting from a 5th Circuit case, *United States v. Carr*, the government states: "[w]hen the lawyer is a partner in a venture, takes a share of the profits, or is not a lawyer who had no interest save to give sound advice for

continued on the bottom of page 9

BOARD TALK

Board Members Question Progress
Of Army Corps Ordnance Clearing

At its April 11 meeting, the state Board of Land and Natural Resources approved a right-of-entry permit to the U.S. Army Corps of Engineers for remediation work on about 4,000 acres on O'ahu and Hawai'i island classified as formerly used defense sites (FUDS).

The eight properties involved — totaling about 2,000 acres on each of the two islands — are in addition to the nearly 30,000 acres that were included in a similar ROE permit granted by the Land Board last year.

Before voting to approve last month's permit, board member Vernon Char repeated complaints he raised last year about the slow rate of progress and the paucity of information provided to the board on cleanup activities.

"It seems the authorization is only for you to go out and search and report back, not remove. ... At this rate, I'm quite concerned by any future request by the feds for military training when we've got all these [uncleaned] areas. ... What has been done in the last two years? Have you searched? Found anything? Done anything?" he asked representatives from the Corps attending the Land Board meeting via Zoom.

Benjamin Konshak, a geophysicist with the Corps, replied that the agency has done field work (i.e., transect surveys with metal detectors, sample digging), remedial inves-



A team uses analog metal detectors to search for possible unexploded ordnance. CREDIT: USACE.

tigation and design activities for shoreline areas running from approximately Anae'ho'omalu Bay up to Kawaihae Harbor on the west side of Hawai'i island, totaling a couple thousand acres, he said.

"A lot of these areas had cleanups in the past. We need to understand where to spend our annual funding ... for future remediation," he said. That work includes reviewing national archives material to help determine what the nature and extent of the military's use of the land was, he added.

Going further back, he said, above Hapuna beach, hand grenades and mortars have been removed.

"Some of the transect investigation work in the last couple of years found munitions debris or parts and pieces of muni-

tions in some areas," he said.

He added that the Corps has also identified areas where "we have not found any evidence of use." Specifically, he mentioned that national archive research found that Parker Ranch did not lease portions of the shoreline in the Waikoloa Maneuver Area.

"We're building the evidence in these areas to also reduce our footprint and relieve some of the impact to the community and the landowner, as far as when you're passing title or ... developing a project, having to think about the risk of munitions," he said.

Richard Tanaka, also with the Corps, said that at the end of 2023, it "closed out" an 11,200-acre area east of Waimea town called Pu'ukapu. "We found no evidence of

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Trial *continued from page 8*

a reasonable fee, the advice of counsel defense is unavailable."

The government continues: "That describes this case with respect to Zamber's supposed reliance on Sulla's advice. Sulla is anything but a disinterested lawyer from whom Zamber could have sought advice. He was deeply involved in the conspiracy and scheme. ... With respect to Plumeria and the Waikoloa property, Sulla formed the company, served as its sole manager and was the sole signatory on the company's bank account. Sulla also formed the shell company and the two trusts that were designed to secretly funnel bribery and kickback payments to Rudo. And he signed the agreement to sell the Waikoloa property for \$1,500,000 and distributed the proceeds to himself, Zamber and Rudo. Thus, Sulla was neck-deep in the fraud and a necessary tool to ensure its suc-

cess. For this reason alone ... Zamber lacks a good-faith basis to rely upon advice of counsel, given the 'counsel' is a co-conspirator. ... Did Sulla tell Zamber that paying money to Rudo to get approval of [affordable housing agreements] and the transfer of [affordable housing credits] was legal conduct? Did Sulla tell Zamber that making false representations to the county and omitting material facts in their bids to obtain AHAs and transfer of AHCs was legal conduct? Did Zamber, himself an attorney, rely on such supposed advice in good faith? Did Attorney Green tell Sulla that selling a property he acquired through a company that Sulla knew was the subject of a criminal investigation was legal?"

The government also intends to introduce at trial statements made by Zamber to the FBI as early as June 24, 2021, the trial brief states. "Specifically, Zamber acknowl-

edged his familiarity with Luna Loa, West View, Plumeria at Waikoloa and related entities. He then indicated that he wanted 'immunity' if he were to assist the FBI with its investigations. Zamber's statements were not audio recorded but will be admitted through the testimony of one or more of the FBI agents to whom Zamber made the statements or who was present at the time the statements were made."

— Patricia Tummons

For a comprehensive account of the schemes that led up to the charging of Rudo, Budhabhatti, Zamber, and Sulla, see "Four Charged in Schemes to Defraud Hawai'i County Housing Program" in the August 2022 edition of Environment Hawai'i.

use. Therefore, we were able to remove that from the FUDS inventory,” he said.

Most of that land is Hawaiian home-
stead land.

“Your work has certified there’s no unexploded ordnance. DHHL awarded pastoral, residential, and agricultural leases at Pu’ukapu over the last 40, 50 years. With your certification that there is no unexploded ordnance present, it enables the awardees ... to apply for and be approved for housing and urban development and FHA loans. Is that your understanding?” Hawai’i island board member Riley Smith asked.

“I believe that’s the case,” Tanaka said.

Board member Char asked about the Pali Training Area on O’ahu, where some of the lands under the ROE permits are located.

“Maunawili. I go hiking there all the time. This [area] has been on the list, been investigated for some activity, since 1943. That’s 80 years ago. And that is a current area under your ROE. Has anything been done on that or anything been planned? ... Every year, we add on more areas. I see no subtraction or progress,” he said.

In 2012 and then in 2017, the Army Corps found and removed a total of 33 unexploded ordnance items, according to the Corps’ Kevin Pien.

Char asked if there was some kind of record that shows the original FUDS areas, what’s been found or cleared, and what areas remain?

Pien said there are reports documenting the work that’s been completed.

When Chang asked whether those reports come to the Department of Land and Natural Resources, Mike Ferreira of the agency’s Land Division confirmed that they do.

“I’ve been trying to get all the DVDs out of them and trying to put it on an archive so we can just look ‘em up on a database,” he said, adding that the state Department of Health also receives the reports.

“Just because they’re not answering the way you want it doesn’t mean I don’t have a report,” he said.

Board chair Dawn Chang advised the Corps representatives that in the future, they should provide the board with a report on what’s been completed since the previous right-of-entry permit was approved.

“I think board member Char raises a good point. ... Give us an update on what was done over the past year so we have a running record,” she said.

Especially since the military is requesting new leases, Char added, referring to leases for training areas — at Pohakuloa on

Hawai’i island and Kahuku, Makua, and Poamoho on O’ahu — that are set to expire in a few years. Last month, the Army published its final environmental impact statement for its continued training at Pohakuloa.

“I’m getting more and more concerned [about] granting future leases to the military in view of this 80-year history of what went on and is still not cleared as of this date. Just as a forewarning,” Char said.

“Absolutely,” Tanaka replied. He said that the FUDS program does really want to try to make Hawai’i safe and appreciates the partnerships with the DLNR and others.

Board member Aimee Barnes was not particularly appeased.

“I don’t want to give you too hard of a time. I know you’re just trying to do your jobs. But also, ... it’s sort of like I have an Airbnb and I have rented it to somebody and they’ve trashed the place, and they’re coming back to me saying, ‘We’d like to work in partnership with you to clean it up and also we’d like to come stay again.’ ...

“You have to clean up the mess that you’ve made before anybody contemplates letting you come to stay again. And I think member Char” — at 90 years old — “has a point of view that certainly extends well before my time on just the history of the fact that these problems continue to be left unattended with little information for the board on what progress has been made,” she continued.

She encouraged the Corps to show to the Land Board what progress is being made, in “very clear, tangible language. How many acres? What are you finding? Are there areas certified as cleared? Because without that information, and just given the long history of trust-breaking between the military and folks here in the state, I think you’re going to find yourself in a difficult position when leases come up in the future. Not just from the board but from the community, who we’re already hearing from who are frankly not particularly supportive of that. ...

“I know you’re already on notice on that. Please keep that in mind and help us to help you be in the best position possible when you come to us, and you can do that by being really clear about ... what you’re doing and what you’re achieving.”

“Well said,” Chang added.

Board member Smith suggested that the Corps could present color-coded maps delineating all FUDS areas surveyed and those that have been cleared or need to be.

He said it was not Ferreira’s job to clearly convey the Corps’ progress to the board.

“It’s the Corps of Engineers’ and their contractors’ job to do that,” Smith said.

Tanaka thanked the board members for their comments. “We do want to be responsive. ... Me and members of my team, a lot of us grew up in Hawai’i. A lot of us do want to continue living here. ... We really appreciate this input,” he said.

In response to questions from Barnes regarding concerns raised by the Office of Hawaiian Affairs about the proper care of cultural resources, Tanaka told the board that all of the FUDS projects have an archaeologist present before and after remediation activities.

The board unanimously approved a motion from Smith to grant the permit.



Board Approves Permit, Easement For Lahaina Shoreline Encroachments

As owners of shoreline lots in Lahaina who lost their homes in the 2023 wildfire seek to rebuild, some critics have questioned the prudence of allowing the return of structures that will be vulnerable to the effects of sea level rise in the foreseeable future.

Controversy has already emerged over former Boeing executive Stanley Deal’s Special Management Area permit application to rebuild the two-story Front Street home he lost in the fire.

And at the Land Board’s April 11 meeting, one testifier warned against piecemeal decision-making and urged the board to defer acting on proposed shoreline encroachment resolutions that would further plans by Mary Ann Arini and Derek Regal to rebuild their Front Street home that burned down.

The couple’s home, purchased in 2021, was built in 1953. The access to Front Street, driveway, and garage are on the adjacent lot, which the couple also owns.

A seawall, stairs, and associated pavement fronting the two properties were constructed sometime before October 1960, which makes them non-conforming uses.

To determine the appropriate shoreline setback for their new home, the couple needs a certified shoreline. A surveyor they hired “located the shoreline at the face of the seawall and identified pavement areas, CRM stairs, and concrete stairs as encroachments within the shoreline with a total combined area of approximately 500 square feet,” according to a report to the board by the DLNR’s Land Division. “Land Division staff and the State Land

Surveyor confirmed the shoreline location and the presence of encroachments at a site visit on June 20, 2024," it stated.

At the board's April 11 meeting, the Land Division recommended approving an immediate right-of-entry and revocable permit, as well as a 25-year, non-exclusive easement, for seawall footing, a paved pad, and stairs that are encroaching on state submerged land fronting the lot where the house used to be. The encroachments there total 192 square feet.

The Land Division recommended a monthly rental amount of \$141.00 for the revocable permit. It also recommended that the couple post a removal bond in the amount of \$23,293 to be used in the event that the easement fails to also win approval from the Legislature and the governor.

Normally, a landowner pays for the easement cost upfront, with the amount determined by an appraisal. In the case of Arini and Regal, the Land Division recommended that that amount, plus interest, be spread out over the term of the easement. Finally, the division recommended that 10 years before the expiration of the easement, the owners post a second removal bond.

With regard to the encroachments fronting the lot that provides access to the house site, the Land Division reported that the Land Board had already granted an easement, which the Legislature approved a decade ago.

"For reasons unknown to staff, the easement document was never finalized and recorded. However, the 302 square foot easement area is mapped and recorded as C.S.F. 25,339, dated November 13, 2013. Land Division staff will complete processing of the easement for Parcel 026 as a separate matter," the division's report states.

In explaining the recommendations to the board, Land Division shoreline specialist Rebecca Anderson said, "It's very important that the board be informed that ... this is one of fewer than a half dozen single family residences in the Front Street recovery zone that are actually owner-occupied, based on information collected by the governor's office. It may be one of only two residential properties where the owners actually live there full-time as their full-time, sole residence."

"This [recommendation] is simply to resolve the encroachment for purposes of certifying the shoreline ... so they can get their building permits and rebuild their home so they have a place to live," Anderson said.

Arini added that the new house will be built 40 feet from the shoreline, "as far back

as we can go." The house was originally 25 feet from the shoreline, she said.

Jacqueline Lasky, an adjunct professor at the University of Hawai'i and a second-year law student testifying as part of an assignment and as a concerned citizen, asked for a deferral.

Her written testimony cited Maui County's Lahaina Long-Term Recovery Plan, which, among other things, describes an Asset Management and Acquisitions Program to address "the significant need for acquisition of real property in the impact zone, including shoreline parcels that face development challenges due to sea level rise and other shoreline hazards."

She also cited the county's West Maui Community Plan's policies regarding resilience, climate change, and sea level rise.

"These are just two examples of why the Board's granting of this proposed easement and permit now is PRE-MATURE and reflects a FAILED PIECEMEAL APPROACH to construction and development on Hawai'i's fragile coastline in light of KNOWN RISKS OF CLIMATE CHANGE AND SEA LEVEL RISE," she wrote.

"Sorry for your loss. I understand your desire to rebuild as quickly as possible," she told Arini and Regal at the board meeting. "I just want to make sure the recovery and rebuild keep in mind the known climate change changes, sea level rise." She also stressed the need for community input.

Board chair Dawn Chang countered, "All we're approving is not the right for

them to rebuild, just to get a shoreline certification."

She said that the couple must still go through the county's Special Management Area permitting process and will have to do an environmental review under Chapter 343 of Hawai'i Revised Statutes. "This doesn't cut short any of the concerns you have," she said of the proposed board action.

Arini's and Regal's consultant, Thorne Abbott of Coastal Planners, added that in addition to being more than 40 feet inland, the new 1,400 square-foot house will also be elevated.

He also noted that the county Planning Department has met with owners seeking to rebuild — including his clients — to discuss sea level rise projections.

Land Board member Aimee Barnes pointed out that even under very modest sea level rise, "this property will be under water."

"You probably know this more than most people. Nothing is forever," she told the couple, and asked them to share their thoughts on the fact the easement would be for just another 25 years. "Are you okay with that?"

Regal replied that he and Arini are both over 70 years old. "So 25 years from now, I don't know whose issue it's going to be. ... We completely understand that. All we're trying to do is get our home back and comply with every requirement that's been put in front of us," he said.

Arini added, "We're in the Baby Beach



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Pu'unoa area. We're not disputing any scientific research that has been done. This is a little sweet spot. ... It's a very calm area. My sister has owned the property, which was acquired by us a few years ago, since 2005. We have to abide by what the projections are. We're willing to take the chance, for our children as well."

The board unanimously approved a motion by Maui board member Doreen Canto to accept the Land Division's recommendations.

Before the vote, Barnes acknowledged that supporting the maintenance of shoreline hardening structures "has not been the direction of the board for a while." However, she said she believed that wildfires are extraordinary circumstances and in this case, the landowners are "going in with clear eyes [about] what scientists are telling us may happen. ... This is an extraordinary circumstance that merits our flexibility."



Entry Permit Paves Way For O'ahu Cat Sanctuary

On April 11, the Land Board granted a right-of-entry permit to Popoki Place O'ahu Cat Sanctuary, a nonprofit working to establish on O'ahu a program similar to that on Lana'i, where cats removed from areas inhabited by protected bird species — and other parts of the island and Maui — can live out their lives on four acres of fenced land, or eventually be adopted.

The three-month permit for 20 acres of agricultural land on Oahu's North Shore allows Popoki Place to conduct due diligence activities.

Holly Holowach, president and co-founder of Popoki Place, told the board her organization's priority is "to remove cats from sensitive areas, from the beaches and the parks, where they threaten endangered native wildlife, and to permanently house



The home of Mary Ann Arini and Derek Regal before it burned in the Lahaina wildfire. CREDIT: DLNR.

them in secure open air enclosures in a natural environment.

"Popoki Place is the the missing piece of O'ahu's stray cat management puzzle and will serve as a critically needed pressure relief valve for shelters, rescuers and the community. ... Everyone supports this idea. We just need land. We have been looking for the unicorn property. ... We need an agricultural, pastoral land and understand it cannot be [important agricultural lands]. This AG2 property is excellent. This property has been vacant for 50 years. ... We think we have found our unicorn," she said.

She stated that their consultant Mark Howland of WHALE Environmental will be preparing the environmental assessment.

Land Board chair Dawn Chang said the Department of Land and Natural Resources supports "providing available state land for a cat sanctuary on each island. Holly has been working very hard with our Land Division to find a suitable site, as well as working with [the Division of Forestry and Wildlife]. Part of our consideration is, we have valuable forest reserves and state parks that have cat colonies. They will work in coordination with us to remove those cat colonies from those critical habitats. It's a good partnership."

Holowach said that the cats are going to be happy in the sanctuary. "It's a way to save them all. We can't kill our way out of this. We can't just kill all the cats. We tried that for years. It didn't work. This is a way to try to find a way to save them all," she said.

Board member Aimee Barnes also expressed her support. "This is a problem that seemed intractable for a long time and really shouldn't be. People at odds who care about animals. ... I appreciate you guys taking the initiative putting this concept together and help to bring it to not full fruition yet. Bringing it one step closer," she said.

She asked if Popoki Place's partnerships with the Hawaiian Humane Society and other rescue groups meant that some of the sanctuary cats would be adopted.

Absolutely, Holowach replied, adding that all the cats will be spayed or neutered.

DOFAW O'ahu branch manager Mari-gold Zoll also testified in support. "I've been working with Popoki Place trying to find a location that's suitable," she said, adding that her division would be happy to provide technical support "in order to benefit our protected species."

— Teresa Dawson