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Environment Hawai'i

a monthly newsletter

Does High Court's No Really Mean Yes?

A year ago, when the state Supreme Court issued its decision in the *Rosehill* case, it seemed clear enough. In the eyes of the justices, at least, the state's land use law, Chapter 205, didn't allow vacation rentals of houses on land in the Agricultural District, unless the lots existed before a change in the law in 1976.

Now, though, Hawai'i County is challenging that ruling, on the basis that the law only applies to "farm dwellings," and not to "single-family residences" on ag land, and even then it doesn't apply at all to "hosted" vacation rentals.

And while the county's appeal works its way through the courts, the county turns a blind eye to ongoing short-term occupancy of dwellings in the Ag District.

No permits? No problem.

IN THIS ISSUE

Hawai'i County Presses ICA To Allow Vacation Rentals on Ag Land

More than a year ago – September 2024 – the state Supreme Court issued a ruling on the question of whether short-term vacation rentals are allowed on land in the state Agricultural District.

The answer was a resounding no.

The issue before the court arose in Hawai'i County, following the county Planning Department's denial of permits to operate STVRs to more than a dozen owners of Ag land. Many if not most of the owners had been renting or planned to rent out houses on their Ag land to tourists.

After years of litigation, involving lower court action and a finding by the Land Use Commission that such uses are not allowed under Chapter 205 of Hawai'i Revised Statutes, the high court upheld the finding of the LUC – to wit, that "farm dwellings may not be used as short-term vacation rentals under HRS Chapter 205."

There was no quibble about whether the rentals were "hosted" (with an owner or manager on site) or "unhosted," or the length of time that qualified as short-term. Nor did the court qualify its ruling by limiting the applicability of its prohibition to one or another specific section within Chapter 205.

Yet now county attorneys profess to be confused by the ruling and the Planning Department is allowing "hosted" vacation rentals to continue to operate in the Agricultural District, claiming that the Supreme Court decision was actually much narrower than it would seem at first glance. And the county

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The pool at the vacation rental in Captain Cook that was operated by Ryan and Zanone.
CREDIT: KOHANIA.COM.

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NEW AND NOTEWORTHY

Trail Contract: After a jury found in April 2014 that the state — not Haleakalā Ranch Company — owns the historic Haleakalā bridle trail, plaintiff David Brown, the executive director of Public Access Trails Hawaiʻi, stated,"We have a moral obligation to protect Hawaiʻi's past, including its rich history of trails. The longer we wait to protect Hawaiʻi's cultural legacy, the greater the risk it will be lost forever for generations to come."

More than a decade later, the trail is finally being surveyed and marked by a state contractor, as required by a stipulation filed with the 2nd Circuit Court in July.

On September 9, the state Department of Land and Natural Resources entered into a $71,562 contract with R.M. Towill Corporation for the work. The contract start date was September 26. The company is to complete the work by December 15.

Under the contract, R.M. Towill will survey the metes and bounds identified in the final judgment in the lawsuit brought by PATH and Brown in 2011 and recorded in the Bureau of Conveyances on August 11, 2016.

The company will also be required to mark the trail "using durable markers in their professional discretion consistent with standard surveying practices," the contract description states.

As we reported last month, PATH attorney Mike Biechler stated that his client's position is that "pedestrians must be allowed access and not be prohibited by a private company [Haleakalā Ranch Company] from accessing public lands, that the state cannot allow HRC to prevent public pedestrian access, and that the HRC has de facto retained private ownership of the trail despite the previous court judgment."

East Maui Permits: On September 5, the Hawaiʻi Supreme Court found in favor of the Sierra Club of Hawaiʻi in its appeal of the state Board of Land and Natural Resources' November 2020 approval of water diversion permits to Alexander & Baldwin and East Maui Irrigation Company, as well as the board's rejection of the group's request for a contested case hearing on those permits.

The Environmental Court had found that the Sierra Club was entitled to a contested case hearing and reduced the amount of water that could be diverted from East Maui streams under the permits pending the remand to the Land Board. The court also awarded the Sierra Club's attorney's fees and costs.

Last year, however, the ICA found that the group was not entitled to a contested case hearing or attorney's fees and costs and that the Environmental Court lacked the authority to modify the permits.

After hearing oral arguments from Sierra Club attorney David Kimo Frankel about how important it was that it be allowed to cross-examine witnesses about new information and representations made to the Land Board, the high court found that the Sierra Club should have been given that opportunity.

The court noted that prior permits to the companies, as well as those for 2021 diversions, contained a condition that there be no water waste and all water diverted "shall be put to beneficial agricultural use or municipal use." That condition, they stated, contrasted with the Land Board's new condition for the 2021 permits that "[s]ystem losses and evaporation shall not be considered as a waste of water," and that this "bears examination."

"[I]t is unclear from the record how water waste for 2020 was no longer considered water waste for 2021. This change in the definition of water waste alone weighs in favor of additional and meaningful process subsequent to the bench trial relating to the 2019 and 2020 RPs, in contrast to the procedure actually afforded Sierra Club at the November 2020 public meeting. …

"Sierra Club further asserts that the 45 mgd rate of water BLNR approved for A&B to divert with the 2021 RPs was not commensurate with the actual water use data submitted by A&B in its quarterly reports to the agency. The record supports and bears this out."

The court concluded that the government's burdens to hold a contested case hearing "in this matter can be reasonably mitigated … and do not outweigh the additional protections a contested case would provide to Sierra Club."

The high court also ruled that the Sierra Club's constitutionally protected property interest in a clean and healthful environment was defined by the Coastal Zone Management Act, Chapter 205A of Hawaiʻi Revised Statutes, as well as state laws regarding Land Board permits and environmental review. The ICA had found that only HRS 171-55, relating to land dispositions, and Chapter 343, relating to environmental impact disclosures, applied.

Quote of the Month

"I don't think most of you folks know the cases you lost this year. … I don't even know if you understand the arguments being made on your behalf. Some of them are just ridiculous and it needs to stop."

— David Kimo Frankel to the Land Board

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BOARD TALK

Land Board Calls For Two Appraisals To Determine Rent for Maui Wind Farm


Kaheawa Wind Power I. CREDIT: CULTURAL IMPACT ASSESSMENT.

At its September 26 meeting, the state Board of Land and Natural Resources did something unusual. It directed its appraiser to prepare two appraisals for a proposed 20-year lease for the use of roughly 200 acres of Conservation District land on Maui now occupied by Kaheawa Wind Power, LLC.

The appraiser would have to determine annual fair market rent for the land both *with* the current improvements — a 30-megawatt wind farm consisting of 20 turbines and other supporting structures — and *without* them.

Normally, the Land Board doesn't weigh in on how an appraisal to determine lease rent should be done.

The company's previous 20-year lease for the property expired in January 2025. But before it expired, the company sought and received a one-year holdover of the lease from the Land Board that allowed the wind farm to continue operating through 2025. In the meantime, KWP would complete its environmental review process and obtain necessary approvals regarding the incidental take of threatened and endangered species.

The original lease states that upon expiration, the lessee shall pay to remove all improvements, "unless the lessor elects to assume ownership of improvements as provided herein."

Section 4 of the holdover, however, contains a condition requiring the removal of improvements and the posting of a removal bond, but does not include language about the Land Board potentially assuming ownership upon expiration. It does state, "It is understood that, except as provided herein, should there be any conflict between the terms of [the expired lease] as aforesaid amended and the terms of this Section 4 of the holdover, the terms and conditions of this Section 4 shall control and specifically to the removal requirements and the [$15 million] removal bond requirement herein."

To KWP, that meant that the appraisal for the new lease should not include the improvements, even though it planned to continue to use them if it were to secure a new lease.

In their report to the board, Andrew Tellio, appraisal and real estate specialist with the Department of Land and Natural Resources' Land Division, and staff planner Lauren Yasaka counter, "Nowhere in the submittal [for the holdover] is it requested or contemplated that the board will waive its right to retain the improvements on KWP I at the termination of the holdover. Staff believes it was not the board's intent to waive its right to assume ownership of the improvements in the lease when it required the removal bond provision in the holdover."

They continued that KWP's bid package in response to a request for proposals by Hawaiian Electric Company included anticipated lease rent in its cost/rate estimates. (In December 2023, according to KWP vice president David Purcell, Maui Electric selected KWP to continue to delivering renewable energy for another 20 years via a new power purchase agreement.)

"[I]t was understood by [Land Division] staff that if the appraised value of the land came back higher than what was contemplated in KWP's bid package, then the increased costs may prohibit KWP from delivering the electricity at the rates KWP proposed in their bid package. It is important to note that KWP **DID NOT** consult with Land Division staff regarding potential rent nor appraisal scope prior to their Hawaiian Electric bid submission. Furthermore, staff does not believe this issue should be resolved by preventing the board from exercising its rights under [General Lease] 5731 (which KWP agreed to when it initially signed the lease), ultimately denying the department from receiving fair compensation for the use of public lands," Tellio and Yasaka wrote.

They asked the Land Board to decide whether the appraiser should determine the value of the land with the improvements (option A), or value it as if it were unimproved (option B). They also asked the Land Board to approve the holding of two public hearings on Maui regarding the proposed lease.

"Typically, the appraisal comes after a lease is approved," Tellio told the board. "We are taking this slightly out of order at the applicant's request."

KWP's Purcell testified that if ownership of the improvements reverted to the state, it wouldn't be possible for the company to secure financing to continue maintaining and operating the wind farm for the next 20 years.

Purcell added that the wind farm saves electricity customers on Maui about $7 million dollars a year compared to what they would pay if fossil fuels were used, but if the company's rent is increased, it would have to pass that additional cost onto those customers.

In support of Kaheawa's continued operation on Maui, he also took note of the "environment we're operating in now, where there's significant uncertainty for renewable energy projects." Following the passage of the One Big Beautiful Bill this past summer, renewable energy projects face a very narrow path to qualify for longstanding renewable energy tax credits, he said.

DLNR director and Land Board chair Dawn Chang argued that the cost of KWP's improvements has been amortized and paid for.

"We also have a public trust obligation. These are public lands. … This is going to set precedent. We have got a lot of wind farms, renewable energy projects, leases about to expire. How we treat Kaheawa here will dictate how we treat … all of our other leases. This is a critical decision for this board," she continued.

Board member Kaiwi Yoon later added that Purcell's request to have the appraisal based on unimproved land "is crazy to me. I don't see logic in how you support that."

Dean Yamamoto, one of the attorneys representing KWP, disagreed with the DLNR's characterization that the holdover language regarding removal of improvements was changed from the original lease language solely to add the bond requirement.

If that were the case, "it would have been one paragraph long. It wouldn't have restated in its entirety the end of term requirements and obligations of the lessees, which is what it did," he said.

He also pointed out how KWP's improvements are different from other commercial improvements a landlord might take ownership of upon lease expiration. In those cases, the lessor is going to have something of value that it can pass on to another lessee.

"This is not an office building. This is not a hotel. This is not a warehouse. This is a bunch of complex machinery that require sophisticated operators to operate. … I would say the nature of this improvement is really, really unique," he said, adding that solar power projects also fall into the same category. "If the state assumed ownership, there would really be no other lessee to get it unless it had a [power purchase agreement from the utility]," he said.

"I appreciate that. I do think similar arguments are made by many of our tenants," Chang replied.

When it came time for the public to testify, Honolulu attorney David Kimo Frankel, who was there for another item on the agenda, spoke up.

He admitted, "I know very little about this issue." However, he continued, "There's a very easy solution. All you folks are doing is determining how the appraisal is going to go. You are not deciding, you cannot decide today, that you own the improvements. But you can assume you own them for the appraisal. They can continue to assume they own them and get their financing. The only issue is how much money you're going to be charging them. This is a smokescreen issue they're raising to not pay a lot of money. That's all it is. They can continue to think and argue to their financiers that they own it."

Former Land Board member Keone Downing weighed in as well. He echoed sentiments expressed earlier by Hawai'i island Land Board member Riley Smith, who believed that even though a new lease was being contemplated, the lessee has not changed, so the improvements should not revert to the state and the appraisal should be based on unimproved land. What's more, the company is "doing good for Maui," Downing said. Without the wind farm, "you go back to unimproved land with no person creating electricity for Maui," he added.

Smith asked Land Division staff whether it was an option for the board to contract for two appraisals, options A **and** B. He noted that none of the Land Board members are appraisal experts, so the two appraisals would "give us data to make an informed decision."

After an executive session, the Land Board ultimately voted to approve the two public hearings on Maui, and to require the appraiser to do both options A and B within the next eight weeks.

The public hearings have been tentatively scheduled for November 6 and December 4.

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Board Approves Stipulated Judgment In 2019 Kahala Hotel Permit Case

Years after David Kimo Frankel challenged a 2018 Land Board decision to approve a revocable permit to Resorttrust Hawai'i, LLC that allowed it to preset and potentially rent out beach equipment on state land (Lot 41) fronting the Kahala Hotel & Resort, the board has finally agreed that it violated its public trust duties when it did so.

That's what the Intermediate Court of Appeals found in January. And the Hawai'i Supreme Court rejected the Land Board's application for a writ of certiorari.

So at the Land Board's September 26 meeting, it unanimously approved a stipulated judgment in *Frankel v. Board of Land and Natural Resources* as to count 4 of his complaint, which alleged that the Land Board breached its trust duties when it approved the company's permit for 2019.

The stipulated judgment notes that the ICA found that the 1st Circuit Court erred in granting summary judgment on count 4 to the Land Board, the DLNR, and Restorttrust and in denying Frankel's motion for summary judgment on the same count.

The parties — which include Frankel, the Land Board and DLNR, and Resorttrust — stipulated that public trust principles apply to Lot 41, which is ceded land. "In rendering its decision regarding the use of Lot 41, the BLNR was required to (a) begin its analysis with the presumption in favor of public use when balancing between public and private purposes, (b) consider practicable alternatives, and (c) set forth its decision with clarity," the judgment states.

The parties also stipulated that the Land Board breached its trust duties in approving the 2019 permit because it "did not start with the presumption in favor of public use, consider alternatives, or provide clarity in its decision," and to grant Frankel judgment as to count 4.

"Because BLNR breached its trust duties … BLNR's 2019 RP for Lot 41 was not authorized. The BLNR will comply with the ICA's opinion. The BLNR must explicitly and clearly authorize the storage of equipment or presenting of chairs on Lot 41 if they are to occur. [Frankel] will not amend his complaint or file a new claim based on the validity of the 2019 RP," the judgment stated.

Frankel testified that back in 2018, "things were pretty atrocious. … A number of us brought our concerns to this board and we were treated with disdain. The hotel took over the beach."

In 2018, the Sierra Club, Hawai'i Chapter, sent a letter, with photos to then-DLNR director and Land Board chair Suzanne Case about apparent violations of the hotel' revocable permit for Lot 41, which only allowed for maintenance and recreation.

In testifying to the the board last month, Frankel said, "your staff went out there and didn't see any violations. We have photographs. Even though Suzanne Case sent a letter [in 2017] to the hotel saying you can't conduct weddings, on the day we went out there, there were two weddings being performed on the public trust land, which Suzanne Case already said no to. There was no consequence to that. These guys were operating a restaurant on the beach without permission. Instead of cracking down on them, this board authorized the hotel to continue to use beach land and exclude the public. That was wrong and the board's refusal to deal with that led to this lawsuit."

He said he hoped the Land Board read and understood the ICA's decision and also recommended that the board start receiving briefings on litigation its involved in.

Other boards and commissions are regularly briefed on litigation, he said. "You rarely are. You need to be. … I don't think

Photographs taken December 24, 2024 at 6:50 a.m of chairs on Lot 41 and the beach fronting the Kahala Hotel & Resort. CREDIT: DAVID KIMO FRANKEL.

most of you folks know the cases you lost this year. This is a big deal. The board needs to be briefed on them so the same mistakes don't occur again and again. … I don't even know if you understand the arguments being made on your behalf. Some of them are just ridiculous and it needs to stop," he said.

In written testimony, Frankel also noted that if the Land Board approved the stipulated judgment, "soon thereafter, it will be filed with the court and then final judgment will be entered. At that point, I will be asking for the defendants in this case to pay my costs. Your attorney thinks that you will not have to pay these costs. She is wrong.

"Your attorney wanted to sign a stipulated judgment in *Frankel v. BLNR* without this board ever having met to discuss this litigation. Her position is inconsistent with *Ching v. Case* … and article XI section 2 of the state constitution. I refused to sign the proposed stipulated judgment until after this board met to discuss it. Before signing, please understand that this board and the department staff have repeatedly breached their trust duties when it comes to lot 41."

After an executive session, the Land Board approved the judgment.

Still Presetting?

Before the vote, although it was not on the agenda, the board discussed allegations in Frankel's written testimony that Resorttrust was continuing to preset chairs on not only Lot 41 but on the sandy beach, as well. This, despite legislation passed in 2023 banning the presetting of commercial beach equipment on beaches under the DLNR's jurisdiction and Resorttrust deciding in 2024 to abandon presetting on the parcel. The company's current permit only covers landscaping, irrigation, and lighting.

Resorttrust and hotel representatives stated that no presetting was occurring, and that the chairs that appeared to have been preset were actually used, at some point, by guests who either left and never came back or returned intermittently.

Frankel, however, argued that the hotel employees were setting out the chairs. "It's not guests leaving them there," he said. Referring to a photo taken in January, he said, "you can see the staff member laying out the chairs, both on the grass and the sand. … Then it happened again this past Saturday."

Public Trust Analysis

As a result of the Intermediate Court of Appeals' decision in Frankel's lawsuit over Resorttrust Hawai‘i's 2019 revocable permit for Lot 41, a new "public trust analysis" section is now being included in the reports to the Land Board for the annual bulk renewals of revocable permits administered by the DLNR's Land Division.

The Land Division submittals for the annual renewal of revocable permits on Kaua‘i (August 22), O‘ahu (September 12), and Hawai‘i island (September 26) all included the analysis, which starts by echoing the ICA's decision.

It states that dispositions of ceded lands must be consistent with the public trust and to make that determination, the Land Board must consider 1) presumption in favor of public use, 2) consideration of practicable alternatives, 3) clear articulation of the decision.

The section continues that a presumption of public use "would appear to require that the subject lands remain vacant. … As revocable permits are limited to month-to-month tenancies … the practicable alternative to a disposition that would favor public use would be to forego a disposition altogether, leaving the properties vacant. However, staff does not believe that would be reasonable or beneficial."

It goes on to explain why certain lands under revocable permit for exclusive commercial, industrial, residential, eleemosynary, or telecommunication uses are not appropriate for public access and use, and why some agricultural and pasture lands need to be under revocable permits, at least for now.

It also describes how the revenue generated from these permits for ceded land "contribute to the betterment of native Hawaiians" because some of it goes to the Office of Hawaiian Affairs. Permit revenue also goes into the Special Land and Development Fund, which supports the DLNR's management of the 1.3 million acres of public land it's responsible for, it adds.

— Teresa Dawson

Vacation Rentals *continued from page 1*

is defending that claim in a case pending before the Intermediate Court of Appeals.

Background

The case goes back to a decision in 2021 by then-county Planning Director Zendo Kern. Several people owning lots in a county-designated Agricultural Project District near the South Kona village of Captain Cook complained in July of that year that Ryan Neal and Beata Zanone, owners of a five-acre lot in the same project district, were operating a short-term vacation rental without a permit, on Ag land, and in violation of the covenants, conditions, and restrictions on the property.

The complaints came nearly a year after the state Land Use Commission had issued its declaratory order that short-term vacation rentals in the state Agricultural District are not a permitted use under Chapter 205 and that the "residential use of a farm dwelling without any connection to an agricultural use has never been allowed in the Agricultural District." The order upheld the position of Hawaiʻi County, which had been challenged by owners of Ag lots carved out *after* June 4, 1976. That's the date a state law limiting residences on Ag land to farm dwellings took effect.

Both the county and the landowners seeking to rent out homes on their Ag land appealed the LUC's decision to the 3rd Circuit Court of Judge Wendy DeWeese.

This was the legal landscape concerning vacation rentals in July 2021, at the time the complaints against Neal and Zanone were lodged.

Appeals on Two Fronts

In September, Kern sent a "warning letter" to Neal and Zanone, informing them that the Planning Department had received a complaint about their operation. He went on to recite the conditions under which short-term vacation rentals could be permitted, referring to an ordinance passed in 2018. "Your property … is located on county Agricultural Project District (APD) zoning district and State Land Use Agricultural (A) zoning district," he wrote. "Please take this opportunity to address the use of this property and come into compliance with the new law within 30 days."

On October 12, Patrick Wong, attorney for Neal and Zanone, responded to Kern. His clients were not operating a short-term vacation rental, he stated, because "Planning Department Rule 23-3 provides that a 'Short-Term Vacation Rental' means 'a dwelling unit of which the owner or operator does not reside on the building site …' It is our understanding that a portion of the entire dwelling may be rented on a short- or long-term basis as a hosted rental, provided the owner or operator resides on the property." (All emphasis was added by Wong.)

Wong went on to say that "fee owner Neal is a full-time resident of the property, Zanone is more than a half-time resident of the property, neither operate a STVR operation on the property … and on occasion [they] may host guests on the property as a hosted short- or long-term rental, in compliance with all applicable rules and regulations."

A print-out of an on-line advertisement provided to the Planning Department describes the property as consisting of "three villas on a private, beautiful 5-acre fruit orchard retreat." The villas are "inter-connected, yet private … all with large sliding glass door openings onto a shared courtyard, pool and patio."

"Currently, one of the villas is occupied by owner," the ad goes on to say. "He will assist with providing keys and is available if needed."

Nine days later, Kern replied: "Planning has received your letter … and were able to confirm that your clients are not operating a Short-Term Vacation Rental. We appreciate your cooperation in resolving the above-mentioned complaint and consider this case closed."

Instead of informing the complainants directly that their complaints were meritless, the Planning Department merely sent them copies of the letter to Wong.

On January 20, 2022, attorney Michael Matsukawa, representing several of the complainants, informed Kern that his letter to Wong did not suffice to resolve the complaints. "As you know," Matsukawa wrote, "without a final decision, your ruling is not final and can always be revised. Further, the complainants cannot file an appeal to the County of Hawaiʻi Board of Appeals until they receive a letter ruling on their complaints."

Matsukawa also noted that Kern's letter "did not address the issue that the complainants raised, which issue was the focus of the State Land Use Commission's declaratory order … and the focus of the State Legislature in Act 77, … effective July 1, 2021."(Act 77, recommended by the Office of Planning, changed the language of 205 with respect to uses of farm dwellings to state that they had to be "accessory to" farming activity, rather than used "in connection with.")

He quoted the language of the declaratory order, which found that "Purely residential uses, with no connection to an agricultural use, … have never been allowed in the Agricultural District" and "A STVR is not a permitted use of a farm dwelling in the Agricultural District under HRS Chapter 205."

Also, "a single-family dwelling can be defined as a farm dwelling only if the dwelling is used in connection with a farm where agricultural activity provides income to the family occupying the dwelling" and "a single-family dwelling which use is accessory to an agricultural activity for personal consumption and use only, is not permissible within the Land Use Agricultural District."

Kern then issued letters to all complainants on February 15, formally notifying them of his decision. He referred to the county zoning code, which defines farm dwelling as "a single-family dwelling located on or used in connection with a farm, or if the agricultural activity provides income to the family occupying the dwelling." The code also defines short-term vacation rental as a "dwelling unit of which the owner or operator does not reside on the building site, that has no more than five bedrooms for rent on the building site and is rented for a period of thirty consecutive days or less."

Based on those definitions, Kern said, "the parcel in question is not in violation" of the county code. "This case is now closed."

On March 14, Matsukawa filed an appeal on behalf of six neighbors, all owners of lots in the same agricultural subdivision, asking the county Board of Appeals to overturn Kern's finding. He pointed out that the lots were created after June 4, 1976, and are thus subject to all of the requirements of Chapter 205 and the LUC's determinations of its applicability.

"The question presented is not whether transient rental activity is 'hosted' or 'non-hosted' activity,'" he wrote, "but whether such activity complies with Chapter 205, HRS, and the determinations of the Land Use Commission."

Less than two months after Matsukawa filed the appeal, Judge DeWeese issued her ruling in the Circuit Court appeal of the Land Use Commission's declaratory order strictly limiting the use of residences on lots in the state Agricultural District.

DeWeese found that the LUC's order was in error, in that it had concluded that a short-term vacation rental, as defined by the county, could never be a farm dwelling, as defined by statute. A comparison of the county ordinance relating to short-term rentals with Chapter 205 "reveals that a dwelling may simultaneously meet the definition of a 'farm dwelling' pursuant to HRS Chapter 205 and the county's definition of 'short-term vacation rental,'" DeWeese wrote.

The Land Use Commission at once filed an appeal of her ruling to the Intermediate Court of Appeals. That appeal was still pending at the time the county Board of Appeals took up the case brought by the neighbors of Zanone and Ryan.

The Board of Appeals

After several continuances, the Board of Appeals was scheduled to hear the case involving the Ryan-Zanone property at its October 2022 meeting.

Wong, attorney for the couple, filed a motion for summary judgment on September 30, arguing that the county code did not prevent the use of homes in the state Agricultural District as hosted short-term vacation rentals. He cited the ruling by DeWeese, which overturned the LUC's declaratory order.

In response, Matsukawa objected to Wong's filing, noting that nothing in the Board of Appeals' rules allowed it to consider motions for summary judgment.

Aside from that, Matsukawa described the issue on appeal not as the use of the Zanone-Neal property as a bed-and-breakfast operation. Rather, it was the fact that the operation was ongoing without the required county permit and, in addition, violated conditions of the county ordinance establishing the agricultural project district that prohibited commercial operations.

On December 9, 2022, the BOA finally heard the appeal.

In arguing in support of his motion for summary judgment, Wong stated that the complaint "speaks to and asks the director to apply state law and also to apply a Land Use Commission decision which we all know has been overturned by Judge DeWeese and is pending current review at the appellate level.

"If the underlying complaints can cite to the Land Use Commission decision, then so too can we rely upon what the current state of the law is in this jurisdiction, as rendered by Judge DeWeese. … There is no application of the short-term rental ordinance to my client. … There's no violation of that statute."

In response, Matsukawa repeated his position that the Board of Appeals has no rule allowing it to consider motions for summary judgment. "It's like asking an appellate court that's hearing an appeal to render a summary termination of the appeal based on some motion and argument. The appeal is to consider all the issues."

As to the case decided by Judge DeWeese, Matsukawa said it had nothing to do with the appeal of his clients. "If you read that decision, it makes clear that none of the parties in the *Rosehill* case have properties that were set apart as a special county Agricultural Project District." (Linda A. Rosehill was the first of more than a dozen owners of land in the state Agricultural District who challenged the county's ordinance banning short-term vacation rentals on Ag lots created after June 4, 1976, the date that amendments to Chapter 205 took effect, banning all uses in the Ag District unless they were specifically permitted in the statute or allowed under special permits.)

"The properties in this case all were put into the county Agricultural Project District per county Ordinance 97-133. That is the governing standard. …The planning director did not address the question of what uses are allowed within a county Agricultural Project District."

In reply, Wong seemed to agree that *Rosehill* didn't apply. Then he added, "We also know the Planning Department is working quite diligently on rules that deal with host-

TVR Timeline

June 4, 1976	Amendment to HRS Chapter 205 takes effect, limiting uses in the Ag District to those specified in the statue or authorized by special permit from the county.
April 1, 2019	Hawai'i County Ordinance 18-114 takes effect, placing restrictions on where new short-term vacation rentals may be permitted and allowing short-term rental nonconforming use certificates for STVRs on Ag land to be issued only for single-family dwellings on lots existing before June 4, 1976. All residences after that time must be farm dwellings, where short-term rentals are not allowed under HRS 205.
Throughout 2019	The Planning Department receives hundreds of requests for non-conforming use certificates, including dozens for residences on land in the state Agricultural District. Many are denied.
May 15, 2020	The Planning Department asks the Land Use Commission for a declaratory order that farm dwellings may not be used as short-term vacation rentals, upholding Ordinance 18-114.
May 22, 2020	Twenty landowners with homes in the Ag District ask the LUC to reverse the county interpretation of HRS 205. This is known as the Rosehill petition.
May 20, 2021	The LUC issues its order, upholding the county's ordinance and denying the Rosehill petition.
June 18, 2021	The Rosehill parties appeal the LUC decision to 3rd Circuit Court.
July 1, 2021	*Several complaints are made by neighbors of a STVR in Captain Cook.*
February 15, 2022	*Planning Director Zendo Kern dismisses the complaints.*
March 14, 2022	*Complainants appeal to county Board of Appeals*
May 2, 2022	Judge Wendy DeWeese reverses the LUC decision.
June 1, 2022	The LUC appeals DeWeese decision to the Intermediate Court of Appeals
December 9, 2022	*The County Board of Appeals hears the appeal of the planning director's dismissal of the complaint against the Captain Cook STVR. Votes to uphold planning director.*
May 15, 2023	Rosehill parties request transfer to Supreme Court
May 23, 2023	*Complainants Ford et al. appeal BOA decision to 3rd Circuit Court.*
June 8, 2023	Rosehill appeal is transferred to Supreme Court
Sept. 24, 2024	Supreme Court issues opinion in the Rosehill case, upholding the LUC order.
November 6, 2024	*Judge DeWeese issues ruling overturning BOA decision, ordering BOA to enter an order granting the complainants' appeal.*
January 2, 2025	*Hawai'i County appeals Judge DeWeese's decision to the Intermediate Court of Appeals.*
July 11, 2025	*Board of Appeals approves order reversing previous BOA holding and complying with November 6, 2024, order of Judge DeWeese.*

Entries in italics refer to events associated with current ICA appeal.

ed rentals. It's not before you yet, but you'll see it. … Once those rules are adopted and my clients apply for and secure their permit under those rules that are currently not in effect, and there's a violation then, I think then it would be more prudent for the neighbors and the appellants to raise those issues. Currently, there is no violation."

After a lengthy executive session, the board voted to uphold the planning director's dismissal of the complaints, accepting Wong's motion for summary judgment. Wong was also asked by the board to prepare the final order, which the board approved in April 2024.

On May 23, Matsukawa, representing six of the petitioners, appealed the decision to 3rd Circuit Court. Hearing the case was, once more, Judge Wendy DeWeese.

Action in the Courts

As mentioned earlier, DeWeese's order in *Rosehill* was appealed to the Intermediate Court of Appeals in June 2022. A year later, in June 2023, it was transferred to the Supreme Court, in keeping with the court's decision earlier in the year that held appeals from LUC declaratory orders should be brought directly before the high court.

So, at the time Matsukawa appealed the BOA decision, *Rosehill* had been before the Supreme Court for nearly a year. In fact, oral arguments had already been heard by the court, on May 16.

On September 24, 2024, the Supreme Court issued its opinion, authored by Chief Justice Mark Recktenwald. Because, in the light of intervening court rulings, the case should not have been brought before the Circuit Court in the first place, the high court stated that the decision of DeWeese had no weight. Still, the Supreme Court's analysis of the arguments that DeWeese found persuasive was pretty devastating.

The upshot was that, on November 7, DeWeese had to take notice of the high court's finding that "short-term vacation rental activity, which is a form of transient accommodation, is not a direct permitted use in the state Land Use Agriculture [sic] District. … As such, the Hawai'i Supreme Court's decision in *Rosehill* resolves the main issue that is raised in the agency appeal that is now before this court." (This despite the fact that both Wong and Matsukawa maintained that the question before the BOA had nothing to do with *Rosehill*.)

Still, DeWeese wrote, there were outstanding questions that needed to be resolved: "(1) whether the Hawai'i County Board of Appeals used an unauthorized procedure; (2) whether the board met in an unauthorized executive session, (3) whether the board failed to render written findings and conclusions to support its orders, and (4) whether the board ignored the pre-*Rosehill* decision of the 5th Circuit Court in the 'Campos Case' that transient accommodation activity is not a direct permitted use in the state Land Use Agriculture District. The answer to each of these questions is 'Yes.'"

At the conclusion of her 36-page order, DeWeese vacated the BOA's decision and ordered it to grant the appeals requested by the original complainants.

Zanone and Ryan then appealed the ruling to the Intermediate Court of Appeals, where it is pending. The county separately appealed. In July, the ICA joined the two cases.

After months of continuances, the Board of Appeals finally approved the order carrying out DeWeese's orders at its July 2025 meeting. While approval was perfunctory, one of the complainants, Robert Gage, suggested that the reason behind the delays was the hope that the Intermediate Court of Appeals might issue a decision favorable to the county before the BOA carried out DeWeese's order. The county attorney denied this, saying the delays were merely the result of administrative issues.

Meanwhile, Before the ICA

As mentioned, litigation over the county's efforts to regulate transient rentals on land in the Agricultural District continues in the Intermediate Court of Appeals, with the county now agreeing with Zanone and Ryan that the Supreme Court's decision in *Rosehill* did not absolutely prevent short-term rentals of dwellings in the district. Rather, it only applied to *unhosted* rentals. The basis for the claim, the county says, is the fact that the Rosehill petitioners challenged the county Ordinance 18-14, which defined short-term vacation rentals as referring only to unhosted rentals, specifically, "a dwelling unit of which the owner or operator does not reside on the building site."

While the complaining neighbors "strenuously argue HRS Chapter 205, *Rosehill,* and *Campos* restrict all forms of transient accommodation activity on the state Land Use Agriculture District, this is clearly not the case," the county says in a reply brief filed with the ICA in July.

As for the short-term vacation rental rules, which the county had indicated would be in place soon in the December 2022 Board of Appeals hearing, they're still a work in progress.

In June, the Hawai'i County Council passed Bill 47, which became Ordinance 25-50, that added a section to the County Code addressing transient vacation rentals. The ordinance, set to take effect next spring, defines a TVR as "a dwelling, dwelling unit, room, apartment, suite, shelter, or the like: that is, or is offered to be, furnished and rented to a transient for a rental period of less than one hundred and eighty consecutive days and in exchange for money, goods, services, or other consideration." It excludes hotels, motels, inns, apartment hotels, boarding facilities, lodges, timeshares, and tents.

The ordinance also distinguishes between "hosted" TVRs, which are "located on a property that is the principal home of a host, and "unhosted," located on a property on which a host does not reside while the TVR is rented.

Administration of the law is given over to the Finance Department. The only reference to the state Land Use Law is oblique. "Notwithstanding any provision to the contrary, a short-term vacation registered … prior to the effective date of this ordinance is deemed separately registered. …"

In other words, short-term vacation rentals are not addressed at all in Ordinance 25-50, which amends Chapter 6 of the County Code. Rather, they are defined only in Chapter 25: "'Short-term vacation rental' means a dwelling unit of which the owner or operator does not reside on the building site, that has no more than five bedrooms for rent on the building site, and is rented for a period of thirty consecutive days or less." It goes on to exclude "the short-term use of an owner's primary residence," as defined by Section 121 of the Internal Revenue Code.

Regulation of STVRs appears in Section 25-4-16 of the zoning law, added after the passage of Ordinance 18-114. This strictly delimits the zones in which they may be permitted, restricting them to urban centers and resort areas, generally, and requiring them to be registered with the Planning Department. Pre-existing STVRs outside of the designated areas were allowed to register as non-conforming uses, subject to annual renewals.

Passage of this law was what triggered the Rosehill petition, specifically the provision stating, "In the state land use district, a short-term vacation rental nonconforming use certificate may only be issued for single-family dwellings on lots existing before June 4, 1976."

Notwithstanding the ongoing litigation, the county Planning Department continues to allow short-term "hosted" operations in the state Agricultural District. In defense of

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Fate of ʻEwa Feedlot is Still Unclear Despite Moves to Facilitate Solar Project

A trucking company that had been occupying state land near Oʻahu's slaughterhouse in Kalaeloa without a formal lease for possibly a decade or more has finally moved.

That move, reportedly to property owned by the Department of Hawaiian Home Lands, was prompted in part by the state Department of Land and Natural Resources' desire to lease most of a 110-acre property known as the ʻEwa feedlot to a renewable energy developer. As of press time, however, it was not clear what the land will now be used for. The trucking company, American Hauling, reportedly occupied about nine acres of the property.

According to a July 12, 2023, declaration by owner David Brian Kaʻahaʻaina, his company, American Hauling, had been invited decades ago to occupy the area by the Hawaiʻi Livestock Cooperative, which owned the adjacent slaughterhouse from the early 2000s until 2016.

It's unclear exactly where on the ʻEwa feedlot his company began its operations and when it started using the property. A June 2008 Phase II Environmental Site Assessment report on the feedlot property prepared for the state Department of Business, Economic Development and Tourism characterized the land as vacant.

In any case, in 2016, after Kunoa Cattle Company bought the slaughterhouse, Kaʻahaʻaina states that he was "instructed to provide a new certificate of insurance" naming as insured Hawaiʻi Livestock Cooperative, Kunoa Cattle Company, LLC, and Hawaiʻi Land & Livestock, whose affiliate, Hawaiʻi Meats, eventually took ownership of the slaughterhouse from Kunoa Cattle Company.

"My company's services by this time included (a) hauling cattle arriving from the neighbor islands for processing in special containers built by my company, (b) transporting breeding cows to the Animal Quarantine station in Halawa, (c) fixing hoses, repairing gate, cleaning sediment ponds, (d) repairing equipment owned by Kunoa Cattle Company, (e) dumping livestock waste at the landfill, and (f) burying livestock waste on the property," Kaʻahaʻaina's declaration states.

He claims that after HL&L secured a long-term lease from the state Department of Agriculture for the feedlot property in December 2019, HL&L manager Robert Farias (formerly of Kunoa) "informs me … that he will grant me the right to use and occupy a portion of the property for the entire duration of their lease term in exchange for my continuing to provide services to them, which consists primarily of refilling their diesel generators and transporting animals."

Initially, the Department of Agriculture (now the Department of Agriculture and Biosecurity, or DAB) consented to HL&L letting American Hauling occupy a portion of the lot. By all accounts, there was never a formal sublease agreement between HL&L and American Hauling.

A June 24, 2025 report by the DAB staff to the Board of Agriculture and Biosecurity (BAB) states, "In August 2020, [the Agricultural Resource Management Division] became aware that a trucking company called American Hauling, Inc. was using a portion of the lease premises to stage trucks, trailers and other equipment. When ARMD staff questioned HL&L about American Hauling's presence on the premises, HL&L explained that it used American Hauling trucks to transport products, that American Hauling fabricated cattle shipping containers for HL&L, and American Hauling also supplied large forklifts needed to load and unload containers. Initially ARMD accepted this explanation and raised no objection to American Hauling's presence, but when it became apparent from inspections that American Hauling was storing many more vehicles and pieces of equipment than needed for HL&L's operations, ARMD required HL&L to remove American Hauling from the premises."

In March 2023, HL&L filed a complaint in 1st Circuit Court seeking American Hauling's eviction, as well as damages. A few months later, the court granted HL&L's request for a writ of possession. On August 12 of this year, after American Hauling had moved out, a stipulation to dismiss all claims and parties without prejudice was filed with the court.

By that time, the BAB had voted to cancel the Land Court transfer certificate of title for the lot, which also included two other lots, and issue each lot a separate transfer certificate of title. The board also voted to deregister the feedlot parcel from the Land Court system to make it easier to subdivide.

"Basically, what this submittal is about is to prepare the land for a future disposition regarding a renewable energy project. … [HL&L] requests only … 10 acres. … The other 100 acres is proposed to be withdrawn from the lease and given back to DLNR so DLNR can issue a renewable energy project lease," Kevin Moore, new agricultural program manager for the ARMD told the board in June. Moore formerly worked for the DLNR's Land Division.

Despite all the controversy over American Hauling, DAB director and board chair Sharon Hurd noted that HL&L "will still have the need to move cattle. … American Hauling seems a likely candidate to continue that service. … The relationship is probably going to continue with someone. Maybe American Hauling, but we don't know. That's to be determined."

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Vacation Rentals *continued from page 8*

this, it has stated that "renting a stay on one's property is not *per se* prohibited within the state Land Use Agriculture [sic] District if it is 'compatible to the activities described in section 205-2 as determined by the commission.'" The only residential uses allowed in that section are farm dwellings and employee housing.

Yet the county's zoning code lists many more uses that may be allowed in the Agricultural District if they receive a special permit. These include adult day care homes, nursing and rest homes, bed-and-breakfast establishments, family child-care homes, guest ranches, lodges, and model homes. A "guest ranch" is defined as an operation that "offers recreational facilities for activities such as riding, swimming, and hiking, and living accommodations." A lodge is "a building or group of buildings … containing transient lodging accommodations without individual kitchen facilities, and no more than forty guest rooms or suites, and generally located in agricultural, rural, or other less populated areas."

— Patricia Tummons


Wahiawa reservoir and spillway. CREDIT: DLNR.

At the BAB's August 26 meeting, when asked by member Jimmy Gomes about the proposed solar project, DAB staff seemed to no longer know what the DLNR was proposing for the property. A DLNR representative stated in an email to *Environment Hawaiʻi* that the department was "not at liberty to respond" to questions about renewable energy development on the parcel "until we've briefed the BAB (formerly BOA) and BLNR. We anticipate briefing them at the October or November meeting."

Also at the BAB's meeting, the board approved the removal of Farias as part-owner of HL&L and the addition of Jeff Rivera, who has worked for Kauaʻi Ranch since 2000.

"As a result, the owners of HL&L will be Jeff Rivera, owning 75 percent interest, and Hawaiʻi Sustainable Beef, owning 25 percent interest," a DOA report states. Hawaiʻi Sustainable Beef is managed by Riverbend Management, whose director is Melaleuca founder Frank VanderSloot.

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State Close to Finalizing Agreement for Wahiawa Spillway Purchase

On June 25, the Board of Agriculture and Biosecurity unanimously approved a recommendation by DAB staff to delegate to the board's chair the authority to negotiate and execute the purchase of the Wahiawa dam spillway on Oʻahu, which the Hawaiʻi Legislature authorized and funded in 2023 (Act 218).

According to Act 218, Dole Food Company, Inc., had listed the Wahiawa Irrigation System for sale for to $20 million. "The Dole portion of the system includes the Wahiawa reservoir, Wahiawa dam, and ditch system. The spillway, owned by Sustainable Hawaiʻi, LLC, is also an integral component of the irrigation system. Dole has offered to donate its interests to the State of Hawaiʻi in exchange for the state's agreement to repair the spillway to meet and maintain dam safety standards. …

"The purpose of this act is to authorize the Department of Agriculture, Department of Land and Natural Resources, and Agribusiness Development Corporation to acquire the Wahiawa irrigation system, on terms negotiated and agreed upon by the office of the governor, or by eminent domain, and to purchase, repair, and maintain the associated spillway."

The act appropriated $26 million for those purposes, including $5 million for the spillway purchase.

The irrigation system has long been eyed as a secure source of water for thousands of acres of agricultural land the state has purchased in the Whitmore area, mostly from Dole, over the years. But it has also long been in disrepair, falling far short of dam safety standards.

Act 218 appropriated the funds for purchase of the spillway to the DAB, even though the agency does not have the statutory authority to hold title to real property. The state Agribusiness Development Corporation, on the other hand, does.

So in February, the BAB authorized its chair to negotiate a memorandum of agreement with the ADC that would allow the agency to acquire the spillway on behalf of the DAB. The DAB would provide the funds to the ADC. After the purchase was complete, the ADC would then make the land available to the DAB to complete repairs and modifications to bring the spillway into compliance with dam safety standards. That MOA was finalized in April.

By the BAB's June meeting, the terms of a purchase and sale agreement had largely been worked out, although a few provisions were still being negotiated, according to a DAB report to the board.

"[T]he provisions are unlikely to substantively change or affect the transaction and are more legal in nature," the report stated.

Under the agreement, the state would purchase 143.116 acres from Sustainable Hawaiʻi for $4.9 million in "as is, where is" condition.

Section 3.6 of the agreement regarding "Removal of Vagrant Activities," notes that an April 10, 2024, Phase 1 Environmental Site Assessment prepared by Element Environmental, LLC, "identified certain 'vagrant activities' on the property, which include the 'littering and illegal dumping and burning of waste materials, including hazardous substances such as chemicals, electronic waste, and construction debris'. … Seller agrees that it will use commercially reasonable efforts to remove the trespassers on the property engaging in said 'vagrant activities' as described in the Phase 1 ESA prior to closing."

The closing date would be the earlier of May 29, 2026, or ten days after the closing of the state's purchase of the part of the irrigation system owned by Dole.

— Teresa Dawson

Board of Agriculture Adopts Interim Rule To Protect Moloka‘i from Coconut Rhinoceros Beetle

Meetings of the state Board of Agriculture and Biosecurity usually fly under the radar. Typical agendas include approval of low-interest loans of last resort for farmers, leases of land in state agricultural parks, and votes on recommendations by the department's Advisory Committee on Plants and Animals, which mostly reviews requests to import plants, animals, and other organisms, among other things.

The August 26 meeting was different.

On the board's agenda that day was a petition from Kunani and Ipo Nihipali to approve an interim rule to block the shipment to Moloka‘i of almost everything that could conceivably harbor the coconut rhinoceros beetle (CRB) and its larvae.

The board had already approved an interim rule last October that blocked most shipments of CRB host material from O‘ahu, with certain exceptions. It did not block shipments from Kaua‘i, however, even though the CRB has become widespread and there is little expectation it can be eradicated from the island. Lana‘i, Maui, and the Big Island have seen limited infestations and there is still hope that they can avoid following O‘ahu and Kaua‘i to the point where the CRB is well established.

Moloka‘i is the only populated island to have escaped any sign of CRB. Increasingly, residents have grown concerned that their treasured and historic Kapuāiwa grove, as well as the thousands of other coconuts grown for food, fiber, and other cultural purposes, would be devastated by the beetle. And not just coconuts: other plants, including Hawai‘i's endemic and endangered *Pritchardia* palms, are likely to be vulnerable as well.

The Nihipalis' petition, submitted July 29, enjoyed widespread support. More than 130 letters were submitted to the board, including testimony from state employees, legislators, and county officials. All urged approval and stressed the urgency of measures to keep the CRB from entering the island. In written testimony and also in the statements made by members of the public at the August 26 board meeting, no one disputed the need for action. All overwhelmingly endorsed the Nihipalis' proposal.

"We are residents of Ho‘olehua, Moloka‘i," they stated in their petition, explaining their interest in the matter. "We farm sustenance and sustainable foods, including coconut on Moloka‘i. … In addition to producing agricultural products, we work to restore the culture of ike niu on Moloka‘i. If CRB were to be detected on Moloka‘i, crown and injection pesticide treatments would cause substantial losses to the uluniu [coconut grove] and severely impact our efforts to restore traditional practices and uses of coconut trees. If CRB were to become established on Moloka‘i, we would lose the production of the uluniu and, as we are now seeing on O‘ahu, the trees themselves.

"In addition to our direct interests in protecting the uluniu we created on Moloka‘i, we have helped organize, and participated in, many community events, are active community members and strong supporters of Native Hawaiian rights and culture, and work to establish food and water security for Moloka‘i and reestablish a loving relationship with niu, the tree of life."

The Nihipalis' presentation to the board was heartfelt and even tearful. Should CRB arrive on the island, Ipo Nihipali stated, "We will be devastated, generationally. So please …" Board members seemed moved.

Other testifiers also stressed the urgency of action. Wayne Tanaka of the Sierra Club of Hawai‘i, took issue with the Plant Quarantine Branch staff's suggestion that the kinds of actions proposed in the Nihipalis' petition be subject to a statewide interim rule. "If you wait to do some kind of statewide thing before you protect Moloka‘i, it's going to be game over," he said.

Pauline Sato agreed that a statewide rule would be desirable, "but," she added, "if we wait for that, it could be another year or two of meetings. … We have to do something now."

Jonathan Ho, recently named to head up the Plant Quarantine Branch, had stated in his submittal to the board that the petition was precedent setting. Among other things, it "could be in violation of the Commerce Clause as the provisions appear to be selectively prohibiting the movement [of certain items]. … It prohibits movement of materials from areas that are not known to be infested with CRB. By doing so, [it] would imply that the rest of the state is infested and that the existing quarantine restrictions would not be needed. It also prohibits the movement of the listed items if they have been staged or stored in any area of the state, which appears to prohibit the movement of any of the identified commodities to Moloka‘i, including imported items in sealed containers."

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Coconut Rhinoceros Beetle *continued from page 11*

If the board should want to take action to protect Moloka'i, Ho said in his report, "the board can direct PQB staff to work with the petitioners to complete the full advisory review." Ho also suggested that the wider Moloka'i community should be consulted, "to ensure that they are aware of the impacts the interim rule would have on them and that they are able to provide their input as they would be the most impacted by the interim rule."

Board members seemed more favorably inclined than Ho to take some action. Board member Nathaniel Oswald, representing Moloka'i, asked if the board could override the staff recommendation.

The deputy attorney general advising them, Jennifer Waihee-Polk, answered with a hard no. The board could only approve interim rules if the Advisory Committee on Plants and Animals first recommended them, she said, referring to Hawai'i Revised Statutes §150-9.5. That law says, "No interim rule shall be adopted without … a finding by the advisory committee on plants and animals" that "the importation or movement of any flora or fauna … creates a situation dangerous to the public health and safety or to the ecological health of flora and fauna present in the state which is so immediate in nature as to constitute an emergency."

"That's a statutory requirement," she said. "You can't override it. Even if I could find a way for you to override your own rules, you cannot override a statute."

Oswald pressed ahead, asking DAB chair Sharon Hurd what was the most expedient way to move this forward.

Hurd: "We could table it, but what we can do is ask all the people who offered impassioned testimony, just be vigilant. Have voluntary compliance. Don't be bringing plants under your shirt. You know, Moloka'i has a very rugged coastline. Don't bring a boat in there and start offloading compost and material. Just do the right thing. We can do that right now. … Whatever this petition says, we can do that right now."

Ho repeated the suggestion: "One of the things we can do is very strongly suggest people who are moving a lot of material, particularly the goods that we have more difficulties with the inspection process, to just not move them interisland. To the extent of what we can do, we've changed some of the inspection processes, for larger potted plants, larger than 10 gallons, we're requiring people to depot the plant so we can check for the potential for grubs like we were seeing in Lana'i. … We've taken measures to the extent of you know to do more. We can I think work with shippers now while we do the interim rule process."

As far as that process is concerned, Ho continued, his recommendation to the board was to follow the standard process for developing interim rules, and this would be not just for Moloka'i, but for the entire state. "It's the same amount of meetings to do an interim rule for a statewide restriction versus one for Moloka'i. If the board is looking to take the petition as is, no changes, we could probably do it relatively quickly – I'd say, two meetings – provided that the Advisory Committee has the findings that, you know, a ban essentially is warranted for a year and bring it back to the board before the next meeting."

In the end, the board approved a motion to have the Plant Quarantine Branch initiate the rule-making process by referring the matter to the Advisory Committee on Plants and Animals, with the instruction to return to the board with its recommendation by the next board meeting.

A Quick Approval

The Advisory Committee on Plants and Animals met on September 17 – its first meeting in nearly a year. After a presentation by Ho, explaining how he had modified the Nihipalis' petition to bring it more in line with departmental precedent, the committee heard from a number of people, most of them Moloka'i residents and all of them in strong support of the Nihipali's proposed interim rule.

An hour and a half after the meeting began, the committee unanimously voted in favor of recommending that the Board of Agriculture and Biosecurity approve the Nihipali rule at the board's next meeting, scheduled for September 23.

When the board met, the Plant Quarantine Branch report recommended that the board approve an interim rule closely following the language of the Nihipalis, but with certain technical changes. Much of the board's discussion focused on the prohibition of gravel shipments to Moloka'i. Testifiers, including all of the Moloka'i residents who weighed in on the matter, insisted that the on-island quarry would be sufficient to address the gravel needs of the island.

In the end, the board approved the interim rule. Meanwhile, the interim CRB rule adopted last year will expire October 11. In January, new regulations addressing the transport of CRB-host material were adopted. According to the Plant Quarantine Branch, "the existing rule and the permanent regulations in Chapter 4-72 somewhat overlap, so even if the interim rule expires, there will still be permanent restrictions on CRB host materials moving interisland."

— Patricia Tummons