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Environment Hawai‘i
a monthly newsletter

Bizarro World

This is the second month in which *Environment Hawai`i* explores the ways in which Hawai`i County continues to allow transient vacation rentals on land in the state Agricultural District.

That includes allowing "hosted" operations that, from the viewpoint of an outside observer, are all but indistinguishable from "unhosted" ones to flourish without benefit of a permit. It includes arcane interpretations of what constitutes farm dwellings and "family." In blessing TVR operations on recently subdivided lots, it dives back in history to count ancient grants and Land Court awards that were subsumed long ago into discrete properties in the tax record.

Almost all this has been done by means of internal memos from the Planning Department to staff, with little public disclosure.

And the consequences? The irreversible conversion of productive agricultural lands into luxury tourist retreats owned by outside investors. Way to go, county!

IN THIS ISSUE

A Vacation Rental on Kona Ag Land Operates With No Permit for Years

At a hearing of the Hawai‘i County Board of Appeals last August, neighbors of a 10,000-square-foot house in the state Agricultural Land Use District challenged the decision of the planning director dismissing their complaints that the fellow who managed the property, Jason Eisert, had engaged in commercial operations – specifically, guests at the short-term vacation rental he manages had used the space for a wedding on April 24, 2024.

That event was the second time in a span of five days that activity on Eisert's "Kona Kai" vacation rental generated ill-will among the neighbors. Several of them complained to the Planning Department that on April 19, guests of Eisert's home on Pikake Place partied long into the night, shattering the normal peace of the agricultural subdivision with amplified music and loud singing.

On June 6, 2024, then-Planning Director Zendo Kern sent a notice of violation to Eisert.

"The Planning Department continues to receive complaints from the community regarding the ongoing unpermitted events on the property," Kern wrote. "Planning was able to confirm that a party took place on April 19, 2024, and that a wedding was held on the property on April 24, 2024."

Kern cited the language of Chapter 205, Hawai‘i Revised Statutes, concerning what activities are to be allowed in the state Agricultural District, and two paragraphs in the county zoning law, Chapter 25 of the County Code, that forbid weddings and events to be held on Agricultural land. He proposed a fine of $5,000 for violating the state law and two $500 fines for violations of the county code, for a total of $6,000 in fines.

Eisert responded with a full-throated defense, obtaining an affidavit and receipts from the bride that showed the actual wedding was at the Outrigger; what occurred the evening of April 24 was merely the wedding

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The Kona Kai vacation rental. CREDIT: VRBO.COM.

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NEW AND NOTEWORTHY

Kaua'i Water Decision: On September 30, the Hawai'i Supreme Court ruled that the state Board of Land and Natural Resources should not have denied contested case hearing requests by Kia'i Wai O Wai'ale'ale and Friends of Māhā'ulepū over revocable permits allowing the Kaua'i Island Utility Corporation to continue diverting water from Wai'ale'ale and Waikoko streams in 2021 and 2022.

The high court also found that the Environmental Court, which had ruled in the groups' favor, had the authority to review the Land Board's approval of the permits.

After KIUC's 2022 permit expired, the utility did not seek another one to continue diversions. Even so, Environmental Court Judge John Tonaki found in May 2023 that the groups' complaint was not moot and that they should have been granted a contested case hearing. He also vacated the permit approvals for 2021 and 2022.

The Intermediate Court of Appeals reversed Tonaki's decision in July 2024, finding that the appeal was moot and no exceptions to the mootness doctrine applied.

The Hawai'i Supreme Court reversed the ICA, upholding Tonaki's ruling.

The Land Board's attorneys had argued that even if the court determined that the groups had actual or threatened injuries, they still lacked standing because their alleged injuries could only be redressed by the Commission on Water Resource Management, which determines the minimum amount of water that must be left in streams.

"The board asserts that it is not 'regulating water use when it' continues a revocable water permit under [Hawai'i Revised Statutes] § 171-55, but is simply carrying out 'a mechanism by which the state may charge rent for use of public trust resources," the high court noted. "Under this argument, the board seeks to be absolved of its responsibility and authority over permits and conditions which it issued … and also its constitutional obligations as trustee of the state's public trust resources.

"We agree with petitioners that such an argument cannot stand," the court wrote.

The high court remanded the case back to the Land Board for a contested case hearing.

"The contested case hearing should address petitioners' claims that permit conditions were violated prior to issuance of the 2021 RP and 2022 RP — including the alleged resulting disrepair or degradation of improvements under the permit and the alleged diversions of water or waste — and the asserted impacts on petitioners' property interests. The board should require actions by KIUC that the board would have required before issuing the 2021 RP and 2022 RP after a contested case hearing, to address prior violations of permit conditions and the resulting harms to petitioners," the opinion states.

DBCP Case Update: Ten years ago, the state Supreme Court ruled that a 1997 lawsuit brought against Dole Food Company, Inc., Del Monte, Shell Oil, Dow Chemical, and several other companies by workers in Central America exposed to the pesticide DBCP could proceed in state court. The workers alleged that they were harmed by exposure to DBCP, which continued to be used for years in Central America plantations even after its use was banned in the United States.

It took another seven years for 1st Circuit Judge Gary W.B. Chang to dispose of the workers' claims, granting the defendants' motions for summary judgment individually for each of the defendants and, finally, for the group as a whole.

The case then moved to the Intermediate Court of Appeals, which issued its 31-page memorandum opinion on September 22.

After reviewing the case history and the findings of Chang with respect to the individual plaintiffs, the ICA went on to consider the plaintiffs' points of error. While rejecting several of them, it found that the lower court did err by not allowing testimony of an expert in toxicology and excluded testimony and statements from some of the plaintiffs. The case was then remanded back to the lower court.

Environment Hawai'i reported extensively on this and related litigation in September 2014.

A Correction: Our September Board Talk reported testimony that little fire ants had been introduced into Upper Limahuli Valley by a contractor for the National Tropical Botanical Garden. Little fire ants "have not been detected in any part of Limahuli Valley, or in the contractor's fence construction materials. However, numerous biting ants were found in the material storage area and a NTBG staff inspecting the site was severely bitten while taking samples of the ants, which prompted the biosecurity concern," according to Uma Nagendra, Conservation Operations Manager for Limahuli Garden and Preserve, National Tropical Botanical Garden.

Quote of the Month

"People live along these streams with no water in them. They are forced to haul water while water is delivered to Mahi Pono miles away."

*— **Sierra Club***

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EDITORIAL

Hawai‘i County Policy on TVRs in Ag District: It's a Mess

What, exactly, is going on in Hawai‘i County? Its own laws and rules specifically forbid the operation of vacation rentals on properties that lie within the state Agricultural District.

It passed an ordinance in 2018 that limits these uses to very clearly defined zones that do *not* include Ag land – except when the rental is on a lot that existed prior to June 4, 1976. The Planning Department's Rule 23, promulgated in response to that 2018 ordinance, also says clearly that short-term vacation rentals are allowed only in the "Permitted Zoning Districts" – which, again, do not include any land in the state Ag District, excepting those lots that were in existence nearly half a century ago.

Heck, the county even won a ruling from the Land Use Commission, upheld by the Supreme Court, validating its position that under Hawai‘i Revised Statutes Chapter 205, short-term rentals were not a permitted use in the Agricultural District.

And yet…

Short-term rentals of properties in the state Agricultural District continue to be allowed and even encouraged – with the county claiming in a court filing in July that the Supreme Court ruling applied only to *non-hosted* rentals; with the former planning director "interpreting" a family to include one family of however large a size plus four unrelated individuals; and with a deputy corporation counsel arguing before the Board of Appeals that a home in the Ag District that rents for multi-thousands of dollars a night is not a commercial use.

Our cover story looks at the fraught history of just one of the many short-term rentals of homes on Ag lots in Hawai‘i County. But a random check of records available on the county's EPIC website shows Kona Kai is far from the only one where neighbors of vacation rental properties have lodged complaints with the Planning Department about parties, traffic, loud guests, and the like.

After many queries to the Planning Department and permittees to get to the bottom of this issue, we were given two documents that go far to explaining – if not justifying – the county's policies on both hosted and unhosted vacation rentals on Ag land.

To say the least, they are bewildering. The determination of what counts as a lot pre-existing in 1976 covers probably every lot in every subdivision created since the demise of sugar, thanks to counting as a "lot" every portion of a Land Court award, or a remainder, or a grant, regardless of how these may have been absorbed into discrete parcels in the county's property tax records.

Interior of the Kona Kai vacation rental. CREDIT: VRBO.COM.

The use of "farm dwellings" for both hosted and unhosted vacation rentals runs contrary to common sense, but common sense flew out the Planning Department window decades ago.

As to former Planning Director Zendo Kern's "interpretation" of what constitutes a family as it relates to the use of dwelling units – what can be said? It would be laughable but for the consequences.

Frankly, what is occurring in Hawai‘i County with respect to short-term vacation rentals in the state Agricultural District is tragic.

Should the county not ultimately prevail in the litigation now before the Intermediate Court of Appeals, it could well face several difficult choices.

It could require the owners of vacation rentals to petition to have their land placed in a different state district classification (Rural or Urban), where the county allows short-term vacation rentals. The county has the authority to redistrict parcels of less than 15 acres, but spot-zoning is not allowed. And the prospect of the county filing a petition with the LUC to move whole neighborhoods now in Ag into Rural or Urban would be an uphill climb.

It could invalidate all the existing permits or indulgences granted to operators of vacation rentals. That would seem to invite legal claims of damage, since for years the county had allowed such operations to continue unhindered and owners, such as Eisert, had made investments in the belief that the vacation rentals were blessed by the county.

It could, finally, ask the state Legislature to amend Chapter 205 to include vacation rentals as one of the listed allowed uses in the state Agricultural District. This, however, might well put paid to any dreams that the state might have of moving in the direction of agricultural self-sufficiency. If it is more profitable to have a vacation rental on an Agricultural parcel than it is to raise crops or livestock, then that parcel might never be put to productive agricultural use again. One need only look at the fate of former sugar land in Launiupoko, Maui, to see what happens when Ag lands are converted to gentleman estates.

Recently, the Hawai‘i County Council received a report it had commissioned on the economic impact of short-term vacation rentals. The report, from Hunden Partners, concluded that in 2024, lodging revenue from STVRs amounted to around $710 million, a sum comparable to revenue generated by island hotels. It went on to report that around a quarter of all STVR users "would not travel to Hawai‘i Island if this lodging option were unavailable." Losses to the county's portion of the state Transient Accommodations Tax would amount to between $3 million and $5 million annually, while some 12,000 full-time jobs and 30,000 part-time jobs would be lost.

Does the fear of revenue loss lie behind the decisions that compromise the island's agricultural potential?

The report does not state how many of the existing STVRs are on land in the state Agricultural District, so it is impossible to know or even estimate the potential cost to the county of eliminating STVRs on Ag land. Yet the loss of revenue would appear to be the only reason for the county's adoption of convoluted and bizarre policies that allow and even encourage their proliferation.

Hawai‘i County at one point seemed resolute in its determination not to allow the gentrification of Agricultural lands. Now that that has changed, the result is a hopelessly confused mess.

(For further background on this subject, see the cover article in our September issue, "Hawai‘i County Presses ICA to Allow Vacation Rentals on Ag Land.")

Kona Kai *continued from page 1*

reception. The party on April 19 didn't really violate any ordinance or statute, he argued. If there was a noise infraction, it was a police matter, he argued – and at no time did the complaining neighbors call the police.

On July 2, Kern responded, thanking Eisert for the information and stating that "Planning has determined that no violations" occurred. Case closed.

One of the neighbors, Erin Gallogly, appealed the decision. The April 19 party, she stated, involved approximately 50 guests and was a commercial event. She had called Eisert to complain about the noise. He arrived at her house around 8 p.m., she stated, while the party was in full swing and "he heard the amplified noise first-hand." Also, in his reply to the notice of violation, Eisert did not address the allegation of commercial use of his property, she wrote.

As to the April 24 event, which she now referred to as a "wedding/wedding related" event, that, too, was a commercial activity. She said that the Planning Department should have required Eisert to produce the rental agreements for both events. Failing that, the Board of Appeals should do so. "The CoH Board of Appeals can compare information in the Lease/Rental Agreement, statements and/or invoices from the service providers, statements from the renter, and the evidence provided by the complaints to ascertain if unpermitted commercial activity (i.e., wedding/wedding related event) occurred. Whether the event was a wedding or a wedding related event is irrelevant. The issue is an unpermitted commercial event," she stated in her complaint.

It took more than a year for Gallogly's complaint to make it onto the agenda of the county's Board of Appeals. During that time, the allegation of a wedding-related event was dropped in a pre-hearing conference. The issue of loud noise was dropped as well. As to the only remaining complaint – that of a commercial use on April 19 – Planning Director Jeff Darrow, successor to Kern, said that the department evaluated the complaint on the basis of whether the event was advertised, admission charged, or donations sought.

Since the time the complaints were made, Darrow said, the department has changed its procedures. Now instead of issuing a notice of violation, the department issues a courtesy letter asking the subject of the complaint to respond. Only after receiving the response would the department now determine whether a notice of violation was warranted, he said.

Gallogly asked Darrow if Eisert had a special use permit. "In regards to the activities and the property," he replied, "there are currently no special use permits."

In her closing argument, the deputy corporation counsel representing the county, Jean Campbell, stated: "The scope of this case is very, very clear. The department did not receive any evidence of commercial activity. … A simple statement from a neighbor is not sufficient evidence for the government to take action against anyone. … We have no evidence that this was in fact a commercial event."

The board then voted unanimously to dismiss Gallogly's appeal. On October 10, it approved the formal findings of fact, conclusions of law, and decision and order.

Eisert accepts payment from guests at Kona Kai. The property is advertised on VRBO and other vacation rental platforms. Information posted on VRBO.com as of mid-October reflects a nightly charge of nearly $5,000, with a weekly rate of around $32,000. The property is described as having six bedrooms and able to accommodate up to 16 guests. Among the amenities is a 100-foot-long infinity pool, a pickleball court, and a movie room that can accommodate more than 16 people. The home is advertised as being "the largest in the county," with the cited reference being the officials in the county "building department" (sic). (In point of fact, there are many much larger single-family homes along the Kohala Coast, according to property tax records.)

"In describing the nature of Kona Kai's business, Eisert checked the box for 'Lodgings & Conventions.' The box for ' Agriculture' was left blank."

In a filing with the state Department of Taxation reporting revenue from activities subject to the general excise tax for the second half of 2021, agricultural "wholesaling" brought in $14,000, offset by exemptions and deductions totaling $13,000, for a net taxable income of $1,000. "Transient accommodation rentals" for the same period netted $20,050.

Yet the Board of Appeals determined that Eisert was not engaging in any commercial activity.

A Short History

On March 31, 2021, Jason Eisert of Provo, Utah, filed a certificate of organization for Kona Kai, LLC, with the Utah Department of Commerce. The stated purpose was to "own property in Hawai'i. Rent it out as business."

Article III of the certificate states that the company "shall continuously maintain an agent in the state of Utah for service of process who is an individual residing in said state." Eisert gave his own name as the registered agent, using the Provo address.

(Eisert is still listed on Utah records as the registered agent, despite statements to the Hawai'i County Council and others that he has been a resident of the county for many years. In June 2023, for example, Mayor Mitch Roth nominated Eisert to the county's Tax Board of Review. Among other things, Roth stated that Eisert "has been a resident of Hawai'i for 6 years." His accomplishments listed by Roth included "recognition as the First Place winner in the State of Utah for Problem Solving.")

Not until October 18, 2021, did Kona Kai register with the Hawai'i Department of Commerce and Consumer Affairs as a foreign (i.e., out of state) limited liability company. Eisert is identified as the sole member as well as the Hawai'i registered agent, giving as his address the Kona property on Pikake Place.

In May 2021, Kona Kai acquired the property, paying $4.75 million for two adjoining lots, each around five acres. The seller was Koyo USA, a company that was one of the original bottlers of desalinated seawater at the state-owned Hawai'i Ocean and Science Technology (HOST) Park adjoining the Kona airport. To finance the purchase, Kona Kai was loaned $3.23 million by Selva, LLC, a Salt Lake company.

Within days of the purchase, Eisert filed Form D with the U.S. Securities and Exchange Commission, stating that Kona Kai, of which he was managing member, was offering $3.6 million in equity, of which $3.2 million had already been sold to 58 investors. States in which investors would be solicited were given as California, Hawai'i, Utah, and Wyoming. In describing the nature of Kona Kai's business, Eisert checked the box for "Lodgings & Conventions." The box for "Agriculture" was left blank.

Just two months following sale of the property, neighbors began to complain. Owners of property in the gated Ka Aina Pono (KAP) subdivision wrote to Eisert in

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SIDEBAR

How Hawai'i County Comes Up With So Many Non-Conforming Lots

Here's a puzzle. A large house on a five-acre lot in the state Agricultural District is rented out to tourists for more than $700 a night, according to a recent listing on the VRBO website.

Inside, near the kitchen door, a framed placard displays a non-conforming use certificate from Hawai'i County Planning Department, stating that the property is permitted to operate as a short-term vacation rental.

Hawai'i County insists, and even went to court to get an affirmative ruling, that short-term vacation rentals are allowed only on lots that were existing as of June 4, 1976.

The lot on which this house sits was carved out of land owned by the Mauna Kea Agribusiness Co. in the late 1990s. The house was built in 2004.

So how is it that this property qualifies for a non-conforming use certificate?

The question was posed to Planning Director Jeff Darrow, whose signature appears on the certificate.

In response, Darrow forwarded two documents to explain the policy.

One, a letter to Richard Armstrong of Mauna Kea Agribusiness, dated June 30, 1997, addresses a request from the company in anticipation of subdividing its property following closure of the sugar plantation north of Hilo. The property affected consisted of just five discrete lots in property tax records. Yet, according to the letter signed by Deputy Planning Director Russell Kokubun, on behalf of Planning Director Virginia Goldstein, "the subject properties contain a total of twenty-two (22) separate legal lots of record." Instead of counting only the lots in real property tax records, the Planning Department included Land Court awards, grants, and portions of awards.

Photo of a short-term vacation rental with a non-conforming use permit. CREDIT: VRBO.COM.

The second document is an October 24, 2019, memo to Planning Department staff from then-Director Michael Yee, providing "guidance on interpreting the meaning of 'existing before June 4, 1976.'"

"Lots that have been consolidated and resubdivided after June 4, 1976, may be considered as existing before June 4, 1976, and eligible for a non-conforming use certificate if: a) the consolidation and resubdivision did not increase the number of lots, or b) the consolidation and resubdivision was a result of a government action to widen roadways, create drainage, or a similar government-initiated project," Yee wrote.

And so it is that a new house, on a lot whose boundaries were not established until a quarter-century ago, can qualify for a non-conforming permit allowing short-term vacation rentals.

The house, by the way, is on the market for more than $2 million.

— Patricia Tummons

Kona Kai *continued from page 4*

July 2021, listing numerous issues.

"As you know, over the July 4th weekend a large party at your property subjected the neighborhood to four days of speeding and unsafe driving, increased traffic and gate use, loud music, strobing lights and loud partying late into the night and early morning hours. … [Y]ou could imagine our disappointment and concern to see the airBnB advertisement that would allow for 30 to 40 persons to stay at your property with no county permits in place."

The easements allowing use of the roadway and gate system "were granted based on residential use, not commercial," the neighbors wrote. "It is an unfair burden on the KAP property owners to have to pay for the accelerated wear and tear on the road system … In addition, this would create increased liability to each of us as the road is privately owned and not under the umbrella of an association."

On December 31, Planning Director Kern issued a warning letter to Eisert, stating the department has "received a complaint alleging that you are operating an unpermitted commercial business, hosting weddings and events" on the Pikake Place property. Kern listed the various activities that the county does and does not allow and asked for a response by February 15. "We want to give you the opportunity to disprove the complaint or take necessary corrective action," he wrote.

On June 26, Eisert responded to Kern's warning letter, proposing several corrective actions that would "bring our property back to good standing with the county and allow for our additional farm dwelling agreement decision to be made."

He added, "Honestly, I am still amazed at how unwelcoming everyone was in this community. I wasn't even given the opportunity to introduce myself when I moved in. … It is a shame that I was greeted this way."

To address county concerns, he said, and comply with county regulations, he was no longer going to advertise his property as a hosted rental and "farm workers will move from off-site locations into the main farm dwelling." Also, "non-agriculture activities will not occur outside of the structural parameters of the dwelling structures. All activities and events that occur outside of the structural parameters will come under the agricultural use restrictions."

The "golf driving range" will be "used only for personal use." (In later communications, Eisert said he had removed this amenity.)

Further bookings, he added, will be limited to "groups consist[ing] of 'one family or group of not more than five unrelated persons."

Special Permit Sought

In October 2023, Eisert applied for a special permit "to allow for the establishment of a wellness and educational center with overnight accommodations within an existing one-story, single-family dwelling consisting of 9,452 square feet of gross floor area and consisting of 5 bedrooms, 5 full baths, 2 half-baths and a swimming pool and processing rooms, all of which are located on approximately 5.083-acres of land and identified as Parcel 14. Also requested is permission to revert an existing two-story, 1,870 square-foot agricultural storage building on the same property, back to its original use as a 3-bedroom, single-family dwelling where on-site management and other wellness support functions can operate, including overnight accommodations."

Two months later, he separately applied for an "additional farm dwelling" permit to cover the reversion of the storage building to a residence.

Michael Matsukawa, an attorney representing owners of property in the same area, wrote Eisert on March 1, with a copy to the Planning Department, informing him that the use of private roads by his guests was not reasonable and "exceeds the scope of the easement." He went on to summarize an exhaustive search of subdivision records, including easements, that thread through the neighborhood of Eisert's property.

As all the land is private, there is no state or county law to address disputes over use of the easements, he noted.

But in the case of special permits, he added, the county Planning Commission's rules require that any activity that a landowner puts on their land should not "adversely affect surrounding properties." Since the access easement "is owned by others and the easement area is 'surrounding property,'" he continued, "this rule requires the consent of owners of 'surrounding property' as to the kind of use that may be put on the affected easement area."

"In any event, the 2008 Grant of Easement is ambiguous as to the scope of the easement in question, which means that the circuit court must be called upon to determine the scope of the easement in question, particularly the kind of uses that a benefited party, such as yourself, may put on the affected easement area," he wrote.

Matsukawa went on to refer to a decision, *Cooper v. Sawyer,* of the Hawai'i Supreme Court in 1965, in which the court determined that the party benefited by an easement can use it only for a "reasonable" use.

"It looks like it might have been left in the drawer in West Hawai'i where documents to be sent to Hilo are kept. They are looking now."

Finally, Matsukawa wrote, Kona Kai's application is incomplete: "[T[he legislative and judicial standards of the 'reasonableness' of a proposed Special Permit are conjoined. No doubt, an agency will not attempt to adjudicate a matter of law that falls within the jurisdiction of the circuit court to make. In other words, before Kona Kai, LLC's application for a Special Permit can be deemed to be complete, Kona Kai, LLC (1) must obtain the consent of the owners of lots in the Ka 'Aina Pono subdivision or (2) must obtain a judgment from the circuit court on the scope of Kona Kai, LLC's ability to use the affected easement area in the Ka 'Aina Pono subdivision."

On August 8, 2024, Daryn Arai, a former county planner turned land use planning consultant, advised Kern that his client, Kona Kai, was requesting the immediate withdrawal of the special permit application. The Planning Department complied and refunded the $500 application fee.

The 'Additional Farm Dwelling'

The December 2023 application to convert the outbuilding to a residence was actually the second such application. The first was made in January 2022, with Eisert stating that this would free up one of the bedrooms in the larger house, allowing the on-site caretakers to live in the converted shed.

The application was problematic. It was withdrawn in December at the same time the second AFD application was submitted. "We kindly request that the planning department consider this updated submission for approval," Eisert stated at the time. "Our planner, Daryn Arai, has conferred with Deputy Director Jeff Darrow, and we understand that, upon approval, the additional dwelling will accommodate our farm workers and family only, while our primary dwelling will continue to support 'hosted 'short-term rentals.'"

"Our intent is to expand agricultural operations," Eisert wrote, "but we have not had the resources and manpower to do so yet. … Approval of the additional farm dwelling application is a pivotal step for us, as it would enable the housing of an additional farm worker….

"In addition to bolstering our agricultural operations, the additional farm dwelling is integral to supporting Kona Kai LLC's overarching business objectives. It will enable us to maintain the flexibility to continue our rental operations and, if approved, the activities outlined in our special permit application. **The synergy between our agricultural activities and hospitality services is crucial for the sustainable growth of our business, ensuring we can meet our financial responsibilities to sustain our agricultural activities.**" (Emphasis in original.)

By February 28, 2024, Kern had approved the application, binding on "all persons who may, now, or in the future, use or occupy the additional farm dwelling."

Approval was subject to several conditions. The first is that the AFD "shall only be used to provide shelter for persons involved in agricultural or farm-related activity." The second condition: the dwelling "shall NOT be used or advertised for hosted or un-hosted vacation rental activities."

To complete the process, Eisert was to mail to the Planning Department a copy of the agreement with notarized signatures, along with a $41 check to cover the cost of filing with the Bureau of Conveyances. "**The Planning Department will not approve a building permit application for the additional dwellings until the AFDA [additional farm dwelling application] document with all required attachments has been recorded at the Bureau of Conveyances.**" (Emphasis in original.)

The Planning Department files include

a copy of the check Eisert sent, as well as a copy of the notarized statement. But the Additional Farm Dwelling Agreement was not registered with the Bureau until after *Environment Hawai'i* notified the Planning Department, responsible for the filing with the bureau, that as of October 1, this had not been done.

Darrow was asked about this.

"We have emails that it [the BOC document] was in transit from Kona to Hilo via the pouch," Darrow replied, referring to the daily shipment of documents to and from the Kona and Hilo offices of the department. "We are following up to see if it is somewhere here in Hilo or in Kona."

In a later email, Darrow wrote, "It looks like it might have been left in the drawer in West Hawai'i where documents to be sent to Hilo are kept. They are looking now. Regardless, we will need to have a new BOC doc signed and notarized."

The agreement was finally recorded at the bureau on October 22.

That year-and-a-half delay did not hold up approvals for the building itself, despite the plain language of the agreement. County inspectors gave the building alterations final approval in July.

In June, Eisert applied for an agricultural-based commercial operation permit, apparently after this operation was already established. "Kona Kai, LLC, operates a food hub and a permitted retail food establishment using Hawai'i-grown and raised products to prepare and sell meals, snacks, beverages, and value-added goods. Food will be offered primarily by appointment," the application states. "Operations may run daily from 8 AM to 9 PM." The application, submitted June 1, was approved on June 16.

Agricultural Tourism

On October 27, the Planning Department received an application from Eisert for a special permit "to allow agricultural tourism" on both parcels owned by Kona Kai. The application states that the request "applies to an existing one-story, single-family dwelling … [and] also includes a two-story, 1,870-square-foot additional farm dwelling … used for on-site management and hosted rental purposes."

The inclusion in the sought-for permit of the "additional farm dwelling" to be used in support of the hosted rental would seem to run counter to the conditions of approval of the additional farm dwelling, which forbid its use in connection with "hosted or un-hosted vacation rental activities."

Overnight accommodations are specifically not allowed under Agricultural Tourism permits, Planning Director Darrow stated when asked about the latest permit application.

Eisert was asked by email whether he had ever received a permit to use his property as a short-term vacation rental. He responded, "Under the county's written guidance, hosted accommodations are permitted by right when the owner or operator resides on the building site." To support this claim, he referred to, and included as attachments, two documents.

One was a letter from Darrow on July 25, addressing the subject: "Clarification of Hosted Rentals on Agricultural Lots." Once Eisert's Additional Farm Dwelling "has received final approval and your host has established permanent residence within that AFD, the requirement to maintain a locked-off host bedroom within the main dwelling no longer applies," Darrow said. "Your host, residing within the approved Additional Farm Dwelling, satisfies the requirement for an onsite host presence. Accordingly, you may now utilize all rooms within the primary dwelling for guest accommodations."

The second document is an August 16, 2021, memo to staff from then-Planning Director Zendo Kern. The memo, Kern said, was "to provide direction to staff when the department receives inquiries regarding hosted rentals."

Under the department's Rule 23, a short-term vacation rental is defined as one where the owner or operator does not reside on site, with no more than five bedrooms for rent, and rented for 30 days or less, Kern noted.

When the owner or operator does live on the site, the operation is referred to as a hosted vacation rental, he stated, which "the Planning Department does not regulate."

He went on to say that the only regulations applying to these rentals are those defining "dwelling unit" ("rooms designed for or containing or used … [by] a single family only") and "family" (persons related by blood, state-sanctioned adoption, foster parentage, guardianship or marriage, or a group of not more than five unrelated persons … occupying a dwelling unit").

Kern restated his "interpretation" of family, initially provided to staff in an earlier memo: "The interpretation stated that a single-family dwelling permits a group of up to five unrelated persons. In this interpretation, a family or group of related persons occupying a dwelling unit will count as one person, which may allow up to four additional unrelated persons in the home."

No mention is made in the memo of excluding properties in the state Agricultural District from operating either hosted or unhosted rentals. The county ordinance passed in 2018 that sets out the areas in which these are allowed states specifically that in the Agricultural District, a short-term rental certificate "may only be issued for single-family dwellings on lots existing before June 4, 1976." The Kona Kai lot was not established until the early 2000s.

In an email to *Environment Hawai'i,* Darrow stated that he would be reviewing Eisert's application for the special permit required for agricultural tourism operations. "It is my understanding that he is requesting a special permit for overnight accommodations as part of his ag tourism business," Darrow wrote.

State land use law forbids overnight stays of 21 days or less as a part of agricultural tourism activities, except in Maui County. According to Eisert's email, he intends "to transition away from overnight accommodations over time, honoring existing bookings while we scale farm tours and agricultural education once the special permit is approved."

— Patricia Tummons

The exterior of Eisert's vacation rental property. CREDIT: VRBO.COM.

Low East Maui Stream Flow Raises Questions About How to Meet User Needs During Drought

Do the interim instream flow standards for East Maui need to be revised again to meet off-stream uses in Upcountry and Central Maui? Even when the current flow standards haven't been fully implemented?

On October 27, the *Honolulu Star-Advertiser* ran a cover story describing how historic drought on Maui has resulted in lower stream flow in East Maui, forcing the county Department of Water Supply, which relies on water diverted from those streams, to implement unprecedented water restrictions in Upcountry.

The next day, staff hydrologist Ayron Strauch provided more detail to the state Commission on Water Resource Management on the drastically reduced stream flows in East Maui and the consequences for municipal and agricultural uses in Upcountry and Central Maui.

For streams with USGS gaging stations, Strauch showed how flows — from median (also known as Q50) to extremely low (Q95) flows — in the 2022-2025 time period are much lower than they were in the 1984-2013 time period.

For Na‘ili‘ilihaele stream, median flows were about 36 percent lower in the 2022-2025 period. Hanawi Stream's median flows were about 38 percent lower, and Honopou Stream's median flows were about 40 percent lower in the same period.

Strauch showed photo after photo of other dry East Maui streams taken earlier this year.

"The soils are drying out. If there is a rain event, it doesn't seep into the ground. No systems recharged in the last six or eight months in East Maui. … In 2025, at the Honopou station, we have 150 days out of 365 that were less than the [Q95] flow. That is as bad as it has ever been," he said. For 2024, it was 115 days.

East Maui streams have been consistently dry from wet season to dry season, he said.

As a result, the surface water diverted from the streams into the plantation-era irrigation ditch system operated by East Maui Irrigation Company has been insufficient to meet the county's drinking water needs in Upcountry as well as the irrigation needs of Mahi Pono, which is growing crops on the former sugar lands of Central Maui.

For 2025, Strauch reported, the potable water need in Upcountry was 8.1 million gallons a day (mgd). The median inflow of stream water into the three county Department of Water Supply treatment plants that serve the area was only 5.38 mgd.

"Basically, EMI [co-owned by Mahi Pono] is operating to serve DWS first. Under drought conditions, DWS may withdraw 6 [million gallons a day]. … Since August 28, Mahi Pono has not received any surface water at all," Strauch said. (East Maui Irrigation Co. diverts stream water under a permit from the Board of Land and Natural Resources.)

As a result, Mahi Pono has had to pump water from groundwater wells in the Kahului and Paia aquifer systems. "Without this, all of their plants would not survive," he said.

While Mahi Pono's use of groundwater had been creeping up in recent years, it spiked this year. In September, Mahi Pono pumped just over 10 mgd from the Kahului aquifer and 25 mgd from the Paia aquifer. The sustainable yields of those aquifers are 1 mgd and 7 mgd, respectively.

Strauch explained why simply using groundwater was not a solution for the county DWS. "Water is heavy, so moving it to higher elevations such as where much of the Upcountry System is located, at 1,000 to 4,000 feet, from basal aquifers at sea level is projected to cost $1.64 per thousand gallons for distribution from the Kamole-Weir [water treatment plant], $4.07 per thousand gallons at the Piiholo WTP, and $5.93 per thousand gallons at the Olinda WTP. [The county's] current charges for water only average about $4 per thousand gallons," Strauch said in his presentation to commissioners.

Stream diversions could be modified to capture more high flows for storage, he suggested, but larger and better reservoirs would be required for that. The commission could modify IIFS under low-flow conditions or extreme drought to ensure a reliable water supply for DWS, he added.

Several East Maui streams gain substantial groundwater below the diversions, he noted, and surveys showed that stream fauna may not require full restoration. In fact, he said, they may thrive on flows as low as H90, the amount of flow that provides for 90 percent of natural habitat availability necessary for reproduction, recruitment, and growth.

"You don't expect to see any difference in biota between H90 and full restoration?" commissioner Lawrence Miike asked.

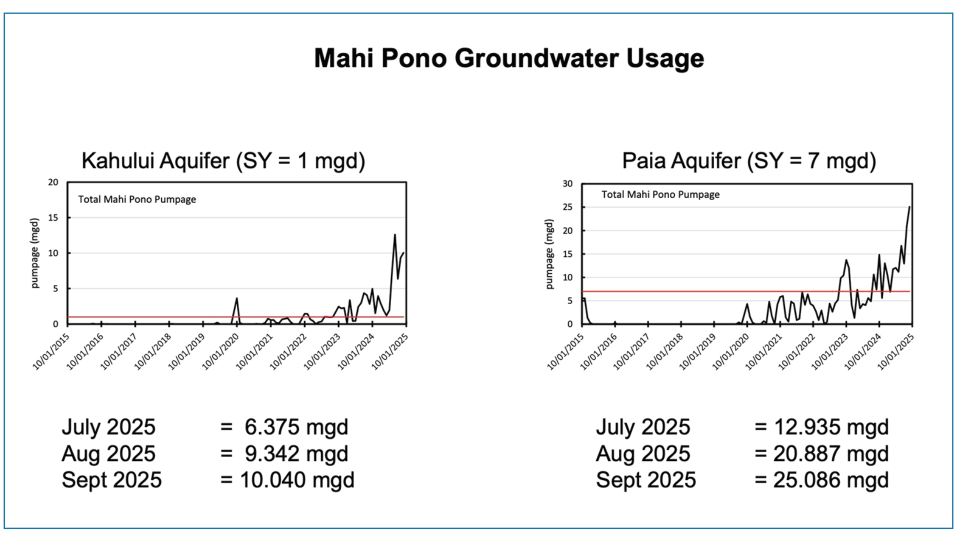
"Correct," Strauch replied.

DWS Director John Stufflebean testified that the county planned to increase the capacity of its Kamole treatment plant and to build reservoirs with a total capacity of 140 million gallons. He said the county hoped to construct the reservoirs over the next few years as well. The estimated cost is $25 million, which is almost the department's entire capital budget of $30 million, he said.

"We are looking for federal funding," he said.

He added that the county is also considering purchasing or leasing private wells and drilling new county wells. "The wells are going to be expensive and pumping is expensive," he said.

CWRM deputy director Ciara Kahahane reported earlier in the meeting that the agency was working to drill a deep monitor well in Paia "so we can track what's going on with the aquifer more accurately. … Ideally, we would



CREDIT: CWRM.

be measuring water and chloride levels in a well not actively pumped."

She added that CWRM had also received funding for the USGS to study Central Maui with the goal of determining more accurate hydrological boundaries.

Commission chair Dawn Chang asked whether the agency has data from Mahi Pono's wells.

Ryan Imata of CWRM's groundwater branch replied, "We are not receiving water levels or chlorides for several of their wells. We have reached out to them. We still haven't received the data. We will reach out and get them in compliance with reporting requirements."

When it came time for members of the public to testify, attorney David Kimo Frankel, who represents the Sierra Club of Hawai'i in a number of court cases involving East Maui stream diversions, argued that Mahi Pono was planting too much of its land in agriculture.

An environmental impact statement for a proposed long-term water license for East Maui water diversions estimated the company would plant 20,000 acres. But Frankel, testifying on behalf of the Sierra Club, said there wasn't sufficient water for more than 12,000 planted acres.

"[EMI co-owner] A&B incorrectly assumed in its EIS that there was 87.95 mgd it could take from East Maui streams. The Sierra Club has been pointing out for years that this number had no basis. Your staff concludes that based on recent changes in rainfall that much less water is available: 46.9 mgd. And twenty-five percent of the time, only 19.4 mgd will be available. Mahi Pono should not be assuming that it will get more than 30 mgd from East Maui streams. Mahi Pono cannot continue to expand its agricultural operations – unless it wants its crops to wither away and die," according to the Sierra Club's written testimony.

It went on to note that, according to University of Hawai'i Professor Ali Fares, Mahi Pono's citrus crops require 2,536 gallons per acre per day. "More than 80 percent of Mahi Pono's crops are citrus. … 12,000 acres of citrus requires approximately 30 million gallons of water a day. Twenty-five percent of the time, there will barely be enough water for Mahi Pono's crops (if you include water from East Maui streams and groundwater and water from streams west of the revocable permit area)."

In addition, the club's testimony said, Mahi Pono was over-pumping groundwater.

"For years, the Sierra Club has been asking the Board of Land and Natural Resources to reduce the amount [of East Maui stream water] allocated to Mahi Pono by the amount of groundwater that can be **sustainably** pumped. In the Paia aquifer, that's 7 mgd. But recently, Mahi Pono has foolishly been pumping far more than that. Mahi Pono must stop pumping so much water. And stop planting more acres. Instead, it should start conserving water."


CWRM staff collecting stream data in East Maui. CREDIT: CWRM.

And while it was over-pumping, Mahi Pono was also wasting water by dumping millions of gallons a day of unused stream water into "century-old, unlined, leaky reservoirs," it continued.

Frankel also argued that, contrary to Strauch's representations, there was not enough data to suggest that H90 flows produce as much habitat as full restoration. "I think there needs to be a much more rigorous examination of what flow is in each stream and species living there. We need that and don't have it yet," Frankel said.

Native Hawaiian Legal Corporation attorney Ashley Obrey, who represents Nā Moku Aupuni o Ko'olau Hui, a group of East Maui farmers and cultural practitioners, expressed concern about how Strauch's report could be used to take more water from streams. Nā Moku has fought for decades to restore stream flow to East Maui streams.

"There likely could be community pushback," Obrey said. Mahi Pono plans to expand operations "in this very real crisis," while the Water Commission's order regarding interim instream flow standards "still has not been completed," she added.

On this, Kahahane reported that the state Historic Preservation Division had recently given its concurrence regarding modifications to the diversion system required by the commission.

The Sierra Club noted in its written testimony that many of the diversion modifications that the commission ordered in 2018 and 2022 in were still undone.

"More than a dozen streams are bone dry below the diversions. People live along these streams with no water in them. They are forced to haul water while water is delivered to Mahi Pono miles away," it stated.

Jonathan Scheuer, a consultant to the state Department of Hawaiian Home Lands and chair of the East Maui Regional Community Board, shared the Sierra Club's concerns about Mahi Pono's groundwater use and the continued water diversion from communities experiencing low stream flow.

He also reminded the commission that at some point, DHHL's water needs have to be factored into the discussion of how off-stream uses are met. DHHL's use of water is considered a public trust use that has priority over commercial uses such as Mahi Pono's.

DHHL requested in December 2020 that the commission approve a reservation of East Maui water for the agency's plans for thousands of acres in Central Maui, but the commission so far has only granted part of it.

Action on the remainder of the DHHL's request is pending further research by Strauch, Scheuer said. "It's really important that this happens soon. … To the degree, though I don't think it's advisable, that the Board of Land and Natural Resources is considering moving forward towards a long-term lease, the plain language of that statute says you're supposed have a reservation in place for DHHL before issuing a long-term lease."

He added that DHHL's use is "one of the five public trust uses of water, but an off-stream public trust use. Our use should not be coming out of, seen as coming out of reducing stream flows further, but really should be, 'ok we've determined that there might be this much available offstream.' DHHL's uses come off of that. Unfortunately, what has happened before and might be suggested by Ayron's otherwise excellent presentation today is that accommodating DHHL's uses will only happen if you further take water from East Maui. And I don't think that's the process that's supposed to be followed under the law."

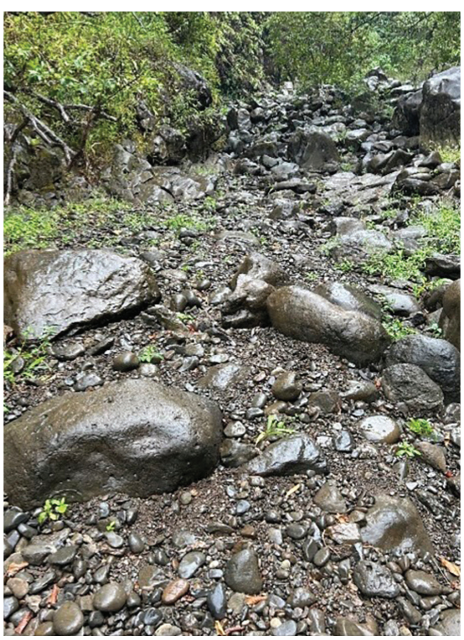
In cautioning against taking more water from East Maui streams, Scheuer noted that a lot of people on the regional community board from Wailuanui and Ke'anae, where streams have been fully restored, are saying the water is warm and flows are low. Other board members from Huelo have no water in their streams, and at the same time you can see water in the ditch going to Central Maui, he said.

"From a community perspective you're seeing your community suffer, you're still seeing water exported and now you're hearing, 'Oh, CWRM is thinking about taking more,'" he said.

Chang interjected, "I want to be really clear, there's no action CWRM is proposing, so I don't want that narrative to go out that CWRM is proposing to do something."

"I believe I'm tracking the conversation, including the questions from you," Scheuer replied. He added that it was great Chang was emphatic that no action was being proposed.

Still, he continued, the talk of taking more water from streams was particularly problematic at a time of deep drought and when Chang, in her role as Land Board chair, had announced she was planning to bring a contested case to move forward with a 30-year water license.



Opana stream in East Maui, above the Wailoa ditch.
CREDIT: CWRM.

"When Strauch is talking about … ways in which he can take more water out of these streams, it's inescapable for people to look at that in the context of what you're proposing for the BLNR. These things are related to each other," Scheuer said.

He urged Chang, as Land Board chair, to hold off on any long-term license and related contested case and instead "let the community- and Maui-driven processes go forward," referring to the work of the board he chairs. That board was created in 2022 with the "specific purpose of trying to take over the East Maui irrigation system and operate it as a county, non-potable water utility," he said. (Chang clarified later that she was proposing not just a long-term license, but also a potential negotiated agreement with county of Maui.)

With regard to Strauch's take on the biological health of the East Maui streams, Scheuer said CWRM staff's assessments were just snapshots and did not capture population dynamics over time, including in response to gathering pressure.

Scheuer also encouraged the commission to consider the habitat beyond the streams in any discussion about H90 flow versus full restoration.

"DAR [the state Division of Aquatic Resources] has been looking at the effects of stream flow and ocean life and have seen really significant correlations between healthy corals and restored streams," he said.

He expressed surprise at the water commissioners' silence on Mahi Pono's recent groundwater pumping levels.

He said he appreciated Kahahane reporting that CWRM will be looking at the aquifer boundaries and trying to track salinity. However, he went on to note that not one of the commissioners was jumping up and saying, "Wait! We manage groundwater by sustainable yield and we have a chart in front of us that says we're, like, ten times over sustainable yield."

That excessive draw-down "has actually been the case for a long time in Kahului," he said. "It's more recent for Paia. I don't know why there's not more alarm."

Scheuer recommended that the commission ask for an update as soon as possible on the groundwater situation in Central Maui, noting that one of the often-touted thresholds to designate a groundwater management area is when pumping exceeds 90 percent of sustainable yield. "You're at, like, hundreds of percent over sustainable yield. You need to pay some attention to it."

Mary Ann Pahukoa, whose family has farmed kalo for generations, testified via Zoom from Ke'anae valley. She thanked Frankel, Obrey, and Scheuer for their testimonies.

"This is a very scary time for everybody. I do hope that you can understand our concerns and mana'o that Ashley and Kimo and Jonathan have shared with you. … This board should be creating some solutions to mandate real-time, slow monitoring. There's a lot of conflict going on with EMI collecting their own data and presenting it to our community," she said.

Mahi Pono was misusing the water it was diverting, she added, saying that the company "continues to threaten our way of life. East Maui provides more ulu, kalo, and sweet potato and various crops than Mahi Pono could ever. So when we talk about protecting the public trust or when we talk about providing food security to our islands and to our communities, Mahi Pono does not do this. The East Maui farmers and generational kalo farmers have done this without prioritizing profit."

In response to some of the testimony calling for more data on ecosystem health in East Maui, Strauch said, "I just wanted to temper expectations. We are in charge of monitoring, at the moment, 120 locations statewide with a team of four. We conduct biological surveys and many, but not all, are at one or more elevations, which takes one or more days.

"We are out of time to add field work. We are lucky enough that we had extra funds this year to purchase helicopter time to get to these locations. The streams are not easily accessible other than if near the highway or via helicopter. We're not going to go in monthly. We don't have the time or resources. We're not going to go in every six months. If we get into a single location every year, that's a win. That's just the reality of the situation. We're never going to understand the monthly dynamics of populations."

Kahahane added, "We're going to keep asking for more funding as long as I'm here."

Chang, in the end, expressed her appreciation for all of the testimony that brought "different levels of expertise and experience to the commission."

"I think we've had the opportunity to vet a lot of issues," from DHHL needs, to community concerns, to data gaps, she said. "All of this is critical. … I want everyone to know how difficult this is. This isn't easy, whether you sit as the Water Commission, whether you sit as the Board of Water Supply, whether you sit as the Board Land and Natural Resources. We are all balancing tremendous competing interests guided by some legal uncertainties, but we're all trying to do the best that we can."

— Teresa Dawson

Court Instructs Board to Better Manage Water Diversions from East Maui Streams

On October 29, Environmental Court Judge Lisa W. Cataldo issued an opinion in the Sierra Club of Hawai‘i's appeal of a June 30, 2022, contested case decision by the Board of Land and Natural Resources to approve revocable permits allowing East Maui Irrigation Company and its parent, Alexander & Baldwin, to divert 45 million gallons of water a day from East Maui streams.

The four permits have expired. Even so, Cataldo noted, "Finding two applicable exceptions to the mootness doctrine—capable of repetition yet evading review and public interest—the Intermediate Court of Appeals remanded this appeal to the Environmental Court for further proceedings consistent with the Summary Disposition Order."

Oral arguments were held on April 30.

In a supplemental brief, the Sierra Club asked the court to reverse the board's decision to grant the 2022 permits. It also asked that the Land Board, in considering revocable permits, a) "reduce the amount of East Maui stream water allocated for irrigation by the amount of groundwater that can be sustainably pumped;" b) "reduce the amount of water allocated for irrigation by the amount of water that the county does not use daily on average;" c) "require practical mitigation measures to reduce system losses;" d) "ensure [the Commission on Water Resource Management's] interim instream flow standards are in place and fully implemented before allowing more water to be taken from East Maui streams;" and e) "render necessary findings regarding traditional and customary practices."

Attorneys for the Land Board, A&B, and EMI argued that, if granted, the Sierra Club's recommendations would amount to a mandatory injunction on current or future permits.

The Sierra Club countered that its proposed instructions simply reiterate general legal principles the Land Board is required to follow.

Judge Cataldo ultimately ruled that the Land Board had breached its public trust duties because it failed to address and protect traditional and customary practices.

She also determined that the Land Board had failed to ensure that water taken from streams "was and will be used in a reasonable and beneficial manner given system losses; that it failed to hold A&B/EMI to their burden regarding their actual water needs and the lack of alternative water sources; it improperly authorized an increase in the amount of water diverted from East Maui before resolution of the Sierra Club's petition to set instream flow standards; and it failed to protect the flow of the 12 Huelo streams and impermissibly used 'uncertainty' as a reason."

With regard to the Sierra Club's recommended instructions to the Land Board, she wrote, "the court takes no issue with items C, D and E, above, finding they are not too inflexible or too vague, are well supported by case authority and do not amount to 'broad, sweeping pronouncements on fact- and case-specific issues.'"

"Bottom line: Mahi Pono should not be planting more acreage until the diversion structures are fixed."

— David Kimo Frankel

She did not, however, instruct the Land Board to follow requests a) and b), "which seek instructions to reduce the amount of water allocated for irrigation."

With regard to the court's instruction regarding item c), ensuring that the commission's IIFS are in place before allowing more water to be taken, Sierra Club attorney David Kimo Frankel explained, "The word 'more' is ambiguous. The Sierra Club has used the word 'more' to mean 'more than had previously been diverted'; not 'not a single drop more.' … The Sierra Club is not attempting to put Mahi Pono out of business, depriving it completely of all water (like umm, some of our streams are. . .). There will be some disagreement about how much has previously been diverted. Bottom line: Mahi Pono should not be planting more acreage until the diversion structures are fixed."

Cataldo's order is the latest in a long list of court decisions against the Land Board regarding its decisions permitting the continued diversion of East Maui streams.

"We are still waiting for decisions from the Intermediate Court of Appeals regarding the BLNR's 2019 and 2020 decisions. We are still waiting a decision from the Hawai‘i Supreme Court on the BLNR's denial of a contested case hearing for the permits for 2023. We are still waiting a decision from the Environmental Court on the permit for 2025," Frankel stated.

Nā Moku Aupuni o Ko‘olau Hui, represented by the Native Hawaiian Legal Corporation, also has a case pending before Judge Cataldo seeking to overturn the Land Board's decisions to deny the group a contested case hearing and to approve the permit for 2025.

— Teresa Dawson

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Honolulu Wins Summary Judgment In Case Over SMA Permit at Marconi

On October 21, U.S. District Judge Jill A. Otake granted the motion for summary judgment brought by the City & County of Honolulu and Department of Planning and Permitting Director Dawn Apuna in a case brought two years ago by the developer of the Marconi Point Condominiums on Oʻahu's North Shore.

The 97 acres that make up the agricultural condominium project are entirely within the city's Special Management Area. Most of the land is zoned for agriculture. A strip along the coast is zoned for preservation and is also within the state Conservation District. The property, which includes the historic Marconi Wireless Telegraphy Station, is flanked by lands targeted for ecosystem restoration and is home to a variety of state and federally protected species.

Jeremiah Henderson III, through his companies Makai Ranch, LLC; Marconi Farms, LLC; MP Unit 21 LLC; and RCA Trade Center Inc., alleged in their May 2023 complaint that they were given official assurances by the DPP that they would not need to obtain a Special Management Area permit to develop the area.

The original complaint alleged that the city and DPP violated the companies' rights when, in 2017, the agency informed Makai Ranch that it would need to apply for a SMA permit if it wanted to subdivide and further develop the lands.

On December 20, 2023, Judge Otake found that the DPP had not given the kind of official assurances that Makai Ranch claimed.

She granted in part the city's motion to dismiss the complaint, stating that the city had discretion to require the companies to obtain an SMA permit. She dismissed the companies' claims regarding building permits and a roadway subdivision application.

Oral arguments were heard August 29 on an amended complaint that included claims about the roadway and agricultural subdivision applications.

Otake noted in her order last month that the companies' amended complaint did not dispute the city's claim that they never sought an SMA permit. As a result, she wrote, "plaintiffs' claims on that front are unripe."

She also shot down the companies' contention that the city should be estopped from requiring them to obtain an SMA permit because of decades-old "assurances" surrounding a roadway subdivision tied to development of the adjacent Turtle Bay Resort.

With regard to the companies' claims that Makai Ranch's agricultural subdivision application was automatically approved under state and county law, Otake sided with city. It had argued that even though the DPP failed to issue its deferral letter on Makai Ranch's application within the 30-day deadline set by ordinance, there was no automatic approval because the state law regarding automatic approval — HRS § 91-13.5 — does not apply.

Even though the subdivision rules state that the DPP must act within 30 days after it receives a subdivision application and the agency did not issue its deferral letter until more than two months had passed, "plaintiffs do not raise this as a basis for their claim," Otake wrote. "Instead, plaintiffs argue that DPP was dilatory for not responding within 30 days to Makai Ranch's August 27 and August 28 letters, and this delay meant that their application was automatically approved.

"But again, the 'automatic approval' provision in HRS § 91-13.5 is irrelevant… Further, plaintiffs do not explain why their August 2020 letters should trigger a 30-day response deadline," she wrote.

She also rejected the companies' claims that the DPP treated development at Marconi Point differently than similarly situated properties within the SMA, specifically, the Waialeʻe condominium project, Kahena Wai and Kealia Farms.

The companies had asked Otake to defer acting on the city's motion for summary judgment pending further discovery (including emails among high-ranking DPP officials), but she denied their motion.

"The court is unpersuaded that plaintiffs were diligent in pursuing discovery or that more relevant documents are discoverable. But setting that aside, plaintiffs' Motion to Defer contains an even more fatal flaw. Although plaintiffs detail *what* information they seek … they fail to clarify *why* the information they seek would preclude summary judgment."

With regard to documents held by DPP, Henderson's companies also alleged in their complaint that the agency violated the state Uniform Information Practices Act by failing to fully comply with Makai Ranch's pre-complaint information requests to determine how or whether corruption played a part in the agency's decision to require an SMA permit.

Because Otake dismissed or granted summary judgment on all of the federal claims, she stated that the court "declines to exercise supplemental jurisdiction over plaintiffs' remaining state law claims."

Environment Hawaiʻi did not receive a response from the companies' attorney by press time to questions about whether they plan to appeal or to apply for an SMA permit.

— Teresa Dawson