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Why big development is so difficult in Hawaii

A look at Hawaii's land use laws

DENNIS HOLLIER

For decades, "too difficult" has been the refrain in the development community. Developers believe Hawaii's land-use laws are too complicated, environmental regulations too onerous, and deference to Native Hawaiian gathering and access rights misguided and even unconstitutional. The consequence is a long list of major development projects that have either failed or get enmeshed in tortuous, sometimes decades-long litigation: Queen's Beach, Turtle Bay, Koa Ridge, Hoopili and, if you are thinking broadly, the Superferry.

That's how developers explain it. The truth, though, is more complicated and if there is any chance to improve the system, it helps to understand the nuances.

According to David Callies, the Benjamin A. Kudo professor of law at University of Hawaii and author of "Regulating Paradise: Land Use Controls in Hawaii," our land-use laws are "the most restrictive and complex in the country." One of the main reasons, he says, is because Hawaii is the only state that has a statewide body responsible for regulating land use, the Land Use Commission.

By email from his sabbatical in Australia, Callies writes: "The Hawaii system is more complicated because of its many layers, particularly at the state level, with the Land Use Commission boundary-amendment process to change the state land classification from agriculture to urban." This reclassification process is critical, he points out, because nearly 95 percent of the land in Hawaii is currently designated either conservation or agriculture, neither of which permits major developments. And getting the LUC to reclassify land isn't simple. It can require public hearings, detailed plans and a lot of time. Maybe more important, LUC hearings are "quasi-judicial" proceedings. That means the opponents of a development have an opportunity to testify, provide their own expert witnesses and cross-examine the witnesses for the developer. Consequently, disputed cases can be laborious affairs.

The LUC isn't the only layer of land regulation. The developer also needs numerous permits and approvals from the counties, which are responsible for zoning within the urban district, issuing building permits, preparing and revising the county development plans, etc. Developers must also contend with a host of state environmental regulations, many of them based on federal law. For example, HRS 343, which deals with environmental impact statements, says any project that involves state land or state money may require an environmental review. Also, under the Coastal Zone Management Act, a federal law passed in 1972, the entire state is considered a "coastal zone management area," which means developers have to consider the effect their project will have on the coastal area. Within the CMZA, the state has designated the most critical portion, essentially the area between the shoreline and the first highway, as a Special Management Area, or SMA, which requires its own permitting from the county. Hawaii developers also must conform to the federal Endangered Species Act, which can be especially burdensome in the state that is considered the endangered species capital of the world. Under the ESA, for example, the entire islands of Maui and Hawaii are considered "critical habitat."

Navigating all those hoops takes a lot of time, Callies points out. "The LUC process takes at least two years," he says. "And the county zoning at least another year, usually two or three. And then there are coastal zone permits, preliminary and final subdivision approvals, and a host of environmental permits. That's 10 years at least, altogether."

One way to speed up the process would be to get rid of the LUC and leave land-use regulation to the counties, as other

states do. That's what Callies advocates. Others disagree.

Contrary View

Robert Harris, executive director of the Hawaii Chapter of the Sierra Club (and, like many land-use attorneys here, a former student of Callies), believes the LUC serves a critical role. "The Land Use Commission," he says, "is supposed to be responsible for the long-term planning, such as looking at how to advance and preserve agriculture, water conservation, energy usage and growth plans. It's relatively clear that most of the counties don't engage in that level of planning." Moreover, he says, county procedures are ministerial rather than discretionary, meaning they don't allow for that crucial quasi-judicial review.

Callies has a different take. "The original intent of the Land Use law," he says, "was, first, to preserve large areas of agricultural land for plantation use, and second, to prevent sprawl. A distant third was concern for the lack of staff and expertise on the Neighbor Islands. The first and third are no longer relevant. We have no plantation agriculture requiring vast swathes of ag lands, and all four counties have more than adequate staff in their respective planning departments." In other words, get rid of the LUC.

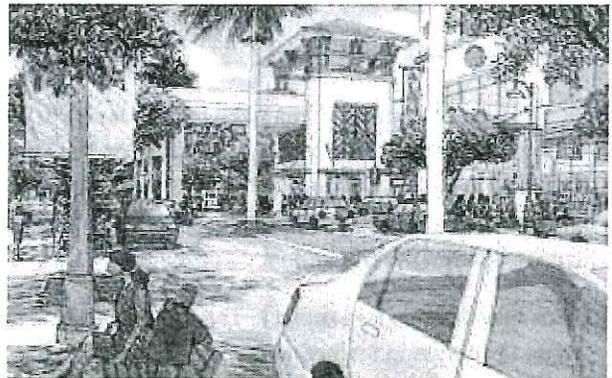
Litigation

Not everyone believes that land use regulations are the problem. "When you speak to real developers," Harris says, "the regulatory side is not where their source of frustration lies, and they'll tell you that similar regulations occur in almost every state. What developers like is for those regulations to be efficient, to move in an orderly process, and they like to have finality when it gets decided. But it isn't the regulatory process that daunts them. It's the cost of financing a project out over time, the cost of construction and construction delay. Those are the things that really drive them to distraction." While developers may say the biggest delays are caused by lawsuits filed by organizations such as the Sierra Club and the Native Hawaiian Legal Corp., environmental and Native Hawaiian rights advocates contend they're just making sure the process is followed.

Denise Antolini, an associate dean at the UH law school and a prominent environmental attorney, believes the current system works well for those who play by the rules. "I think there is a lot of development moving ahead successfully in Hawaii – some of it very good," she says. "The rules are pretty clear on most land-use and environmental laws, and I think the businesses and developers who are used to operating here know how to get through the system. I think the projects that get stymied, or become controversial, or blow up, tend to be the projects driven by interests that don't have a lot of experience or roots in Hawaii."

Antolini's contention is that most of the major land-use litigation over the past decade has been for projects developed by off-island corporations. Callies has a different take: He thinks only off-island interests – those who only expect to do only one project in Hawaii – can afford to challenge the system. Local developers, who know they have to deal with the LUC and the counties in the future, are afraid to rock the boat.

Bill Meheula, a prominent land-use litigator, takes a kind of middle ground. "Litigation, if its purpose is to bring the developer



Hoopili

Approved by state Land Use Commission, but further approvals still required.

Rendering: Courtesy of Hoopili



into compliance with the law, is perfectly valid," he says. "I think that most developers here go to great lengths to comply with the law because they don't want litigation to stop or delay their projects. But what's happened all too often is that some plaintiffs are filing lawsuits not because there's a legitimate basis to find the developer not in compliance, but just in order to stop or delay the project long enough that it's not going to be profitable."

Meheula also suggests a cure: "My recommendation would be that any state law or county ordinance that sets forth requirements that a developer has to comply with should have a provision that says, 'If anyone sues for violation of these laws, then the prevailing party should be entitled to attorney's fees.'" Meheula contends this will have two consequences: discourage frivolous lawsuits and attract highly qualified attorneys to legitimate cases because of the prospect of attorney's fees.

Most environmental attorneys don't agree that frivolous lawsuits are a problem. "Certainly, the well-established citizens' groups and the well-established attorneys who work on these issues don't bring frivolous cases," Antolini says. "They wouldn't survive, and they're in it for the long term." She sees the issue mostly as a matter of "framing." "From the community's perspective," she says, "some of the cases that are brought to court may seem like legal long shots, but they're often test cases where the law is unsettled. And the stakes are so high that, on balance, it's worth pushing to find out what the law or the courts will support."

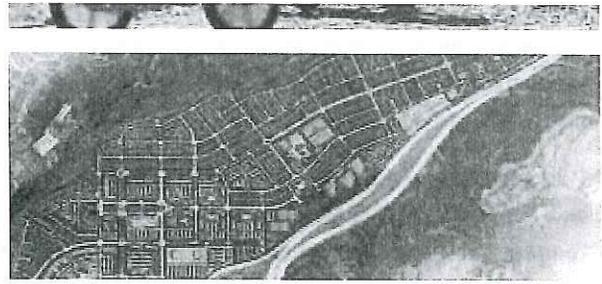
In some ways, the whole dispute over excessive litigation is about "framing." Property-rights advocates, like Callies, look at the long list of projects stopped by litigation and say: "The process has been co-opted by NGOs like the Sierra Club and the Native Hawaiian Legal Corp." Environmental advocates, like Harris, point out that "thousands and thousands" of development projects go on unchallenged every year. "Looking at those projects," he says, "there's probably, at best, a couple of environmental litigation cases that come out each year." Moreover, he says, the members of the LUC "are almost entirely representatives of the development community or the large landowners, so there's a question whether they're being fair, impartial and objective on a consistent basis."

High Court

Of course, when Harris talks about thousands of development projects going unchallenged, he's talking mostly about many small projects and a number of big projects involving redevelopment of already-developed land. The contentious cases tend to involve big projects on land that is agricultural or conservation. Those are the cases that the development community has often lost at the state Supreme Court.

In the summer of 2011, Callies wrote a paper for the Hawaii Law Review that criticized the land-use record of the state Supreme Court under the leadership of Chief Justice Ronald Moon. One of his primary criticisms was that the Moon Court was biased toward activists groups such as the Sierra Club, Earthjustice, Hawaii's Thousand Friends and the Native Hawaiian Legal Corp. By Callies' calculation, the high court sided with anti-development groups 82 percent of the time, reversing the more pro-development Intermediate Court of Appeals 65 percent of the time.

While no one disputes Callies' numbers, other members of the legal community are less than impressed by their significance. Robert Harris, for example, reminds us that nonprofits like the Sierra Club have limited resources and can't afford to fight



Koa Ridge

OK'd by state Land Use Commission, awaiting city approvals.

Photo: Courtesy of Koa Ridge



every battle. "We tend to take on the most obvious, worst-case examples," he says. "Broadly speaking, Callies' complaint is that we win too often, when the reality is that we select those cases that are the worst examples of abuse, so it's not terribly surprising that we tend to win."

Photo: Courtesy of the Hawaii Supreme Court

Callies seems particularly disturbed by the court's ruling in the Turtle Bay decision. In that case, the developer's original EIS was accepted in 1985, but, for several reasons, the developer waited until 2005 to file for a subdivision approval. The Supreme Court, once again reversing the Intermediate Court of Appeals, ruled that the developer would have to file a Supplemental EIS. According to Callies, adding a time limit to an EIS "appears nowhere in the statute." Like several of his specific complaints about the Moon Court, this one is debatable. For example, the wording of the law seems pretty clear about the limitations of an original EIS (at least to a layman): "A statement ... is usually limited by the size, scope, location, intensity, use and timing of the action, among other things." (Italics added.) Twenty years delay seems like a significant change in timing.

But Callies' broader argument – that the Turtle Bay ruling and other Moon Court decisions reflect a conflict with traditionally accepted concepts of property rights – is harder to dispute. As Callies puts it: "The use of private land is not a privilege but a right guaranteed by the U.S. Constitution."

In the same issue of the Hawaii Law Review in which Callies' paper appeared, Denise Antolini published a counter-argument. Her main contention was that the Moon Court wasn't so much focused on environmental issues as it was on process – making sure developers and agencies follow the letter and intent of the law. She points to the first section of Chapter 343, the statute governing environmental impact statements, which says environmental review is an important part of the planning process and that "public participation during the review process benefits all parties involved and society as a whole." Many of the Moon Court's rulings can be seen as simply enforcing that basic principle.

Antolini writes that the Moon Court rulings were grounded in "the four key principles of the state environmental review system": protecting the environment, serving an "informational role," ensuring public participation and improving the quality of agency decision-making. As she puts it, the Supreme Court "has made it clear that agencies and developers proceed at their peril if they circumvent the environmental review process." In case after case, that's what developers and agencies appear to have tried to do. For example, no matter how much we may lament the loss of the Superferry, it seems clear the state tried to sidestep a required EIS. And the Turtle Bay developers made a valiant attempt to avoid a Supplemental EIS. In both cases, the Moon Court made them pay.



Superferry

Shut down after state Supreme Court ruled it needed a full environmental impact statement.

Photo: Mike Keany

Bottleneck

There are other key players in this drama: the regulators. A lot of the delay and confusion over land use in Hawaii can be traced right back to the agencies responsible for regulating the process. Environmentalists and Native Hawaiian advocates often accuse them of being too cozy with developers. Developers, on the other hand, criticize them for being slow and inefficient. The agencies' leaders, though, are of mixed minds.

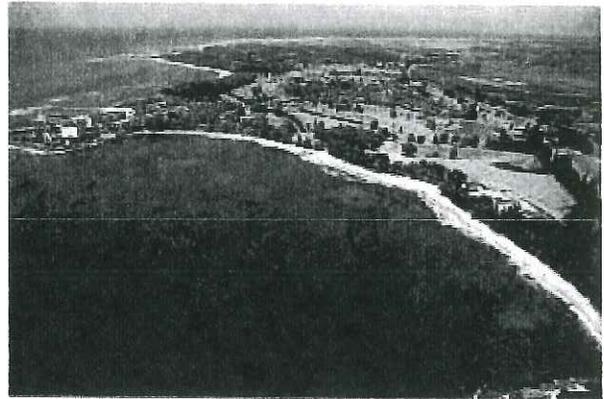
David Tanoue, former director of the Department of Planning and Permitting for the City and County of Honolulu, tends to agree with Callies that the main problem with our land use system is the court. But he adds that the regulatory process is often slow for a reason. "We need checks and balances," he says. "At the department, I stressed that we're not looking at the merits of the project. We're looking at how the process and procedures are followed. Because that procedure can be used as a sort of a shield. Following procedure may be too slow for some private developers' time frame, but that's what's going to protect them if their case gets challenged. And if we deny an application, and the developer sues the city, we can say, 'We followed the procedures, and the project didn't meet all the criteria, so we denied it.' Likewise, if we approve a

project, and we get challenged, we can fall back on procedures.”

The glacial pace of permitting can also be attributed to a lack of resources. This isn't just at the counties, which handle the bulk of the permitting process; it's also true at the state level. Jesse Souki, director of the state Office of Planning, points out that his office's budget fell steadily through the previous three administrations. “We had about 80 generally funded planners under (Gov. John) Waihee. Today, we have about 12 generally funded planners. And the budget follows the same arc.”

Souki also notes that there are further costs to this lack of resources. “For example,” he says, “we've been asked to do some planning about infrastructure. Well, we would do that if we had the money for it. Also, this office hasn't done a five-year boundary review since the early 1990s. Of course, we're supposed to do it every five years. The boundary review is supposed to evaluate where the current state land use districts are, where the county growth boundaries are, and then takes the initiative to get that land redistricted, instead of a case-by-case planning effort.” Given the absence of thoughtful, comprehensive review, maybe it's not surprising so much conflict revolves around individual boundary amendments.

One person with a different perspective is George Atta, the new (and former) director of the Department of Planning and Permitting for the City and County of Honolulu and former partner at the planning, design and architecture firm Group 70. “This is just my personal opinion,” Atta says, “but just as public discourse at the political level has become antagonistic, individuals increasingly seem to have polarized views from one another. They don't look at one another as neighbors anymore. Their neighbors have become antagonists or opponents. That's not a legal problem; that's more of a social or cultural thing that's been slowly growing.”



Turtle Bay

Planned expansion of the North Shore resort on Oahu derailed by a state Supreme Court ruling.

Photo: Thinkstock.com

Working as intended?

There's another way to look at this. Maybe our regulatory system is working just as it was designed to work. Instead of complaining about our complicated land-use laws, or overzealous environmentalists, or policy-making by the state Supreme Court, we should look inward. These are laws, after all, that were written by elected officials: state legislators, county councilors and constitutional convention delegates. If we don't like the laws anymore, we can elect officials to change them.

The laws' main obstacle to development may not be that they're too restrictive, it may be that they're too democratic. Callies complains that the Moon Court vastly extended the concept of 'standing,' which defines who can bring a case to court. Extensive public participation and access to information is hard to revoke, especially in an arena as contentious as land use. As Jesse Souki puts it, “In land-use processes, the public just has to be involved. There may not be a constitutional provision that says that, but if you're going to have a state or county permitting process that doesn't involve the community or public hearings, good luck with that.”

Volunteer Storm Team Elevates Water Quality Issues in Washington

"The problem was difficult to understand because agencies had limited time and money for sampling, especially on short notice when storm events created dramatically different results."

*Susan Wood,
Padilla Bay National Estuarine Research Reserve*

An elite group of volunteers quickly mobilizes during heavy rain events along the Samish River in Washington State to collect important water quality data. Information provided by the volunteers helps coastal officials make decisions about commercial shellfish harvesting and brings attention to water quality concerns in the area.

"There is a fecal coliform problem in the Samish River," says Susan Wood, estuary educator for the Padilla Bay National Estuarine Research Reserve. "The problem was difficult to understand because agencies had limited time and money for sampling, especially on short notice when storm events created dramatically different results."

The Storm Team grew out of Stream Team, an existing Padilla Bay Reserve program where volunteers measure fecal coliform along the Samish every four weeks. During a routine

measurement after a heavy rain, volunteers got unusually high numbers.

"They got very energized and wanted to know where it was coming from," Wood recalls. They decided they would expand from eight locations along the river to twenty sites to try to narrow down the sources of pollution.

This new Storm Team quickly began to mobilize whenever rain events created the need, even on Thanksgiving Day one year, Wood says. The data the team collected helped state health department officials decide when to open or close shellfish harvesting and helped identify some possible sources of pollution.

It also helped bring attention to the problem. Two years after beginning the program, the state provided a grant to the county to tackle the issue.

With dedicated resources to address the problem, instead of disbanding, the Storm Team turned its attention to another problem watershed that did not yet have state resources. This year, the volunteers turned their attention back to the Samish, where they are investigating an area that is not sampled by the county.

"They work very closely with the county water quality people," Wood says. "They go out and sample when the county officials can't."



A Storm Team volunteer takes a sample.

To mobilize quickly, one of the volunteers monitors rainfall and sends out an email calling the group of eight into action. Wood supervises their use of Padilla Bay's volunteer lab, where fecal coliform tests are run.

"We check the data and maintain the equipment and make sure they have the supplies they need," Wood says. The reserve provides 10 to 12 hours of annual training for the Stream Team volunteers, and reserve staff members go out with the volunteers on their first sample every year.

"This is a wonderful group," Wood says. "They've really taken the initiative to make this work. They understand the drainage of the watershed very well and are out there investigating."

She adds, "Just having that many people out in the watershed that are aware of what's going on has been really helpful. It's really focused attention on the problem." ❖

For more information on the Padilla Bay Reserve's volunteer Storm Team, contact Susan Wood at (360) 428-1066 or swood@padillabay.gov.

Adaptation Policy Helps Prepare Hawaii for the Future

The efforts of many partners to strengthen Hawaii's climate change preparedness were rewarded on July 9, 2012, when Governor Neil Abercrombie signed into law Act 286, thereby incorporating a climate change adaptation policy into the statewide planning system.

"This new policy means that county and state officials considering any project or plan—a setback variance, capital improvements, road construction, or others—*must* consider the adaptation policy as part of those plans," says Jesse Souki, the director for the State of Hawaii Office of Planning.

The adaptation policy specifies that county or state plans must address potential climate change impacts to agriculture, conservation lands, coastal

and nearshore areas, natural and cultural resources, energy, the economy, and many other sectors.

Any plans must pay particular attention to the policy's priority guidelines. These include educating the community about climate change and adaptation considerations, encouraging community stewardship, investing in monitoring and research, considering traditional knowledge, encouraging landscape preservation and restoration, exploring adaptation strategies, promoting resilience, fostering collaboration among jurisdictions, adopting effective new approaches, and integrating the adaptation policy into planning and managing of the natural and built environments.

“This new policy means that county and state officials considering any project or plan—a setback variance, capital improvements, road construction, or others—must consider the adaptation policy as part of those plans.”

Jesse Souki, State of Hawaii Office of Planning

The Hawaii Coastal Zone Management (CZM) Program led the development of the policy's priority guidelines, which are expected to streamline planning processes in a way that helps both public and private sectors work more collaboratively and effectively on adaptation-related issues.

RECOGNIZING THE NEED

The idea of devising a statewide climate change adaptation policy was first discussed in 2007 by the Ocean Resources Management Plan (ORMP) working group, which is composed of more than 20 representatives from local, state, and federal entities involved in coast- and ocean-related issues.

That year, the governor's office had signed into law the Global Warming Solutions Act, which aimed to reduce greenhouse gas emissions to 1990 levels by the year 2020. “As we updated the ORMP, we were feeling good about Hawaii's climate change mitigation efforts—but no amount of mitigation is going to completely prepare Hawaii for some of the challenges ahead. The missing piece was adaptation,” says Souki.

Anticipated impacts in the Pacific Islands region have been well-researched and documented by organizations that include the Intergovernmental Panel on Climate Change. Likely impacts include higher sea levels, greater risks to agriculture and built infrastructure, stronger coastal storms, and threats to fisheries, tourism, and ocean resources from warmer and more acidic waters.

The ORMP working group, partnering with the University of Hawaii Sea Grant's Center for Island Climate Adaptation and Policy, produced a report in August 2009, *A Framework for Climate Change Adaptation in Hawaii*. It outlined for the State of Hawaii a step-by-step process for assembling a cross-sector adaptation team, assessing risks, defining adaptation priorities, and developing a proposed adaptation policy.

AN INCLUSIVE WORKSHOP

Adaptation efforts took another leap forward in August 2011, when 60 participants attended a two-day workshop in Honolulu to create a collective adaptation vision and draft language for the adaptation policy. The workshop was sponsored by Hawaii CZM, NOAA, and the Pacific Islands Silver Jackets Initiative, a U.S. Army Corps of Engineers effort to reduce flood risks.

“Diversity across agencies, organizations, nonprofits, institutions, and the private sector was very important to us at the workshop—and we knew it would help us get buy-in on the eventual adaptation policy,” says Souki.

Techniques Move Participants to Action

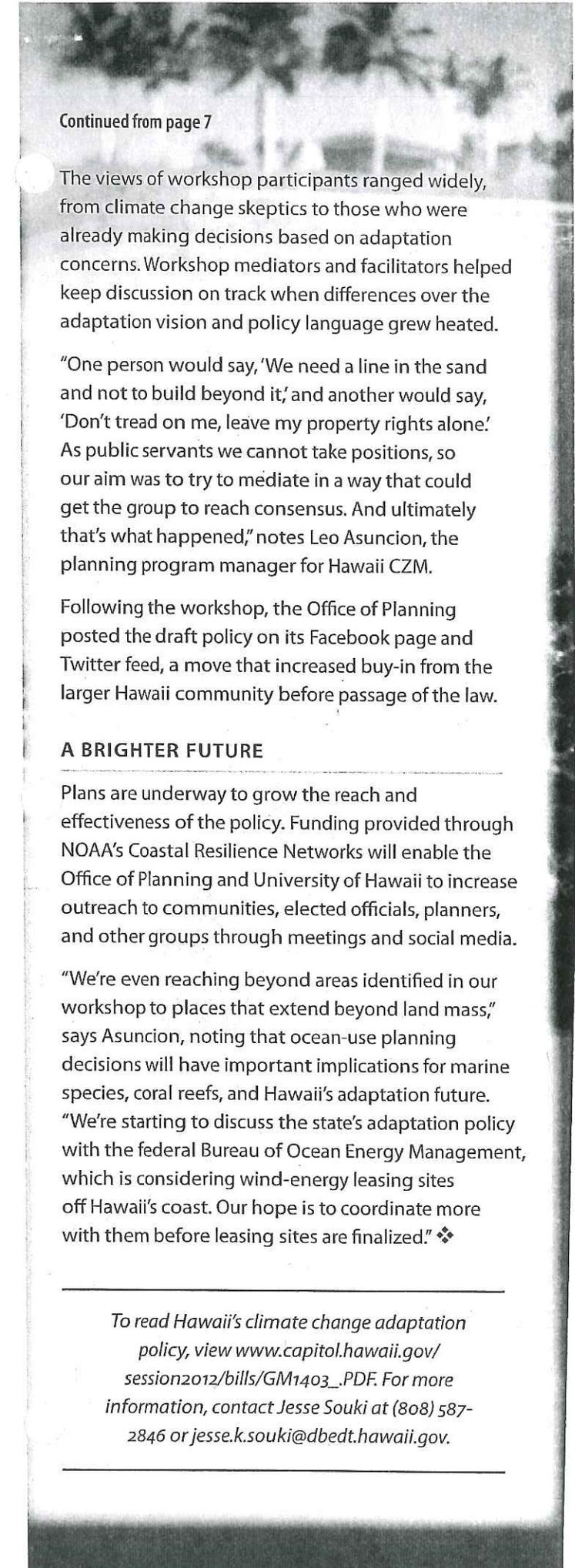
Two different facilitator-led processes at an August 2011 workshop helped attendees reach consensus on draft language for Hawaii's climate change adaptation policy.

Facilitators on the first day laid out four potential adaptation futures and assigned participants to pretend living in those futures and making decisions. “This helped us work through the repercussions of our decisions and seek both public and private approaches,” says Cindy Barger, the Honolulu District watershed program manager for the U.S. Army Corps of Engineers. The corps supported the workshop through its Pacific Islands Silver Jackets Initiative.

On the second day, with the group's vision and mission statement serving as a skeleton of the climate adaptation policy, participants used a visioning process to define their values, objectives, and action plans.

“We gained momentum using these two different techniques, and by the second day we were moved to action,” says Barger. “The corps in Hawaii is developing engineering considerations for public infrastructure in the sea level rise-inundation zone—and that project is a direct outgrowth of our workshop objectives.”

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The views of workshop participants ranged widely, from climate change skeptics to those who were already making decisions based on adaptation concerns. Workshop mediators and facilitators helped keep discussion on track when differences over the adaptation vision and policy language grew heated.

"One person would say, 'We need a line in the sand and not to build beyond it,' and another would say, 'Don't tread on me, leave my property rights alone.' As public servants we cannot take positions, so our aim was to try to mediate in a way that could get the group to reach consensus. And ultimately that's what happened," notes Leo Asuncion, the planning program manager for Hawaii CZM.

Following the workshop, the Office of Planning posted the draft policy on its Facebook page and Twitter feed, a move that increased buy-in from the larger Hawaii community before passage of the law.

A BRIGHTER FUTURE

Plans are underway to grow the reach and effectiveness of the policy. Funding provided through NOAA's Coastal Resilience Networks will enable the Office of Planning and University of Hawaii to increase outreach to communities, elected officials, planners, and other groups through meetings and social media.

"We're even reaching beyond areas identified in our workshop to places that extend beyond land mass," says Asuncion, noting that ocean-use planning decisions will have important implications for marine species, coral reefs, and Hawaii's adaptation future. "We're starting to discuss the state's adaptation policy with the federal Bureau of Ocean Energy Management, which is considering wind-energy leasing sites off Hawaii's coast. Our hope is to coordinate more with them before leasing sites are finalized." ❖

To read Hawaii's climate change adaptation policy, view www.capitol.hawaii.gov/session2012/bills/GM1403_.PDF. For more information, contact Jesse Souki at (808) 587-2846 or jesse.k.souki@dbedt.hawaii.gov.
