Office of the Auditor's Response to Draft Report of the House Investigative Committee to Investigate Compliance with Audit Nos. 19-12 and 21-01

Written Response
January 14, 2022

OFFICE OF THE AUDITOR
STATE OF HAWAIʻI

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Constitutional Mandate

Pursuant to Article VII, Section 10 of the Hawaiʻi State Constitution, the Office of the Auditor shall conduct post-audits of the transactions, accounts, programs and performance of all departments, offices and agencies of the State and its political subdivisions.

The Auditor's position was established to help eliminate waste and inefficiency in government, provide the Legislature with a check against the powers of the executive branch, and ensure that public funds are expended according to legislative intent.

Hawaiʻi Revised Statutes, Chapter 23, gives the Auditor broad powers to examine all books, records, files, papers and documents, and financial affairs of every agency. The Auditor also has the authority to summon people to produce records and answer questions under oath.

Our Mission

To improve government through independent and objective analyses.

We provide independent, objective, and meaningful answers to questions about government performance. Our aim is to hold agencies accountable for their policy implementation, program management, and expenditure of public funds.

Our Work

We conduct performance audits, which examine the efficiency and effectiveness of government programs or agencies, as well as financial audits, which attest to the fairness of financial statements of the State and its agencies.

Additionally, we perform procurement audits, sunrise analyses and sunset evaluations of proposed regulatory programs, analyses of proposals to mandate health insurance benefits, analyses of proposed special and revolving funds, analyses of existing special, revolving and trust funds, and special studies requested by the Legislature.

We report our findings and make recommendations to the governor and the Legislature to help them make informed decisions.

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I. Introduction

We welcome the committee's efforts to understand the significant agency dysfunctions brought to light by Audit Reports Nos. 19-12 and 21-01, as the House of Representatives requested in House Resolution No. 164. We welcome the committee's efforts to remedy those dysfunctions through statutory revisions or other means.

We do not welcome what appears to be the use of an investigative committee as a vehicle for a personalized attack on the Auditor and a generalized attack on the Office of the Auditor. Investigative committees should never be vehicles for personal or political animus.

"Investigative committees should never be vehicles for personal or political animus."

To the contrary, state law requires investigative committees in Hawai'i "to perform properly the powers and duties vested in them." Hawai'i Revised Statutes (HRS) § 21-3. One conspicuous duty is that committees must conduct their proceedings "in a fair and impartial manner." HRS § 21-3. Here, the process was anything but fair and impartial, and the draft report even less so. Legislative committees should comply with state law. That should not be a controversial proposition.

The many problems with the draft report, and with the committee's proceedings, go beyond the significant but presumably unintentional pattern of mistakes and oversights, or even the intentional innuendo and animus, detailed below. Instead, the draft report offered by the chair,[1] and the proceedings she presided over, bear all the indicia of a deliberate political "hit job."

We realize that not all members of the committee share the chair's insistence on misusing the committee in order to, in part, perpetrate an unwarranted and political attack on the Auditor and on the Office of the Auditor. We appreciate their sincere and dedicated attempts to get to the bottom of the problems at the Department of Land and Natural Resources (DLNR) and the Agribusiness Development Corporation (ADC) revealed by the respective audits. We apologize to those members if their good work seems tarred by our necessary effort to call out the chair's transparent attempts to create a pretext for further "investigation" of the Auditor and the Office of the Auditor, and those that have willingly supported those attempts.

Unfair and not-impartial committee proceedings

Recently, the committee's proceedings have departed even more markedly from being conducted in a "fair and impartial manner." The January 10, 2022, hearing at one point descended into a circus-like atmosphere when the chair threatened to refer the Auditor for prosecution on charges of tampering with a witness. The chair, the committee, and the witness in question all know full-well that the witness changed his sworn testimony to more accurately reflect the actual facts, not to distort, falsify, or obscure them. We know that because the witness put his corrected testimony on the record while under oath.

Nonetheless, the chair seized on the opportunity to imply that the Auditor had tampered with the witness. She then engaged in a scripted set of limited questions to the witness, apparently rehearsed but

[1] The committee's hearing on January 10, 2022 appeared to confirm that the draft report is Chair Della Au Belatti's draft report, not one that the other members of the committee had even reviewed and certainly had not approved.

"Confidential" by House Rules…?

ACCORDING TO CHAIR BELATTI, the incomplete and unfinished draft of the committee's report emailed to us at 5:16 p.m. on December 30, 2021, is "not a public document at this time" and she claims that disclosure of the draft report "will be considered a violation of Rules 4.4 and 4.5 of the Committee's Rules." While Chair Belatti understandably may want to hide the defective draft from the public, and even from other legislators, that desire is not based on any legal authority, and especially not the cited committee rules.

Committee Rule 4.4, *Confidential Information*, protects certain information received by the committee. Specifically, the rule states, "All information of a defamatory or highly prejudicial nature *received by or for the Committee* other than in a public hearing or closed hearing shall be deemed to be confidential. No such information shall be made public unless authorized by the majority vote of the authorized membership for legislative purposes or unless its use is required for judicial purposes." Emphasis added. By its express and unambiguous language, the rule relates to defamatory or highly prejudicial information "received by or for the Committee." It does not apply to defamatory or highly prejudicial information *produced by the committee* (or any information provided by the committee).

Committee Rule 4.5, *Disclosure of Committee Activities to the Public and the Media*, similarly does not prohibit disclosure of the draft report by the Office of the Auditor or any other entity that received the document from the committee. Rule 4.5 states, "All information of official actions, statements, or positions *of the Committee* shall be made by the Chair, unless otherwise authorized." Emphasis added. Although titled "Disclosure of Committee Activities to the Public and the Media," the rule is clearly intended for and applicable to the members of the committee, not others. By its language, it applies to "official actions, statements, or positions *of the Committee*," not actions, statements, or positions of the Office of the Auditor or others. The committee certainly cannot abrogate rights guaranteed under the United States and Hawai'i Constitutions, such as the freedom of speech. Likewise, the committee is not empowered to declare selective documents to be "confidential" that are public documents under the Uniform Information Practices Act (Modified), Chapter 92F, HRS, which is Hawai'i's version of the Federal Freedom of Information Act.

At the committee's hearing on January 10, 2022, Chair Belatti accused the Auditor, the office's General Counsel, and the attorney representing the Office of the Auditor of violating the committee rules cited above based on the Auditor's letter to the committee, which was copied to all members of the Senate and House, regarding the incomplete and unfinished state of the draft document about which the Office of the Auditor is expected to comment, questioning how the office can reasonably respond to portions of the draft that have yet to be drafted. Not only are Chair Belatti's accusations against the Auditor and others baseless, they once again highlight her attempt to misdirect what should be the committee's concern – how the Office of the Auditor and others can reasonably respond to the incomplete and unfinished draft.

At the committee's hearing on January 10, 2022, Chair Belatti also accused the Auditor of making an unauthorized disclosure of a portion of the draft document to KMH LLP. However, it was Chair Belatti who emailed the Office of the Auditor and KMH LLP an identical draft document on December 30, 2021.

definitely designed to reinforce the false impression that the Auditor had engaged in nefarious criminal conduct. She then threatened the Auditor with a referral for prosecution for witness tampering. Maybe this makes for what the chair considers good political theater. But it is in fact an abuse of power, and everyone knows that.

This "investigation" may represent a new low in Hawai'i power politics. It is in its way, sadly, reminiscent of that famous slogan, "show me the man and I'll show you the crime." A chair and a committee interested in the actual facts would not be attempting to bludgeon the Auditor through threats of criminal prosecution for promoting a true and more accurate record of the proceedings. Something is very wrong with this picture, and you do not have to be an avid political observer to notice that fact. We hope the committee's future proceedings don't descend even further, from a circus-like atmosphere to one more resembling a show-trial.

Evidentiary findings missing in action

FINDINGS ARE based on criteria; in government auditing this generally starts with the statutory provision that created the program – determining what the program's mission is and how the Legislature intended the program to achieve it. Using those criteria, auditors assess whether the program's performance is effective and efficient, among other things. Findings must be supported by sufficient and appropriate *evidence* – not unsupported speculation and innuendo. And that evidence is subject to a rigorous internal quality control process, as is virtually every individual sentence in our reports.

The committee's draft report shows that it conducted its proceedings in anything but a fair and impartial manner. To take a simple example, the committee's draft report is entirely devoid of any findings whatsoever – despite the fact that the report is subtitled "findings and recommendations." That violates the committee's own rules and deprives us of a fair opportunity – that is, *any* meaningful opportunity – to comment on the report's contents. The effect will be to leave unchallenged *virtually every factual finding* that eventually appears in the final report.

There is no world in which this can be construed as fair. It certainly cannot be characterized as professional. The final report will be nothing like the draft that we were provided for purposes of our comments. That is a fundamental violation of the statutory requirement of fair proceedings. We have not been provided a fair opportunity to comment. We cannot offer adequate critique or comment on findings that have yet to be drafted and on recommendations that were, in turn, drafted in the absence of facts. In the legal context, the procedure used by the committee in providing its draft knowing it will have little resemblance to the final report is called "sandbagging" an opponent. No one views it as a fair and impartial procedure.

In addition, the draft features "commentaries" that appear to serve as a substitute for formal findings; those "commentaries" are riddled with misinterpretations, errors, and inaccuracies. We detail many of them below. Some of them contain remarkably unfair and inaccurate insinuations and inuendo regarding the Auditor under the cover of "commentary." We examine many of those below as well.

In the auditing profession, rigorous findings are the prerequisite for formulating recommendations. The recommendations flow from, and develop out of, the factual foundation for those findings and are intended to address the causes of the reported issues. The recommendations are not first arrived at by some other ulterior process or motive and then later retrofitted with matching findings or "commentary." That is because, in the auditing profession, the process is designed to arrive at objective results, not pre-determined ones.

We are already regularly peer-reviewed by professionals with experience in performance auditing

We are a professional office staffed by professionals in the accountability profession. Our auditors must complete a minimum of 80 hours of continuing professional education in every 2-year period, 56 hours of which must directly enhance auditors' professional expertise. As the Auditor repeatedly explained to the committee in his testimony, we are subject to regular professional peer reviews by external accountability professionals. Those accountability professionals are government auditors from other jurisdictions, and those reviews are thorough and exacting. They must be conducted by independent reviewers who have experience in conducting government performance audits. The National Conference of State Legislatures' 2019 peer review of our office examined samples of our reports, as well as the processes that underlie the reports, to determine whether they met five criteria: (1) Work is professional, independent, and objectively designed and executed. (2) Evidence is competent and reliable. (3) Conclusions are supported. (4) Products are fair and balanced. (5) Staff is competent to perform work required.

The peer reviews conducted during the Auditor's tenure have been uniformly positive. The results are publicly accessible through the Office of the Auditor's website, which the committee could have easily reviewed. The results are starkly at odds with the dark narrative painted by the committee concerning the professionalism of both the Auditor and the Office of the Auditor. Our 2016 peer review concluded, "The Hawaii Office of the Auditor conducts its performance audits in accordance with the generally accepted government auditing standards for performance audits contained in the *Government Auditing Standards* (2011 Revision), internal operating guidelines and professional best practices." The 2019 peer review arrived at the same conclusion.

As noted, those results are not compatible with the pattern of insinuations and innuendo of unprofessionalism concocted by some members of the committee and presented so luridly in the draft report.

Perhaps unsurprisingly, the draft report's chapter 4, "Office of the Auditor," mentions none of these thorough and positive peer reviews. This pattern of omissions is indefensible. Key omissions like that cannot be accidental, and they also cannot reasonably be construed as fair and impartial.

Crafting a convenient narrative versus rigorously verifying fact

"When an investigative committee acts outside those powers, that is by definition an abuse of power."

Anyone can start with a particular narrative and then cherry-pick and force-fit facts to support that narrative. The rigorous quality control and verification procedures used in professional auditing make that technique impossible to use. Every sentence of every report is rigorously and meticulously verified by an analyst not associated with the subject audit. The independent reviewer must maintain an objective attitude with respect to the audit, work independently, and not have involved discussions with the project team about the findings and work performed. The loose and malleable procedures used by the committee, in contrast – "commenting" on recommendations unsupported by facts – facilitate the use of slanted storytelling over rigorous fact-finding.

It is noteworthy that Representative Dale Kobayashi, the only professional auditor on the committee, has concluded that chapter 4 of the draft report, "Office of the Auditor," is mostly "innuendo" that "seemed designed to cast a negative light on the Office of the Auditor."[2] His own professional assessment of the defects in draft chapter 4 went further. "Much of what was said pertaining to the auditor was way over the line and can even be construed as defamatory." His assessment of the draft as a whole? "Much of what is said in this report is incorrect and improper."[3] This is not the kind of report that should be used as the basis for far-reaching policy changes.

To be honest, we believe the people of Hawai'i are tired of these kinds of political machinations and maneuvers. But that is an assessment politicians themselves are best equipped to make. They are "peer-reviewed," so to speak, by the voters. In contrast, our business as auditors – as accountability professionals – is to continue performing our job of providing fact-based and meaningful analyses that give independent and objective answers to questions about government performance. Our job is to continue to conduct audits that meet and exceed the expectations of the independent and professional external auditors who regularly peer-review the quality of our work.

[2] https://www.civilbeat.org/2022/01/house-may-ask-ag-to-probe-alleged-criminal-conduct-by-state-auditor/

[3] Id.

Been There, Done That

THE GOVERNMENT AUDITING STANDARDS promulgated by the Comptroller General of the United States, often referred to as the Yellow Book, require government audit organizations conducting audits in accordance with generally accepted government auditing standards to have an external peer review *at least once every three years*. It means external reviews conducted by competent audit professionals from other state audit offices are *already* an integral and regular part of the Office of the Auditor's existing process to ensure that its performance as an audit office meets or exceeds professional standards for quality and professionalism in government auditing and accountability. The Office of the Auditor has undergone two peer reviews during the Auditor's tenure, the most recent in 2019.

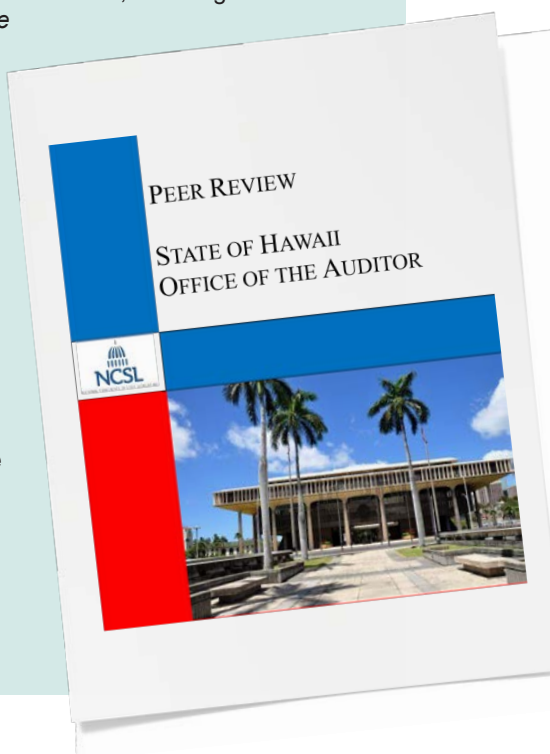
In 2019, the peer review team described its work as follows:

This peer review compared the office's policies and performance to Yellow Book requirements and the knowledge base of peers from similar offices. The review provided a collective assessment of the office's quality assurance and review processes, those quality processes were used to develop the office's performance audits, and the qualifications and independence of staff.

Specifically, the peer review team sought to determine whether the sample of reports reviewed, as well as the processes that underlie the reports, met the following criteria:

1) Work is professional, independent, and objectively designed and executed.
2) Evidence is competent and reliable.
3) Conclusions are supported.
4) Products are fair and balanced.
5) Staff is competent to perform work required.

The 2019 peer review team reported many positive aspects of the office's work, including the work atmosphere. The team also noted, *"The Office of the State Auditor includes experienced, well-educated staff. The staff's diverse backgrounds and skills are beneficial to the Office of the State Auditor. The staff assigned to perform audits collectively possess adequate professional competence for the tasks required."*



The peer review team also concluded:

In the peer review team's opinion, the Hawai'i Office of the Auditor has a quality control system that is suitably designed and followed, provided reasonable assurance that the office is performing and reporting performance audit engagements in conformity with applicable Government Auditing Standards for the period reviewed. Based on its professional judgment, the peer review team gives [the highest] rating of "pass" to the Hawai'i Office of the Auditor.

The Office of the Auditor received the highest rating in 2019, as it had three years before in 2016.

Defamation in any other context

THE DRAFT REPORT contains a large number of what appear to be knowing misstatements. Those misstatements, in almost any other context, would probably constitute defamation.

Defamation in Hawai'i involves, among other things, "a false and defamatory statement concerning another." *Beamer v. Nishiki*, 66 Haw. 572, 670 P.2d 1264, 1271 (1983). A "communication is defamatory when it tends to harm the reputation of another as to lower him in the estimation of the community[.]" *Nakamoto v. Kawauchi*, 142 Hawai'i 259, 270, 418 P.3d 600, 612 (2018) (citation omitted). The standard for defaming a private person involves mere negligence. The standard for defaming a public figure is higher. The person making a defamatory statement regarding a public figure must make the statement knowing that it "was false or with reckless disregard of whether it was false." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

While the doctrine of legislative immunity may protect a legislator from legal liability for defamatory statements made in the course of legislative process, which likely includes the committee's legitimate activities, the more important point is not about legal liability, but about reliability. If this committee's draft report contains numerous statements that meet the standard for defaming a public figure – knowing falsity or reckless disregard for truth or falsity – then the draft report is not a reliable document.

There comes a time when it is necessary to speak truth to power. The chair has elected to use her power and position on an investigative committee to conduct an ugly political smear campaign against the one office in state government (other than the judiciary) deliberately created under the Hawai'i constitution to be free from unwarranted political interference. That independence from political pressures is required for the job. Auditors are part of the accountability profession. The Auditor and his staff have to be able to call things as they see them, even if that means stepping on the toes of those who lead agencies or those who are politically connected.

A Note on the Limited Nature of the Committee's Powers

The committee was created by House Resolution No. 164 and authorized by it to investigate two specific state agencies' compliance with two specific audits. The chair's attempt to misuse the committee to "audit the auditor" under the guise of House Resolution No. 164 was never authorized by the House of Representatives, is far outside the committee's delegated powers, and is therefore an illegal abuse of power.

Government officials must act within the limits of their powers, not outside them. This principle applies to chairs and members of legislative investigative committees. Even they must act within the boundaries of the powers delegated to them by the broader Legislature,[4] in this case by the House of Representatives.

Investigative committees enjoy only the limited powers granted to them by the Legislature. When an investigative committee acts outside those powers, that is by definition an abuse of power. The single-body resolution creating and authorizing the committee includes a specific section devoted to the "scope of its investigatory authority," as required by Hawai'i law. HRS § 21-3(b). That scope is carefully and explicitly delineated, as required by the Hawai'i statute and by U.S. Supreme Court holdings.[5]

[4] *Watkins v. United States*, 345 U.S. 178, 206 (1957)("investigating committees are restricted to the powers *delegated* to them" (emphasis added)); *id*. ("Plainly these committees are restricted to the missions *delegated* to them" (emphasis added)). As the statute governing investigative committees in Hawai'i states, its purpose is to enable such committees "to perform properly *the powers* and duties *vested in them*[.]" HRS § 21-1 (emphasis added). Elsewhere the same statute speaks of "the single house resolution … from which it [the committee] derives its investigatory powers." HRS § 21-3(a).

[5] *United States v. Rumely*, 345 U.S. 41, 44 (1953)(noting that the legislative resolution authorizing an investigative committee "is the controlling charter of the committee's powers.") *Rumely*, 345 U.S. at 44 (noting that an investigating

The resolution delegates only specific and limited powers to the committee – powers explicitly spelled out in its scope of authority section. The resolution's "purpose … of the investigating committee" and "scope of its investigative authority" sections mention only two state agencies.[6] The Office of the Auditor is not one of them. The resolution's title mentions only two state agencies; neither of them is the Office of the Auditor.

The committee's own name – "the House Investigative Committee to Investigate Compliance with Audit Nos. 19-12 and 21-01" – testifies to its specific scope and limited powers.[7] As its name reveals, the committee is tasked with investigating the "compliance" of the two relevant agencies with the two specific audits. That is what House members who voted for the resolution understood its scope to be. Until the chair attempted to co-opt the committee to serve some other purpose *not* present in the resolution, that is what the committee itself understood its purpose, subject matter, and scope of authority to be.[8]

In the draft, the committee now calls itself "the House Investigative Committee Established under HR 164." Any mention of its actual name – with its connotations of an investigation of the "compliance" of two specific agencies with the recommendations of two specific audits – has been airbrushed out of the report. In other words, remarkably, the committee's real name appears nowhere in the report. And by rechristening itself, the committee or its chair can proceed with conveying the impression that it was empowered to investigate the Auditor and the Office of the Auditor all along.

Nevertheless, the House resolution creating the committee does not authorize "auditing the auditor." Far from it. Here is what it says, in plain English. According to the resolution, the "purpose and duties of the investigating committee and the subject matter and scope of its investigative authority" are threefold. (1) To "follow up on the audits," that is, the two specific audits, of two specific agencies, (2) "to examine the recommendations made in those audits," and (3) "for purposes of

committee's "right to exact testimony and to call for production of documents must be found in this language.").

[6] House Resolution No. 164, at 3, lines 21-23; id., lines 25-35.

[7] The committee's name appears on every one of the subpoenas the committee issued, every one of its hearing notices, and on the committee's own website.

[8] The committee describes itself this way on its own website. "House Resolution No. 164 (House Resolution No. 164) established the House Investigative Committee to Investigate Compliance with Audit Nos. 19-12 and 21-01. The Committee is tasked with following up on the audits which focused on the management and operations of the Department of Land and Natural Resources' Special Land and Development Fund (Report No. 19-12) and Agribusiness Development Corporation (Report No. 21-01). The Committee will examine the recommendations made in those audits for the purposes of improving the operations and management of those state agencies, their funds, and any other matters."

improving the operations and management of these state agencies, their funds, and any other matters."

No one, not even the committee, thinks the phrase "these state agencies" includes the Office of the Auditor.[9] No one, not even the committee, thinks the related language in the resolution "improving the operations" of the two specified agencies somehow empowers the committee to "improve the operations" of the Office of the Auditor. No one who knows law or grammar thinks the phrase "and any other matters," tacked on at the end of clause (3), gives the committee the power to investigate whatever agency or topic it wants, for example, the Office of the Governor, the Office of Hawaiian Affairs, or Ringling Brothers' circus.[10]

Clause (1) is limited to following up on the two specific audits of the two specific agencies. Clause (2) is limited to examining the actual recommendations contained in the two identified audits. Clause (3) plainly states that the purpose of the committee's investigation is to improve the operations of DLNR and ADC, their funds, and other matters relating to these agencies' compliance with the two audits.

The chair has attempted to rationalize away these limitations on the committee's power in several ways. First, she claimed the committee had "inherent power"[11] to investigate the Auditor. That is flatly wrong as a matter of law. The Legislature has inherent powers. But the committee itself has only the powers delegated to it by the broader

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[9] That is not to say the committee or its chair did not try to obscure the point. On the face of each of its subpoenas, the committee has a "notice to witness" that accurately describes its purpose and scope of power under House Resolution No. 164 – with one very conspicuous omission. It says, "The Investigative Committee is authorized to follow up" on the two audits "and to examine the recommendations made in those audits, for purposes of improving the operations and management of state agencies, their funds, and any other matters."

Notice that the limiting word "these" from the resolution's actual phrase, "these state agencies," is conspicuously omitted in the "notice to witness" on the committee's subpoenas. In one stroke, the committee transformed its authorized purpose from "improving the operations and management of these state agencies," namely two, to a general purpose of improving the operations and management of an indeterminate number of state agencies. It's possible the omission of that key limiting word was an innocent mistake. It seems more likely that it was not.

[10] Delegation of legislative authority cannot be unlimited, that is, "for any purpose." Even at its outermost legal limits, delegation of legislative power presupposes "an intelligible principle" of delegation, according to numerous and longstanding U.S. Supreme Court decisions. It is absurd to pretend that this tiny tail of "and any other matters" wags the whole dog of the resolution. And even if, against all reason, it did, the phrase "and any other matters" does not remotely qualify as an "intelligible principle" of delegated powers. It would be an illegal and improper delegation of legislative power.

[11] https://www.youtube.com/watch?v=5S3UyJdECkM. Timestamp 00:12:25 of the October 21, 2021 hearing. (Chair Belatti: "we are a legislative committee and an inherent power and fundamental right of this body is to investigate …")

House. Simply put, the committee's delegated powers are specific and limited by the authorizing resolution, and they do not include a roving commission to wholesale investigate the operations and management of other state agencies.

Second, the draft report now claims the committee is only following unspecified "congressional practice" and other states in going beyond the scope of its authorizing resolution. This is an odd claim. Hawai'i legislators, in particular, should be very clear about the fact that they must follow Hawai'i laws and U.S. Supreme Court precedents governing the delegation of legislative power. That is not optional. Claiming to possess unspecified and non-delegated powers to follow vague and unspecified "practices" of Congress and other states just does not cut it.

Third, the chair appears to claim that she "specifically drafted" House Resolution No. 164 "to allow the committee to delve into other matters[.]" That may have been her private intent, but if she is referring to "other matters" outside the scope of the two specified agencies complying with the two specified audits, that is not the legal effect of her drafting.

Under standard canons of statutory construction, the phrase "and any other matters," tacked on at the end of very specific scoping language in the resolution, must be interpreted to modify only the specific language preceding the phrase in the resolution and not as some kind of unlimited grant of plenary investigative authority. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts*, 199 (the canon *ejusdem generis* "applies when a drafter has tacked on a catchall phrase at the end of an enumeration of specifics[.]"); *id*. (the phrase ejusdem generis is Latin for "of the same kind"); *id*. (characterizing the canon as, "Where general words follow an enumeration of two or more specific things, they apply only to persons or things of the same general kind or class specifically mentioned."). See also *Priceline.com, Inc. v. Dir. Taxation (In re Priceline)*, 144 Hawai'i 72, 436 P.3d 1155, 1173 (2019)("The doctrine of ejusdem generis states that where general words follow specific words in a statute, those general words are construed to embrace *only* objects similar in nature to those objects enumerated by the preceding specific words. Courts employing the doctrine identify the commonality shared by the enumerated examples and use this commonality to limit the reach of the general term." (citations and quotation marks omitted)(emphasis added)).

The committee interprets the phrase "and any other matters" as though it were magically unmoored from the specific words that precede it. In effect, the committee pretends the phrase has no context, and thereby

creates the impression the committee has been delegated an unlimited power to investigate from the Legislature. Under the standard principles of legal interpretation, however, the phrase "and any other matters" applies only to the purpose of "improving the operations and management of these state agencies [DLNR and ADC],"[12] and therefore applies at its widest only to those two specific state agencies.

Fourth, the chair has claimed that the committee is merely "following up" on the recommendations in the two audits. That claim is belied by the fact that, for example, the chair attempted to go quite outside the boundaries of the two agencies' compliance with the respective audit, to throw Honolulu Authority for Rapid Transportation (HART) and various other wide-ranging and unauthorized investigations into the mix. Quite obviously, that is not a "follow-up" to the recommendations in the two audit reports concerning the two agencies. It has nothing to do with those agencies' compliance with the two audits specified in the resolution. It is, instead, a transparent pretext for pursuing political machinations in the service of a political agenda to force the Auditor from office prior to the expiration of his term.

"We are a government of laws and not of men," as John Adams famously said. We all know what happens when government officials ignore the boundaries of their legal and legitimate power; it is sufficient to mention Senator Joseph McCarthy's rogue investigative committee in this regard. In other words, for government officials to act outside their legal authority is no minor matter. That is why the law takes officials acting without proper legal authorization very seriously.

To be clear, we are not saying *the Legislature* lacks power to investigate what it wants, when it wants, with very few (mostly constitutional) limitations. We are saying *this committee* lacks the power to investigate what it wants, when it wants, under the pretext of "following the evidence" to a pre-ordained conclusion. It lacks that power because that power was never delegated to the committee from the broader House. No House member voted for an investigative committee with a roving commission. They voted for a very specific and limited delegation of investigative authority to the committee.

The Legislature could have granted broad and wide powers in the authorizing resolution had the Legislature wanted to do so. We have no quarrel with the Legislature's ability to do that. But that is not what the Legislature did in House Resolution No. 164. Again, if the Legislature wanted Hawai‘i law to follow congressional practices or those of other states, it has the power to change Hawai‘i law to do so. But it

[12] House Resolution No. 164, p. 3, lines 33-35.

did not, and it has not, and the committee's attempts to simply pretend otherwise, and to act on that pretense, represent an abuse of power.[13]

In addition, there are serious ethical issues raised when a committee or chair consistently oversteps the boundaries of their legitimate powers. When public officers act beyond their lawful authority, it represents a serious ethical lapse. As the Hawai'i constitution emphasizes, "The people of Hawai'i believe that public officers and employees must exhibit the highest standards of ethical conduct and that these standards come from the personal integrity of each individual in government." Haw. Const. art. XIV. What are the people of Hawai'i to make of committee members or chairs who are apparently unconcerned with willfully operating well beyond their legitimate and authorized powers? Shouldn't everyone be concerned about this kind of thing?

Nothing to Hide; but Plenty to Protect

As you read the committee's report, and this response, one might wonder why the Auditor did not simply turn over all documents and answer all questions sought by the committee. Why resist if you don't have anything to hide?

As the Auditor has said repeatedly, we have nothing to hide. Our work, in stark contrast to that of this committee, is complete, accurate, supported, and contains meaningful findings and recommendations. But our office is established in the Hawai'i State Constitution; it was designed by the framers of that constitution to function free from undue influence by politicians and politics.

Why not just give the committee our workpapers and other confidential information? The answer to that question has two parts.

First, the committee was formed to investigate compliance with recommendations made in two audit reports regarding two agencies –ADC and DLNR's Special Land and Development Fund. The

[13] The importance of observing the boundaries set by the legislature in delegating power to investigative committees has been underscored by a federal court. The case involved a legislative subpoena issued from a state investigative committee that was operating outside the boundaries of its authorizing resolution. *Thompson v. Ramirez*, 597 F.Supp. 730, 735 (D. P.R. 1984). The case raised an important legal question. "If the challenged subpoenas were not issued pursuant to an authorized legislative resolution, do the legislators enjoy immunity under" 42 U.S.C. § 1983 (the federal statute that allows government officials to be sued for constitutional violations)? The court answered that the legislators were stripped of legislative immunity under those circumstances. Id. ("[W]e now find that the legislators do not enjoy absolute immunity when the Legislative Rules and Resolutions are not strictly followed in taking action.") The relevant point here is that when legislators violate authorizing resolutions in the context of investigative committees, it is not a minor legal inconvenience. To the contrary, under some circumstances, it may even put legislators' legislative immunity from suit at risk.

A Year-Long Attack on Good Government

THE UNSUPPORTED AND UNJUSTIFIED ATTACKS on the Office of the Auditor are even more egregious – and the deceptive "gut and replace" of the resolution that created this committee to look at the findings and recommendations made in the reports on the Special Land and Development Fund and the Agribusiness Development Corporation are even more intolerable – when seen as part of a year-long, relentless attack on the office and on good government oversight.

The Working Group and legislation introduced in 2021 designed to gut the Office of the Auditor and impose undue interference on independence.

January 14, 2021
Speaker Scott Saiki issues a memorandum to all House members announcing his unilateral creation of a "State Auditor Working Group." The Working Group is led by appointed chair Edwin Young. The Working Group initiated interviews of individuals outside of the Office of the Auditor before it contacted the State Auditor or this office.

January 20, 2021
Speaker Saiki introduces House Bill No. 1, which slashes the office's personnel and operational budget by 52.6 percent. The bill would not only eliminate positions and threaten the viability of the office, it eliminates funding for the financial statement audits of 22 state departments and programs as well as the State of Hawai'i Annual Comprehensive Financial Report, all of which are paid through the Audit Revolving Fund that Speaker Saiki removes from the Office of the Auditor's budget. House Bill No. 1 also excludes funding for special studies by the Auditor; and removes boilerplate language that allows the Auditor to expend funds appropriated to the office.

January 22, 2021
Speaker Saiki and Chair Belatti co-introduce House Bill No. 354, which allows the Legislature to determine the Auditor's salary, currently set by statute and is the same as the salaries of the heads of the three other legislative service agencies. However, House Bill 354 does not propose altering the salary structures of the three other legislative service agency heads.

January 27, 2021
Chair Belatti introduces House Bill No. 1341, which creates another level of bureaucracy to oversee the activities of the Office of the Auditor and other "good government" offices.

January 29, 2021
Working Group Chair Edwin Young emails the State Auditor stating that the Working Group will be performing an "independent and objective" assessment of office operations. Most, if not all, of the requested documents and questions seem unrelated to and well outside the Working Group's purpose, as defined by the Speaker. Among the documents that Young requests are confidential personnel files, including private contact information for former employees; audit work papers confidential pursuant to section 23-9.5, HRS; litigation files, including "lawyer files"; and information about "media battles," staff evaluations, and staff turnover.

February 5, 2021
An email from Rona Suzuki, Speaker Saiki's senior advisor, to Working Group members is mistakenly sent to the Office of the Auditor. In the email, Suzuki, a non-member of the Working Group, updates the group members on research she has done on its behalf. Among the recipients of the email is the former Administrative Deputy Auditor, Ronald Shiigi, who will later testify before the House Investigative Committee that, in his opinion, Auditor Kondo omitted important information from an audit. Shiigi, a non-member of the Working Group and a current Executive Branch Interim Division Head, provides the Working Group private contact information for former Office of the Auditor employees.

April 1, 2021
The Working Group releases its report, which contains many personal attacks against the Auditor. The report relies heavily on accusations and lacks factual support. The Working Group never took the Auditor up on multiple invitations to meet and never responded to the Auditor's questions, including questions about its authority to access personnel records and the office's confidential work papers. Instead, the Working Group contented itself with interviewing a few former employees. They did not identify their sources and did not give the Office of the Auditor an opportunity to respond, which the chair had promised. They did not even ask to interview the Auditor or any current staff.

"I am going to let it speak for itself," she said. "I believe anyone who takes the time to read it will see that was not predetermined, and neither is the next step we will take." – *Della Au Belatti*, House Majority Leader, Civil Beat, April 1, 2021.

Belatti is later named Chair of the House Investigative Committee to Investigate Compliance with Audits Nos. 19-12 and 21-01.

April 29, 2021
On the last day of session, Majority Leader Belatti offers, and the House adopts, House Resolution No. 164, which establishes the House Investigative Committee to Investigate Compliance with Audit Nos. 19-12 and 21-01.

September 29, 2021
At a procedural hearing of the House Investigative Committee, early in its investigation, Chair Belatti claims that there may be "something amiss in the scope of these audits" and is concerned that some important issues may have been omitted from scrutiny of the Auditor. "We would not be doing our job as legislators if we turned a blind eye to the problems being raised in this Committee," she says. The Chair opines that the committee's follow up of the audit recommendations could have been disposed more quickly if the Office of the Auditor had followed Yellow Book standards. She announces that the committee will examine if, in fact, the Office of the Auditor followed Yellow Book standards at the various stages of its audit process. "Members, we are going to be asking these questions and doing our due diligence. That is what we have been tasked to do by House Resolution 164," she says.

October 20, 2021
Before the committee is to hear the testimony of Ronald Shiigi, former Administrative Deputy Auditor for the Office of the Auditor, Chair Belatti states that the committee believes omissions in evidence by the Auditor warrant further investigation since the issues "concern policy making and at minimum auditing irregularities that should be explained, and at worst cases of abuse and misuse of power, mismanagement, malfeasance and/or fraud that need to be audited pursuant to Yellow Book standards." Chair Belatti then announces that the next two weeks of testimony will be dedicated to better understanding the circumstances surrounding the omissions, actions or inactions of the Auditor, as well as the policies, procedures, management oversight and disposition of public lands by DLNR and ADC.

December 30, 2021
The House Investigative Committee releases its draft report to the witnesses it subpoenaed during its investigation. The draft contained nearly two dozen incomplete pages, many of them featuring recommendations and commentary that are half-formed, accompanied by editorial notes or placeholder text. A couple of recommendations featured options from which committee members could choose from. Several recommendations and the report's "closing conclusion" were missing altogether. One of the recommendations is: "The Committee recommends further investigation into the Office of the Auditor by the House of Representatives, a future investigative committee, or an independent third party that can conduct a thorough performance audit of the Office of the Auditor."

resolution that was offered by the chair contained nothing about investigating the Office of the Auditor. It became evident early on that the committee was improperly exceeding its authority by looking into matters unrelated to ADC and DLNR.

Second, this office has legal and ethical obligations to protect its independence and the confidentiality of its workpapers. When the committee subpoenaed our confidential workpapers, the Office of the Auditor had to go to court to protect them. A Circuit Court judge agreed with us, followed the law, and quashed the committee's subpoena seeking this information. The draft report attempts to downplay this, of course. It is not credible to say that the Auditor refused to cooperate. A simple look at the record shows that the Auditor gave almost eight hours of testimony going through the findings made in the audit reports, the process used by our office, and answering the committee's questions. But when the committee made it clear, and then later named the Office of the Auditor as a subject of investigation, we had to protect this office's independence. It is not a matter of protecting one person's job or position. It is the critical role of our office and all good government agencies that must be protected.

Another "Gut and Replace"

ON THE LAST DAY of the most recent legislative session, the House of Representatives passed House Resolution No. 164. The resolution's title mentions only two state agencies, neither of them the Office of the Auditor. Likewise, the resolution's "purpose … of the investigating committee" and "scope of investigative authority" sections mention only two state agencies. The Office of the Auditor is not one of them. As the committee's own name acknowledges, it is a "Committee to Investigate Compliance with Audit Nos. 19-12 and 21-01."

The Office of the Auditor authored the two audit reports named in the committee's title, and the Auditor can and has supplied helpful information to the committee concerning them. But the Office of the Auditor cannot, by any logic, be in or out of compliance with its own audits of other agencies.

That means the Office of the Auditor itself cannot be a proper subject of, or target of, a committee authorized by the House only to investigate two other agencies' compliance with two specific audits. Yet, from the outset, it was clear that one of the committee's main objectives was to investigate the Office of the Auditor. This "gut and replace" should not be tolerated.

On Thursday, October 28, 2021, all pretext was abandoned when the chair confirmed that the testimony that day of Randal Lee would concern "the management and function of the Office of the Auditor." The chair was now committed, she said during the hearing, "to stay focused on the proper management and operation of all three agencies." That is, not only DLNR and ADC – the agencies whose compliance with the Auditor's audits the committee was authorized to investigate, as reflected in the committee's very name – but also "the management and function of the Office of the Auditor." According to the chair, "we are going to go down this path."

We have noted the importance of free and open communication with employees and supervisors of the agencies we audit. Everyone should be concerned about the chilling effect when staff know that management may eventually hear their responses to our questions and the importance of providing a protected space.

Our working papers are confidential by or protected from disclosure by law. To protect the Office of the Auditor's independence and credibility, it was reasonable and necessary to seek clarification about the committee's authority, purpose and objective(s).

What follows is a detailed response to the many inaccuracies, half-truths, and innuendo contained in the draft report. As we note, the draft report given to us was not complete. There were many holes and incomplete sections. But we are compelled to make a record showing the false and unsupported allegations for what they are. They cannot stand unopposed.

An official report issued by a legislative committee should consist of more than a patchwork of unsupported statements, fact-less yet strangely pre-fabricated recommendations, periodic accusations of impropriety, and—in Representative Kobayashi's words—innuendo apparently designed for the very purpose of casting the Office of the Auditor in a negative light. That goes without saying. Yet the draft report is not only tantamount to a failure to conduct a professional, or fair, or impartial proceeding with regard to the Auditor. It is also at least vaguely suspicious. If, as Representative Kobayashi noted, "much of what is said in this report is incorrect and improper;" that was not caused by a mere failure of due diligence on the part of the committee or its staff.

Indeed, the chair made a point of repeating that she and the committee had poured over tens of thousands of pages of subpoenaed documents. One would expect such a widely cast net to yield more fish. But, strangely, it did not. The periodic accusations of impropriety, sprinkled throughout the draft, are supported by no documentary evidence. To be sure, the voluminous testimony has been scoured for tidbits that are then framed in the light least favorable to the Auditor or the Office of the Auditor. For example, some of the testimony regarding the Auditor himself was so extreme, so inaccurate, so emotive, and so untethered to fact that it can be fairly categorized as defamatory, and some of that found its way into the report.

In addition, the committee has conducted much of its "fact finding" in private meetings which we assume will remain confidential.

Undue Influence Threats

GOVERNMENT AUDITING STANDARDS issued by the U.S. Government Accountability Office require that we maintain our objectivity and independence – both of mind and appearance – including independence from undue political or other external influences or pressures that may affect an auditor's ability to make objective judgments.

We cannot disregard or otherwise compromise the Government Auditing Standards that are the foundation of our performance audits. We must preserve auditor independence and objectivity. Auditors are independent and objective when they perform their work with an attitude that is impartial, fact-based, nonpartisan, and nonideological with regard to audited entities and users of the audit reports. Objectivity includes independence of mind and appearance, maintaining an attitude of impartiality, having intellectual honesty, and being free of conflicts of interest. An auditor's credibility is paramount, and credibility emanates from independence and objectivity. Independence impairments, such as undue influence threats, affect auditors' objectivity. Therefore, it is critical that we eliminate any actual or perceived undue influence threats to our independence, or reduce them to an acceptable level.

Actions by the committee pose an undue influence threat to the Auditor's and the Office of the Auditor's ability to make objective judgments in contravention of Government Auditing Standards.

Paragraph 3.42 of the 2018 revision of Government Auditing Standards provides examples of circumstances that create undue influence threats for an auditor or audit organization:

1. External interference or influence that could improperly limit or modify the scope of an engagement or threaten to do so, including exerting pressure to inappropriately reduce the extent of work performed in order to reduce costs or fees.
2. External interference with the selection or application of engagement procedures or in the selection of transactions to be examined.
3. Unreasonable restrictions on the time allowed to complete an engagement or issue the report.
4. External interference over assignment, appointment, compensation, and promotion.
5. Restrictions on funds or other resources provided to the audit organization that adversely affect the audit organization's ability to carry out its responsibilities.
6. Authority to overrule or to inappropriately influence the auditors' judgment as to the appropriate content of the report.
7. Threat of replacing the auditor or the audit organization based on a disagreement with the contents of an audit report, the auditors' conclusions, or the application of an accounting principle or other criteria.
8. Influences that jeopardize the auditors' continued employment for reasons other than incompetence, misconduct, or the audited entity's need for GAGAS [generally accepted government auditing standards, i.e., the Yellow Book] engagements.

One Side Does Not Fit All

AS WE STATED in our closing statement, an investigative committee is a kind of "adversarial proceeding," much like a trial. Like a trial, the committee brings the awesome power of the state to bear on individual witnesses, who must testify under oath. Like a trial, an investigative committee can compel attendance of witnesses, compel testimony, and compel the production of documents. Unlike a trial, however, only committee members can ask questions of witnesses. Unlike a trial, no one on the receiving end of committee process is entitled to confront his or her accusers. Unlike a trial, witnesses testify under a continuing threat of criminal contempt.

Also, unlike a trial – or any other adversarial proceeding for that matter – a committee investigation can be deliberately conducted in a one-sided manner, and the one-sided story is not subject to correction. Unlike a trial, in a committee investigation, the other side does not have the power to compel witnesses to appear and to ask questions of witnesses. Unlike a trial, there are not even two sides to begin with – a prosecutor and a defendant. There is only one side – the committee's side – and only the committee is able to present witnesses to support its narrative.

In a trial, one side can ferret out inconsistencies or omissions in the other side's telling of the story through cross-examination. But an investigative committee does not allow questions by anyone not on the committee, and it need not attempt to balance the committee's perspective with contrary perspectives and contrary questions. It need not tell the whole story. In an investigative committee, unlike a trial, testimony can be choreographed to tell only one side of the story. In an investigative committee hearing and report, the committee can write its own script in advance, including its own pre-determined outcome, if it so chooses.

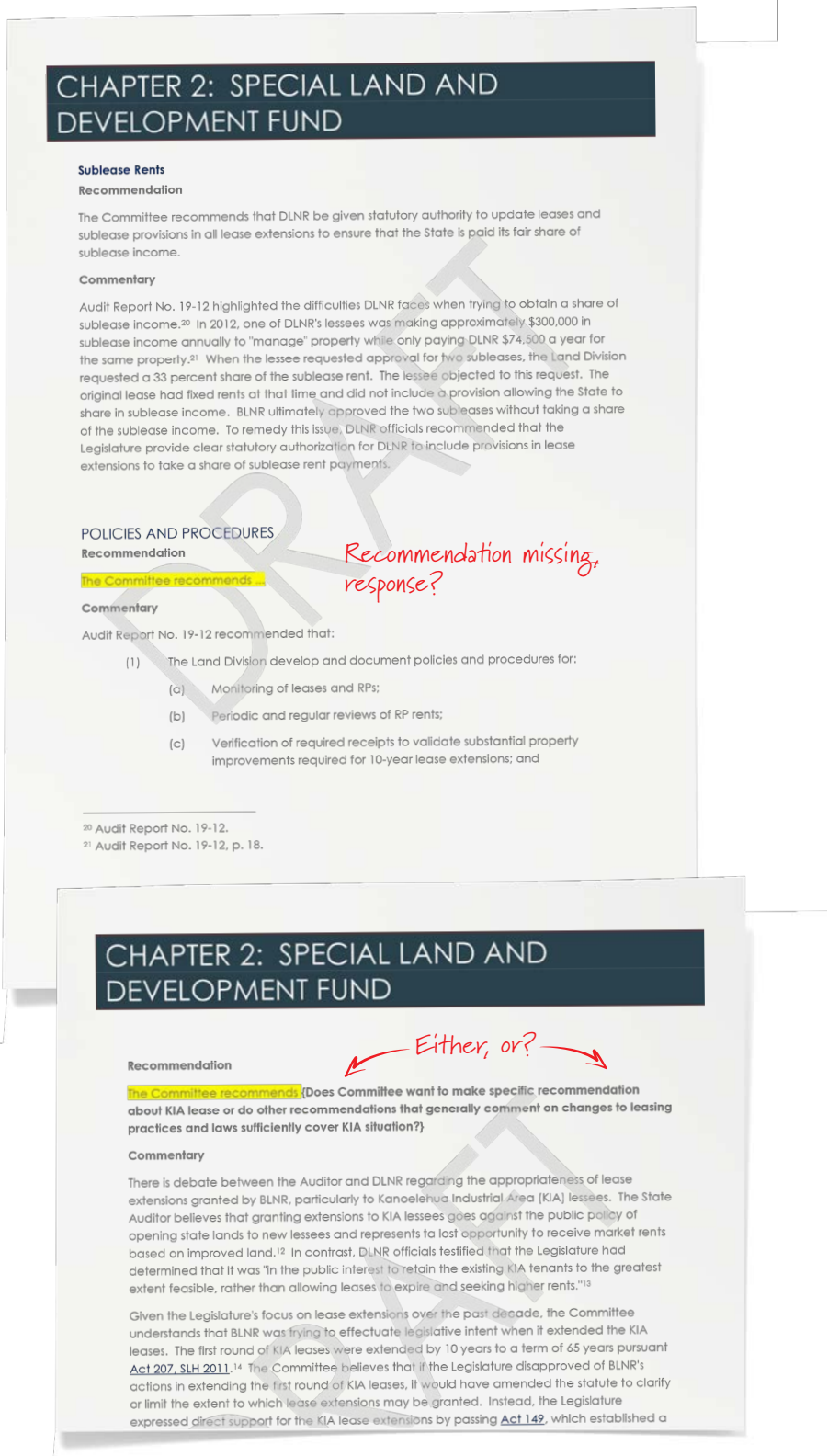
Fill in the Blanks

In her December 30, 2021, letter to House Investigative Committee subpoenaed witnesses announcing the release of draft report, Chair Belatti explained that the attached document was a "reflection of its findings and recommendations…." While the draft report is a reflection of something, it isn't a reflection of the committee's report's findings and recommendations. The draft contained nearly two dozen incomplete pages, many of them featuring recommendations and commentary that are half-formed, accompanied by editorial notes or placeholder text. A couple of recommendations featured options from which committee members could choose from. Several recommendations and the report's "closing conclusion" were missing altogether.

In her letter, Belatti explained that if subpoenaed witnesses wished to respond to the draft, they would have to submit those responses to her office in 14 days. She did not acknowledge that the draft report is unfinished or explain how witnesses could respond to missing or half-formed recommendations and commentary. However, Belatti did note that the "committee reserves the right to make changes and additions before final submittal of its report to the House of Representatives pursuant to House Resolution No. 164, Regular Session 2021."

Hopefully, sometime before then, the investigative committee will have filled in the blanks.

The following are a sampling of the draft report's missing items:



CHAPTER 2: SPECIAL LAND AND DEVELOPMENT FUND

Sublease Rents

Recommendation

The Committee recommends that DLNR be given statutory authority to update leases and sublease provisions in all lease extensions to ensure that the State is paid its fair share of sublease income.

Commentary

Audit Report No. 19-12 highlighted the difficulties DLNR faces when trying to obtain a share of sublease income.[20] In 2012, one of DLNR's lessees was making approximately $300,000 in sublease income annually to "manage" property while only paying DLNR $74,500 a year for the same property.[21] When the lessee requested approval for two subleases, the Land Division requested a 33 percent share of the sublease rent. The lessee objected to this request. The original lease had fixed rents at that time and did not include a provision allowing the State to share in sublease income. BLNR ultimately approved the two subleases without taking a share of the sublease income. To remedy this issue, DLNR officials recommended that the Legislature provide clear statutory authorization for DLNR to include provisions in lease extensions to take a share of sublease rent payments.

POLICIES AND PROCEDURES

Recommendation

The Committee recommends ...

Recommendation missing, response?

Commentary

Audit Report No. 19-12 recommended that:

(1) The Land Division develop and document policies and procedures for:

(a) Monitoring of leases and RPs;

(b) Periodic and regular reviews of RP rents;

(c) Verification of required receipts to validate substantial property improvements required for 10-year lease extensions; and

[20] Audit Report No. 19-12.
[21] Audit Report No. 19-12, p. 18.

DRAFT

CHAPTER 2: SPECIAL LAND AND DEVELOPMENT FUND

Either, or?

Recommendation

The Committee recommends **{Does Committee want to make specific recommendation about KIA lease or do other recommendations that generally comment on changes to leasing practices and laws sufficiently cover KIA situation?}**

Commentary

There is debate between the Auditor and DLNR regarding the appropriateness of lease extensions granted by BLNR, particularly to Kanoelehua Industrial Area (KIA) lessees. The State Auditor believes that granting extensions to KIA lessees goes against the public policy of opening state lands to new lessees and represents a lost opportunity to receive market rents based on improved land.[12] In contrast, DLNR officials testified that the Legislature had determined that it was "in the public interest to retain the existing KIA tenants to the greatest extent feasible, rather than allowing leases to expire and seeking higher rents."[13]

Given the Legislature's focus on lease extensions over the past decade, the Committee understands that BLNR was trying to effectuate legislative intent when it extended the KIA leases. The first round of KIA leases were extended by 10 years to a term of 65 years pursuant Act 207, SLH 2011.[14] The Committee believes that if the Legislature disapproved of BLNR's actions in extending the first round of KIA leases, it would have amended the statute to clarify or limit the extent to which lease extensions may be granted. Instead, the Legislature expressed direct support for the KIA lease extensions by passing Act 149, which established a

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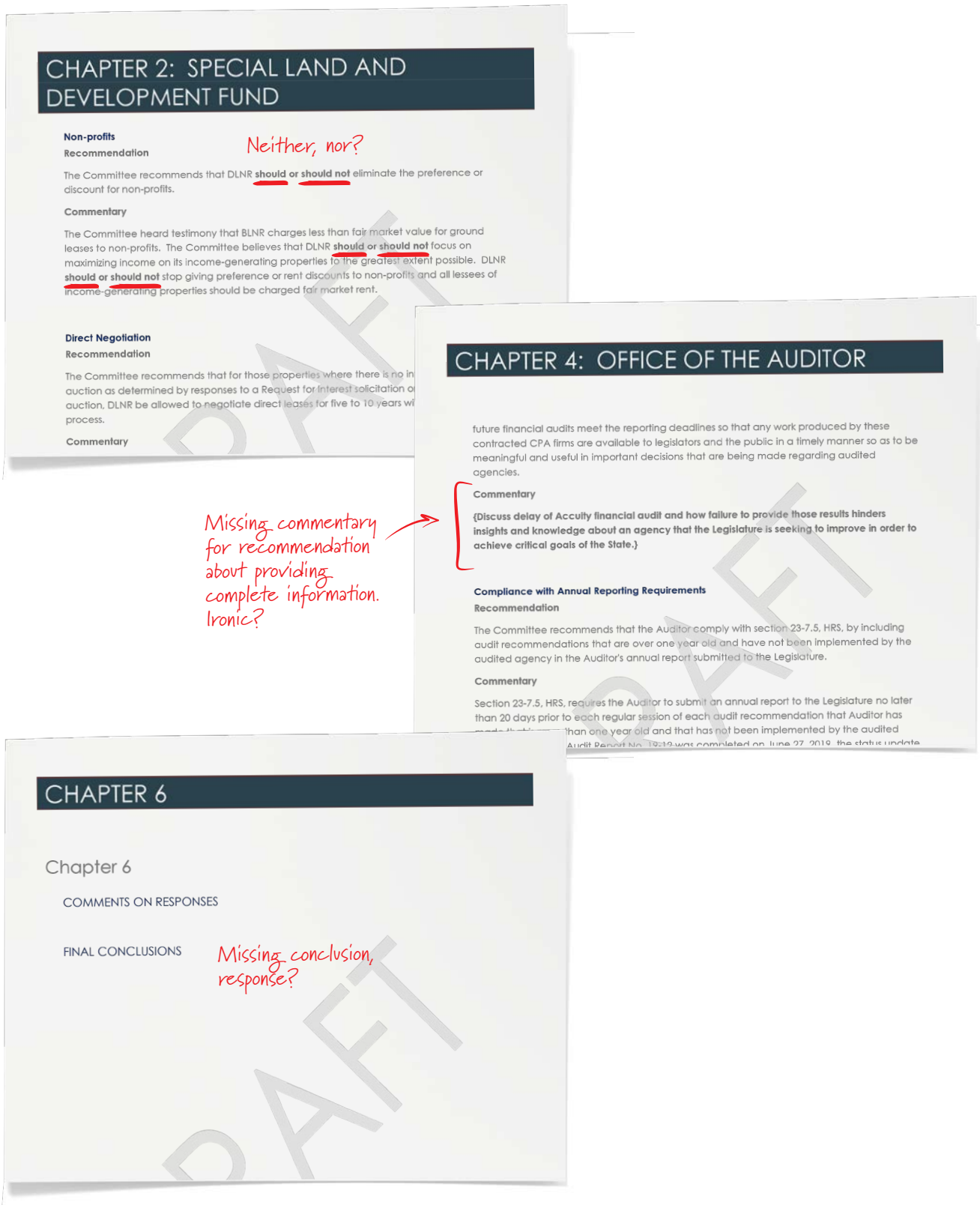


CHAPTER 2: SPECIAL LAND AND DEVELOPMENT FUND

Non-profits

Recommendation

Neither, nor?

The Committee recommends that DLNR **should or should not** eliminate the preference or discount for non-profits.

Commentary

The Committee heard testimony that BLNR charges less than fair market value for ground leases to non-profits. The Committee believes that DLNR **should or should not** focus on maximizing income on its income-generating properties to the greatest extent possible. DLNR **should or should not** stop giving preference or rent discounts to non-profits and all lessees of income-generating properties should be charged fair market rent.

Direct Negotiation

Recommendation

The Committee recommends that for those properties where there is no in
auction as determined by responses to a Request for Interest solicitation o
auction, DLNR be allowed to negotiate direct leases for five to 10 years wi
process.

Commentary

CHAPTER 4: OFFICE OF THE AUDITOR

future financial audits meet the reporting deadlines so that any work produced by these contracted CPA firms are available to legislators and the public in a timely manner so as to be meaningful and useful in important decisions that are being made regarding audited agencies.

Commentary

{Discuss delay of Accuity financial audit and how failure to provide those results hinders insights and knowledge about an agency that the Legislature is seeking to improve in order to achieve critical goals of the State.}

Missing commentary for recommendation about providing complete information. Ironic?

Compliance with Annual Reporting Requirements

Recommendation

The Committee recommends that the Auditor comply with section 23-7.5, HRS, by including audit recommendations that are over one year old and have not been implemented by the audited agency in the Auditor's annual report submitted to the Legislature.

Commentary

Section 23-7.5, HRS, requires the Auditor to submit an annual report to the Legislature no later than 20 days prior to each regular session of each audit recommendation that Auditor has
than one year old and that has not been implemented by the audited
Audit Report No. 19-12 was completed on June 27, 2019, the status update

CHAPTER 6

Chapter 6

COMMENTS ON RESPONSES

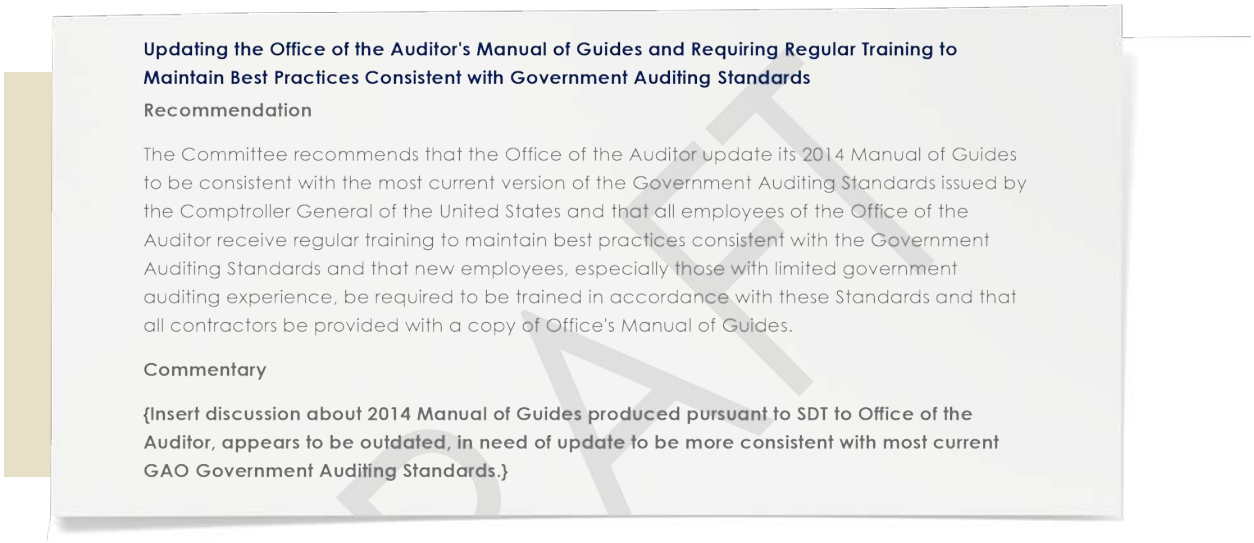
FINAL CONCLUSIONS

Missing conclusion, response?

II. Response to Draft Report Chapter 4 – "Office of the Auditor"

1. "Auditing Policies and Practices of the Office of the Auditor"

Updating the Office of the Auditor's Manual of Guides and Requiring Regular Training to Maintain Best Practices Consistent with Government Auditing Standards



Updating the Office of the Auditor's Manual of Guides and Requiring Regular Training to Maintain Best Practices Consistent with Government Auditing Standards

Recommendation

The Committee recommends that the Office of the Auditor update its 2014 Manual of Guides to be consistent with the most current version of the Government Auditing Standards issued by the Comptroller General of the United States and that all employees of the Office of the Auditor receive regular training to maintain best practices consistent with the Government Auditing Standards and that new employees, especially those with limited government auditing experience, be required to be trained in accordance with these Standards and that all contractors be provided with a copy of Office's Manual of Guides.

Commentary

{Insert discussion about 2014 Manual of Guides produced pursuant to SDT to Office of the Auditor, appears to be outdated, in need of update to be more consistent with most current GAO Government Auditing Standards.}

DRAFT

The Facts

As there was no commentary included in the draft report, it is difficult to respond in any detail. However, we have been working on an update to the Manual of Guides to include, among other things, the updates to the Government Auditing Standards promulgated by the U.S. Comptroller General, also known as the Yellow Book, and do already undergo regular training, at least 80 hours every two years, as required by Yellow Book standards. We have been peer reviewed on our auditing practices, including staff qualifications and training, and found in compliance. The implication that we are somehow deficient in our auditing processes, qualifications, and training is unfair and unsupported. It simply is untrue, as is the suggestion that any of our employees are unfamiliar with the Government Auditing Standards. As we noted, professional auditors from other states have confirmed our staff's competence and compliance with Yellow Book standards.

Furthermore, in 2017 and 2019, the Office of the Auditor arranged for training from the U.S. Government Accountability Office specific to Government Auditing Standards (Yellow Book) and internal control standards for the federal government (Green Book). In 2017 and 2018, the Office of the Auditor arranged for multi-day training on performance auditing from the then-Chair of the U.S. Comptroller General's Advisory Council on Government Auditing Standards.

Draft Audit Report Requirements

Draft Audit Report Requirements

Recommendation

The Committee recommends requiring the Auditor to provide audited agencies with a draft audit report that includes the Auditor's findings and recommendations at least 30 days before the exit interview.

Commentary

When the Auditor submitted its draft audit reports to DLNR and ADC, it did not include the Auditor's proposed recommendations.[77] When asked why the proposed recommendations were not included in the draft report, Auditor Kondo indicated that the audit recommendations are not necessary for a department to consider or provide comment on when it looks at a draft report because they are just suggestions as to how to fix what audit report found. Auditor Kondo also stated that the Committee and departments should focus on the audit report findings, not recommendations.

The Committee was surprised that Auditor Kondo downplayed the importance of audit recommendations. After an audit is completed, audited entities are required provide updates on their progress in implementing the recommendations made by the Auditor.[78] These status updates are then relayed to the Legislature in the Auditor's annual report.[79] Furthermore, government auditing standards, which mandatory when conducing audits, indicate that auditors "should obtain and report the views of responsible officials of the audited entity concerning the findings, conclusions, and **recommendations** in the audit report, as well as any planned corrective actions"[80]

Since the progress of audited agencies will be measured against audit report recommendations, the Committee believes the agencies should be given the opportunity to comment on the recommendations at the draft report phase.

The Committee also believes that audited entities should be given ample time to properly and fully respond to draft reports. ADC testified that it only had nine working days to respond to the draft audit report provided by the Auditor due to weekends and holidays. This made it difficult for a small agency like ADC to receive input from its Board of Directors who are volunteers subject to Hawaii's open meetings law (Sunshine Law) and provide a detailed response to the draft audit report. Providing a longer period of time to respond to draft audit reports will further enable boards that are subject to Sunshine Law notice and meeting requirements to meet with the Auditor for an exit interview, if desired.

The Committee understands that requiring the submission of draft audit reports 30 days in advance of the exit interview may put a strain on staff in the Auditor's office to complete audits sooner. The Committee requests that legislators be mindful of these time constraints when establishing audit deadlines and asks that the Auditor voice any concerns about short audit deadlines during the legislative process.

The Facts

The committee's citation to the 2011 Yellow Book is misleading. There is no requirement that recommendations be shared with an agency in a draft report. More importantly, the findings, specifically, the causes of the findings, are what the agency needs to address and where the agency should focus its review of the draft report. The recommendations are simply our suggestions as to how to address those causes. We believe our recommendations are meaningful and achievable means for the agency to improve its operations going forward. However, our recommendations to address the findings are not the only means. Agencies may have different ideas as how to better address those findings.

We do follow up on the status of implementation of our recommendations but have no enforcement power. From 2015-2019, 87 percent of our recommendations were at least partially implemented. But when an agency disagrees or feels a recommendation is no longer applicable, it has an opportunity to say so when reporting implementation status. Any implication that our office is improperly "sandbagging" auditees or violating applicable standards is unfair and unsupported. The Auditor in no way "downplayed" the importance of audit recommendations.

As for the timeframe for responding to our draft reports, as the committee notes, we have much work to do and much of it is time sensitive. We try to give auditees sufficient time to respond to our drafts, and if more time is needed, we always consider those requests and have been very accommodating on giving more time. Any implication that our office puts undue time pressure on auditees is unfair and unsupported.

It is also misleading to suggest that ADC staff wanted to involve the ADC board but were unable to because of the timing of its response. The ADC board declined an invitation to discuss the audit process at the beginning of the audit, and staff did not indicate any intent to include the ADC board in its response. Moreover, we have offered on numerous occasions, including directly to the board and through ADC staff, an individual ADC board member, and Representative Amy Perruso, to participate in a meeting with the board to discuss the audit findings. We have never received any response to those offers.

Timeliness of Completion of Audits

Timeliness of Completion of Audits

Recommendation

The Committee recommends that the Office of the Auditor immediately direct Accuity to complete its financial audit of ADC, provide this audit to the Legislature, and ensure that future financial audits meet the reporting deadlines so that any work produced by these contracted CPA firms are available to legislators and the public in a timely manner so as to be meaningful and useful in important decisions that are being made regarding audited agencies.

Commentary

{Discuss delay of Accuity financial audit and how failure to provide those results hinders insights and knowledge about an agency that the Legislature is seeking to improve in order to achieve critical goals of the State.}

The Issue

In accordance with Act 28 (SLH 2019), the Office of the Auditor contracted with Accuity LLP, a public accounting firm, to audit ADC's financial records. The audit, which was initiated in July 2019, was scheduled to be completed by mid-December 2019. It has yet to be completed.

The Facts

The committee's recommendation is ill-informed, based on the false assumption that the Office of the Auditor and/or Accuity are holding up the financial audit. It is impossible to ascertain the reasoning behind the recommendation since in place of its "commentary," drafters inserted placeholder text promising future discussion.

However, if the drafters of this recommendation had read Report No. 21-01, they would have learned Accuity suspended its audit after it determined that ADC's financial records were not in auditable condition. Since ADC's staff did not have the capability to get its records into auditable condition, it hired another public accounting firm, KMH LLP, to assist with the collection and preparation of the financial records, many of which needed to be recreated years after the fact. In Fall 2020, KMH informed the Office of the Auditor and Accuity that it believed ADC's financial records were in auditable condition and Accuity restarted its efforts. At the time, Accuity believed that it would be able to publish a financial audit report in January 2021.

If the drafters had followed up with Accuity, they would have learned that Accuity found numerous exceptions (events that deviate from expectations) and required ADC management to resolve those exceptions and conduct a review for any additional errors that would require further adjustments. The investigative committee was aware that as of September 2021, ADC – not the Office of the Auditor or Accuity – was still working on addressing the various issues raised.

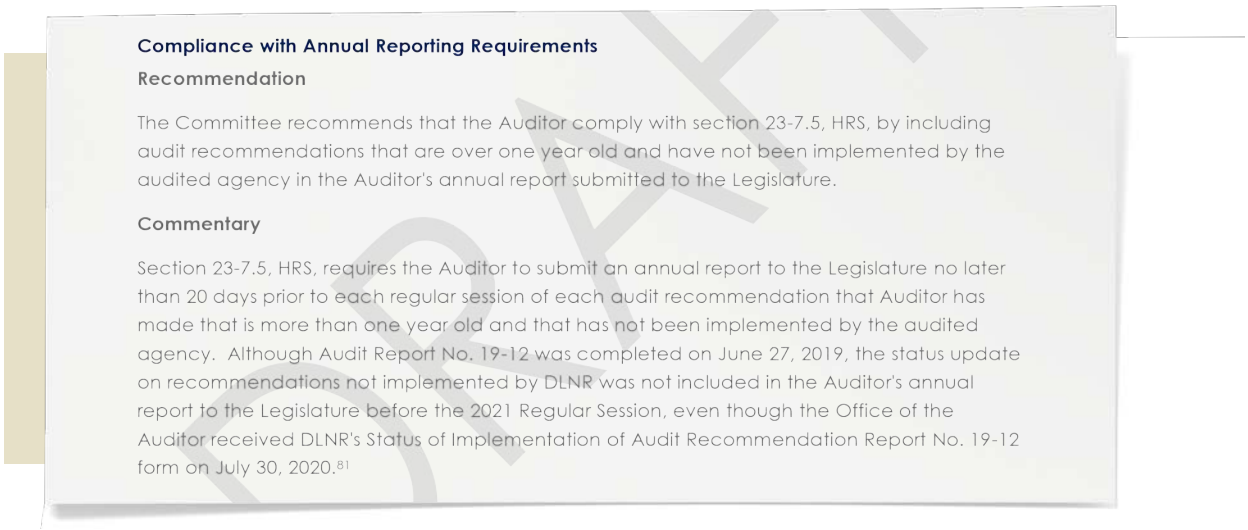
During its September 21, 2021, hearing, Representative Linda Ichiyama asked ADC officials for an update on the completion of the financial audit. ADC's Senior Executive Assistant responded that management was trying to address Accuity's concerns while balancing the needs of its daily work schedule along with the recent demands of the House Investigative Committee. She said that they were "really very close."

If the drafters had followed up with ADC, they would have learned that the agency was not very close to completing its work. On September 28, 2021, a wildfire swept through a vacant property in the Whitmore Village area long known to be a haven for criminal activity. The fire exposed an illegal dumpsite and "chop shop" that had been home to hundreds of abandoned cars.

While the fire burned everything in the cars that was not made of metal, making it easier for the cars to be removed a month later, the intense heat melted car batteries, air conditioning systems and electronics that contain toxic materials. Accuity provided the relevant accounting guidance to ADC to perform an initial assessment as to whether such a liability and disclosure should be recorded on its financial statements as of June 30, 2019.

If report drafters had followed up with ADC, Accuity, or the Office of the Auditor, they would have learned that the agency recently procured an environmental consultant, which will assess the Whitmore Village area environmental issues and potential pollution remediation obligation and loss contingency. The Office of the Auditor continues to receive biweekly updates from Accuity.

Compliance with Annual Reporting Requirements



Compliance with Annual Reporting Requirements

Recommendation

The Committee recommends that the Auditor comply with section 23-7.5, HRS, by including audit recommendations that are over one year old and have not been implemented by the audited agency in the Auditor's annual report submitted to the Legislature.

Commentary

Section 23-7.5, HRS, requires the Auditor to submit an annual report to the Legislature no later than 20 days prior to each regular session of each audit recommendation that Auditor has made that is more than one year old and that has not been implemented by the audited agency. Although Audit Report No. 19-12 was completed on June 27, 2019, the status update on recommendations not implemented by DLNR was not included in the Auditor's annual report to the Legislature before the 2021 Regular Session, even though the Office of the Auditor received DLNR's Status of Implementation of Audit Recommendation Report No. 19-12 form on July 30, 2020.[81]

The Facts

Our office complies with HRS section 23-7.5; in fact, we do more than required under the statute. As we tried to explain to the committee, for the past few years, we have issued a separate report dedicated to reporting the status of implementation of our recommendations – not just the ones that have not been implemented, but all of them. The most recent report, Report No. 21-11, may be found at https://files.hawaii.gov/auditor/Reports/2021/21-11.pdf. We suspect that the committee may have been looking at our "Annual Report" instead, which is now a separate report.

Because we believe that follow-up is an effective way to monitor action on our recommendations in the absence of enforcement power, we affirmatively reach out to agencies to solicit status. We also provide the updated information to legislators so they, as appropriate, can compel action to address audit findings and "enforce" the recommendations. Our follow-up includes not only self-reports by the agencies, but generally, we do "active" follow-ups two to three years out, where we independently conduct a review of implementation. Not surprisingly, the result of our independent assessment differs from the status reported by the auditees. These active follow-ups are detailed in separate reports as well.

Finally, as to why certain recommendations might not be included in our reports, it is usually a matter of timing. We do reach out to check status a year after an audit, but there is a lag time on responses, and the annual report includes status of recommendations made in the previous five-year period. For example, our 2021 report includes status of recommendations made from 2015-2019. Status of recommendations made in the ADC audit, and other reports issued in 2020, will be included in our 2022 report on the status of implementation of our recommendations.

2. “Transparency of the Office of the Auditor”

Access to the Office of the Auditor’s Working Papers

Access to the Office of the Auditor's Working Papers

Recommendation

The Committee recommends amending section 23-9.5, HRS, to require the Auditor to disclose information, evidence, and requested documents to investigative committees after Audit Reports have been issued.

Commentary

Section 23-9.5, HRS, states:

> **[§23-9.5] Confidentiality.** The auditor shall not be required to disclose any working papers. For the purposes of this section, "working papers" means the notes, internal memoranda, and records of work performed by the auditor on audits and other investigations undertaken pursuant to this Chapter, including any and all project evidence collected and developed by the auditor.

Section 23-9.5, HRS, was established in 1996 to allow the Auditor to reject disclosure requests under the Uniform Information Practices Act.[82] The confidentiality provision neither forbids the Auditor's disclosure of documents nor does it entirely protect documents from disclosure.[83] However, throughout the course of the Committee's investigation, Auditor Kondo repeatedly cited the confidentiality provision in his refusal to provide the Committee with information and evidence related to Committee's investigation.

The Auditor routinely cited the confidentiality provision to block information and evidence that did not qualify as working papers such as public documents and basic information, including the names of staff who worked on an audit and dates when certain auditing processes were started and completed. The Auditor also refused to provide the Committee with audio recordings or transcripts of the interviews it conducted with department officials and employees even though the Committee obtained consent from the interviewees. The Committee was confused by Auditor's statements that disclosing working papers would jeopardize the Auditor's independence since the Committee was only seeking the working papers for audits that had already been completed and reported to the Legislature.

On September 29, 2021, the Committee issued its first and only subpoena duces tecum to the Office of the Auditor to obtain public documents that Auditor Kondo had previously agreed to provide under oath and deliverables from a financial audit that was specifically required by the Legislature under Act 209, Session Laws of Hawaii 2017, and funded by state monies.[84] Rather than cooperate with the Committee and comply with the subpoena duces tecum, the Auditor filed a motion in court for enlargement of time to respond to and/or to quash or for protective order against subpoena duces tecum issued upon the Auditor by the Committee on September 29, 2021. Auditor's motion to quash was granted in part and denied in part. The Auditor was ordered to produce the public documents to the Committee but did not have to produce the deliverables from the financial audit.

At the outset, the Committee expected cooperation from the Auditor. Auditor Kondo testified that the Office of the Auditor has nothing to hide and did its job well. Section 21-16, HRS, requires state and county officers and employees cooperate with investigating committees and their representatives and furnish information as may be called for in connection with the research activities of the committees. The Legislature also specifically directed and funded

the audits of SLDF and ADC. As the client, the Committee believes that the Legislature, on behalf of the public, should have access to the audit records. Furthermore, the Auditor routinely provides access to its records for third-party peer review.

The Committee finds that congressional members and investigative committees are allowed access to audit documentation. For example, the United States Government Accountability Office (GAO), which provides auditing, evaluation, and investigative services for the United State Congress, will grant members, upon their written request, access to audit documentation at GAO offices or provide copies of selected audit documentation after a product has been made publicly available.[85] GAO's statutory responsibility to keep its records confidential does not authorize information to be withheld from Congress.[86]

The Committee also finds Auditor Kondo's unwillingness to furnish information and evidence to an investigative committee problematic. Ultimately, Auditor Kondo's uncooperativeness prevented the Committee from obtaining important information and evidence, delayed the Committee's receipt of documents and information, and resulted in the unnecessary

expenditure of public resources by the Office of the Auditor to hire outside counsel for litigation against the Committee. The Committee does not believe that the Auditor's working papers should be outside of an investigative committee's subpoena power. For these reasons, the Committee believes that section 23-9.5, HRS, should be amended to require the Auditor to disclose information, evidence, and requested documents to investigative committees after audit reports have been issued.

The Facts

Any statement or implication that the Auditor is obstructionist or has something to hide is simply untrue. It is hard to fathom how the committee fails to recognize the importance of confidentiality and independence. The office routinely is asked to affirm the confidentiality provision with auditees and interviewees. Likely because the information (including audio recordings) are confidential working papers and not available to outsiders, interviewees are more open and frank in their answers and in the information they provide. They are assured that others, like their boss but also legislators, are not privy to their responses and comments. The committee's recommendation is much more concerned about finding "dirt" against the Auditor rather than protecting the Auditor's ability to do his job, to be the important resource to the Legislature that the office is created to be.

The "commentary" contained in the draft report relating to these recommendations should alarm anyone that reads it, at least anyone who cares at all about good government and independent oversight. In its zeal to continue its attack on the Auditor, the commentary further shows the committee's failure to understand the appropriate role of agencies like the Office of the Auditor, nor the respective roles of our Legislature and the Office of the Auditor under the Hawai'i Constitution. The characterization of the Auditor as "uncooperative" is outrageous and unsupported.

The Auditor spent about eight hours testifying and fielding questions over three hearing dates. The Auditor is obligated to protect confidential information, especially when the information sought was not even close to being within the scope of the committee's authorized inquiry.

The draft report also refers to the Legislature as the "client" of the Office of the Auditor. This is simply wrong. Both the committee and its supposed audit expert, Edwin Young, fail to grasp this. Our office is an independent agency, established by the Hawai'i Constitution to operate free from the very type of interference and undue influence perpetrated by this committee.

Likewise, the committee has referenced "best practices" that include a legislative audit committee, and analogized the Office of the Auditor to the Honolulu Office of the City Auditor, Kaua'i County Auditor, and other jurisdictions. These comparisons are again unfair and misleading. This office, unlike those offices, is established via Constitution to be independent from the legislative body.

It is our hope and intention that our reports will serve as guidance to the Legislature, and contrary to the picture the chair tries to paint, we do regularly consult with key legislators and subject matter chairs to clarify the issues that are most meaningful for review.

Regarding the specific "recommendations" made under the "transparency" umbrella, we further respond as follows:

The recommendation that section 23-9.5, HRS, be amended to require the Auditor to disclose information, evidence, and requested documents to investigative committees is, simply put, a bad idea. The committee should seriously reconsider making such a recommendation, and if such an amendment is ever proposed, our office will oppose it for many of the reasons we discuss above.

The committee's "confusion" as to the concept that disclosure of working papers would compromise the independence of the Office of the Auditor is itself confusing. As written, the 1996 statute's language is unambiguous. Even if it were ambiguous, the legislative history confirms that working papers are, and remain, confidential, as that is crucial to the audit function. As we have said, we have a legal and ethical obligation to maintain the confidentiality of records and information.

Recorded Interviews

Recorded Interviews

Recommendation

The Committee recommends legislation to clarify that the Office of the Auditor is not allowed to shield documents from public disclosure, such as recorded interviews, when other safeguards or requirements are met under other laws that require or warrant disclosure.

Commentary

The Committee heard testimony questioning whether it is appropriate for auditors to record interviews.[87] In any event, if and when interviews are recorded, the Auditor should not be allowed to shield those documents from disclosure especially if the person interviewed requests copies of the interview or other safeguards or requirements are met under other laws that require or warrant disclosure.

The only reason the Committee found out about the forged easement involving a DLNR Kauai parcel is because the DLNR Chair requested a copy of her recorded interview and produced the audio of that interview to the Committee pursuant to a subpoena duces tecum. The Committee probably would have never found about the forged easement unless there was a whistleblower who was brave enough to come forward to disclose that information to the Legislature.

Despite all interviewed ADC and SLDF employees and board members signing waivers for the release of their interviews, Auditor Kondo still refused to provide those interviews to either the interviewed subjects or the Committee. Auditor Kondo routinely stated that his Office promised the interviewees that the recorded interviews would remain confidential, which precluded disclosure. However, the Committee notes that Audit Report Nos. 19-12 and 21-01 used direct quotes from those interviews in the public reports, thereby breaching the promised confidentiality.[88] Auditor Kondo even refused to produce the recorded interviews to ADC pursuant to a Uniform Information Practices Act request, apparently asserting the primacy of Section 23-9.5, HRS, over the State's public records laws. The Committee believes that this is another delay tactic by the Office of the Auditor.

The Facts

This recommendation is so vague as to be impossible to respond to in any specific manner. When the process under which our reports are completed, as evaluated by an independent peer reviewer, complies with Government Auditing Standards, we reiterate our reports should and do speak for themselves and there is no reason other than harassment and undue influence to allow review of the workpapers and processes that lead to the final report. Allowing the specter of this type of review would cripple the ability of this office and other watchdog agencies to do full and fair and independent work. The committee also obliquely and misleadingly refers to a "brave whistleblower" who brought a forged easement to the Auditor's attention. This line of inquiry was debunked during the hearings. The committee's concern over this issue is

disingenuous and overblown, considering their only recommendation regarding the easement was to expunge the forged easement from the public record, something that DLNR testified it was already working on.

Moreover, the committee's suggestions that the Auditor's denial of the requests by ADC personnel for copies of the audio recordings of interviews under the Uniform Information Practices Act (Modified), Chapter 92F, HRS, was anything but appropriate only highlights the biased and uninformed nature of the committee's draft report. The law presumes documents maintained by government agencies are accessible by the public. But, the statute also includes certain limited exceptions to disclosure that allow an agency to deny access to documents. One of those exceptions allows an agency to protect documents that are confidential under law from public disclosure. And, for the reasons thoroughly explained above, the Legislature intended that the Auditor's working papers would be confidential and not subject to public disclosure.

Witness Reluctance/Hesitancy

Witness Reluctance/Hesitancy

Recommendation

The Committee recommends clarification that cooperation with an investigative Committee is not an ethics violation that jeopardizes a potential witness.

Commentary

Efforts by the Committee to speak with current and former employees were hindered by Auditor Kondo. Not only was Auditor Kondo unwilling to provide the Committee with the names of staff who worked on an audit, he attempted to dissuade employee cooperation with the Committee by threatening ethics violations. The Committee believes that this resulted in current and former employees from the Office of the Auditor, including former contractors, who were reluctant or unwilling to informally meet with the Committee or testify in a public hearing regarding the audits of SLDF and ADC or their experiences at the Office of the Auditor.

The Facts

As for the recommendation itself, there is nothing to respond to. There is no proposed legislation, no specific action proposed. The commentary, however, presents a warped understanding of the ethics laws regarding disclosure of confidential information. The committee attempted to intimidate witnesses, especially current and former employees, by threatening attendance under subpoena, which carried with it the potential of criminal contempt for refusing to answer questions. This would potentially put our employees, who are just trying to do their jobs, in an impossible choice between answering questions seeking confidential information and not answering and being held in criminal contempt. The information is confidential by law, and disclosure is a potential ethics violation by law, and our employees needed to be aware of their rights and obligations for their protection, not the office's. Contractual provisions and a contractor's professional code of conduct also require confidentiality. To say or imply that the Auditor was attempting to intimidate or suppress information is wrong.

The State Ethics Code provisions relating to confidential information (sections 84-12 and 84-18(a), HRS) prohibit both current and former employees of the Office of the Auditor from disclosing information contained in confidential working papers and any other information that by law or practice is not available to the public and which the employee or former employee acquired in the course of the employee or former employee's official duties.

§ 84-12 Confidential information. No legislator or employee shall disclose information which by law or practice is not available to the public and which the legislator or employee acquires in the course of the legislator's or employee's official duties, or use the information for the legislator's or employee's personal gain or for the benefit of anyone; provided that this section shall not preclude a person who serves as the designee or representative of an entity that is a member of a task force from disclosing information to the entity which the person acquires as the entity's designee or representative.

§ 84-18 Restrictions on post employment. (a) No former legislator or employee shall disclose any information that by law or practice is not available to the public and that the former legislator or employee acquired in the course of the former legislator's or employee's official duties or use the information for the former legislator's or employee's personal gain or the benefit of anyone.

Unlike the other post-employment provisions, there is no time limit involved in section 84-18(a), HRS.

3. "Misleading or False Statements"

MISLEADING OR FALSE STATEMENTS

Recommendation

The Committee recommends that the Office of the Auditor exercise a higher standard of professional judgment to avoid sensationalizing reports and making misleading or false statements.

Commentary

The Committee found several misleading or false statements in Audit Report Nos. 19-12 and 21-01 that raise concerns about the Office of the Auditor's, and ultimately Auditor Kondo's, professional judgment.

Audit Report No. 19-12

In its review of the KIA lease extensions, the Audit Report criticized the proposed improvements for certain KIA leases as insufficient under Act 149.[89] Under the text box "Substantial Extension for Substantial Improvements?", the Report states that the improvements for 10 of the 16 KIA lease extensions reviewed by the Office of the Auditor would not have qualified as substantial improvements under Act 149 because the improvement costs did not reach the 30 percent threshold established.

The Committee finds this assessment unfair and misleading. As noted in Audit Report No. 19-12, the 10 KIA leases referenced were extended before passage of Act 149, under an entirely different statute that does not define the term "substantial improvement." The Committee believes that it is inappropriate for the Office of the Auditor to suggest that the KIA lease extensions were somehow flawed because the proposed improvements do not meet a standard that did not exist at that time.

The Committee finds that language used in Audit Report No. 19-12 stating that DLNR hired a consultant to assist in "cleaning up" its accounting records is misleading.[90] Agencies, like DLNR, do not organize their accounting records on an accrual basis. Therefore, DLNR needed assistance from an accounting firm to help organize its accounting records so that those records could then be audited.

The Committee believes that Audit Report No. 19-12 conflated the public trust doctrine, the public land trust law, and ceded land revenues. The Audit criticized DLNR for depositing public land lease revenue in SLDF after setting aside the amount owed to the Office of Hawaiian Affairs (OHA), rather than depositing the revenue into the general fund from which the Legislature would appropriate funds to the programs.[91] BLNR members and Land Division officials stated their belief that this arrangement is appropriate because the revenues were spent on maintaining public lands, which is one of the purposes for which ceded land revenues must be spent.

{Discussion on public trust doctrine, public land trust, ceded revenues, and SLDF. See C.Yuen testimony and DLNR documents related to ceded land revenues.}

Audit Report No. 21-01

Audit Report No. 21-01 represented the allegations of a plaintiff in a pending lawsuit against ADC as if those allegations were established fact.[92] As discussed by ADC, the Office of the Auditor could have used another example to illustrate its point, without compromising the State's position in ongoing litigation.[93] The Committee finds Auditor Kondo's actions inappropriate, misleading, and irresponsible.

According to one of the Committee's witnesses who has over 45 years of auditing experience at the federal, state, and city and county levels of government and participated in peer reviews across the country, making misleading or false statements is an attribute of a dysfunctional audit office. As a purported Yellow Book office, the Office of the Auditor must exercise a higher standard of professional judgment to maintain the integrity and credibility of its audit reports.

The Facts

The statement or implication that concerns the Auditor's independence, integrity, credibility, or professional judgment is false, misleading, and defamatory. The "examples" cited in the draft report demonstrate, at minimum, both a reckless disregard for the facts and a lack of basic reading comprehension skills.

The committee should heed its own advice. The draft report is sensationalized, false, misleading. Words matter.

A "finding" should summarize the **evidence** gathered and developed during an audit in response to the objectives and should be the **factual** basis for conclusions and recommendations. There should be sufficient and appropriate evidence to ensure adequate understanding of the matters reported.

The alleged "false and misleading statements" cited in the draft report reflect either a failure to read our reports carefully enough, or deliberate distortion.

The committee cites our use of Act 149 in reference to the Kanoelehua Industrial Area (KIA) leases in our Special Land and Development Fund report as "unfair" and "misleading" because the leases were extended before the Act was passed. The committee misses the point. Our report used Act 149 to illustrate that the amount of improvements that Land Division was allowing to justify lease extensions was below the amount the Legislature subsequently set. We fail to see who this would be unfair and misleading to. Also, DLNR apparently understood the reference to Act 149. DLNR did not appear to think the reference was unfair or misleading. If DLNR had, DLNR would have so said in its response to the report – and it did not.

A Question of Integrity

Chair Belatti's odious attempt to question the integrity of our employees reveals much about her own.

TWO FORMER LAND DIVISION EMPLOYEES have been employed by the Office of the Auditor since 2017. The two analysts have been exemplary employees, who have brought impressive skill sets to our staff and have made significant contributions to the audits they have worked on.

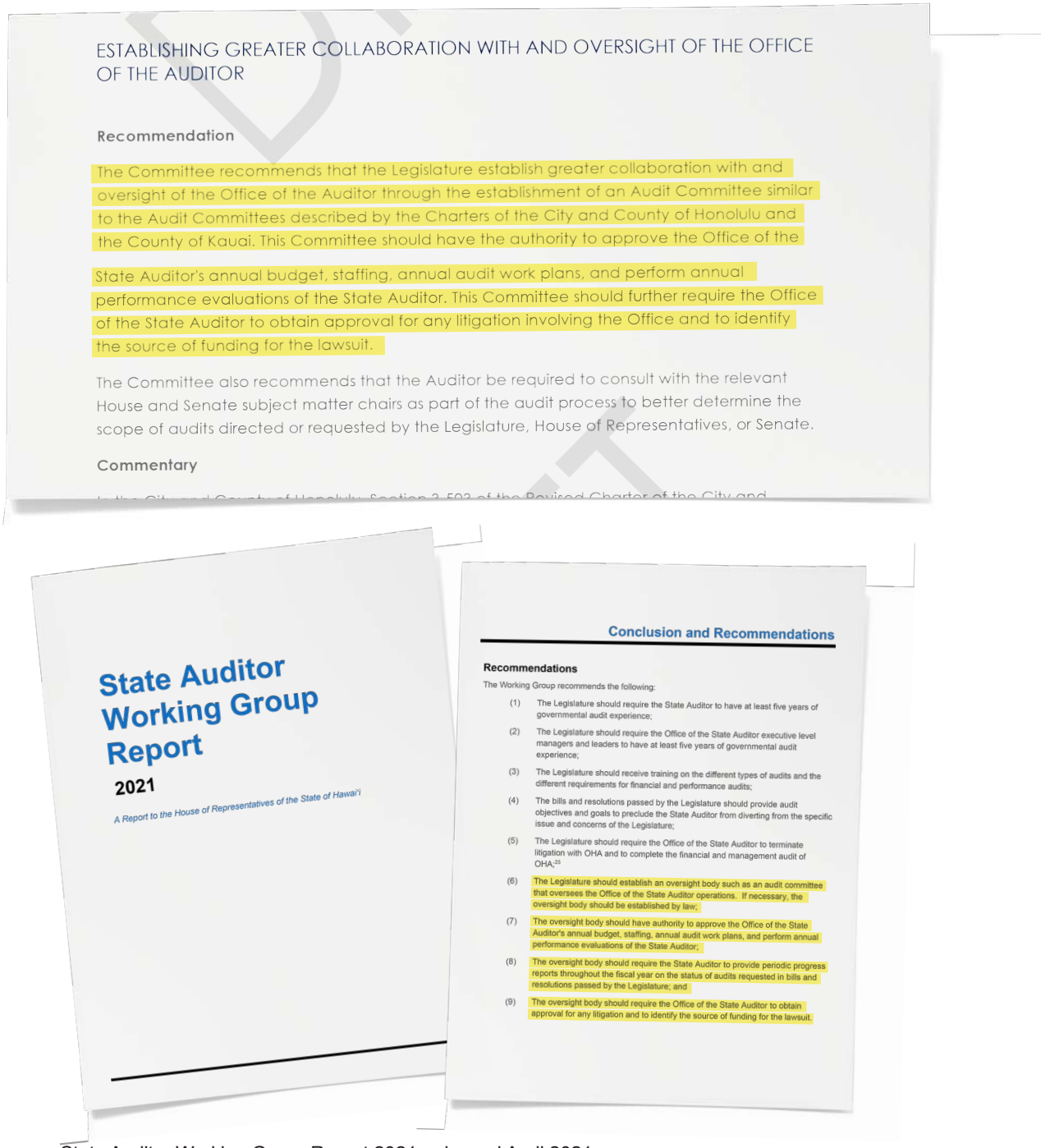
However, in an effort to bolster a false narrative about Auditor wrongdoing, the committee tars these valuable employees and their contributions with the broad brush of innuendo and insinuation. For example, the committee's draft report reads, "At least three out of seven people who filed complaints against Land Division Administrator Russell Tsuji were hired by or received an unsolicited job offer from the Office of the Auditor. The Committee finds these circumstances to be odd especially considering that the individuals recruited do not appear to have backgrounds in auditing."

Neither analyst received an unsolicited job offer from the Auditor, and neither was involved in the Land Division audit we completed in 2019. Both were "walled off" from that audit, assigned to another audit and instructed not to discuss any aspect of their former employment with the Land Division audit team, not that we needed to explain this necessity to them. Both the Auditor and the chair's own witness, former Administrative Deputy Auditor Ronald Shiigi, who was the DLNR audit supervisor, appeared before the committee and testified to these facts. Both assured the committee that there was no conflict of interest.

However, despite the testimony and in the absence of any evidence, the committee included these offensive accusations in its draft report. We hope that this is a drafting error. If not, Chair Belatti's odious attempt to question the integrity of our employees reveals much about her own.

Chronicle of a Recommendation Foretold

If at first you don't succeed….The committee's investigation of the Office of the Auditor was a rerun of the working group's "audit of the Auditor," so it comes as no surprise that the recommendation for legislative action is also a repeat.



ESTABLISHING GREATER COLLABORATION WITH AND OVERSIGHT OF THE OFFICE OF THE AUDITOR

Recommendation

The Committee recommends that the Legislature establish greater collaboration with and oversight of the Office of the Auditor through the establishment of an Audit Committee similar to the Audit Committees described by the Charters of the City and County of Honolulu and the County of Kauai. This Committee should have the authority to approve the Office of the State Auditor's annual budget, staffing, annual audit work plans, and perform annual performance evaluations of the State Auditor. This Committee should further require the Office of the State Auditor to obtain approval for any litigation involving the Office and to identify the source of funding for the lawsuit.

The Committee also recommends that the Auditor be required to consult with the relevant House and Senate subject matter chairs as part of the audit process to better determine the scope of audits directed or requested by the Legislature, House of Representatives, or Senate.

Commentary

State Auditor Working Group Report

2021

A Report to the House of Representatives of the State of Hawai'i

Conclusion and Recommendations

Recommendations

The Working Group recommends the following:

(1) The Legislature should require the State Auditor to have at least five years of governmental audit experience;

(2) The Legislature should require the Office of the State Auditor executive level managers and leaders to have at least five years of governmental audit experience;

(3) The Legislature should receive training on the different types of audits and the different requirements for financial and performance audits;

(4) The bills and resolutions passed by the Legislature should provide audit objectives and goals to preclude the State Auditor from diverting from the specific issue and concerns of the Legislature;

(5) The Legislature should require the Office of the State Auditor to terminate litigation with OHA and to complete the financial and management audit of OHA;[25]

(6) The Legislature should establish an oversight body such as an audit committee that oversees the Office of the State Auditor operations. If necessary, the oversight body should be established by law;

(7) The oversight body should have authority to approve the Office of the State Auditor's annual budget, staffing, annual audit work plans, and perform annual performance evaluations of the State Auditor;

(8) The oversight body should require the State Auditor to provide periodic progress reports throughout the fiscal year on the status of audits requested in bills and resolutions passed by the Legislature; and

(9) The oversight body should require the Office of the State Auditor to obtain approval for any litigation and to identify the source of funding for the lawsuit.

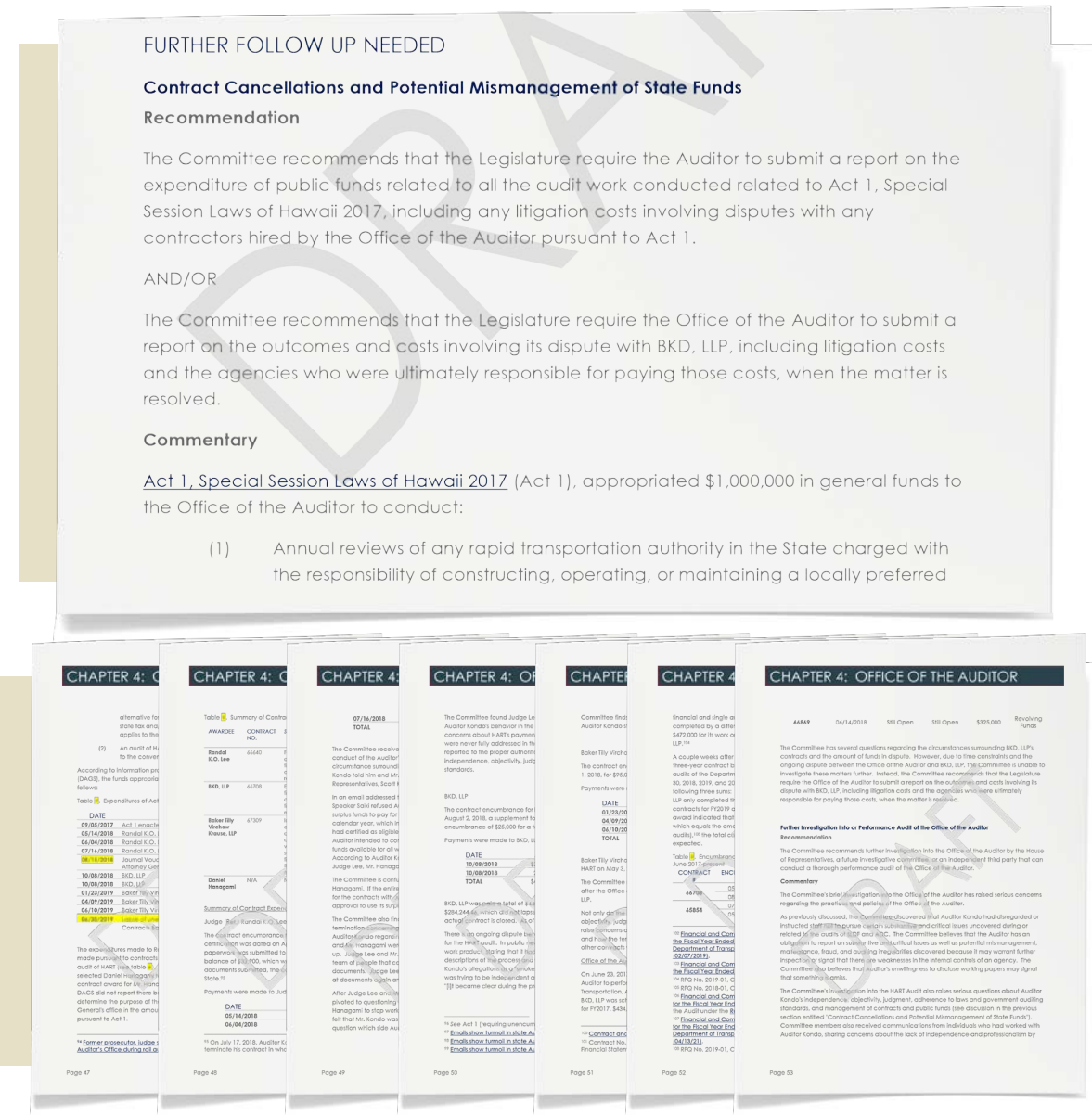
State Auditor Working Group Report 2021, released April 2021

The committee raises our alleged "conflating" of the public trust land doctrine, the public land trust law, and ceded land revenues in the DLNR audit. Anyone reading our report should see that we did not criticize DLNR on this point. We raised questions and suggested that DLNR seek guidance from the Legislature about the ceded land revenue issues. With respect to the public land trust, we noted Board of Land and Natural Resources (BLNR) members have a responsibility to manage those public lands in the best interest of the public and to generate revenue from those revenue generating lands.

Finally, the committee cited our reference to allegations made in a lawsuit in our report on ADC as "inappropriate, misleading, and irresponsible." The committee's commentary is misleading. Our report represented allegations as allegations and used documents provided by ADC to verify information – including the letter from attorney Michael Green, ADC board submittals, and correspondence between ADC and the plaintiff, 'Ohana Best. The fact that ADC was being sued for not supplying water, declining to issue a lease instead of a license, and issues related to criminal trespassing was relevant to our findings. Reporting information contained in public documents is not inappropriate. We were careful to make clear that we were not agreeing with or supporting the plaintiff's arguments. But the arguments about the inability to secure financing is exactly the point. While the committee wants local farmers and ADC to license its lands, the committee is either unconcerned or uninformed about the need to fund those operations and the inability of farmers to use the licenses to secure loans.

4. "Further Follow Up Needed"

Contract Cancellations and Potential Mismanagment of State Funds



FURTHER FOLLOW UP NEEDED

Contract Cancellations and Potential Mismanagement of State Funds

Recommendation

The Committee recommends that the Legislature require the Auditor to submit a report on the expenditure of public funds related to all the audit work conducted related to Act 1, Special Session Laws of Hawaii 2017, including any litigation costs involving disputes with any contractors hired by the Office of the Auditor pursuant to Act 1.

AND/OR

The Committee recommends that the Legislature require the Office of the Auditor to submit a report on the outcomes and costs involving its dispute with BKD, LLP, including litigation costs and the agencies who were ultimately responsible for paying those costs, when the matter is resolved.

Commentary

Act 1, Special Session Laws of Hawaii 2017 (Act 1), appropriated $1,000,000 in general funds to the Office of the Auditor to conduct:

(1) Annual reviews of any rapid transportation authority in the State charged with the responsibility of constructing, operating, or maintaining a locally preferred

CHAPTER 4: OFFICE OF THE AUDITOR

The Facts

The committee dedicates *7 pages* of the draft report (of the 17 pages about the Office of the Auditor) to selective facts about the Office of the Auditor's contracts with consultants hired for the audit of HART. While the committee tries to insinuate that the Auditor mismanaged those contracts, the information recited by the committee – inaccurate, incomplete, and uninformed – only serves to again highlight the

committee's true and predetermined purpose – to manufacture fault with the Auditor and his work, irrespective of the truth and at any cost. The committee's suggestion that the Auditor's management of those contracts was anything but appropriate is irresponsible and inflammatory. More than only trying to smear the Auditor, Chair Belatti and possibly other members would expose the state to potential liability by intentionally bolstering of BKD's unfounded allegations against the Auditor and demands for additional payment for its uncompleted and substandard work.

The committee's recommendation that the Auditor be required to report on the expenditure of the funds appropriated for the purposes of the HART audit "and/or" to report on "the outcomes and costs" involved in its dispute with BKD is puzzling. Chair Belatti, who serves as the House Majority Leader, seems to be unaware that the Auditor regularly informed Senate and House leadership, including Speaker Saiki and House Committee on Finance Chair Sylvia Luke, about the status of the HART audit. House leadership is fully aware of the deficiencies with BKD's work uncovered by the Auditor, BKD's refusal to address the Auditor's concerns about those and other inaccuracies with its work, and the decision to terminate BKD's contract for default. In fact, leadership supported the Auditor's termination of BKD's contract.

BKD, LLP

The Office of the Auditor contracted with BKD to review the contracts and change orders relating to eight HART contractors and to assess HART's change order approval process. The contract amount, as amended, was $725,000.

In November 2018, the Auditor discovered significant issues with BKD's work, including incomplete analyses and factual errors in its draft report. BKD refused to address the Auditor's concerns about the quality of its work and ignored the Auditor's multiple requests for a plan to provide reasonable assurance that its work was complete, accurate, and supported by appropriate evidence. Considering the magnitude and significance of the known errors in BKD's work, the Auditor determined that it would be unreasonable and imprudent for the Auditor to "assume" the rest of the report had been critically reviewed and was accurate and supported by sufficient and appropriate evidence; the Auditor will not issue a report without reasonable confidence the findings and statements therein are complete, accurate, and supported by sufficient and appropriate evidence. The Auditor rejected the incomplete and mistake-filled draft report and terminated BKD's contract for default, withholding the remaining $284,244.46 under the contract.

It is puzzling that the committee's concern about the Auditor's actions with respect to BKD is based solely on statements BKD made to Hawai‘i News Now alleging that the Auditor's concerns about its work

product was a "smokescreen to undermine BKD's credibility." Those statements, made while a mediator attempted to help resolve the dispute, are clearly biased and not what can remotely be called "evidence." What possible motivation did the Auditor have to undermine BKD's credibility?

Did the committee review BKD's work and conclude that it was complete, accurate, and sufficiently supported? BKD's work was simply subpar, which the committee easily could have confirmed; the Auditor's decision to terminate BKD's contract for default was not only justified but responsible, preventing the waste of public funds that would have resulted if the Auditor ignored BKD's breach of its contractual duties, which the committee seems to suggest the Auditor should have done. [14]

Soon after terminating, for default, the contract relating to HART, the Auditor exercised the right to terminate, for convenience, contracts with BKD to perform the financial audits of the Department of Transportation, Airports Division and the Department of Transportation, Highways Division. The Auditor determined it would be irresponsible – and was not in the best interest of the state – to continue those contracts given BKD's threats and demands against the Office of the Auditor. BKD was paid, in full, for the work it had performed up to the date of termination for convenience.

Randal K.O. Lee and Daniel Hanagami

The Office of the Auditor also contracted with Randal K.O. Lee and entered into an agreement with the Department of the Attorney General for the services of Chief Special Agent Daniel Hanagami to assist the office in its audit of HART. The committee characterizes Mr. Lee's testimony about the circumstances surrounding the office's termination of his contract as "troubling." As Mr. Lee testified, once Speaker Saiki refused to allow the Office of the Auditor to use surplus funds that were about to lapse for the HART audit, the Auditor's hand was forced – the Auditor had to use the funds that had been encumbered to pay for Mr. Lee and Mr. Hanagami's services to retain another construction consultant to verify that the HART invoices approved for reimbursement by the Department of Accounting and General Services met the eligibility requirements for reimbursement under Act 1. The Office of the Auditor subsequently procured Baker Tilly Virchow Krause, LLP to review the Department of Accounting and General Services' verification process. It is Speaker Saiki's insistence that

[14] The Department of the Attorney General represented the Office of the Auditor in response to BKD's demand for payment of the remaining amount under the contract and in an unsuccessful mediation of the dispute. If BKD filed a complaint against the Office of the Auditor – which it has not – the Department of the Attorney General was prepared to file a counterclaim against BKD for breach of contract, seeking recovery of the entire amount paid to BKD.

the Office of the Auditor obtain his approval to use surplus funds for the HART audit and then his refusal to allow the Office of the Auditor to use those funds that were about to lapse that is "troubling."

The committee again tries to question the Auditor's "independence, objectivity, judgment, and adherence to laws and government auditing standards" based on Mr. Lee's responses to selective and leading questions. According to the committee, the Auditor did not include concerns about irregular change orders and potential bid rigging raised by Mr. Lee and Mr. Hanagami in the audit report or to "the proper authorities for investigation." That statement, however, is highly misleading and ignores evidence that directly addresses and rebuts the committee's suggestion that the Auditor "interfered" with their work. It also ignores the statement that the Office of the Auditor issued immediately after Mr. Lee's testimony. [15]

It is unclear if the committee hasn't read our report on HART or is intentionally mischaracterizing it. As plainly stated in the report, we did look at the matters that Mr. Lee identified to us and which he described to the committee. We reported that the City prematurely entered into contracts. Here are some of the headings and subheadings from the report: "The City prematurely entered into contracts under an artificial timeline and a fragile financial plan"; "Premature awarding of the initial $483 million contract was driven by concerns that rising costs and loss of tax revenue would derail the Project"; "The City awarded nearly $2 billion more in contracts in 2010 and 2011 despite not achieving milestones needed to begin construction activities"; "Low construction cost estimates, higher than anticipated inflation, and unanticipated issues also drive costs increases"; "Rising costs and revenues shortfall result in $700 million to $910 million budget gap." We also specifically reported about the utility relocation costs.

The Auditor also had multiple discussions with the FBI and the U.S. Attorney's office about HART, and immediately after the office released Mr. Hanagami from his contract, Mr. Hanagami went to work with the FBI and the U.S. Attorney's office in their criminal investigation of HART. Neither Mr. Lee nor Mr. Hanagami ever recommended or otherwise suggested any matter that they had uncovered should be referred to a law enforcement or other agency. Mr. Hanagami surely would have followed up and investigated the issues once he joined forces with the FBI and U.S. Attorney's office if Mr. Hanagami believed that there may be some misconduct or other issues with the change orders described by Mr. Lee.

[15] The committee has purposely denied the Auditor any opportunity to explain and refute the inaccurate, misleading, and uninformed statements by the committee's cherry-picked witnesses. The Auditor has tried to correct those statements through letters to the committee as well as public statements.

A Line-by-Line Review

BEFORE THE OFFICE OF THE AUDITOR issues any report – even before a draft of the report is provided to an auditee – the report must pass the office's quality control process. That process, which we refer to as the "Independent Review," involves an auditor independent of the audit reviewing every sentence and verifying that, in the independent reviewer's professional judgment, each sentence is appropriately supported by sufficient evidence. The independent reviewer will often have questions about a report, including the evidentiary support for a finding, which the audit project team must address and resolve to the independent reviewer's satisfaction. That process, often takes a week or more, provides reasonable assurance that the statements in the report are based on evidence that is sufficient and appropriate, to support the audit's findings.

Judgment Call

Professional judgment requires auditors to make decisions about relevance.

"Professional judgment assists auditors in determining the audit scope and methodology needed to address the audit objectives and in evaluating whether sufficient, appropriate evidence has been obtained to address the audit objectives." Paragraph 8.13, 2018 revision of Government Auditing Standards.

The committee suggests the Auditor may have purposely blocked Randal K.O. Lee and Chief Special Agent Daniel Hanagami from completing their review of change orders by terminating their contracts. The committee relies on a statement by BKD to Hawai'i News Now to suggest that the Auditor's motivation for terminating BKD's contract was similar. That accusation is reckless and untrue. The Auditor has *never* tried to stop or obstruct a consultant's otherwise relevant work.

In auditing, difficult decisions have to be made about whether particular lines of inquiry are relevant to audit objectives. Those decisions have to be made in a disinterested and ethical manner, informed by professional judgment. For example, after Speaker Saiki publicly disagreed with the Auditor's objection to HART management recording and transcribing employee interviews, a position he expressed without ever hearing the Auditor's concerns, Mr. Lee and Chief Special Agent Hanagami considered whether Speaker Saiki was trying to show support for certain contributors to his campaign and compiled a list of Speaker Saiki's political donors that have HART contracts or interest in the construction of the rail system.

The Auditor directed Mr. Lee and Chief Special Agent Hanagami to stop pursuing that line of inquiry – that is, Speaker Saiki and his possible motivation for seemingly undermining the office's audit of HART. The Office of the Auditor is not an all-purpose investigative office; we have neither the expertise nor the resources for that. And the Speaker's motivations regarding his public disagreement with the Auditor were not relevant to the audit's objectives. Again, Chief Special Agent Hanagami was free to follow-up once he joined forces with the FBI and U.S. Attorney's office.

Further Investigation into or Performance Audit of the Office of the Auditor

Further Investigation into or Performance Audit of the Office of the Auditor

Recommendation

The Committee recommends further investigation into the Office of the Auditor by the House of Representatives, a future investigative committee, or an independent third party that can conduct a thorough performance audit of the Office of the Auditor.

Commentary

The Committee's brief investigation into the Office of the Auditor has raised serious concerns regarding the practices and policies of the Office of the Auditor.

As previously discussed, the Committee discovered that Auditor Kondo had disregarded or instructed staff not to pursue certain substantive and critical issues uncovered during or related to the audits of SLDF and ADC. The Committee believes that the Auditor has an obligation to report on substantive and critical issues as well as potential mismanagement, malfeasance, fraud, and auditing irregularities discovered because it may warrant further inspection or signal that there are weaknesses in the internal controls of an agency. The Committee also believes that Auditor's unwillingness to disclose working papers may signal that something is amiss.

The Committee's investigation into the HART Audit also raises serious questions about Auditor Kondo's independence, objectivity, judgment, adherence to laws and government auditing standards, and management of contracts and public funds (see discussion in the previous section entitled "Contract Cancellations and Potential Mismanagement of State Funds"). Committee members also received communications from individuals who had worked with Auditor Kondo, sharing concerns about the lack of independence and professionalism by Auditor Kondo. Unfortunately, the Committee was not able to fully investigate these issues due to time constraints.

The Committee heard concerning testimony that personnel turnover at the Office of the Auditor is occurring at the rate of 40 percent or more due to Auditor Kondo's inconsistent leadership, decision making, and audit processes.[109] Auditor Kondo's leadership was described as authoritarian and outdated and he is alleged to rule by intimidation. The testifier even referred to Auditor Kondo as "the poster child for bad auditing."

The Facts

The committee makes these recommendations despite admitting that it "was not able to fully investigate" the issues relating to these recommendations. It is false, misleading, and irresponsible for the committee to publish its conclusions on issues that, by its own admission, the committee did not have time to fully investigate.

The committee's allegations regarding the Auditor's independence and professionalism are wholly unsupported, reckless innuendo. The sole "evidence" cited for the slanderous accusations appears to be the biased, self-serving testimony of the chair of the State Auditor Working Group that, earlier in 2021, had issued a similarly ill-supported,

questionable report critical of the Office of the Auditor. The "Further Investigation into or Performance Audit of the Office of the Auditor" section of the draft report repeats many of the same comments/ criticisms of the working group.

The Office of the Auditor has been improperly and excessively under siege for more than a year. (See "A Year-Long Attack on Good Government" on page 14)

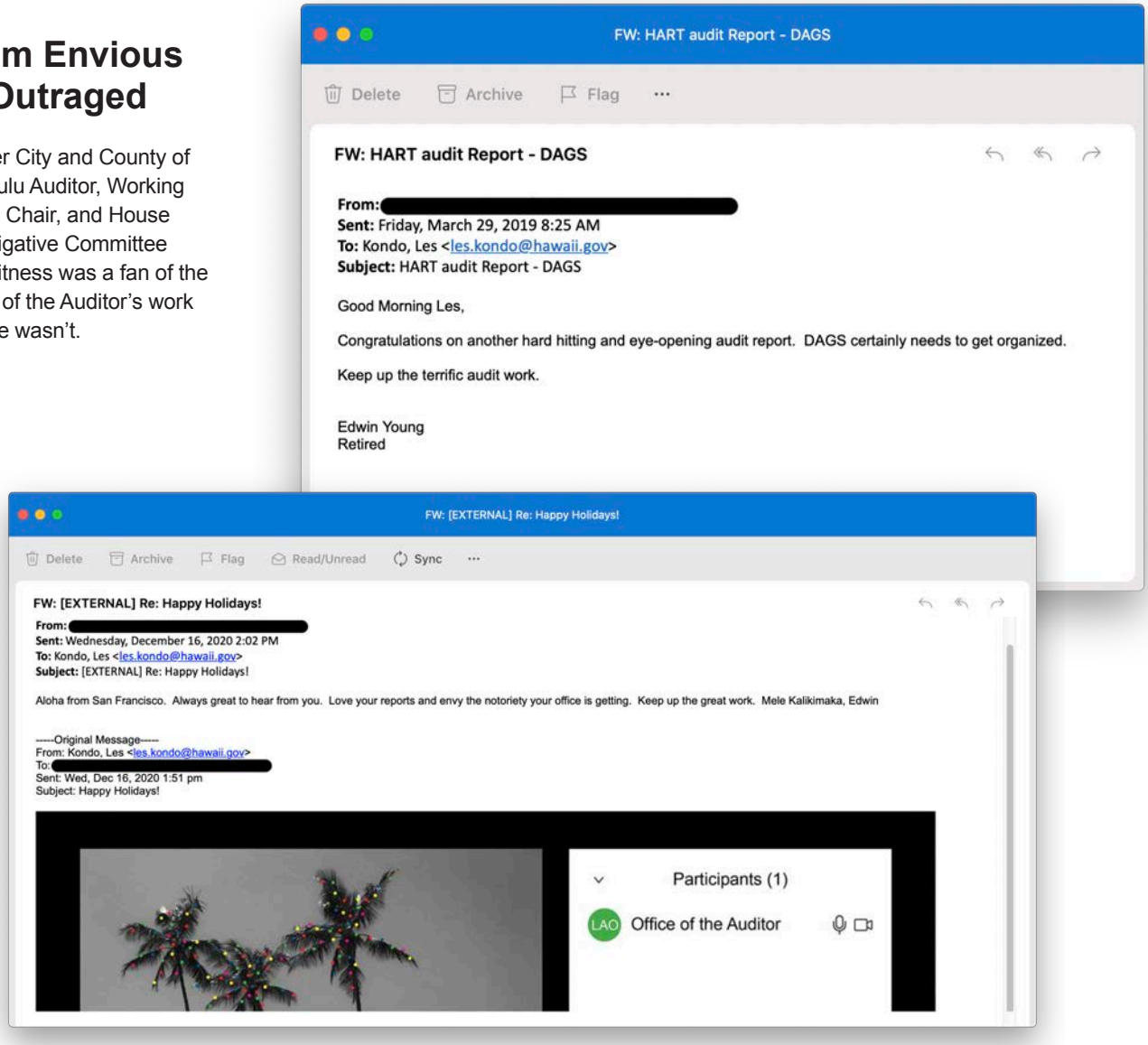
But, just as importantly, the Office of the Auditor does undergo regular, periodic independent reviews, by a third-party who actually does not have some politically motivated agenda and is truly unbiased and qualified.

The committee falsely implies that the Office of the Auditor is facing decertification or loss of accreditation, and that this would somehow damage the State's bond rating. This is untrue. The untimely issuance of the State's Annual Comprehensive Financial Report (ACFR) *could* jeopardize the State's bond rating, not the committee's opinion of the Auditor's compliance with Government Auditing Standards. FY2021's ACFR was issued on time, as were each of the prior ACFRs issued during the Auditor's tenure. The financial auditor of the State's ACFR must be peer reviewed, which they are.

The committee repeatedly fails to understand or acknowledge the difference between financial and performance audits. We do not perform financial audits; we contract with independent public accounting firms to perform the financial audits. Per our triennial peer reviews, we are in compliance with Government Auditing Standards for performance audits (see "Been There, Done That" on page 7).

From Envious to Outraged

Former City and County of Honolulu Auditor, Working Group Chair, and House Investigative Committee star witness was a fan of the Office of the Auditor's work until he wasn't.



FW: HART audit Report - DAGS

Delete Archive Flag ...

FW: HART audit Report - DAGS

From: [redacted]
Sent: Friday, March 29, 2019 8:25 AM
To: Kondo, Les <les.kondo@hawaii.gov>
Subject: HART audit Report - DAGS

Good Morning Les,

Congratulations on another hard hitting and eye-opening audit report. DAGS certainly needs to get organized.

Keep up the terrific audit work.

Edwin Young
Retired

FW: [EXTERNAL] Re: Happy Holidays!

Delete Archive Flag Read/Unread Sync ...

FW: [EXTERNAL] Re: Happy Holidays!

From: [redacted]
Sent: Wednesday, December 16, 2020 2:02 PM
To: Kondo, Les <les.kondo@hawaii.gov>
Subject: [EXTERNAL] Re: Happy Holidays!

Aloha from San Francisco. Always great to hear from you. Love your reports and envy the notoriety your office is getting. Keep up the great work. Mele Kalikimaka, Edwin

-----Original Message-----
From: Kondo, Les <les.kondo@hawaii.gov>
To: [redacted]
Sent: Wed, Dec 16, 2020 1:51 pm
Subject: Happy Holidays!

Participants (1)

LAO Office of the Auditor

> "And Mr. Kondo and his behavior so far, if the newspaper articles are correct, is the poster child for bad auditing."
>
> – Edwin Young
> from his October 28, 2021, testimony before the House Investigative Committee

Witnesses for the Persecution

THE "EVIDENCE" set forth by the committee in the draft report almost wholly consists of testimony from hand-picked witnesses.

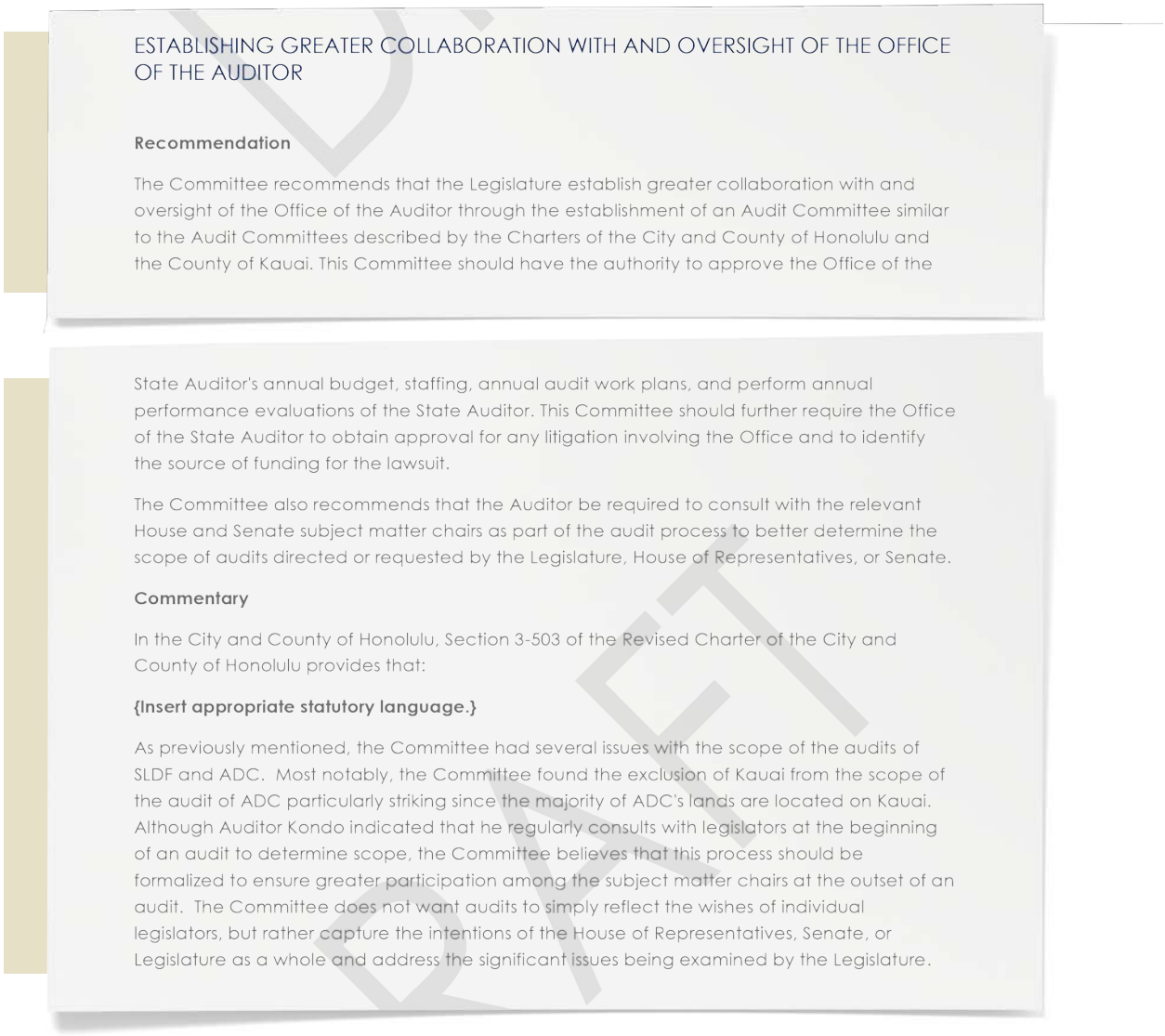
- The draft report cites Edwin Young as an authority for various supposed violations of auditing standards, only some of which have any possible relation to the audits of DLNR and ADC. His testimony, which did not include any direct criticism of either audit report, was biased, unsupported, and in some cases dangerously misleading. Much of it appeared to be based on previous Working Group accusations against the Office of the Auditor, which were still unfounded. Rather than call an independent expert on auditing standards, the committee hand-picked Mr. Young, chair of House Speaker Scott Saiki's unilaterally created "State Auditor Working Group" that issued an unsupported, one-sided report critical of the Office of the Auditor, to continue the improper attack on our office.

- The draft report cites testimony by Randal Lee, who was briefly contracted to do some work on this office's audit of HART – not ADC or DLNR – as evidence that the Auditor omitted or suppressed work Mr. Lee did before terminating his contract with the office. Aside from the fact that Mr. Lee worked on a project that has nothing to do with this committee, Mr. Lee admittedly had no knowledge as to what happened with the issues – mainly regarding change orders – that he raised. If Mr. Lee or anyone else read our report, it is plain to see that we did discuss this in our HART audit reports to the extent appropriate.

- The draft report cites testimony from former Administrative Deputy Auditor Ronald Shiigi, who was supervisor on the DLNR audit, in a ludicrous attempt to show more "omissions" on the part of this office in the DLNR report. The matters that Mr. Shiigi discusses were dealt with appropriately. There was a forged document by a DLNR land agent that the draft report claims we should have included. As DLNR chair Suzanne Case acknowledged, this document had been known to DLNR and dealt with by DLNR before we did our audit. Mr. Shiigi also mentioned a non-profit status issue that even he was not clear on; this issue was not germane to our audit work.

- The draft report insinuates that our office was somehow guilty of some serious omission or some kind of breach of duty by not examining the Kaua'i lands held by ADC. This is, again, misleading and unsupported innuendo. Our report does discuss the Kaua'i lands, but the Kaua'i lands were not a focus of our work because, among many reasons, those lands are managed by outside entities other than ADC.

5. "Establishing Greater Collaboration with and Oversight of the Office of the Auditor"



ESTABLISHING GREATER COLLABORATION WITH AND OVERSIGHT OF THE OFFICE OF THE AUDITOR

Recommendation

The Committee recommends that the Legislature establish greater collaboration with and oversight of the Office of the Auditor through the establishment of an Audit Committee similar to the Audit Committees described by the Charters of the City and County of Honolulu and the County of Kauai. This Committee should have the authority to approve the Office of the State Auditor's annual budget, staffing, annual audit work plans, and perform annual performance evaluations of the State Auditor. This Committee should further require the Office of the State Auditor to obtain approval for any litigation involving the Office and to identify the source of funding for the lawsuit.

The Committee also recommends that the Auditor be required to consult with the relevant House and Senate subject matter chairs as part of the audit process to better determine the scope of audits directed or requested by the Legislature, House of Representatives, or Senate.

Commentary

In the City and County of Honolulu, Section 3-503 of the Revised Charter of the City and County of Honolulu provides that:

{Insert appropriate statutory language.}

As previously mentioned, the Committee had several issues with the scope of the audits of SLDF and ADC. Most notably, the Committee found the exclusion of Kauai from the scope of the audit of ADC particularly striking since the majority of ADC's lands are located on Kauai. Although Auditor Kondo indicated that he regularly consults with legislators at the beginning of an audit to determine scope, the Committee believes that this process should be formalized to ensure greater participation among the subject matter chairs at the outset of an audit. The Committee does not want audits to simply reflect the wishes of individual legislators, but rather capture the intentions of the House of Representatives, Senate, or Legislature as a whole and address the significant issues being examined by the Legislature.

The Facts

Similar to the other efforts to improperly insert political influence into the operations of the Office of the Auditor, this should be rejected. The comparison to the City and County of Honolulu and County of Kaua'i is, once again, misleading. As we have repeatedly explained, our office is designed to be independent. This was set forth in the Constitution. Unlike other offices, we are not an arm of the Legislature, nor is the Legislature our client. This "recommendation" is another thinly veiled, improper effort to exert undue influence over the Office of the Auditor.

It is also misleading and disingenuous to suggest that there is not sufficient collaboration with legislators about the scope of audits.

Throughout the legislative session, the Auditor and the Deputy Auditor request meetings with legislators about bills and resolutions that include an audit or other work directed to the Office of the Auditor. Often those bills and resolutions contain broad, undefined audits. For example, Act 28, Session Laws of Hawai‘i 2019, directed the Auditor to "conduct a performance audit of the agribusiness development corporation." We simply do not have sufficient staff resources or time to audit every aspect of ADC's operations. We always ask legislators to identify the specific activities or areas of the agency's operations that they are interested in assessing. And, as we have explained to the committee over and over again, if directed to audit "the agribusiness development corporation," as Act 28 did, we will develop audit objectives, i.e., an audit that we have sufficient resources to complete, based on a risk-based assessment of the agency's key activities. Those objectives, however, may not include activities that certain legislators may be interested in better understanding.

As part of the initial audit planning phase, the Auditor does request meetings with the chairs of the Senate and House subject matter committees as well as with those legislators who strongly advocated for the bill. In most cases, the Auditor has met with those legislators during the legislative session to suggest revisions to the scope of the audit requested in bills and resolutions. In the case of the DLNR audit, the Auditor met numerous times during and after the legislative session with the then-chair of the House Committee on Land and his Senate counterpart. They noted for us that the Land Division's land leases and revocable permits were "contracts" as that term is used in Act 209, Session Laws of Hawai‘i 2017. They also expressed questions about the use of state funds appropriated to DLNR to support the International Union for Conservation of Nature (IUCN) conference that would be held in Honolulu. While we agree that individual legislators should not dictate the scope of audits that are not otherwise specified in legislation passed by the Legislature, we do consider legislators' perspectives and concerns about the agency in our audit planning.

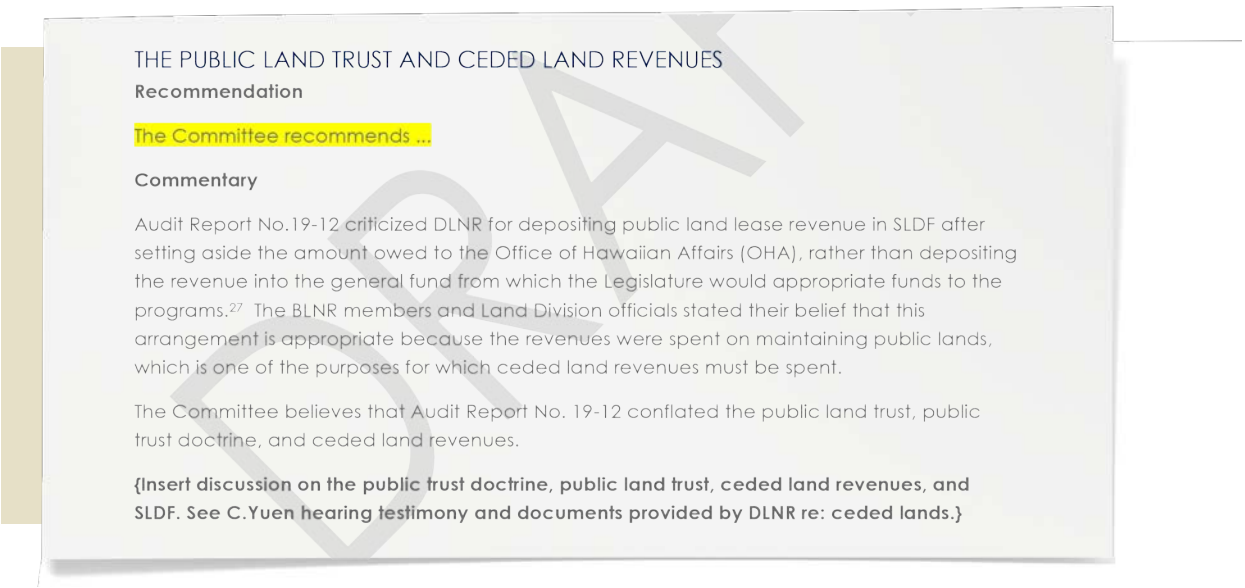
With regard to the ADC audit, we requested meetings with members of the Senate and House agriculture committees. The then-chair of the Senate Committee on Agriculture and three members of his committee jointly met with the Auditor and the project team to discuss their perspectives and concerns about ADC. None of the members of the House Committee on Agriculture responded to our request for a meeting, including Representatives Perruso and Okimoto.

III. Response to Draft Report Chapter 2 – "Special Land and Development Fund"

Throughout this report, beginning with the first recommendation, the committee incorrectly labels our findings "criticism." To be clear, we present **findings** that are objective, fact-based analyses based on substantive and relevant evidence. We are concerned that the committee's dismissive language and tone could mislead readers into thinking that our real and significant findings are merely unsupported criticisms that can be disregarded.

It is both concerning and frustrating that the committee, in its attempt to find fault with the audit and the Auditor, undercuts our findings and, in several instances, seems to imply that we were holding DLNR to too rigid a standard (i.e., the law, fiduciary duties, legislative intent). However, perhaps most troubling are the committee's recommendations themselves, which flow from "commentary" that in turn are supported by opinions, suggestions, and assumptions – not facts, not evidence. Because many of these recommendations involve changes in policy that could have wide-ranging and significant impacts on the agency and the public, we suggest that the committee consider the following facts before finalizing its report recommendations.

Fact Check: Ceded Land Revenues



THE PUBLIC LAND TRUST AND CEDED LAND REVENUES

Recommendation

The Committee recommends ...

Commentary

Audit Report No.19-12 criticized DLNR for depositing public land lease revenue in SLDF after setting aside the amount owed to the Office of Hawaiian Affairs (OHA), rather than depositing the revenue into the general fund from which the Legislature would appropriate funds to the programs.[27] The BLNR members and Land Division officials stated their belief that this arrangement is appropriate because the revenues were spent on maintaining public lands, which is one of the purposes for which ceded land revenues must be spent.

The Committee believes that Audit Report No. 19-12 conflated the public land trust, public trust doctrine, and ceded land revenues.

{Insert discussion on the public trust doctrine, public land trust, ceded land revenues, and SLDF. See C.Yuen hearing testimony and documents provided by DLNR re: ceded lands.}

The Issue

The committee misunderstands the issue that Report No. 19-12 raised in respect to DLNR's ceded land revenues. Land Division identified selected ceded lands (the highest income producing ceded lands in its portfolio) and the BLNR authorized revenues from those lands to be kept in the Special Land Development Fund (SLDF) (after the 20 percent is transferred to OHA).

We questioned whether BLNR has the authority to decide to retain some of the revenues from ceded lands. Under the Admissions Act, revenues from ceded lands can be used for only 5 purposes: (1) support of public education; (2) betterment of the conditions of Native Hawaiians; (3) development of farm and home ownership; (4) public improvements; and (5) provision of lands for public use. DLNR's mission relates to only one of the 5 permitted uses of ceded land revenues, provisions of lands for public use. We suggested that the Legislature should determine the use or uses of the ceded land revenues; in other words, it is a policy determination that belongs to the Legislature. We suggest that the committee recommend such a legislative review.

Fact Check: Sublease Rents

Sublease Rents

Recommendation

The Committee recommends that DLNR be given statutory authority to update leases and sublease provisions in all lease extensions to ensure that the State is paid its fair share of sublease income.

Commentary

Audit Report No. 19-12 highlighted the difficulties DLNR faces when trying to obtain a share of sublease income.[20] In 2012, one of DLNR's lessees was making approximately $300,000 in sublease income annually to "manage" property while only paying DLNR $74,500 a year for the same property.[21] When the lessee requested approval for two subleases, the Land Division requested a 33 percent share of the sublease rent. The lessee objected to this request. The original lease had fixed rents at that time and did not include a provision allowing the State to share in sublease income. BLNR ultimately approved the two subleases without taking a share of the sublease income. To remedy this issue, DLNR officials recommended that the Legislature provide clear statutory authorization for DLNR to include provisions in lease extensions to take a share of sublease rent payments.

The Issue

The issue goes back to Land Division having no strategic plan, not being prepared for the inevitable lease expiration dates, and having no alternative but to extend the leases. When executed 55 years earlier, the lands were unimproved and the lease rents were based on the appraised fair market rent of the *unimproved* lands. Today, those lands have tenant-constructed buildings and other improvements, as well as infrastructure like water and sewer service; under the terms of the leases, tenants must surrender the property along with those buildings and improvements at the end of the lease term.

If BLNR had allowed the leases to expire and issued new leases, the new lease rent would be based on the appraised fair market rent of the *improved* land, which Land Division advised BLNR would likely generate higher lease rents. For just the 16 leases in the KIA that BLNR approved 10 year lease extensions, DLNR lost annual revenue opportunities totaling over $1.6 million, or $16 million over the 10 years.

The example cited in Report 19-12 about 69 Railroad, LLC, a KIA lessee, was to illustrate the material difference between the lease rent based on the value of the unimproved land compared to the value of the land, as improved. 69 Railroad was collecting four times more rent from its tenants than it was paying to lease the state-owned land. BLNR nevertheless approved a 10-year extension of the land lease and attempted to add a portion of the sublease revenue to the annual lease rent. The tenant objected.

Again, it is not the inability to share in the sublease revenue that should be the committee's concern. It should be BLNR's practice of extending leases whose rent is calculated on the fair market value of unimproved land when that land now includes substantial (and valuable) improvements. If the lease was allowed to expire, the fair market value of the land used to calculate the annual lease payments would be based on the land *including the improvements*.

The committee misunderstands the issue and is offering a solution to a problem that doesn't have to exist.

Fact Check: Lease Extensions

Recommendation

The Committee recommends {Does Committee want to make specific recommendation about KIA lease or do other recommendations that generally comment on changes to leasing practices and laws sufficiently cover KIA situation?}

Commentary

There is debate between the Auditor and DLNR regarding the appropriateness of lease extensions granted by BLNR, particularly to Kanoelehua Industrial Area (KIA) lessees. The State Auditor believes that granting extensions to KIA lessees goes against the public policy of opening state lands to new lessees and represents ta lost opportunity to receive market rents based on improved land.[12] In contrast, DLNR officials testified that the Legislature had determined that it was "in the public interest to retain the existing KIA tenants to the greatest extent feasible, rather than allowing leases to expire and seeking higher rents."[13]

Given the Legislature's focus on lease extensions over the past decade, the Committee understands that BLNR was trying to effectuate legislative intent when it extended the KIA leases. The first round of KIA leases were extended by 10 years to a term of 65 years pursuant Act 207, SLH 2011.[14] The Committee believes that if the Legislature disapproved of BLNR's actions in extending the first round of KIA leases, it would have amended the statute to clarify or limit the extent to which lease extensions may be granted. Instead, the Legislature expressed direct support for the KIA lease extensions by passing Act 149, which established a 10-year Hilo Community Economic District pilot project. More recently, the Legislature has recognized the economic benefits that lease extensions offer statewide with the passage of Act 236, SLH 2021. While acknowledging that the statutory language in Chapter 171, HRS, authorizing DLNR to grant lease extensions to lessees with certain terms and conditions permits but does not mandate DLNR to grant the lease extension, BLNR members and Land Division officials noted that they interpret the legislative intent such that they recommend lease extensions if the lessee qualifies.

In its review of the KIA lease extensions, the Office of the Auditor also criticized the proposed improvements for certain KIA leases as insufficient under Act 149.[15] Under the text box "Substantial Extension for Substantial Improvements?", the Auditor states that the improvements for 10 of the 16 KIA lease extensions reviewed by the Office of the Auditor would not have qualified as substantial improvements under Act 149 because the improvement costs did not reach the 30 percent threshold established. The Committee finds this assessment unfair and misleading. As noted in Audit Report No. 19-12, the 10 KIA leases referenced were extended before passage of Act 149, under an entirely different statute that does not define the term "substantial improvement." The Committee believes that it is inappropriate for the Office of the Auditor to suggest that the KIA lease extensions were somehow flawed because the proposed improvements do not meet a standard that did not exist at that time.

The Issue

Act 207 (SLH 2011) provided that the term of a commercial lease may be extended upon approval of the Land Board and to the extent necessary to qualify the lessee for loans or to facilitate the lessee's self-financing of "substantial improvements" to the property. The aggregate of the initial term and any extension granted shall not

exceed 65 years. Pursuant to Act 207, lessees that were granted 10-year extensions were required to provide receipts and other documentation of improvements, or the lease extension would be cancelled.

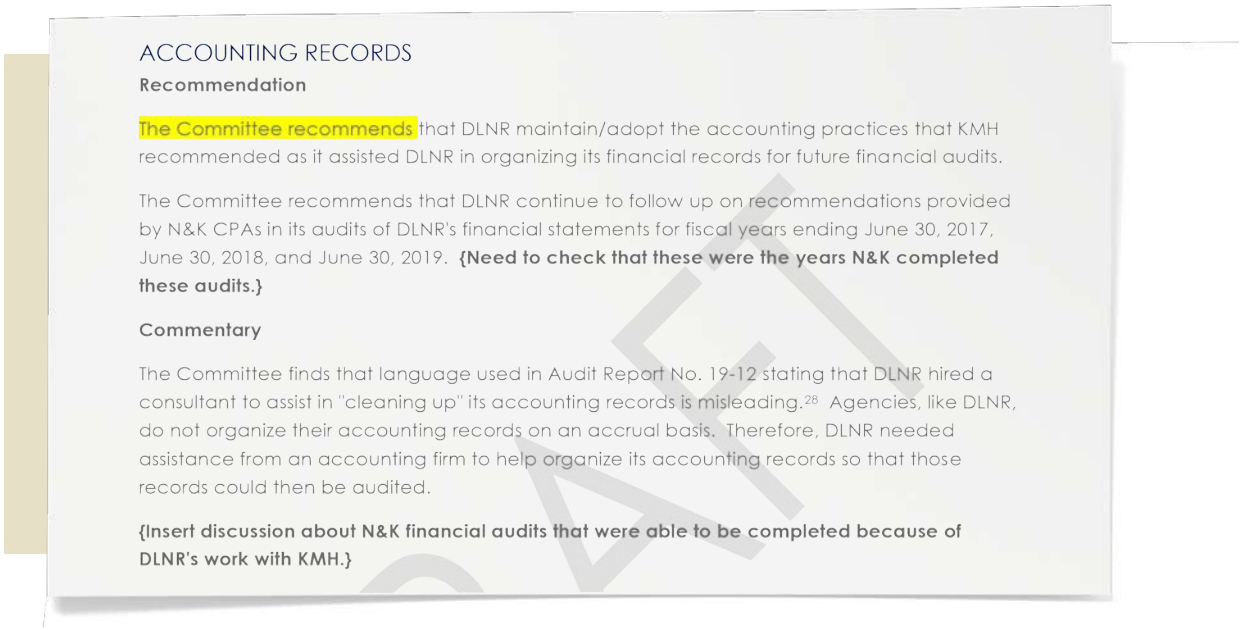
The Facts

Of the 13 lease files we reviewed for documentation to support substantial improvements, only 4 contained all the receipts to verify that the lessee completed the required improvements. Some files only included proposals submitted by contractors. Others included receipts for only a portion of the improvement costs. In other words, BLNR requires minimal (if any) substantial improvements to justify extending leases. Some of the Land Division's KIA lease extensions would not have met the criteria pursuant to Act 207 (SLH 2011), which was already in effect when the first KIA lease extension was approved. There is nothing unfair or misleading about this assessment.

There is also a question as to whether some of the "substantial improvements" were routine repairs and maintenance, and installation of business equipment instead. For example, roof and gutter repairs (versus replacement); roof resurfacing; replacement of skylights, gutters, and deteriorated sections of building; painting; repairing termite damage; and replacement of a fuel distribution pump (which is business equipment and not part of the building). Also, in a few cases, the lessees were given credit for improvements made in prior years.

In addition, some proposed improvements were nominal and would not normally require a full 10-year extension period to amortize the costs of self-financed improvements.

Fact Check: Accounting Records



ACCOUNTING RECORDS

Recommendation

The Committee recommends that DLNR maintain/adopt the accounting practices that KMH recommended as it assisted DLNR in organizing its financial records for future financial audits.

The Committee recommends that DLNR continue to follow up on recommendations provided by N&K CPAs in its audits of DLNR's financial statements for fiscal years ending June 30, 2017, June 30, 2018, and June 30, 2019. **{Need to check that these were the years N&K completed these audits.}**

Commentary

The Committee finds that language used in Audit Report No. 19-12 stating that DLNR hired a consultant to assist in "cleaning up" its accounting records is misleading.[28] Agencies, like DLNR, do not organize their accounting records on an accrual basis. Therefore, DLNR needed assistance from an accounting firm to help organize its accounting records so that those records could then be audited.

{Insert discussion about N&K financial audits that were able to be completed because of DLNR's work with KMH.}

DRAFT

The Issue

In November 2017**,** at DLNR's request, the Office of the Auditor contracted N&K CPAs, Inc. (N&K) to audit DLNR's financial statements for the fiscal year ended June 30, 2017; however, the auditors were unable to complete the audit by the February 16, 2018, target date because they found significant irregularities in the department's accounting records. In one instance, DLNR's schedule of capital assets differed from what is reported in the State's accounting records by approximately $626.6 million.

DLNR subsequently hired a consultant, KMH, to assist in getting the accounting records into auditable shape so that N&K could be able to complete its work. The clean up was completed in February 2019 and the audit was completed in April 2019.

The Facts

Report drafters claim that the use of the term "cleaning up" to describe the work that the consultant did to get DLNR's financial records into auditable condition was misleading, pointing out that other state agencies do not organize their accounting records on an accrual basis. However, N&K identified five findings, with only the first finding related to preparing accrual basis financial statements. The remaining audit findings related to improper accounting for construction in progress, not performing reconciliations for several years, a lack of written formal procedures for delinquent receivables or writing off uncollectible balances, and untimely remittance of ceded land revenues to OHA. There is nothing misleading about describing the nature of KMH's work for DLNR as "cleaning up."

Fact Check: Forged Easement

Forged Easement

Recommendation

The Committee recommends that DLNR and the Attorney General complete its work to correct and remove the forged easement on Kauai.

Commentary

In response to one of the Committee's subpoena duces tecum, DLNR produced an audio recording of an interview conducted by the Office of the Auditor with the BLNR Chair. In that recording, one of the Auditor's analysts asked the BLNR Chair about a forged easement on Kauai. The Committee was surprised to learn about the existence of a forged easement because it was not reported to the Legislature or discussed in Audit Report No. 19-12.

Although the BLNR Chair indicated that it was a one-time occurrence, the Committee is concerned that the Office of the Auditor did not follow up further on the forged easement and DLNR's response, and did not disclose this matter in Audit Report No. 19-12. According to the former Administrative Deputy Auditor, Auditor Kondo made the final decision on whether to pursue further auditing and has the ultimate responsibility for the report.[35] The BLNR Chair testified that DLNR made a request to the Attorney General's office to start a process for expunging the forged easement from the public record at the Bureau of Conveyances.[36]

However, it has been over five years since the forged easement was first discovered by DLNR. The Committee believes that DLNR and the Attorney General should complete its work and remove the forged easement on its Kauai parcel.

The Issue

On October 20, 2021, Chair Belatti announced that the committee would be pursuing "a larger pattern by the Auditor to unilaterally decide not to report on certain substantive and critical issues discovered in the field, including in some cases of criminal and potentially criminal acts." She made this announcement before introducing the first of several witnesses whose recollections supposedly necessitated this change of direction in the committee's investigation. That witness, Ronald Shiigi, former Administrative Deputy Auditor, gave an account of a fraud, a forged signature on an easement on Kauaʻi, by a former DLNR Land Division employee that went unreported by the Office of the Auditor. Mr. Shiigi, who was the supervisor on the audit, claimed that he was made aware of the fraud by two analysts he supervised and passed the information along to the Auditor.

The Facts

An auditor must report fraud or suspected fraud uncovered during the audit to department management. Conversely, an auditor is not required to report fraud or suspected fraud that is already known to management.

While Mr. Shiigi should know when fraud needs to be reported, he nevertheless implied that the Auditor had arbitrarily dropped the matter. Mr. Shiigi could not recall the details of his conversations with the two analysts regarding the fraud or any subsequent discussions with the Auditor.

Mr. Shiigi's claims of negligence were quickly and easily refuted by committee member Representative Dale Kobayashi, who pointed out that not only had DLNR been aware of the fraud *before* the office's analysts discovered it, but the Department of the Attorney General had prosecuted the case and secured a verdict. Later that day, DLNR Chairperson Suzanne Case confirmed to Chair Belatti that DLNR had forwarded the case to the Attorney General long before she met with Mr. Shiigi and the audit team. Undeterred, Chair Belatti noted that it was still unclear if the fact the fraud had been fully prosecuted had been evident to members of the audit team at the time. If Chair Belatti was truly interested in gaining clarity on this and other issues, she could have just asked the Auditor. She did not.

Fact Check: Non-profits

Non-profits

Recommendation

The Committee recommends that DLNR **should or should not** eliminate the preference or discount for non-profits.

Commentary

The Committee heard testimony that BLNR charges less than fair market value for ground leases to non-profits. The Committee believes that DLNR **should or should not** focus on maximizing income on its income-generating properties to the greatest extent possible. DLNR **should or should not** stop giving preference or rent discounts to non-profits and all lessees of income-generating properties should be charged fair market rent.

Lessee Loss of Non-profit Status

Recommendation

The Committee recommends that DLNR follow up regarding the potential loss of non-profit status of its lessees and its impact on leases.

Commentary

The former Administrative Deputy Auditor testified that during the Audit of SLDF, he discovered that a DLNR lessee had lost its status as a non-profit organization by the Internal Revenue Service.[37] The former Administrative Deputy Auditor expressed concern to Auditor Kondo regarding the impact of the loss of non-profit status on the lessee's lease with DLNR since non-profit entities generally receive rent discounts. However, the matter was not pursued further because Auditor Kondo did not feel that it was a significant matter and it was not reported in Audit Report No. 19-12.

The Issue

During the investigative committee's September 20, 2021, hearing, former Administrative Deputy Auditor Ronald Shiigi testified that, during the audit of the Land Division's Special Land and Development Fund, he became aware that a nonprofit had lost its non-profit status after it had failed to file paperwork with the IRS. According to Mr. Shiigi, he was concerned that such a change in status could alter the lease agreement the one-time nonprofit had with the State, since, generally, nonprofits receive a break on lease rent. Mr. Shiigi said he raised the issue with the Auditor, but the matter wasn't pursued because it was not considered significant. He did not provide any details about this discussion with the Auditor, nor could he recall details of his discussions of the issue with his audit team members. He also could not recall the identity of the one-time nonprofit.

In response to Mr. Shiigi's testimony, the investigative committee issued two recommendations, one of which was incomplete. The incomplete recommendation was undecided as to whether DLNR

should be allowed to offer nonprofits reduced lease rents. The other recommendation asked DLNR to follow up on potential loss of non-profit status of lessees and the impact that might have on leases.

The Facts

The unnamed lessee that Mr. Shiigi referred to is the Sand Island Business Association (SIBA), which is the Land Division's largest revenue-generating lessee. While it was a nonprofit, SIBA was not a charitable organization and had been paying fair market rent. Therefore, when SIBA's non-profit status changed, its lease rent did not. It continued to pay fair market rent. SIBA was aware of this, the Land Division was aware of this, the Auditor and the analysts on the DLNR audit team were aware of this. Mr. Shiigi, apparently, was not. There was no need to report this issue.

We suggest that before the committee completes its recommendation that DLNR "should or should not" eliminate the discounted lease rents for nonprofits, it may consider reviewing Chapter 171-43.1, which allows BLNR to lease at nominal consideration to an eleemosynary (charitable) organization that has been certified to be tax exempt under Sections 501(c)(1) or 501(c)(3) of the IRS Code.

Fact Check: Unreported Issues

UNREPORTED ISSUES

Contracts, Grants, and Memoranda of Understanding

Recommendation

The Committee recommends that the Legislature consider whether there needs to be further follow up on the review and examination of contracts, grants, and memoranda of understanding entered into, awarded by, or otherwise involving SLDF between the period beginning July 1, 2015, through June 30, 2017, since the Office of the Auditor did not focus on this matter in Audit Report No. 19-12.

Commentary

Act 209, SLH 2017, which required the Auditor to conduct an audit of the SLDF, specifically required the Auditor to:

(1) Review contracts, grants, and memoranda of understanding entered into, awarded by, or otherwise involving SLDF between the period beginning July 1, 2015, through June 30, 2017; and

(2) Examine whether:

(A) The funds that were expended by DLNR were in compliance with laws and in accordance with the terms of the contracts, grants, and memoranda of understanding; and

(B) Contractors and awardees were adequately screened and qualified.[29]

To assist with this review and examination, the Office of the Auditor contracted with KKDLY, LLC to:

(1) Prepare a schedule of expenditures by cost category. Select vendors that were paid more than $100,000 in aggregate, and review invoices to verify proper approval, procurement in compliance with procedures, and propriety of disbursements; and

(2) For the International Union for Conservation of Nature (IUCN) expenditures using monies from the SLDF, identify and report all funding sources, and review internal controls over the accounting and reporting of cash disbursements.[30]

Although Audit Report No. 19-12 discussed the IUCN expenditures and included summaries of IUCN expenses by natural classification and vendors paid more than $100,000 in aggregate, the report did ***not*** similarly discuss or include a summary for all vendors that were paid more than $100,000 in aggregate from SLDF.

The Committee was also confused as to why contracts, grants, and memoranda of understanding were not discussed in the audit. DLNR's Land Administrator testified before the Committee that he was surprised that to learn in one of his initial meetings with Auditor Kondo the scope of the audit was focused on RPs and not on contracts, procurement, and SLDF, pursuant to Act 209, SLH 2017.[31] According to the Land Administrator, the audit team disregarded the list of contracts, including appraisal contracts and planning contracts for Kanoelehua and East Kapolei, that the Land Administrator thought would be the subject of the audit (see Appendix C).[32] When asked about the scope going beyond what the Land

Administrator thought the audit was supposed to be about, Auditor Kondo responded with something to the effect of "well, that's within my authority. It's my decision and I'm going to do what I want to do with the audit."[33]

The Legislature may want to follow up on whether the contracts, grants, and memoranda of understanding involving SLDF were reviewed and examined pursuant to Act 209, SLH 2017 (see Appendix C). According to the former Administrative Deputy Auditor, if there were no findings made by the Auditor or KKDLY, LLC regarding the contracts, grants, and memoranda of understanding involving SLDF, it was not included in the audit.[34] The Committee attempted to obtain this information through a subpoena duces tecum to the Office of the Auditor, however, Auditor Kondo declined to produce this information as well as other information prepared by KKDLY, LLC as part of its financial audit of SLDF, citing working papers confidentiality (see Confidentiality of the Auditor's Working Papers below).

The Facts

It is untrue that the Office of the Auditor did not review "contracts, grants, and memoranda of understanding involving SLDF" as the commentary suggests. As the then-chairs of the Senate and House subject matter committees noted to the Auditor, the land leases and revocable permits are the Land Division's more significant, if not most significant, contracts and are the most significant source of revenue to the Special Land and Development Fund. Those revenues fund the Land Division and a number of other DLNR programs. Report No. 19-12 reviewed, among other things, the Land Division's management of its income-producing leases and revocable permits.

As Act 209 (SLH 2017) instructed, KKDLY, LLC prepared a schedule of expenditures by cost category. The audit also covered the selected vendors that were paid more than $100,000 in aggregate and reviewed invoices for proper approval, for compliance with government procurement procedures, and propriety of disbursements, a wider – not narrower – review than what the Legislature requested. KKDLY did not have any finding regarding the contracts, grants, and memoranda of understanding involving the Special Land and Development Fund; therefore, no findings were included in the report.

Note: Including the Land Division Administrator's "something to the effect" recollection of an alleged conversation he had with Auditor as evidence of anything is meaningless and unprofessional.

IV. Response to Draft Report Chapter 3 – "Agribusiness Development Corporation"

Throughout this report, beginning with the first recommendation, the committee incorrectly labels our findings "criticism." To be clear, we present **findings** that include objective, fact-based analyses based on substantive and relevant evidence. We are concerned that the committee's dismissive language and tone could mislead readers into thinking that our real and significant findings are merely unsupported criticisms that can be disregarded.

Generally, the committee agreed with nearly all of our recommendations to ADC. In one exception, the committee disagreed that ADC should get an opinion on rent credits from the State Procurement Office. Other areas of stated "disagreement" related to statutory requirements in section 163D, HRS, that only the Legislature – not the Office of the Auditor or ADC – can amend. If the committee's proposed amendments to ADC's enabling statute become law, the 2021 audit recommendations would become obsolete and subsequent audits would assess whether ADC's policies and procedures comply with the updated mandates. In any event, **they are not simply recommendations made by the Auditor. They are legal requirements that we "recommend" ADC fulfill unless and until the requirements are amended or repealed by the Legislature.**

However, it is both concerning and frustrating that the committee, in its attempt to find fault with the audit and the Auditor, claims that the audit is somehow incomplete because we omitted the management of ADC's lands on Kaua'i. As we explain below, our audit, properly scoped, found significant administrative and governance problems that impact all ADC holdings. We also provide important context to another recommendation that involves changes in policy that could have wide-ranging effects on the agency and the public. We suggest that the committee consider the following facts before finalizing its report recommendations.

Fact Check: Enabling Legislation

ENABLING LEGISLATION

Refocusing, Updating, and Streamlining ADC's Authorizing Statute

Recommendation

The Committee recommends amending Chapter 163D, HRS, to refocus, update, and streamline ADC's authorizing statue to reflect the current state of farming and focus on Hawaii's needs for local agricultural products in addition to export products. Specifically, the Committee recommends:

(1) Having ADC prioritize entering into lease agreements designed to increase the production of local agricultural products and support small farmers;

(2) Setting requirements regarding the production of local agricultural products for local consumption; OR Aligning plans and projects with recently set goals for the purchasing of local agriculture products for local consumption;

(3) Making various changes throughout Chapter 163D, HRS, to deemphasize marketing and emphasize production for local consumption; and

(4) Amending ADC's powers and responsibilities to repeal functions performed by other agencies.

The Committee also recommends that ADC coordinate and administer programs to reduce the State's reliance on imported agricultural products, increase local production of agricultural products for local consumption, and increase access to farmland and related infrastructure for local farmers and cooperatives.

Commentary

ADC's enabling statute, Chapter 163D, HRS, places great emphasis on marketing and developing agricultural exports to replace sugar and pineapple. The Committee finds that Chapter 163D, HRS, needs to reflect the current realities of agriculture. For the past two centuries, Hawaii's agricultural industry has largely been driven by its anchor tenants, beginning with sugar and pineapple plantations in the 19th and 20th centuries and more recently with seed companies on ADC's lands in Kauai. However, similar to the exodus of sugar and pineapple plantations, seed companies are starting to leave Hawaii.

Given the change in social, political, and economic context in recent decades, the work of ADC is not well aligned with state goals. The Committee recognizes that Hawaii's agricultural industry and its food crops are no longer just about export and large-scale farmers. ADC should be restructured to support the achievement of local food self-sufficiency in a manner that is economically and environmentally sustainable.

Whenever feasible, ADC should collaborate with other agencies to achieve its purposes and assist its tenants. ADC's enabling statute should be amended to remove or modify functions that are performed by other agencies. For example, Chapter 163D, HRS, should deemphasize marketing since this function is performed by the Department of Agriculture (DOA). Instead, ADC should collaborate with DOA to provide resources, such as marketing resources, to its lessees and licensees. ADC should also work with the Department of Education as part of the Hawaii Farm to School Program.

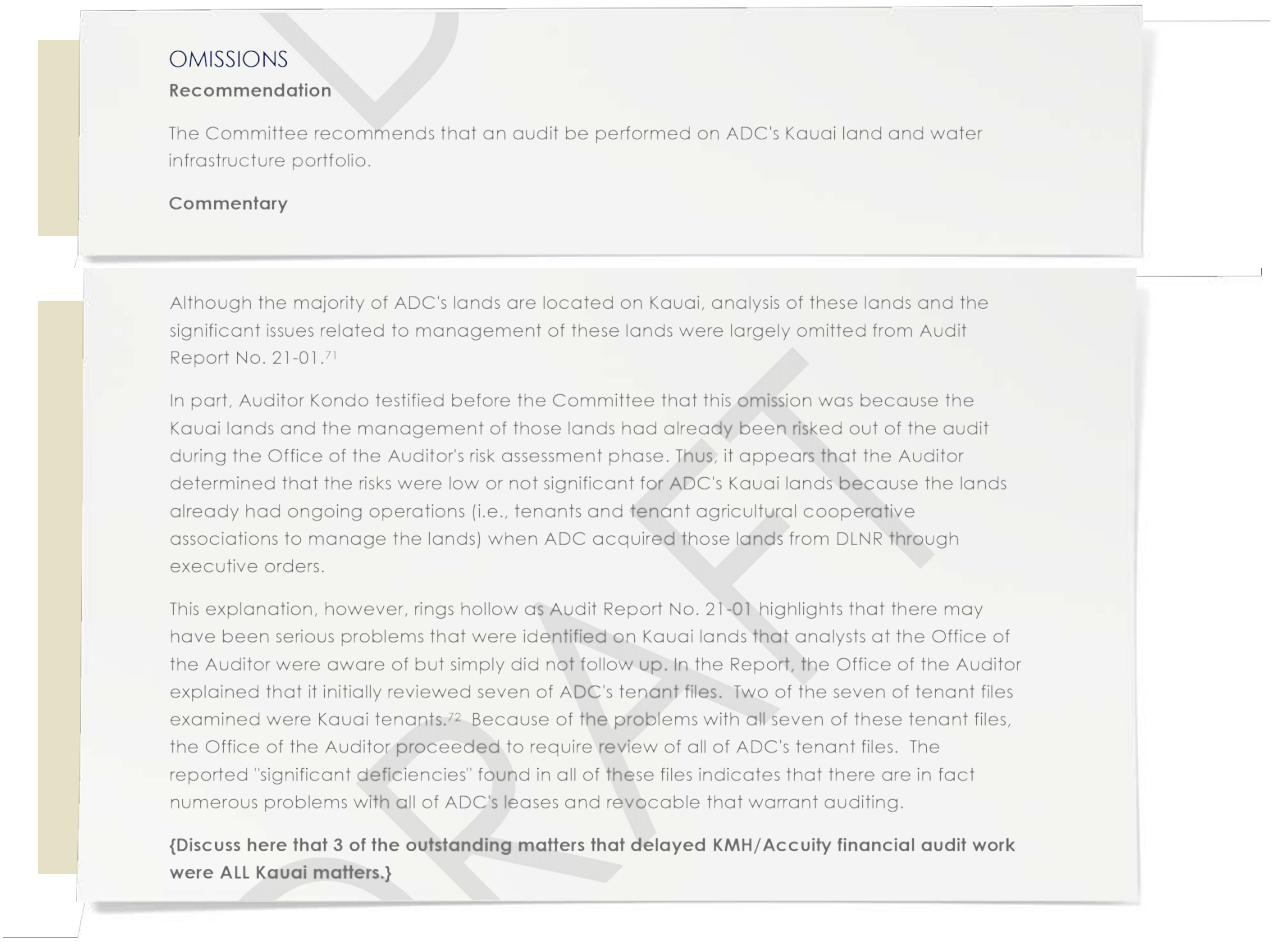
The Facts

The realization that Hawai‘i’s agricultural industry is no longer just about export and large-scale farmers is why ADC was created in the first place – to fill the growing economic void in the wake of sugar and pineapples departure from the Islands. The Legislature granted ADC powers and exemptions unique in Hawai‘i state government that afford the corporation unrivaled flexibility to bring former plantation infrastructure back into production. Among other things, ADC is statutorily authorized to acquire, own, and sell land; lease or sell its lands to agricultural enterprises and farmers without having to go through a public auction process; invest in enterprises engaged in agricultural crop development, development of new value-added crops, and enhancement of existing agricultural commodities; issue revenue bonds to finance acquisitions; create subsidiaries; and even reorganize itself as a nonprofit organization.

It is true that sugar and pineapple are long gone, but the need for a vibrant and diversified agriculture industry is now more important than ever. And that includes a robust sector for exports and large-scale farming. The fact that after nearly 30 years in existence, ADC has not addressed this necessity does not mean that the need no longer exists, and the State should abandon efforts. The fact is that Hawai‘i’s agriculture industry is shrinking and the economic void left after the departure of sugar and pineapple continues to widen.

The committee reasons that paring down ADC’s statutory duties to fit its current capabilities will eliminate unnecessary duplication that could occur throughout the Department of Agriculture. However, by stripping away ADC’s legislative mandate, the committee could potentially exacerbate redundancies throughout the department by creating a duplicate agency. The department already has the Agricultural Park program, which provides for the space and support of the state’s small farmers. However, the department does not have another agency that is purposely built to attract and cultivate support for large-scale agricultural operations.

Fact Check: Omissions



OMISSIONS

Recommendation

The Committee recommends that an audit be performed on ADC's Kauai land and water infrastructure portfolio.

Commentary

Although the majority of ADC's lands are located on Kauai, analysis of these lands and the significant issues related to management of these lands were largely omitted from Audit Report No. 21-01.[71]

In part, Auditor Kondo testified before the Committee that this omission was because the Kauai lands and the management of those lands had already been risked out of the audit during the Office of the Auditor's risk assessment phase. Thus, it appears that the Auditor determined that the risks were low or not significant for ADC's Kauai lands because the lands already had ongoing operations (i.e., tenants and tenant agricultural cooperative associations to manage the lands) when ADC acquired those lands from DLNR through executive orders.

This explanation, however, rings hollow as Audit Report No. 21-01 highlights that there may have been serious problems that were identified on Kauai lands that analysts at the Office of the Auditor were aware of but simply did not follow up. In the Report, the Office of the Auditor explained that it initially reviewed seven of ADC's tenant files. Two of the seven of tenant files examined were Kauai tenants.[72] Because of the problems with all seven of these tenant files, the Office of the Auditor proceeded to require review of all of ADC's tenant files. The reported "significant deficiencies" found in all of these files indicates that there are in fact numerous problems with all of ADC's leases and revocable that warrant auditing.

{Discuss here that 3 of the outstanding matters that delayed KMH/Accuity financial audit work were ALL Kauai matters.}

The Facts

Determining the scope and objectives of a performance audit involves more than acreage counts and Google searches. During the planning phase of an audit, which can take up to a third of an entire audit period, analysts do extensive research to obtain background information on an agency, reviewing such things as statutory requirements, mission and vision statements, and annual reports, among many other things. Analysts meet with the agency, request documents, conduct preliminary interviews, and make initial observations to determine audit objectives, which are often questions the audit will try to answer.

The first audit objective, "Describe ADC's process for acquiring former plantation lands and facilitating their transition to other agricultural uses," did not include ADC's lands on Kaua'i. Those lands were transferred to ADC from another state agency and the majority of the lands were under license agreements that ADC assumed. For that reason, we did not assess ADC's process to acquire those

lands. However, the lack of an agribusiness development plan and other statutorily required components to that plan, like marketing and transportation, very likely apply to and would benefit all ADC tenants.

However, contrary to what the committee believes, our audit *did* include ADC's management of its Kauaʻi lands. We requested tenant files for seven of ADC's 83 tenants, which we randomly selected for review. When we were provided those files, which staff had to create in response to our request, we found none were complete. We then asked to review the files for the remaining 76 tenants, which include all of the tenants occupying ADC lands on Kauaʻi. Staff, however, could only assemble the files for 71 of the remaining 76 tenants. To the extent the documents were included in the files created by ADC, we reviewed the copy of the tenant's initial application, the corporation's ranking and selection of the tenant, board approval to issue a tenant contract, the tenant contract, determination of annual rents, insurance certificates, site inspection reports, tenant ledgers, notices of default, general correspondence, and any other significant documentation relevant to the management of the specific lease, license, or permit relating to 78 of ADC's tenants, the majority of which are on Kauaʻi lands.

Our finding, *ADC's land management struggles – inconsistent, incomplete, and, in many cases, non-existent record keeping; prospective tenants occupying lands without signed written agreements; and persistent criminal activity on its properties – expose the State to unnecessary risk*, includes those lands ADC controls in the Wahiawā and Whitmore Village areas on Oʻahu as well as the Kekaha and Kalepa areas on Kauai. And, while we did not distinguish the tenant files by island, we described the condition of the files we had been provided – missing and incomplete documents – that were generally applicable to all of the files.

To make matters worse, the committee's recommendation to the Office of the Auditor includes the editorial note "Discuss here that 3 of the outstanding matters that delayed KMH/Accuity financial audit work were ALL Kauai matters," which appears to be an attempt to further develop its Kauaʻi conspiracy theory into a larger story of wrongdoing. We hope this is not the case.

The real reason that ADC's financial audit is delayed is that its financial records – like its tenant files – didn't exist when auditors asked for them. ADC had to hire another accounting firm to collect and create such a financial record. While the committee heard testimony from Ross Murakami of KMH stating KMH's work was completed by September 2021, the financial auditor, Accuity, provided observations to ADC and KMH requiring further revisions from KMH. ADC management did not review KMH's work product

until December 2021. Accuity reported that the House Investigative Committee's investigation in the fall of 2021 required ADC's immediate attention, delaying the completion of the audit. ADC acknowledged Accuity's requests but did not provide a timetable for the completion of outstanding requests. Additionally, the latest delay in the completion of the financial audit is due to a potential environmental remediation obligation from a fire in September 2021 on an O'ahu, not Kaua'i, property. ADC procured an environmental consultant in December 2021 to assess the potential liability and as of December 31, 2021, Accuity had not received an update from ADC on the environmental assessment.

V. Conclusion

We welcome the committee's interest in, and efforts at, remedying the significant problems in two state agencies disclosed by the audits that were the subject of House Resolution No. 164. We also welcome honest, thoughtful, and independent review and feedback. We are subject to a regular, nationally-recognized, peer-review process, conducted by independent professionals proficient in performance audits, and we have passed with flying colors every time. Strangely, that is never mentioned in the draft report.

Of course, while we welcome the committee's assistance in addressing and remedying the problems we discovered in the two state agencies, we cannot welcome the effort by some to use the opportunity provided by the resolution to conjure up evidence of some sort of misconduct by the Auditor. That effort is mistaken, inappropriate, and counter-productive. That effort also exceeds the authority delegated to the committee from the broader House in the resolution, which was specific, limited, and narrowly confined to two specific audits of two specific agencies. The authorizing resolution is the source of both the power the committee can exercise and the limits to that power. In other words, delegated authority is all the authority the committee has. It does not possess the inherent powers possessed by the broader Legislature. It cannot simply pick and choose what it wishes to investigate.

An investigation conducted beyond the boundaries of legitimate legal authority is not just a legal issue. It is also an ethical issue, and it contributes to the public perception – justified or not – of political shenanigans in state government. If it is intentional, then acting beyond the legal and authorized boundaries of a specific grant of investigative authority may even itself be potential evidence of misconduct. It also smacks of political interference in matters that should be above political interference. The task of being a public "watchdog" in Hawai‘i is hard enough without being treated like a fire hydrant.

As shown in great detail in the body of our response, the committee's draft report is defective in many ways. For example, though it is subtitled "findings and recommendations," the draft is devoid of any findings whatever. A half-complete draft is no more practical or useful than a half-complete ship. Neither should be launched before it is completed. Neither is a very useful or trustworthy way of getting from A to B. The draft report also suffers from significant and recurrent

inaccuracies, also detailed above, even apart from the absence of any findings.

Finally, the committee has repeatedly failed to live up to its statutory obligation to be "fair and impartial." Minor departures from that obligatory statutory norm might be understandable. But the departures we have laid out are not minor. They infect the whole tone and tenor of the draft report. A legislative committee tasked with conducting itself in a "fair and impartial manner" should never allow itself to become the vehicle for what has all the hallmarks of a political "hit job."