

DAVID Y. IGE
GOVERNOR OF
HAWAII



SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

KEKOA KALUHIWA
FIRST DEPUTY

JEFFREY T. PEARSON, P.E.
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

**Testimony of
SUZANNE D. CASE
Chairperson**

**Before the Senate Committee on
WAYS AND MEANS**

**Monday, April 3, 2017
1:35 PM
State Capitol, Conference Room 211**

**In consideration of
HOUSE BILL 839, HOUSE DRAFT 1, SENATE DRAFT 1
RELATING TO THE DEPARTMENT OF LAND AND NATURAL RESOURCES**

House Bill 839, House Draft 1, Senate Draft 1 proposes to require the Auditor to conduct an audit of certain special funds of, and accounting of appropriations to, the Department of Land and Natural Resources (Department). **The Department appreciates the intent of this bill and provides the following comments.**

The Department welcomes a fair and independent audit as an opportunity to improve our work. The Department regularly reports financial information in Legislative reports and a multitude of budget forms for special, general, and capital improvement project funds. The Department is willing to provide additional information to Legislators, auditors, or any other interested parties.

Like other departments, the Department is regularly audited, such as the Annual Departmental Audit – (completed by Ohata, Chun, Yuen, LLP), the Annual A-133 Audit – (completed by Accuity, LLP), as well as various Federal audits for grants from the United States Fish and Wildlife Service and Forest Service.

The Department strives to be transparent and proactive, so we would appreciate the opportunity to address any additional questions that are giving rise to an audit recommendation now, rather than waiting for a long and protracted audit process.

The Department seeks an amendment to SECTION 5 to assist with the added capacity needed to respond to the audit:

SECTION 5. There is appropriated out of the general revenues of the State of Hawaii the sum of \$ or so much thereof as may be necessary for fiscal year 2017-2018 and the same sum or so much thereof as may be necessary for fiscal year 2018-2019 to hire two analysts, one senior analyst, and consultants as necessary, to conduct the audit of the department of land and natural resources pursuant to this Act[-], and for the department of land and natural resources to hire three analysts to support the department in providing information requested by the auditor.

The sums appropriated shall be expended by the auditor and by the department of land and natural resources for the purposes of this Act.

With respect to the Special Land and Development Fund (SLDF), the Land Division procures disinterested appraisers to determine lease rents and fair market values for the sale of remnants and other dispositions, procures planning, architectural, engineering and other consultants to advise the Department on its leases, vacant lands, and tenant improvements on expired leases, and procures hearing officers for contested cases.

House Bill 839, House Draft 1, Senate Draft 1 specifies that the performance audit shall review contracts, grants, and memoranda of understanding entered into, awarded by, or otherwise involving the department of land and natural resources' special land and development fund and the land conservation fund.

The bulk of the contracts under the SLDF are for land appraisals. With respect to the procurement of appraisers, Section 171-17, Hawaii Revised Statutes (HRS), requires that rents for public land leases be no less than the value determined by a disinterested appraiser whose services shall be contracted for by the Board of Land and Natural Resources (Board). In retaining real estate appraisal services, the Department follows the procurement process for professional services set forth in the Hawaii Procurement Code, Chapter 103D, HRS. The Department publishes a Land Division solicitation for statements of qualifications and expressions of interest from licensed real estate appraisers on the State and County Procurement Notices for Solicitations internet site, and also publishes notices of solicitation in the Honolulu Star Advertiser, as well as the county newspapers. A review committee appointed by the

Chairperson reviews and evaluates submissions from real estate appraisers who submit statements of qualifications and expressions of interest (SoQs) by the published due date and prepares the list of persons qualified to provide appraisal services. As required by Section 103D-304(c), HRS, the review committee members have education or training sufficient to review the credentials of the appraisers who submit SoQs.

When an appraisal is required, all appraisers on the qualified list are evaluated for the job in accordance with the requirements of subsections (e) and (f) of Section 103D-304, HRS, by a selection committee appointed by the Chairperson of the Department. Although the statute requires that a minimum of three persons be ranked, the selection committee ranks all of the qualified appraisers to determine the top three ranked appraisers. The selection criteria provided in subsection (e), in descending order of importance, are:

- (1) Experience and professional qualifications relevant to the project type;
- (2) Past performance on projects of similar scope for public agencies or private industry, including corrective actions and other responses to notices of deficiencies;
- (3) Capacity to accomplish the work in the required time; and
- (4) Any additional criteria determined in writing by the selection committee to be relevant to the purchasing agency's needs or necessary and appropriate to ensure full, open, and fair competition for professional services contracts.

In accordance with Section 103D-304(g), HRS, the selection committee sends its ranking to the Chairperson for approval. If approved, pursuant to Section 103D-304(h), HRS, Land Division staff (as the Chairperson's designee) contacts the first-ranked appraiser and negotiates a contract in writing, to include a rate of compensation that is fair and reasonable. If a satisfactory contract cannot be reached with the first-ranked appraiser, negotiations are formally terminated and negotiations with the second ranked appraiser commence. (The process will continue down the list of the ranked appraisers if necessary.) Section 103D-304(h), HRS, also provides that negotiations shall be conducted confidentially. The contract with the appraiser includes the appraisal assignment, date of valuation, and agreed upon compensation to the appraiser.

With respect to revocable permits, Chapter 171, HRS, does not require that rents be established by a disinterested appraiser. Rather, pursuant to Section 171-55, HRS, the Board issues revocable permits "under conditions and rent which will serve the best interests of the State . . ." In the past, the Land Division had a licensed staff appraiser who would review revocable permit rents from time-to-time. However, the Land Division has not had a licensed appraiser on staff for a number of years. In 2016, the Chairperson convened a task force to revisit and evaluate the existing protocols and criteria for selecting a revocable permit or a lease for a disposition of use of State lands and to make recommendations for improvement. The Task Force made a number of findings and recommendations designed to improve the process of issuing and renewing revocable permits, which are set forth in a report to the Board at its meeting of June 24, 2016, under agenda Item D-7 (copy of report attached).

A legislative informational briefing (before the Senate Committee on Water, Land and

Agriculture) on the Report and Recommendations of the Department's Revocable Permits Task Force was held on July 13, 2016.

Also in 2016, the Department procured an independent appraiser to review the rents for revocable permits. The appraiser's focus is on those permits covering lands and uses that have potential to generate significant rents, such as permits for commercial, industrial and parking uses. It would be cost prohibitive to have an appraiser value each one of the Land Division's approximately 350 revocable permits statewide. Subject to budget constraints in the SLDF,¹ we expect the appraiser to reach rent conclusions in 2017-18, after which the Land Division staff intends to present recommendations for rent increases to the Board. In the interim, in 2016 the Board did increase rents for all revocable permits for land by 1.5% for each year since the last rental adjustment for each permit.

The professional services procurement method is also used to procure planning, architectural, engineering and other professional services. However, the review and selection committees for the respective professions have different members than the appraisal review and selection committees.

Accordingly, the Department requests the following revisions to SECTION 2:

SECTION 2. The audit shall review contracts, grants, and memoranda of understanding entered into, awarded by, or otherwise involving:

- (1) The department of land and natural resources' special land and development fund; to review:
 - (A) Authorized purposes and uses of the special land and development fund;
 - (B) Revenue sources for the special land and development fund;
 - (C) Ceiling restraints of the special land and development fund;
 - (D) Cash flow needs to ensure the funds are available

¹ The estimated cost of preparing a portfolio appraisal report on 167 parcels under revocable permit is approximately \$600,000.

for use in the event of emergencies either for expenditures or to cover unplanned drops in revenues such as from the default of a major public land tenant;

(E) A review of urban and industrial, lands listed as owned by the department of land and natural resources, the number of lands currently under the jurisdiction of the land division for commercial use as compared to the number of lands owned by the department of land and natural resources that are under the jurisdiction of other agencies through executive order or otherwise such as the department of transportation, department of education, other state departments, other counties, community development agencies, or otherwise, and the number, size, and zoning and encumbrance status of remaining urban or industrial parcels that are under the direct management jurisdiction of the land division;

(F) The estimated unrealized economic potential of unencumbered public lands that are under the direct management jurisdiction of the land division; and

(G) Capacity issues within the land division,
including the number of active and pending
matters per land agent within the land division;
and

(2) The department of land and natural resources' land
conservation fund;

between the period beginning July 1, 2015, through June 30,
2017. The auditor shall examine whether the funds that were
expended by the department of land and natural resources were in
accordance with the terms of the contracts, grants, and
memoranda of understanding.

The Department believes a performance audit will verify that the Department expends funds in
accordance with the contracts, grants and memorandums of understanding.

Thank you for the opportunity to comment on this measure.



Chamber of Commerce HAWAII
The Voice of Business

**Testimony to the Senate Committee on Ways and Means
Monday, April 3, 2017 at 1:35 P.M.
Conference Room 211, State Capitol**

**RE: HOUSE BILL 839 HD1 SD1 RELATING TO THE DEPARTMENT OF LAND
AND NATURAL RESOURCES**

Chair Tokuda, Vice Chair Dela Cruz, and Members of the Committee:

The Chamber of Commerce Hawaii ("The Chamber") **supports the intent** of HB 839 HD1 SD1, which requires the Auditor to conduct an audit of certain special funds of, and accounting of appropriations to, the Department of Land and Natural Resources.

The Chamber is Hawaii's leading statewide business advocacy organization, representing about 1,600+ businesses. Approximately 80% of our members are small businesses with less than 20 employees. As the "Voice of Business" in Hawaii, the organization works on behalf of members and the entire business community to improve the state's economic climate and to foster positive action on issues of common concern.

A periodical review of processes and procedures in any government institution should be welcomed as audits often identify areas that need to be revised or re-engineered to bring the current processes and procedures more in line with today's objectives or outcomes.

We strongly support the passage of this bill, and appreciate the opportunity to provide our comments on this matter.



BOARD OF
DIRECTORS:

Chris Cramer
PRESIDENT

April 2, 2017

Angela Correa-Pei
VICE-PRESIDENT

Senate Committee on Ways & Means, Conf. Room 211

Brenda Asuncion
DIRECTOR

Re: Comments Only on HB 839, HD 1. SD 1
Hearing on Monday, April 3, 2017, 1:35 pm

Jeannine
Johnson
SECRETARY

Aloha Chair Tokuda, Vice Chair Dela Cruz, and Committee Members:

We have no comment on the audit of the IUCN conference, but are concerned that an audit of the Legacy Land Conservation Program is not a good use of state funds. If an audit is completed, we welcome the opportunity to highlight this program. We believe it will show it is well-run and supported by local communities.

Diane Warncke
TREASURER

Christiane "Kauai"
Lucas
DIRECTOR

The State Legacy Land Program is one of Hawaii's programs that benefits all of Hawaii. Without evidence that the land conservation funds are not conserving lands as intended, this proposal appears to be a poor expenditure of State tax dollars and resources. Maunalua Fishpond Heritage Center agrees that audits "are a useful tool for making sound policy decisions in the public interest" as the WAM Committee report states. It is disheartening though that one individual can spur punitive legislation that siphons needed public money and resources from positive State programs.

Alyssa Miller
DIRECTOR

Laura Thompson
DIRECTOR

Is a performance audit of the land conservation fund that has benefitted communities island wide and approved for conservation 22,580 acres of legacy lands needed? We have seen no evidence of this. If it is, why is this proposal being squeezed in at the last minute into an unrelated bill regarding the IUCN conference? The intent of the land conservation fund is to conserve legacy lands. There are no indications that lands purchased with conservation funding are not being conserved or that funds are going outside their intended purpose. Legacy land success stories can be seen in communities across Hawai'i. So the question remains: ***Where is the need for an expenditure of funds for an audit?***

ADDRESS:
P. O. Box 240204
Honolulu, HI
96824-0204

PHONE:
(808) 382-0847

EMAIL: ccramer@maunaluafishpondheritage.org
WEBSITE: maunaluafishpond.org

How does the Legacy Land Conservation Fund affect community currently? The aid of the Legacy Land Conservation fund is enabling the Maunaloa Fishpond Heritage Center to purchase and permanently preserve our community's cherished water source at Kānewai Spring for the betterment of our entire community and island. The funds will be used directly for the purchase as intended. As one of the last functioning springs in Honolulu that still flows actively to the ocean, the \$1.3 million in Legacy Land funds go to a wise use. They leverage \$1 million in City Clean Water funding. We also have initiated strategic planning for the health of the Spring and in the last year, a \$350,000 community campaign for long term funding for Kānewai Spring. We have only \$50,000 remaining to raise.

Who benefits from Legacy Land Conservation Fund and what do the funds conserve? As a community led nonprofit at the forefront of conserving two Hawaiian legacy fishponds in East Honolulu since 2007, it is really the entire community who benefits. In our community's case, we don't want to be the generation who loses our last legacy springs and fishponds. All of our board members live in the surrounding community with several of our families fulfilling stewardship kuleana in the area for centuries. Traditional fishpond practices shared by the last fishpond kupuna in our area are perpetuated by our organization. These elders managed the largest fishpond in Polynesia. This traditional knowledge is fused with modern science and disseminated statewide through social media and participation in Hui Mālama Loko I'a, a statewide hui of fishpond experts. Thousands of school children and community members have volunteered to care for these sites since we began in 2007. Group parking is conducted offsite with small respectful groups of volunteers.

When we started, the ponds were choked with invasive species, nearly stagnant water, and ongoing problems with vagrants and vandals. Today these sites are actively being maintained by our community stewardship. Kānewai Spring now has crystalline blue flowing water. Thousands of gallons of freshwater feed each day from this headwater spring out to the adjacent Kānewai Fishpond, Paikō Lagoon State Wildlife Sanctuary and Maunaloa Bay.

Who loses when programs like the Legacy Land Conservation Fund are challenged? At Kānewai Spring, the biggest losers would be the keiki who catch their first fish and their parents and grandparents who come for a safe place to share and pass down our island traditions. Many of our community elders have watched over their lifetimes the loss of cherished sites such as springs and fishponds. The community volunteers who come together monthly to malama Kānewai Spring recognize this and have committed for the last six years to maintain this special place. At Kānewai, Hawaiian medicinal plants and traditional practice thrive. It is a spiritual place of beauty and mana. Rare endemic species found at Kānewai as well as nearby

April 2, 2017

Page 3

endangered species all benefit from the sound stewardship that has occurred for six years at Kānewai Spring.

An overwhelming majority of the community has advocated time and again for the preservation of legacy sites like Kānewai Spring and places like it island-wide. These are places for the benefit of all of Hawaii and we ask our legislators that you respect these wishes.

Mahalo nui loa,

A handwritten signature in black ink that reads "Chris Cramer". The signature is written in a cursive, flowing style.

Chris Cramer
President



HAWAII

1003 Bishop St.
Pauahi Tower, Ste. 740
Honolulu, HI 96813
T: 808.524.8694
F: 808.524.8565
tpl.org

ADVISORY COUNCIL

Gregg H. Takara, Chair
Morgan Stanley

Dr. Noa Emmett Aluli
Molokai General Hospital

Stanford S. Carr
Stanford Carr Development

John and Julianna Leong
Pono Pacific and KUPU

Earlynne Maile
Hawaiian Electric

Kurt Matsumoto
Pūlama Lānaʻi

Rachel Ogdie
Attorney

Edmund C. Olson
Farmer, Rancher, Landowner

Gregory C. Pietsch
Pietsch Properties LLC

Brad Punu
Energy Excelsior

Tom Reeve
Conservationist

Michael S. Spalding
Michael Spalding Realty

Sharon Stanbro
Retired Educator, Farmer

Jon Wallenstrom
Forest City

Carol Wilcox
Author

The Trust For Public Land's Testimony Opposing HB 839, HD 1. SD 1 Relating To The State Budget

Senate Committee on Ways & Means, Conf. Room 211
Monday, April 3, 2017, 1:35 p.m.

Aloha Chair Tokuda, Vice Chair Dela Cruz, and Committee Members:

The Trust for Public Land has comments regarding HB 839, HD 1, SD 1. We do not oppose an audit of the Legacy Land Conservation Program. We believe an audit will reveal that the program is well run, has many safeguards, is conserving important natural, agricultural, and cultural lands throughout the Hawaiian Islands, and that the state funds are being used wisely with state funds matched more than 1:1 by federal, county, and private funds.

It has come to our attention, however, that Diedre Mamiya submitted testimony before the Senate Water & Land Committee relating to the Kanewai Spring project that omitted certain pertinent facts:

- Ms. Mamiya identified herself as a former DLNR employee in her testimony before the Senate Water & Land Committee. She did not mention that she works for the law firm of Morihara Lau & Fong LLP where she is listed as a “consultant” (see attached website screenshot). Morihara Lau & Fong represents Las Vegas developer Richard MacDonald in a lawsuit filed against the State of Hawai‘i, The Trust for Public Land, and the local non-profit Maunaloa Fishpond Heritage Center (“the Center”), that raises the same issues discussed in her testimony. The Environmental Court dismissed this lawsuit on December 12, 2016. The Environmental Court’s opinion is attached to this testimony.
- Tremendous efforts have been made to address Ms. Mamiya’s and Mr. MacDonald’s stated concerns over the private and exclusive character of this waterfront East Honolulu neighborhood. The City and County of Honolulu has imposed 16 separate restrictions on the property to ensure the privacy of neighbors is respected and preserved (the City’s budget conditions and summary table are attached):
 1. On site commercial activities are prohibited, including weddings or vacation rentals;
 2. The Center must maintain a vegetative privacy screen along the site’s Kanewai Fishpond (aka Kuliwai Lagoon) boundary that is at least six feet tall and two feet wide.
 3. The Center must comply with all noise ordinances and conduct its stewardship activities in a manner respectful of the surrounding residential neighborhood.
 4. Unsupervised public access to the Kanewai Spring site is prohibited.
 5. The Center must limit groups of students and volunteers to three groups per month with the understanding that the Center typically has no more than two groups per month.



6. The Center must limit the number of people that can visit the Kanewai Spring site at one time to 30 people, with the exception of one annual stewardship gathering limited to 50 people.
7. The Center must ensure that its Kanewai Spring volunteers do not enter Kanewai Fishpond (aka Kuliwai Lagoon), neighboring properties, and neighboring private roads.
8. No activities are allowed on site after 6:00 p.m.
9. The property is limited to one caretaker cottage for no more than two people.
10. Student and volunteer groups visiting Kanewai Spring must park off site and walk to the Kanewai Spring site, with the exception that disabled or elderly students or volunteers may drive or be driven to the site.
11. The Center must check on the Kanewai Spring site at least three times per week to maintain the safety of the Spring site and nearby residences, and discourage squatters.
12. The Center must secure the site with a locked gate so that the site is not accessible to the public.
13. The Center must request to be included on the Kuliouou/Kalani Iki Neighborhood Board's agenda annually to summarize its activities and progress made in the past year, and plans for the upcoming year.
14. The Center must mail quarterly a brief update of its activities over the past quarter and planned activities for the upcoming quarter to the residences surrounding Kanewai Fishpond (aka Kuliwai Lagoon) including notice of its annual report to the Kuliouou/Kalani Iki Neighborhood Board.
15. The Center is prohibited from building outside the current site building footprint and must limit any building to one-story.
16. The Center is prohibited from subdividing or using CPR on the site.

In addition to these 16 separate restrictions, the State Department of Land and Natural Resource is considering requiring that the Center give the State the right to enforce any violations of usage restrictions on Kanewai Fishpond (aka Kuliwai Lagoon) so that there is further back-up to the City's restrictions.

Ms. Mamiya also raises concerns about the appraisal of the Kanewai Spring property, which appraised the value of the .77 acre waterfront property at \$2.3 million. The State of Hawai'i Department of Land and Natural Resources requires a third-party appraisal review by an independent appraiser to verify that the appraisal has been completed in accordance with all applicable standards, and considered all appropriate comparable sales. Although this appraisal review has not been completed or contracted, this process ensures that any appraisals under the Legacy Land Conservation Program meet all applicable standards for appraisals. In addition, the City and County of Honolulu, which is contributing funds to this project, typically has its own in-house appraiser review and approve any appraisal. There will be not one, but two, separate and independent reviews of the appraisal for this project in the future.

A review of the City real property tax assessed values of the Kanewai Spring property and neighboring properties, such as the nearby properties owned by Las Vegas developer/litigant Richard MacDonald (under Kalaniani'ole Hwy LLC) and the Mamiya family also can provide some context regarding values in this area of East of Honolulu:

Property	Acreage	2017 Real Property Tax Assessed Value
Kanewai Spring property	.77 acres	\$2,115,300
MacDonald property	.6011 acres	\$4,550,100
Mamiya property	1.0405 acres	\$3,573,400

We regret Ms. Mamiya's and Mr. MacDonald's opposition to the Kanewai Spring project, which hopes to preserve in perpetuity one of the last functioning freshwater springs in East Honolulu that feeds clean water into Kanewai Fishpond, Paiko Lagoon Wildlife Sanctuary, and Maunalua Bay, and provide educational opportunities for youth. We have sent written invitations to Ms. Mamiya and Mr. MacDonald to present their views to the Neighborhood Board, the Clean Water & Natural Lands Commission, and the Legacy Land Commission, but they have declined to participate. We have also invited Ms. Mamiya and Mr. MacDonald to the Kanewai Spring property so they can witness first-hand the restoration of the Spring, the educational programs for keiki, and the low impact nature of the use. They both have declined to visit. We have also apologized in writing for any hurt feelings or past miscommunications, but have not received a response. We continue to hope that Ms. Mamiya and Mr. MacDonald will one day appreciate the natural and cultural resource values of Kanewai Spring, and this community effort.

Mahalo for this opportunity to testify. I regret that I cannot make attend the hearing in person due to a prior commitment.

Me ke aloha,


Lea Hong
Hawaiian Islands State Director
Edmund C. Olson Trust Fellow

- Encls. (1) Morihara Lau & Fong screenshot
(2) Environmental Court opinion
(3) City budget conditions
(4) Summary table of restrictions

MORIHARA LAU & FONG LLP
a limited liability law partnership

841 Bishop Street, Suite 400, Honolulu, HI 96813
t 808 526 2888 f 808 566 0800

ABOUT US

TEAM MLF

AREAS OF PRACTICE

CLIENTS



ATTORNEYS

Angela Fong, Partner.
Lauren M. Imada, Partner.
Yvonne Y. Izu, Of Counsel.
Michael H.Q.L. Lau, Partner.
John K. Lucey, Of Counsel.
Ronald H.W. Lum, Jr., Counsel.
Kent D. Morihara, Partner.
Kris N. Nakagawa, Partner.

SUPPORTING PROFESSIONALS

Dierdre S. Mamiya, Consultant.
Jill K. Veles, Legal Assistant.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

RICHARD C. MACDONALD,) CIVIL NO. 16-1-0902-05 (JHC)
) (Environment; Declaratory Judgment)
Plaintiff,)
)
vs.) MEMORANDUM OPINION
)
BOARD OF LAND AND NATURAL)
RESOURCES, SUZANNE CASE, in her)
official capacity as Chairperson of the Board of)
Land and Natural Resources, the)
DEPARTMENT OF LAND AND NATURAL) Hearing:
RESOURCES, MAUNALUA FISHPOND) Date: November 4, 2016
HERITAGE CENTER, and THE TRUST FOR) Time: 10:00 a.m.
PUBLIC LAND,) Judge: Hon. Jeannette H. Castagnetti
)
Defendants.) No Trial Week
)
_____)

MEMORANDUM OPINION

I. INTRODUCTION

This matter involves the Board of Land and Natural Resources' decision to approve a grant of public funds to the Maunalua Fishpond Heritage Center ("MFHC") and the Trust for Public Land ("TPL") to acquire real property located at 5975 Kalaniana'ole Highway in East Honolulu (the "Property"). The main feature of the Property is an open freshwater spring that flows into the ocean and into an ancient Hawaiian fishpond that abuts the Property and other surrounding parcels. The fishpond is privately owned with each surrounding property owner holding an undivided interest in the fishpond.

In 2010, MFHC entered into an agreement with the existing owner of the Property to restore the spring and other natural resources on the Property. In 2015, MFHC and TPL negotiated an agreement to purchase the Property so that the restored Property could be preserved in perpetuity. To aid in the acquisition of the Property, MFHC and TPL applied for a grant through the Land Conservation Fund of the Legacy Lands Conservation Program, established by chapter 173A of the Hawai‘i Revised Statutes. On April 8, 2016, the Board of Land and Natural Resources voted to approve MFHC and TPL’s application determining that awarding a grant for the Property probably will have minimal or no significant effects on the environment.

On May 11, 2016, Plaintiff Richard C. MacDonald filed this lawsuit alleging that the Board of Land and Natural Resources violated the Hawai‘i Environmental Policy Act (“HEPA”) by failing to prepare an environmental assessment in support of the Board’s decision to grant funds to MFHC and the Trust. A First Amended Complaint was filed on June 1, 2016.

Currently before the Court is TPL’s and MFHC’s Motion for Summary Judgment, filed August 16, 2016. Plaintiff filed a Memorandum in Opposition on October 26, 2016. TPL and MFHC filed their Reply on November 1, 2016. Defendants Board of Land and Natural Resources (“BLNR”), Suzanne Case as chair of the BLNR, and the Department of Land and Natural Resources (“DLNR”) (collectively “State Defendants”) filed a joinder to the motion on October 18, 2016.

The motion was heard by the Honorable Jeannette H. Castagnetti on November 4, 2016. Elijah Yip, Esq. and W. Keoni Schultz, Esq. appeared on behalf of TPL; Michelle J. Chapman, Esq. appeared on behalf of MFHC; Deputy Attorney General Amanda J. Weston appeared on behalf of the State Defendants; and Yvonne Y. Izu, Esq. appeared on behalf of Plaintiff.

II. BACKGROUND

A. Factual Background

The following material facts, viewed in the light most favorable to Plaintiff, are not in dispute.¹

The subject of this lawsuit is a State grant of \$1,300,000 to MFHC and TPL to assist them in buying what the parties refer to as the Kānewai Spring Property, a 0.77 acre parcel of land at 5975 Kalanianaʻole Highway, in Kuliʻouʻou, Koʻolaupoko, Oʻahu. The main feature of this Property is the Kānewai Spring – the last large open freshwater spring in Honolulu that still flows to the ocean. Cramer Decl., ¶ 3. Kānewai Spring feeds a continual flow of freshwater into the Kānewai Fishpond, which feeds into the Paiko Lagoon Wildlife Sanctuary which in turn feeds into Maunalua Bay. Id., ¶ 8. Kānewai Spring is believed to be the probable fresh water source for ancient Hawaiians living in cave shelters above the Spring. The Spring has a large upright kuʻula stone (Hawaiian fishing shrine) and also has a stone lined ʻauwai (water channel) and mākāhā (sluice or fish gate) which lead to the ancient Fishpond. Id., ¶ 15.

Kānewai Spring is adjacent to an ulu niu (coconut grove) and mature tree thicket running along the southern and eastern borders of the Spring. The Fishpond lies on the other side of a basalt and coral wall which forms the southern border. The western border is a two-story panax hedge. The northern border is a concrete wall which spans along Kalanianaʻole Highway. Id., ¶ 7; Exh. 7 to Motion.

¹ In ruling on a motion for summary judgment, the court must view the evidence and inferences from the evidence in the light most favorable to the non-moving party. Kilakila ʻO Haleakala v. Univ. of Hawaiʻi, 138 Hawaiʻi 364, 375, 382 P.3d 176, 187 (2016) (citations omitted). Plaintiff indicated in his opposition that [t]he pertinent facts are undisputed.” Memo. in Opp. at 2.

Native fish and invertebrates inhabit Kānewai Spring. Endangered birds feed at the spring outlet on a protected islet. Kānewai Spring is the primary source of freshwater in the immediate area. Preservation and conservation of the Spring protects resources on the Kānewai Spring Property and enhances the surrounding ecosystem. Id., ¶ 9.

Large multi-story homes face the Kānewai Spring and the Fishpond. Besides the Kānewai Spring Property, the Fishpond is surrounded by eight (8) other parcels, including Plaintiff's property. From the Kānewai Spring Property, there is little to no view of the surrounding landowners on the Fishpond except at various points. To the east and adjacent to the Kānewai Spring Property is a parcel of vacant state land. To the west and adjacent to the Property is a parcel owned by Dennis Yeomans, whose property is not presently visible from the Kānewai Spring Property due to vegetation. Directly to the south of the Property is a property owned by the Miss Paris Beauty Academy which may be used for occasional weddings but is screened from direct view by trees and vegetation. Id., ¶ 11.

Plaintiff MacDonald is one of two member managers of Kalanianaʻole Highway LLC, the entity that owns residential real property located at 6015-B Kalanianaʻole Highway, Kuliouou, Honolulu, Hawai'i 96821. MacDonald Decl., ¶ 1. Plaintiff's wife is the other member-manager of the LLC. Id., ¶ 2. Plaintiff's property is on the Kānewai Fishpond and includes an undivided ownership interest in the Kānewai Fishpond along with nine other neighboring properties on the Fishpond. Id., ¶ 3. The Fishpond is privately co-owned by each of the landowners.

Plaintiff's property is visible from the Kānewai Spring Property at some points through vegetation. Cramer Decl., ¶ 11. As of the filing of the motion for summary judgment, Plaintiff's property appeared vacant and under construction. Id.

Since the 1940's, title to the Kānewai Spring Property changed numerous times. Id., ¶ 16. By 2010, the Property had suffered from years of neglect. Thick vegetation grew over the Kānewai Spring and most of the Property. Water in the Spring was smelly, dark and barely flowing, and mosquitos infested the area. Id., ¶ 17. The area was a haven for theft, vandalism, and squatters. Id. Litter was abundant in the Spring. Id.

In an effort to maintain the Kānewai Spring and the Kānewai Property, on December 2, 2010, MFHC entered into an agreement with Rikuo USA Corp., the manager and owner of the Kānewai Spring Property. Id., ¶ 18; Exh. 10 to Motion. MFHC, a non-profit corporation staffed by volunteers, coordinated volunteer groups to clean, maintain, and restore the Kānewai Spring Property to its historical use and function, consistent with Hawaiian history and culture. Id., ¶ 18.

For the next five and a half years, MFHC volunteers in groups of 12 to 20 visited the Kānewai Spring Property to help restore and maintain the Property. Since February 2011, educational and community activities at the Property have taken place approximately two to three times a month to maintain the Property. Activities include maintenance of the Kānewai Spring and related infrastructure to improve flow and propagation of native vegetation and removal of invasive fish and plant species. Id., ¶ 19.

On October 24, 2008, Plaintiff sent an email to MFHC on behalf of the Kuliwai Lagoon² Association stating that “all of the owners are interested in restoring the water quality that was lost when the highway was widened. . . . However, the owners of our pond are not interested in any public or semi-public use of our pond. It has always been private and it shall

² The Kuliwai Lagoon is also referred to as the Kanewai Fishpond.

always remain private. Privacy is one of the key points in our Association Guidelines, along with liability, so the idea of opening the pond up to groups is not an option.” Exh. 17 to Motion.

In 2012, MFHC approached TPL, a national, non-profit public benefit corporation formed in California in 1972, for assistance in preserving and conserving the natural and cultural resources at the Kānewai Spring Property. Kaakua Decl., ¶ 5. When MFHC learned of a possible sale of the Kānewai Spring Property to a private buyer and its possible redevelopment, MFHC worked with TPL to secure funding to purchase the Property. Cramer Decl., ¶ 21. On July 24, 2015, TPL executed a Letter of Intent with Rikuo to buy the Kānewai Spring Property, and later executed an Option Agreement dated October 30, 2015 to buy the Property. The purchase price was based on an appraised value of the Property, which was originally estimated at \$2.4 million, but later revised downward to \$2.3 million. Id., ¶ 22.

In September 2015, MFHC and TPL applied for a \$1,400,000 land acquisition grant from the Legacy Land Conservation Program to purchase the Kānewai Spring Property.³ Exh. 11 to Motion. The 80 page application included detailed information about the applicants, MFHC and TPL, the type of acquisition to be funded, description of the land to be acquired, preservation purposes of the acquisition, environmental hazards, the amount of funding requested, the project description, stewardship and management, cultural and historic

³ Earlier, on July 30, 2015, MFHC and TPL submitted an application for a grant from the City and County of Honolulu’s Clean Water and Natural Lands Fund. Cramer Decl., ¶ 23; Kaakua Decl., ¶ 8. After considering Plaintiff’s objections and concerns, the City Council granted the application by way of Ordinance 16-15 (2016) subject to 16 conditions. See Memorandum in Support of Motion at page 8; Exh. 15 to Motion. While many of the conditions appear to address objections and concerns raised by Plaintiff (e.g., that MFHC would use the property for “commercial activity beyond what is described in their application, including conducting illegal weddings or vacation rentals”), the Court will not consider the City’s granting of the application or the conditions imposed by the City in ruling on the motion for summary judgment. Such evidence is not relevant to the claim raised by Plaintiff – namely, whether the BLNR erred in determining an exemption applied and an EA was not required under chapter 343.

significance, legal restrictions affecting title, state agency consultation, and required preliminary documentation. Exh. 12.

According to the application, the Kānewai Spring is located “in the backyard of the house” on the Property. Exh. 12 at 004. MFHC and TPL indicated in the application that if funding is approved, their plan was for the 3,357 square foot house to be “demolished” and an “educational center” to be built within the existing footprint. As to the use and activities to take place on the Property, the application noted that educational activities on the property involve “removing invasive marine & plant species; & planting of natives” and “limu, plant & marine species identification; ahupua‘a management; & Hawaiian cultural practices & history. Id. at 005.

Also in their application, MFHC and TPL indicated that acquisition of the property will protect the freshwater source which is essential to the health of the water ecosystem. They indicated that acquisition “will preserve a source of freshwater; an ‘auwai and mākāhā where the fresh and salt water create an estuary that nurtures baby ‘opae, ‘o‘opu, pipiwai and many other native fresh and ocean water species.” Id. at 006. Further, the “spring and coastal strand vegetation growing around the spring and fishpond banks includes significant native groundcover including ‘ae‘ae, ‘uhaloa, ‘akulikuli, makaloha, and ahu‘awa. The banks are also dotted with native and Polynesian introductions including hala, milo, hau, naupaka, noni, nai‘o, and niu. The floor spring is covered in green limu ‘ele‘ele.” Id. They further stated in their application that “an entire ecosystem will be enhanced.” Id. at 007. The applicants also described in detail the archaeological, historical and cultural resources of the Kānewai Spring to include “the Hawaiian drystack wall surrounding the spring, the ‘auwai leading water in the fishpond, and the makaha or sluice gate to manage the fish between the spring and the pond.” Id.

The application also indicated that if the property is protected, “school & community groups can continue to learn from the Kānewai Spring about Hawai‘i’s water cycle, area history with water, and the native species and cultural practices that rely on fresh water and brackish water.” Id. at 006. Further, “[o]wnership by [MFHC] would provide opportunities for managed access for groups to experience Kanewai Spring and to see Kānewai Fishpond.” Id. According to the applicants, “[h]undreds of volunteers have been a part of Kānewai’s restoration and care through [MFHC] including Boy Scouts, Hawaii Kai LDS Church, Polynesian Voyaging Society’s Hokule‘a Crew, Honolulu Waldorf High School, Honolulu Waldorf Lower School, ‘Iolani School, Hui Malama Loko I‘a, Hui Malama o Ke Kai, Kamehameha (Middle School), Kamehameha (High School), Kaimuki LDS Church, Kaimuki YMCA, Kaiser High School, Kaneohe Bay Marines, KCC, KUA, Maryknoll School, Loui ‘Ohana, Niu Valley Intermediate, NOAA Humpback Whale Sanctuary, Ocean Awareness Training, Reeves ‘Ohana, and Takahashi ‘Ohana.” Id. at 007-08. The Kānewai Spring Property, according to the application, “would provide a respite in a highly developed residential area.” Id. at 008. Finally, in their application, TPL and MFHC wrote that the “protection of Kānewai Spring safeguards against any misinformed future decision to harden and separate the spring from the fishpond thereby blocking the entire marine ecosystem from its freshwater source. Kānewai Spring is the lifeforce for Kānewai Fishpond, Paikō Lagoon Wildlife Sanctuary and Maunalua Bay.” Id.

Specifically as to management and stewardship of the Kānewai Spring Property, TPL’s and MFHC’s application sets forth the following details:

MFHC’s management plan for Kānewai Spring centers around the protection and health of the Spring. MFHC will continue to educate school children and community about all of Kānewai Spring Complex’s resources through mālama ‘āina actions such as invasive species fishing, planting of natives, practicing Hawaiian stone drystacking, and monitoring water quality. MFHC views all of the property’s resources as cultural resources, and integrates a

Hawaiian value system and world view into its current use, future plans, and all teachings.

The house on the property has the potential to function as a hale kia'i, classroom, community gathering space, caretaker's residence, and MFHC office. Hale kia'i, or guard houses, are part of a functioning loko i'a (fishpond), and are traditionally located at every mākāhā (loko i'a inlet and outlet) to guard the loko i'a from animal and human predators, and provide temporary shelter for kia'i loki (fishpond caretakers). The house's expansive lanai functions as the hale kia'i so that a separate hale kia'i is not needed. The lanai provides shelter for volunteers needing a break from the sun or rain while working at the Spring.

...

MFHC will be taking on a large financial and volunteer or staff resource burden in accepting the kuleana to own and steward Kānewai Spring Complex. In the balanced concept of kuleana, owning and stewarding Kānewai Spring Complex is also a great privilege. As a nonprofit lead by volunteers, Maunalua Fishpond Heritage Center has been and will continue to contribute its own funding and thousands of volunteer hours to caring for Kānewai. Rebuilding the house will require outside funding sources necessitating a well-developed fundraising plan and campaign.

Commercial activity will be limited to quarterly fundraisers on-site to support [MFHC's] ongoing maintenance expenses, the sale of any invasive species needing to be removed from the property such as caught tilapia, and the possible sale of fish or plant products such as coconuts only if there is a surplus and the resources are truly sustainably harvested...."

Id. at 015-16.

Again, MFHC and TPL sought funding from the State Legacy Land Conservation Program ("LLCP") which was established pursuant to chapter 173A⁴ of the *Hawai'i Revised*

⁴ HRS § 173A-1 provides:

Purpose. The State has provided for the regulation of land use and development throughout the State under the provisions of the land use law, and has provided through that law for the controlled regulation of land use and development of lands which have natural, environmental, recreational, scenic or historic value. However, these lands, though protected by the land use law, may in many instances require placement under public ownership and management

Statutes. The LLCP recognizes that Hawai‘i’s unique cultural, natural, agricultural, historical, and recreational resources are often damaged or lost when private lands possessing these resources are sold and developed. The LLCP provides grants from its Land Conservation Fund to State agencies, counties, and non-profit land conservation organizations seeking to acquire property that has value as a resource to Hawai‘i. Yuen Decl., ¶¶ 2- 5.

On December 2 and 3, 2015, the Legacy Land Conservation Commission (“Commission”),⁵ discussed TPL’s and MFHC’s Application at Commission meetings held on December 2 and 3, 2015. The Commission determined that the proposed acquisition of the Kānewai Spring Property for preservation purposes was consistent with the purposes of the LLCP. At its December 3, 2015 meeting, the Commission ranked the Application second out of

in order that they can be made accessible to all of the people of the State. The purpose of this chapter is to provide for the acquisition and management of such lands in those instances in which such acquisition and management are considered necessary by the State.

⁵ The Commission falls within the DLNR and consists of nine members. HRS § 173A-2.4(a). The Commission’s responsibilities include advising the DLNR and the BLNR on any requests for grants from the LLCP to a nonprofit land conservation organization for the preservation of lands having value as a resource to the State. HRS § 173A-2.5(2). In advising the DLNR and BLNR on grant applications, the Commission is statutorily required to give the following lands priority in its recommendations for acquisitions:

- (1) Lands having exceptional value due to the presence of:
 - (A) Unique aesthetic resources;
 - (B) Unique and valuable cultural or archaeological resources; or
 - (C) Habitats for threatened or endangered species of flora, fauna, or aquatic resources;
- (2) Lands that are in imminent danger of development;
- (3) Lands that are in imminent danger of being modified, changed, or used in a manner to diminish its value;
- (4) Lands providing critical habitats for threatened or endangered species that are in imminent danger of being harmed or negatively impacted;
- (5) Lands containing cultural or archaeological sites or resources that are in danger of theft or destruction; and
- (6) Lands that are unique and productive agricultural lands.

HRS § 173A-2.6.

five grant applications submitted to the Commission, and voted to recommend to the BLNR that the grant request for \$1,300,000⁶ in LLCP funding be approved. Yuen Decl., ¶¶ 10 & 11; Exhs. 1 & 2 to Motion.

Following the Commission’s meeting, the DLNR’s Division of Forestry and Wildlife (“DOFW”) prepared a submittal to the BLNR regarding the Commission’s recommendation for the Kānewai Spring Property (among other projects). Case Decl., ¶ 3; Exh. 3 to Motion. The submittal summarized the Commission’s recommendations on project selection funding from the LLCP, which included MFHC’s grant acquisition request for \$1,300,000. Id.

Specifically as to the Kānewai Spring Property, the DOFW submittal to the BLNR said,

Kānewai Spring is one of the last remaining freshwater springs in Honolulu. The mixing of fresh and salt water between Kānewai Spring and Kānewai Fishpond provides the fertile estuary that is the source of life for a wide variety of native species, including rare freshwater limpets pipiwai and hapawai, native shrimp ‘opae, ‘oeha‘a and ‘opae huna, native goby fish ‘o‘opu ‘akupa, and ‘ama‘ama and ‘aholehole which feed on the treasured limu ‘ele‘ele many of which are rarely seen today. It is the source of abundant freshwater and marine life. The health of Kānewai Spring directly affects the health of the waters into which it flows: Kānewai Fishpond, Paikō Wildlife Sanctuary, and Maunalua Bay. Archaeological and cultural sites surround the spring, the acquisition of which is a rare opportunity to protect a healthy natural spring. Ownership and stewardship of Kānewai Spring by [MFHC] will not only safeguard the health and function of this precious freshwater source, but will provide opportunities for educational access for schools, community groups and the public. Convenient access to a spring and fishpond in Honolulu opens the door for more field trips, placebased education, regular scientific monitoring, and various Hawaiian cultural practices.

⁶ The Application had been amended to reduce the grant request to \$1,300,000. Case Decl., ¶ 4.

...
... MFHC's management plan for Kānewai Spring centers around the protection and health of the Spring. MFHC will continue to educate school children and community about all of Kānewai Spring Complex's resources through mālama 'āina actions.

[MFHC] is a 501(c)(3) nonprofit organization; its mission is to preserve and mālama Honolulu's last fishponds for community education.

Exh. 3 to Motion. In its submittal, the DOFW recommended that the BLNR grant \$1,300,000 to MFHC to acquire the Kānewai Spring Property and declare the award of funds "exempt in accordance with Class 1, Exemption 15, on the June 12, 2008, Division of Forestry and Wildlife Exemption List." Case Decl., ¶ 4-5; Exh. 3 at 9. Class 1, Exemption 15 states:

The award of grants under H.R.S., Chapter 173A, for the acquisition of interests in land, provided that the acquisition does not cause any material change of use of land or resources beyond that previously existing.

Case Decl., ¶ 5.

The BLNR reviewed the recommendations contained in the submittal, as amended, at the Board's April 8, 2016 meeting and voted to approve them, including for the Kānewai Spring Property project. Case Decl., ¶¶ 2, 9. In accepting the recommendation set forth in the submittal, the BLNR declared that the Kānewai Spring Property project is exempt from the environmental assessment requirement pursuant to Class 1, Exemption 15 (redesignated as Class 1, Exemption 49 on the 6/5/15 DLNR Exemption List)⁷ and determined that awarding

⁷ On June 5, 2015, the Environmental Council approved a comprehensive list of exemptions from HRS chapter 343 for all divisions of DLNR (the "6/5/15 DLNR Exemption List"). Case Decl., ¶ 6; Exh. 4 to Motion. According to Case, Class 1, Exemption 15 was redesignated as Class 1, Exemption 49 on the 6/5/15 DLNR Exemption List. Id., ¶ 7. Class 1, Exemption 15 on the DOFW Exemption List, now redesignated as Class 1, Exemption 49 on the 6/5/15 DLNR Exemption List, is the HRS chapter 343 exemption that the BLNR typically relies upon in ensuring that LLCP grant awards comply with chapter 343. Id., ¶ 8.

an LLCP grant for the Kānewai Spring Property project probably will have minimal or no significant effects on the environment. Id., ¶ 9.

B. Procedural Background

On May 11, 2016, Plaintiff filed a Complaint alleging that the LLCP grant violated HEPA because no environmental assessment (“EA”) had been prepared. Plaintiff filed a First Amended Complaint (“FAC”) on June 1, 2016. In his FAC, Plaintiff claimed the BLNR erred in declaring the use of state funds for the acquisition and use of the Kānewai Spring Property to be exempt from an EA and that the BLNR must require MFHC and TPL to complete an EA before the DLNR decides the request for funds. FAC at pp. 1–2. Specifically, Plaintiff alleged that MFHC and TPL’s proposed use of state funds to acquire and use the Kānewai Spring Property requires the preparation of an EA pursuant to HRS § 343-5(c) and that the action taken by the BLNR (approval of the granting of public funds to MFHC and TPL) did not qualify for any exemption under HAR § 11-200-8(a) or DLNR’s Exemption List of June 5, 2015. FAC, ¶¶ 21-27.

Plaintiff alleged that MFHC and TPL’s application for funding proposes to change the use of the Kānewai Spring Property from single-family residential use to educational, community and public use. Id., ¶ 28. To accomplish their change in use, according to Plaintiff, MFHC and TPL intend to demolish the existing residential house and build an educational center consisting of classroom, community center, caretaker’s residence and administrative office. Id.

Plaintiff claims that MFHC’s and TPL’s proposed project is not a minor project qualifying for an exemption to an EA because MFHC and TPL intend to change the use of the property and construct new facilities to effectuate the change. Id., ¶ 29. Further, Plaintiff alleges BLNR did not consider the appropriate factors in making its determination that use of the public funds was exempt from the preparation of an EA and therefore erred in declaring the action to be

exempt and in approving MFHC's and TPL's use of state funds without requiring an EA. Id., ¶ 30.

III. DISCUSSION

As a threshold matter, the Court must first determine whether Plaintiff has standing to bring this action. If the Court concludes Plaintiff lacks standing, the Court is without subject matter jurisdiction and the Court must dismiss this lawsuit without reaching the merits of the case. Hawai'i Medical Ass'n v. Hawai'i Medical Service Ass'n, Inc., 113 Hawai'i 77, 94, 148 P.3d 1179, 1196 (2006) (citing Pele Def. Fund v. Puna Geothermal Venture, 77 Haw. 64, 67, 881 P.2d 1210, 1213 (1994)).

Plaintiff bears the burden of establishing standing. See Hawai'i Med. Ass'n, 113 Hawai'i at 95, 148 P.3d at 1197 (“[A]lthough lack of standing is raised by the defendant, the plaintiff bears the burden of establishing that he or she has standing”) (citing Sierra Club v. Hawai'i Tourism Auth., 100 Hawai'i 242, 250, 59 P.3d 877, 885 (2002)). In addressing a plaintiff's burden to establish standing, the Hawai'i Supreme Court has said that since standing requirements “are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation.” Sierra Club, 100 Hawai'i 242, 250, 59 P.3d 877, 885 (2002) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). “At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [courts] presum[e] that general allegations embrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the

summary judgment motion will be taken to be true.” *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130, 2137, 119 L.Ed.2d 351 (1992) (emphasis added) (internal quotation marks, brackets, and citations omitted).

On the question of Plaintiff’s standing, Plaintiff argued that he has standing based on his interest in the Fishpond, his geographic nexus to the Property, and “liberal standing rules in environmental cases.” Plaintiff’s legal argument set forth in his memorandum in opposition was as follows:

Where the interests at stake are in the realm of environmental concerns, [the Hawai`i Supreme Court has] (sic) not been inclined to foreclose challenges to administrative determinations through restrictive applications of standing requirements. *Ka Pa ‘akai O Ka Aina v. Land Use Commission*, 94 Hawai`i 31, 42, 7 P.3d 1068, 1079 (2000). An individual has standing if that person can show concrete personal or environmental interest in the property involved in the action. *Sierra Club v. Dept. of Transportation*, 115 Hawai`i 299, 320, 167 P.3d 292, 313 (2007). Having “a geographical nexus” to the location of a project is a more than sufficient concrete personal or environmental interest to establish standing under Chapter 343. *Id.*, 115 Haw. at 323, 167 P.3d at 316.

Here, Plaintiff and his wife are the owners of the entity that owns one of nine properties that surround and share an undivided interest in the Kanewai Fishpond...The Kanewai Spring Property is one of the other nine properties located on the Kanewai Fishpond and it also shares an undivided ownership interest in the Kanewai Fishpond...Given Plaintiff’s geographic nexus to the Kanewai Spring Property and this jurisdiction’s liberal standing rules in environmental cases, Plaintiff unquestionably has standing to file this HRS Chapter 343 complaint.

Memo. in Opp. at 3 – 4.

As set forth below, this is plainly insufficient to meet the standing requirements under Hawai`i law.

Under HEPA, a plaintiff may establish standing to sue either on the basis of a traditional injury in fact or on the basis of a procedural injury. *Sierra Club v. Dep’t of Transp.*,

115 Hawai‘i 299, 321, 167 P.3d 292, 314 (2007) (“Superferry I”). Of critical importance in determining whether a plaintiff has standing is assessing the nature of the injury alleged, as each element of the standing test depends on the theory of injury presented by the plaintiff and adopted by the court. Id.

To have standing under the traditional injury-in-fact test, a plaintiff must meet the following: (1) he has suffered an actual or threatened injury as a result of the defendant’s wrongful conduct; (2) the injury is fairly traceable to the defendant’s actions; and (3) a favorable decision would likely provide relief for the plaintiff’s injury. Sierra Club v. Hawai‘i Tourism Auth., 100 Hawai‘i 242, 250-51, 59 P.3d 877, 885-86 (2002). “A threatened injury under the traditional injury-in-fact test may be shown based on direct personal interests in the site of a project coupled with concerns of actual injury should the project go forward without adequate environmental review.” Superferry I, at 329, 167 P.3d at 322.

Alternatively, a plaintiff may establish standing based on a procedural injury (e.g., the BLNR’s failure to conduct an EA as required by HRS § 343-5 and determination that the proposed use of funds was exempt from chapter 343’s EA requirement). The test for a procedural injury under HEPA is as follows:

- (1) the plaintiff has been accorded a procedural right, which was violated in some way (e.g., . . . a failure to conduct an EA);
- (2) the procedural right protects the plaintiff’s concrete interests; and
- (3) the procedural violation threatens the plaintiff “personally,” which may be demonstrated by showing (a) a “geographic nexus” to the site in question and (b) that the procedural violation increases the risk of harm to the plaintiff’s concrete interests.

Superferry I, at 329, 167 P.3d 292, 322 (2007).

The Hawai‘i Supreme Court in Superferry I stated that “HEPA accords procedural rights to members of the public and protects the types of interests we have recognized in past environmental cases, such as aesthetic and recreational interests and other environmental

concerns.” Id. at 330, 167 P.3d at 323. Plaintiff must demonstrate harm to a “concrete interest” falling within the “zone of interests” of HEPA, the statute that confers upon Plaintiff the procedural right Plaintiff claims was violated. Superferry I, at 329, fn. 41, 167 P.3d at 322, fn. 41. Under HEPA, the “zone of interest” includes some environmental interest or concern. Id.

The law is clear that even with relaxed standing requirements in environmental cases, Plaintiff is obligated to establish standing. Here, Plaintiff has not met his burden under Hawai‘i law. Plaintiff’s interest in the Fishpond and his geographic nexus to the site are only one aspect of standing under a procedural injury. Under the procedural injury test laid out in Superferry I, *supra*, Plaintiff must also identify some environmental interest or concern, that affects him personally, that is threatened by the lack of an environmental assessment. Plaintiff did not specifically identify any environmental interest or concern in this case. During the hearing, counsel for Plaintiff made general reference to environmental interests, none of which were attested to specifically by Plaintiff or by any other specific evidence. Thus, Plaintiff has not established standing by way of a procedural injury.

Plaintiff also did not provide or point to specific evidence of an actual or threatened injury under the traditional injury in fact test. Plaintiff did not specifically identify any concerns of actual or threatened harm should MFHC be allowed to acquire the Property without conducting an EA.

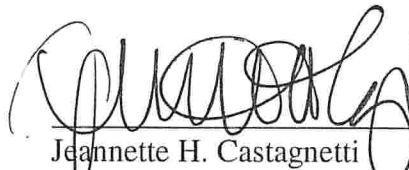
Thus, under either a traditional injury in fact or a procedural injury test set forth in Superferry I, Plaintiff has failed to establish standing. Accordingly, Plaintiff has not met the legal requirements for standing, and as such, the Court lacks subject matter jurisdiction over this matter.

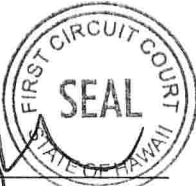
IV. CONCLUSION

As Plaintiff has not established standing to bring this lawsuit, this Court lacks jurisdiction.

Therefore, the Court ORDERS, ADJUDGES AND DECREES that Plaintiff's First Amended Complaint is dismissed for lack of jurisdiction.

Dated: Honolulu, Hawai'i, December 12, 2016.


Jeannette H. Castagnetti
Judge of the above-entitled Court



COPIES SENT VIA U.S. MAIL TO:

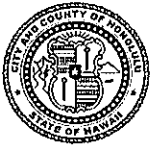
YVONNE Y. IZU
Moriyara Lau & Fong, LLP
Davies Pacific Center
841 Bishop Street, Suite 400
Honolulu, HI 96813
Attorneys for Plaintiff
RICHARD C. MACDONALD

AMANDA J. WESTON
Deputy Attorney General
Department of the Attorney General,
State of Hawai'i
Kekuanao`a Building, Room 300
465 South King Street
Honolulu, HI 96813
Attorneys for Defendants
BOARD OF LAND AND NATURAL RESOURCES,
SUZANNE CASE, in her official capacity, and the
DEPARTMENT OF LAND AND NATURAL RESOURCES

MICHELLE J. CHAPMAN
Case Lombardi & Pettit
Pacific Guardian Center, Mauka Tower
737 Bishop Street, Suite 2600
Honolulu, HI 96813
Attorneys for Defendant
MAUNALUA FISHPOND HERITAGE CENTER

ELIJAH YIP
W. KEONI SHULTZ
Cades Scutte
1000 Bishop Street, Suite 1200
Honolulu, HI 96813
Attorneys for Defendant
THE TRUST FOR PUBLIC LAND

Richard C. MacDonald vs. Board of Land and Natural Resources, et al., Civil No. 16-1-0902-05 JHC; In the Circuit Court of the First Circuit, State of Hawai'i; Memorandum Opinion



CITY COUNCIL
CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII

ORDINANCE _____

BILL 15 (2016), CD2, FD1

A BILL FOR AN ORDINANCE

PROJECT NUMBER	FUNCTIONS, PROGRAMS & PROJECTS	WORK PHASE	SOURCE OF FUNDS	TOTAL ALL FUNDS
	KANEWAI SPRING, KULIOUOU	900,000 L 100,000 X	1,000,000 CF	1,000,000
	<p>Provision of funds for the acquisition of land and other miscellaneous costs for the preservation of Kanewai Spring, Kuliouou as recommended by the Clean Water and Natural Lands Commission in Council Communication 293 (2015) for purposes consistent with the Revised Ordinances of Honolulu 1990, Chapter 6, Article 62. No monies shall be expended or encumbered unless the following conditions are included in the Conservation Easement over the Kanewai Spring site: 1) Prohibits on site commercial activity, specifically prohibiting conducting illegal weddings or vacation rentals; 2) Maintains a vegetative privacy screen along the site's Kanewai Fishpond (aka Kuliwai Lagoon) boundary that is at least six feet tall and two feet wide; 3) Requires Maunaloa Fishpond Heritage Center to comply with all noise ordinances and conduct its stewardship activities in a manner respectful of the surrounding residential neighborhood; 4) Prohibits unsupervised public access to the Kanewai Spring site; 5) Limits groups of students and volunteers to three groups per month with the understanding that Maunaloa Fishpond Heritage Center typically has no more than two groups per month; 6) Limits the number of people that can visit the Kanewai Spring site at one time to 30 people, with the exception of one annual stewardship gathering limited to 50 people; 7) Requires Maunaloa Fishpond Heritage Center to ensure that its Kanewai Spring volunteers do not enter Kanewai Fishpond (aka Kuliwai Lagoon), neighboring properties, and neighboring private roads; 8) Limits activity on site after 6:00pm; 9) Limits the property to one caretaker cottage for not more than two people; 10) Requires the student and volunteer groups visiting Kanewai Spring to park off site and walk to the Kanewai Spring site with the exception that a disabled or elderly student or volunteer may drive or be driven into the site; 11) Requires Maunaloa Fishpond Heritage Center to check on the Kanewai Spring site at least three times per week to maintain safety of the Kanewai Spring site and the nearby residences and discourage squatters; 12) Requires Maunaloa Fishpond Heritage Center to secure the site with a locked gate so that the site is not accessible to the public; 13) Requires Maunaloa Fishpond Heritage Center to request to be included on the Kuliouou Kalani Iki Neighborhood Board's agenda annually to summarize its activities and progress made in the past year and plans for the upcoming year; 14) Requires Maunaloa Fishpond Heritage Center to quarterly mail a brief update of their activities over the past quarter and their planned activity for the upcoming quarter to the residences surrounding Kanewai Fishpond (aka Kuliwai Lagoon) including notice of its annual report to the Kuliouou Kalani Iki Neighborhood Board; 15) Prohibits Maunaloa Fishpond Heritage Center from building outside of the current site building footprint, and restricts any building to one-story; and 16) Prohibits Maunaloa Fishpond Heritage Center from subdividing or using CPR on the site.</p>			
1973116	KAPOLEI REGIONAL PARK	100,000 D 900,000 C	1,000,000 GI	1,000,000
	Design and construct master-planned skate park and lighting improvements.			

COMPARISON OF RISKS OF CHANGES IN USE OF KĀNEWAI SPRING PROPERTY

RISK OF CHANGE IN USE	CITY FUNDING RESTRICTIONS AND CONSERVATION EASEMENT	PRIVATE BUYER/UNRESTRICTED
Building Height	One story	Multiple stories
Building Size	Existing building footprint (≤ 3,357 sq. ft.)	Greater than existing building footprint (> 3,357 sq. ft.)
Density	No subdivision or CPR	2 lot subdivision, CPR possible
Occupancy	2 people or less	> 2 people
Spring	MFHC to continue existing restoration and maintenance to allow Kānewai Spring and native species to thrive	<ul style="list-style-type: none"> • No restoration/maintenance of Kānewai Spring required • Owner could fill in Kānewai Spring, let it overgrow with invasive vegetation, or build over the lava tubes feeding spring
Visitors to Property	<ul style="list-style-type: none"> • No more than 3 groups of 30 or less per month • Unsupervised access to Kānewai Spring prohibited • Visitors must park off-site unless disabled or elderly 	<ul style="list-style-type: none"> • Unlimited visitors • Owner may allow access to Kānewai Spring without supervision • No limits on who may park on-site
Privacy/security	<ul style="list-style-type: none"> • 6 ft. tall, 2 ft. wide vegetative barrier abutting Fishpond • MFHC must check on site at least 3 times per week to maintain site safety and discourage squatters • MFHC must secure site with locked gate to ensure site is not accessible to public 	<ul style="list-style-type: none"> • No vegetative barrier required • Owner is free to leave property vacant and unattended for unlimited period of time • Owner under no obligation to restrict public access

From: mailinglist@capitol.hawaii.gov
Sent: Friday, March 31, 2017 2:07 PM
To: WAM Testimony
Cc: bcsc@hawaii.rr.com
Subject: *Submitted testimony for HB839 on Apr 3, 2017 13:35PM*

HB839

Submitted on: 3/31/2017

Testimony for WAM on Apr 3, 2017 13:35PM in Conference Room 211

Submitted By	Organization	Testifier Position	Present at Hearing
William K. Chang	Individual	Support	No

Comments:

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

From: mailinglist@capitol.hawaii.gov
To: [WAM Testimony](#)
Cc: mamiyaconsulting@gmail.com
Subject: Submitted testimony for HB839 on Apr 3, 2017 13:35PM
Date: Saturday, April 1, 2017 3:16:57 AM

HB839

Submitted on: 4/1/2017

Testimony for WAM on Apr 3, 2017 13:35PM in Conference Room 211

Submitted By	Organization	Testifier Position	Present at Hearing
Dede Mamiya	Individual	Support	No

Comments: Testimony attached.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

Do not reply to this email. This inbox is not monitored. For assistance please email webmaster@capitol.hawaii.gov

April 1, 2017

The Honorable Jill Tokuda
Chairperson
Senate Committee on Ways and Means
State Capitol
Honolulu, Hawaii 96813

Dear Chair Tokuda and Committee Members:

SUBJECT: Testimony on House Bill 839, HD1, SD1, Relating to the Department of Land and Natural Resources

I am a former Land Division Administrator of the Department of Land and Natural Resources (Department). More recently, I was involved in a project as a private citizen during which I discovered flaws in the Department's process in awarding Legacy Land Conservation funds which raise questions as to whether the Department is expending these funds in a responsible and judicious manner. Therefore, I support HB839, HD1, SD1 which proposes, in part, to audit the Land Conservation Fund otherwise known as the Legacy Land Conservation Program (Legacy Land). I respectfully suggest the following amendments:

- 1) Page 1, lines 15 to 16: Either delete the time period or lengthen it. For the Legacy Land Conservation Fund, a longer time horizon is needed to adequately conduct a program audit since the number of awards made each year is small (2-5) and the time from Land Board approval to the actual granting of the award can be lengthy. So by lengthening the audit's time period or, alternatively, allowing the Auditor to determine the time period, an appropriate number of awards can be included in the audit; and
- 2) Pages 1, line 16 to Page 2, line 2: Either delete "The auditor shall examine whether the funds that were expended by the department of land and natural resources were in accordance with the terms of the contracts, grants, and memoranda of understanding" or clarify that these tasks are "at a minimum." A performance audit looks more broadly at a program to assess whether the agency is achieving economy, efficiency and effectiveness in the use of resources. The sentence recommended for deletion appears to limit the scope and may not include, for instance, an investigation of the process of awarding the contracts and grants.

By way of background, I had been working with my neighbors in opposing the proposed acquisition of one of the 10 residential properties on our small, privately-owned lagoon in East Honolulu, the former Ronald Rewald property (also referred to as the Kanewai Spring property), by the Maunalua Fishpond Heritage Center (MFHC) and The Trust for Public Land (TPL) using State Legacy Land and City Clean Water funds.

Despite our history with MFHC dating back to 2008, MFHC never informed us of their applications for State and City funding and I and my neighbors only learned of it by way of a

newspaper article reporting on the Land Board's approval of Legacy Land funds to MFHC. As a result, we were not able to testify at the Legacy Land Commission, the Land Board, the City's Clean Water Commission, or the Neighborhood Board. In addition to shutting us out of the process, my research of documents showed multiple instances in which MFHC and TPL misrepresented our position on the project to the Department, City Clean Water Commission, and Neighborhood Board. While there is no legal requirement for notification to adjacent neighbors, the tactics used should raise red flags with the Department as to the legitimacy of an applicant.

But I found that the Department conducted little if any vetting of MFHC's qualifications or capacity to ensure the viability and legitimacy of the organization and their ability to implement the project over the long term. In its Legacy Land application: 1) MFHC stated it has no paid staff, 2) Its only evidence of any past grants is mentioned as "Several NOAA grants totaling \$35,000," 3) MFHC stated that any rebuilding of the house, as proposed in the application, will require a "well-developed fundraising plan and campaign." The Department did not require any financial statements, whether audited or not, and none were included with MFHC's application. MFHC's only existing projects include maintenance and small educational events involving volunteers at the former Rewald property and a State-owned property via a right-of-entry.

Also, my further research showed that MFHC has been filing 990-N forms to the Internal Revenue Service (IRS) which means MFHC's annual gross receipts were less than \$25,000 up to 2010 and then less than \$50,000 since then. It also appears MFHC neglected to file 990s for the years 2011, 2012 and 2013 which resulted in its 501(c)(3) status being revoked. By letter dated February 13, 2015, the IRS reinstated MFHC's 501(c)(3) status, seven months before they applied for Legacy Land funds.

Furthermore, MFHC testified in a court proceeding concerning this project as follows:

"Section H of the LLC Application form asks applicants to describe, among other things, the proposed use of the acquired property including any short and long term goals, resource management plan, sources of start-up funding, operation and maintenance funding. Given the broad range of information elicited by this question, MFHC and the Trust [TPL] provided an exhaustive description of **potential uses** of the Kanewai Spring Property on the LLC Application, including those that are **merely aspirational in nature due to the lack of present funding.**" And "MFHC currently has **no funding** for capital improvement projects at the Kanewai Springs Property, nor does MFHC have any **concrete plans** for capital improvement projects." (Bolding added.)

From these statements, it appears that MFHC was only proposing "potential" uses in its Legacy Land application, has no clear management or business plan for the property and has no funding to carry out the potential uses. Despite MFHC's lack of qualifications, track record, financial and organizational capacity, and solid plans, the Department's Legacy Land Program granted \$1.3 million to MFHC (along with the City's grant of \$1 million) to purchase – in full and in perpetuity – a \$2.3 million residential property in East Honolulu.

Another issue that should be examined is the Department's compliance with Chapter 343, HRS. The use of State funds through the Legacy Land Program triggers the requirement of an environmental assessment (EA). According to my research of past Land Board approvals of Legacy Land awards, the Department has not required any project to complete an EA prior to Board approval. Similar to past projects, the staff submittal and Land Board's approval exempted MFHC and TPL from completion of an EA. In this particular case, however, MFHC's proposed project changes the use from single-family residential to community and educational use and, in my opinion, did not meet any of the exempt EA classes which are intended only for minor changes. It appears no analysis was conducted into the appropriateness of the EA exemption. The Legacy Land application process did not include any analysis of EA compliance or evidence of any agency consultation regarding the EA exemption as required by law. Furthermore, the staff submittal did not include the Department's standard "Exemption Notification" form and, as such, no analysis or justification of the exemption was provided to the Land Board. In fact, the staff submittal referenced an EA Exemption List that was no longer valid.

I also noticed that the staff submittal oddly exempted the project from an EA but then made it subject to compliance with Chapter 343, HRS, in the approval section. If the Board is declaring this action exempt from an EA, then why would the project be subject to compliance with Chapter 343, HRS? Furthermore, the Department's Legacy Land Program guide only raises EA compliance **after** the Board has approved a grant.

In researching this issue, I discovered that the Legacy Land Program administrative rules (Chapter 13-140, HAR) appear to violate Chapter 343 in that EA compliance is addressed **after** the Board makes a decision on the award of State funds. Section 13-140-24, HAR, entitled "Awardee forms and requirements," states that "Prior to disbursing funds for land acquisition grants, the department may require awardees to . . . (8) Meet any requirements of chapter 343, HRS." Awardee is defined as "a grant applicant that has been awarded grant funding pursuant to section 173A-9, HRS." (I also noted that the Department was awarding grants dating back to 2007 but the program's administrative rules were only adopted in 2012.)

Pursuant to the EA law, "Acceptance of a required final statement shall be a condition precedent to approval of the request and commencement of the proposed action." (HRS §343-5(e)) So compliance must be met before the Board decision on an award can be made, whether through an exemption or completion of an EA/EIS. Such timing is only logical since the purpose of Chapter 343 is to provide the decision maker, as well as the public, with the impacts of the proposed action so that a more informed decision can be made. This apparent error in the rules reflects a basic misunderstanding of the purpose and requirements of Chapter 343 and suggests staff did no analysis of whether an EA was required by MFHC prior to the Land Board's decision.

Because no EA was prepared, we do not know what the proposed project entails or what the potential environmental impacts are. Also, through the EA process, we would have had the opportunity to correct any potential mistruths and exaggerations made by MFHC and TPL. Most notably, MFHC and TPL portrayed that the Kanewai Spring was threatened if the property was not

acquired. We who live on the lagoon that the Kanewai Spring feeds believe this to be a gross exaggeration at best.

Lastly, there are issues with the appraisal process used by the Legacy Land Program to determine the amount of State funding that was granted. The Department used the appraisal conducted by MFHC and TPL and paid for by MFHC, TPL and the owner of the property to be acquired.¹ An appraisal is the process of developing an **opinion** of the market value of a property. The appraiser identifies comparable sales and makes adjustments to account for differences between the subject property and the comparables. Because it is a subjective process, who contracts and pays for the appraisal is very important since there are competing interests: the landowner typically wants a higher price while the State wants to ensure the price is more reasonable. Because the State did not contract with the appraiser, there is a potential conflict of interest for the landowner to pay for the appraisal as was done in this case.

Furthermore, as has been its practice and as stated in its supplemental application, TPL will ask the landowner for a donation which represents another possible conflict of interest since a higher price would typically make a landowner more amenable to giving a donation. While I am not alleging any misconduct regarding this appraisal, I am merely pointing out that there may be conflicts of interest which can work against the State's best interests. At the very least, the Department should be scrutinizing a third party appraisal but it is my understanding the Department no longer employs licensed staff appraisers (as was the practice at my time at the Land Division) so there are no qualified persons to conduct such a review on the State's behalf.

Thank you for this opportunity to testify.

Sincerely,

Dierdre Mamiya

¹ Section 173A-4.5, HRS, of the Legacy Land law allows the Department to use appraisals conducted by a non-profit. The public land law (Section 171-17, HRS), on the other hand, requires that appraisals be conducted only by a State employee or an outside appraiser contracted by the State. This ensures the best interests of the State are represented in appraisals since the appraiser is clear that the State is his/her client.