HOKULI`A: The Costs and Consequences of Fake Farms

*Hawai`i's Thousand Friends 2006 Unsung Heroes are two outstanding attorneys with the Native Hawaiian Legal Corporation,* ***Alan Murakami and Moses Hai`a****. For more than five years they fought to protect Hawai`i's cultural heritage and agricultural lands from being paved over for multi-million dollar urban and resort development in the Hokuli`a case on the Island of Hawai`i.*

Here are excerpts from Moses Hai`a's presentation at our 2006 Annual Dinner:

The development at Hokuli`a spans nine ahupua`a in North and South Kona and includes 1,550 acres of agriculturally designated land. It contains an 18-hole golf course, 730 one- to three-acre agricultural lots ranging in price from $650,000 to $8 million per lot, and an 80-unit members' guest lodge. There are no plans for any kind of serious agriculture.

Initially, Hokuli'a's developer, Oceanside 1250 Partners, envisioned a residential development consisting of two separately zoned areas: 1) 684 acres rezoned from Ag-5a to Ag-1a, and 2) 756 acres rezoned from Ag-5a to Urban.

According to the state land use law, Chapter 205, this plan required the developer to apply to the State Land Use Commission (LUC) for a district boundary amendment from agriculture to urban. The LUC would, upon request, hold a contested case hearing to consider whether the proposed amendment conformed to the Hawai`i state plan and any impacts on preservation of important natural systems or habitats, valued cultural, historical or natural resources, etc.

Counties generally have the power to rezone within districts without LUC approval but they must, however, enforce the restrictions on use and the farm dwelling requirement on agricultural lands. (HRS 205-4.5) After a series of private meetings with County representatives, Oceanside 1250 changed the concept of the project to consist of one-acre agricultural lots and the County thereafter enacted a series of zoning changes, included a general plan amendment, and granted final subdivision approval for the "agricultural" project.

In effect, the County granted approvals for this agricultural subdivision with a golf course, members' lodge, golf club house, tennis facilities, beach club, gated community and million-dollar lots with residential housing as agricultural facilities and farm dwellings.

The County's Department of Public Works then issued mass grubbing and grading permits that provided the developer with the unlimited ability to grub and grade causing runoff that subsequently polluted Class AA coastal waters (the most protected class of marine waters) considered pristine, or in "wilderness" condition, fronting the project.

In the case brought before the Third Circuit Court by plaintiffs opposing the development, the court ruled the County of Hawai`i violated its public trust duty to

protect these coastal waters. On appeal, the County argued that it did not have any such public trust duties. The Hawai`i Supreme Court recently ruled otherwise:
"the County's argument that it has no "attendant obligations" under the public trust doctrine and that public trust responsibilities arise out of state ownership is not correct"…"the County has an affirmative duty to ensure conditions designed for effective soil erosion control are, in fact, met."

The State Department of Health issued a Notice of General Permit Coverage that prohibited the discharge of substances into Class AA waters. The Third Circuit Court ruled that DOH violated its public trust duties. On appeal, DOH argued that it need only place conditions on a developer and then enforce it if and when violated. The Hawai`i Supreme Court disagreed: **"duty requires DOH to not only issue permits after prescribed measures appear to be in compliance with state regulation, but also ensure that the prescribed measures are actually being implemented after a thorough assessment of the possible adverse impacts the development would have on the State's natural resources."**

Other violations of law were noted by the Third Circuit Court's Judge Ibarra, who found that "Agricultural activities as defined by HRS Chapter 205 include raising and breeding animals. Oceanside's prohibitions of this agricultural use hinders the farmer's ability to diversify and adapt in response to changing market conditions" and that "Oceanside's condition that a lot owner need only place 20% of his/her one-acre lot in active agriculture will lessen the likelihood that there will be maximum use of agricultural lands."

In September 2003 Judge Ibarra concluded, "The primary use and activities within the agricultural lots are not agriculture. Furthermore, the agricultural use and activities are insubstantial" and that under the "totality of the circumstances that the Hokuli`a activities and uses as proposed in the Covenants, Conditions and Restrictions (CC&Rs), particularly within the agricultural lots, violates Chapter 205."

In another violation of law, Oceanside 1250 tried to claim title and prevent public access to the ancient public right-of-way known as the "alaloa." The alaloa, a trail that circumnavigates the island and runs through the 1,550 acres of Hokuli`a property, was built in the 14th century and continued to be an important pedestrian access route in this area up through at least 1930 when prior property owners of Hokuli'a restricted access. The Third Circuit Court ruled that the alaloa is a "public highway" and ordered its restoration—"The right to use the stepping stone trail/alaloa as a right of way is a constitutionally protected right under Article XII, Section 7… (State Constitution)

Oceanside 1250 appealed Judge Ibarra's decision, launched a publicity blitz, and sought a legislative fix. The sum effect of these efforts forced a settlement among the parties in 2006.