

Using State Laws and Regulations to Protect Parks from Adjacent Development Impacts: A Case Study from Hawaii

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Introduction

Although federal laws, regulations, and management policies govern the management of national parks, parks have little control over surrounding lands. The parks most often affected by surrounding development are small parks and those in urbanizing areas. This paper provides an example of how development outside of a park might affect park resources and how a park can use state and local land use processes to help protect those resources. Kaloko–Honokohau National Historical Park, located on the island of Hawaii, formally intervened in an administrative hearing before the Hawaii Land Use Commission (LUC) regarding a proposed industrial development upslope of the park. In this specific case, the park entered into a contested-case hearing with TSA Corporation, which sought to have the classification of 102 acres of land changed from “Conservation” to “Urban” for the expansion of Kaloko Industrial Park.

Setting

Kaloko–Honokohau National Historical Park was established to “provide a center for the preservation, interpretation and culture, and to demonstrate historic land use patterns as well as provide needed resources for the education, enjoyment, and appreciation of ... traditional native Hawaiian activities and culture by local residents and visitors....” The park encompasses an area rich in native Hawaiian sacred places and traditional practices. Located on the west coast of Hawaii Island, the park consists of 564 acres of terrestrial and 596 acres of marine ecosystems. It contains 11 endangered, threatened, and candidate species and over 230 archeological sites. Three lava flows from Hualalai Volcano dominate the landscape, as do invasive plant communities.

The park’s cultural resources include Kaloko Fishpond, Aimakapa Fishpond, and Aiopio Fishtrap, all of which historically provided fish for Hawaiian families. Kaloko Fishpond is one of the most significant cultural features in the Park. The fishpond could

produce up to 5,000 pounds of fish per year. The park waters are a central element in many Native Hawaiian practices and rituals performed within the park boundaries. These traditional practices rely heavily on the quality of the water, including groundwater, in the national park.

The park is located on the leeward, or dry, side of the island in the rain shadow of Hualalai Volcano and receives 15 to 20 inches of rainfall a year. However, orographic convection produces between 40 and 60 inches of rain upslope at elevations ranging from 1,000 to 6,000 ft. The porous nature of the lava allows rainfall to seep quickly underground; consequently there are no permanent streams on the west side of the island. Groundwater eventually emerges as slightly brackish anchialine pools along the coast as the lighter freshwater lens rides over the heavier seawater. Freshwater springs are also found offshore. As this water flows downslope to the park it passes beneath development and can carry nutrients and contaminants produced or discharged there. The purpose of the park’s intervening in the land use change process

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was to have this and future developers minimize or eliminate potential contamination of the groundwater, thus reducing potential effects on park natural and cultural resources.

Hawaii Land Use Commission

State law created the LUC in 1961 and Hawaii was the first to have a land use law. Significant revisions to the law were made in 1974. There are nine governor-appointed commissioners, one from each of the four counties and five from the public at large. Commissioners are generally a mix of lawyers, developers, and union leaders. The original organizing principles of the LUC were efficient urbanization and the preservation of agricultural and conservation lands. By law, the decision-making process of the LUC is quasi-judicial in nature to ensure that those who are affected by the decision are accorded due process before an action is taken. The park's case was strengthened by two recent Hawaii Supreme Court decisions that reaffirmed the state's constitutional requirement to protect native Hawaiian traditional and customary rights exercised for subsistence, cultural, and religious purposes. In one of those cases, the Supreme Court specifically found that the LUC had run afoul of its obligation to uphold such rights.

Land Use Classification

The LUC recognizes four categories of land classification: Urban (4.7% of the state) Conservation (48%), Agriculture (47%), and Rural (2.3%). In Hawaii, counties have exclusive administration over land uses within the Urban district. Once classified by the state as Urban, county zoning laws and regulations apply. One reason the park intervened at the state level is that we believed the state was more likely to impose additional and stricter conditions on the developer than Hawaii County.

Procedures and Proceedings

In April 2000, the park received an environmental impact statement (EIS) preparation notice from TSA Corporation for the expansion of Kaloko Industrial Park as part of a peti-

tion to the LUC to change the property's land use designation from Conservation to Urban. The park responded to the notice, voicing our concern for water quality and concern with the current development. Specifically, contaminants had been found in park wells, fish-pond sediments, and fish tissue, and some waters were showing evidence of nitrification. We felt that these impacts could be attributed to the use of cesspools for wastewater disposal and dry wells for stormwater runoff in the first phases of Kaloko Industrial Park. TSA Corporation published its draft EIS for comment in August 2000. The park again commented, noting the inadequacy of scientific study to show that there would be no impact to the park from upslope development. TSA stated that they would upgrade wastewater disposal to a standard septic tank. The park argued that standard septic tanks and dry wells were inadequate methods of water treatment. The LUC held a hearing in November on the TSA EIS. The National Park Service (NPS) attended and, asserting that the EIS was inadequate, requested that the commission reject it. However the commission voted to accept the EIS.

Once the commission accepted the EIS, the park's only recourse was to become an intervening party in the LUC hearing process. The park was also encouraged to intervene by the State Office of Planning, which was concerned that the proposed development would adversely affect the environment but did not have access to the high level of expertise as did NPS. The park's desire was not to stop development but rather to ensure that it would not adversely affect park resources, primarily those dependent on good water quality. We requested four broad conditions be placed on the developer: (1) enhanced wastewater treatment to reduce nutrients; (2) stormwater runoff containment and treatment; (3) monitoring of water quality; and (4) a pollution prevention plan specific to the types of businesses that could be located within the development.

As an intervener, the park enjoyed the same standing as the other parties in this hearing: the petitioner (TSA Corporation), State

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Office of Planning, and Hawaii County. We could enter and present evidence, and cross-examine and call witnesses. Legal representation is not required before the LUC. The park started the first hearing without an attorney but after having a commissioner point a finger and shout, "Park Service, get a lawyer!" we knew we needed one.

From March 2001 to February 2002 the LUC held eight hearings on the TSA petition. Perhaps the most significant event for the park came early in the hearing process when the LUC conducted a site visit to Kaloko-Honokohau. All nine commissioners and parties were present. None of the commissioners had visited the park and prior to their visit viewed the area as an unproductive lava field. Once commissioners saw and understood the significance of park's cultural and natural resources, they were much more sympathetic to the our position.

Beginning with the petitioner, each party called its expert witnesses. The petitioner had experts in groundwater, marine resources, pollution prevention, botany, wildlife biology, cultural resources, and wastewater engineering and stormwater management. State and county experts were engineers with comments on wastewater and stormwater management.

The core NPS team consisted of Nicole Walthall, an assistant field solicitor from the San Francisco Field Office; Stanley Bond, integrated resource manager; Sallie Beavers, marine ecologist; and Roy Irwin from the NPS Water Resources Division. The team pulled together information that questioned the developer's findings of no effect on the park and contacted individuals who could provide relevant information and serve as expert witnesses. The park assembled an impressive list of expert witnesses from throughout the NPS, Department of the Interior, and other public and private organizations.

Needless to say there were significant disagreements between the developer's experts, who claimed that the development would have no impact, and NPS experts, who demonstrated that the developer's studies were flawed. The weakness of the petitioner's studies and its inability to support a claim of

no impact to the park was the focus of NPS' case. Testimony from state and county witnesses showed that county, state, and federal laws did not protect groundwater, except in the case of drinking water. Even the LUC members were incredulous over some of the developer's testimony, and the high point was when one commissioner, after hearing that a 10,000-gallon gasoline spill would not reach the park, stated (in Hawaiian Pidgin): "So far today I never hear anybody say it's not going to happen. All I been hearing 'it could not happen.' So you no need to be a rocket scientist to figure this out. Your spill in the area, especially on the Kona side with all the lava tubes and the cracks, you going to contain a spill in that area? I get only 12 grades of education, but I not dumb."

Outcome

Following the public hearings, each party prepared a draft Findings of Fact, Conclusions of Law, and Decision and Order. Ultimately, the LUC "supported [the precautionary principle] as applied to National Parks and determined that, for all proposed development adjacent to or near a National Park that raises threats of harm to the environment, cultural resources, or human health, precautionary measures should be taken to protect the National Park cultural and natural resources, even if some cause and effect relationships are not fully established scientifically" (Finding no. 165). The LUC adopted much of the language that was in the NPS version. As to the adequacy of the Findings on impacts to the park, the LUC stated: "For this petition, there was a lack of scientific study and research as to the potential adverse impacts from the proposed development. No risk assessments as prescribed by the NPS have been done to determine that no harm will come to the resources of the National Park, including anchialine ponds, the coral reef, and endangered and threatened species that rely on the health of those systems for habitat, and are considered sacred to native Hawaiians. Contrary to petitioner's position, a lack of scientific inquiry is cause for caution" (Finding no. 171). "There is an absence in the evidence

of competent and reliable studies showing that the proposed industrial development would not adversely impact the National Park's resources" (Finding no. 294). "Contamination of groundwater, increased nutrient load in the groundwater, changes in salinity of groundwater, and changes in groundwater volume alter the natural ecosystems in the National Park. The myriad of potential impacts from such changes—ranging from massive bird die-offs from avian botulism to increased population of toxic algae growth in the ponds—remains inadequately assessed and lack sufficient scientific study" (Finding no. 339).

The LUC concluded that, by law, it was required to develop and impose conditions that protected national park resources. In its Decision and Order, the LUC imposed 28 conditions on the development. For wastewater treatment, the lot owners are required to hook up to the central wastewater treatment system when it becomes available. Prior to availability, lot owners can use an enhanced septic system that removes 92% of the nitrogen and has added phosphorus removal. Only 45% of the lots (38) can be built upon prior to connection to the central wastewater treatment plant. For stormwater runoff, lot owners have to at least use oil/water separators or filters prior to runoff entering the ground. If a business uses nonpetroleum-based toxic substances, then the catchment basin must be designed to trap and remove them prior to the water entering the ground. The developer has to pay a pro-rated share of water-quality monitoring costs over the next ten years and produce a new Pollution Prevention Plan that is acceptable to the park and other parties.

Impact on Future Development

The LUC made it clear that these conditions would apply to other developers in the area of the park. A second commercial/light industrial development is planned for Conservation land directly south of this petition area and the park has successfully negotiated conditions with this developer. There are also broader implications to this ruling than simple effects on park resources. It appears that this Decision and Order has set an important precedent and that all future development adjacent to Class AA waters, not just in the vicinity of the park, will also likely be required to conform to these conditions.

Lessons Learned

- Comment at every opportunity so there is a record of your concerns.
- Get legal help from the Solicitor's Office early in the process. Legal processes are never simple or easy and are generally complex and extremely time consuming.
- Know what you want from the decision-making body.
- Use experts to analyze scientific documents and for testimony. Where possible, use qualified local experts who are familiar with the resource.
- Make sure your paperwork is in on time.
- Get the decision-makers to the site. Make your park and its resources concrete, not an abstraction.
- Reach out to the local community for public testimony. In the rush to pull evidence, information, and witnesses together, this is perhaps the area where we failed. It likely did not affect the final outcome, but could in future hearings.

