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Subject: FW: Hokuli'a created "legal cloud"
Date: Friday, March 23, 2007 1:50:17 PM
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-----Original Message-----

From: Charlee Abrams [mailto:kksp@juno.com]
Sent: Tuesday, March 21, 2006 7:27 AM
To: labrams@kauairentals.com
Subject: Hokuli'a created 'legal cloud'



Posted on: Tuesday, March 21, 2006

ANALYSIS

Hokuli'a created 'legal cloud'

By [Kevin Dayton](#)

Advertiser Big Island Bureau

KEALAKEKUA, Hawai'i — The Hokuli'a ruling is gone, but the cloud over certain homes on agricultural lands lingers.

Kona Circuit Judge Ronald Ibarra's decision last week approving the settlement in a lawsuit over the Hokuli'a luxury home project will allow construction on the development to resume, and

will provide a community benefits package worth as much as \$100 million.

The settlement ends the Hokuli'a lawsuit itself, but observers will argue for years about what the case meant, and whether it did harm or good.

From a developer's perspective, the case was shocking: The Hokuli'a golf course had been built, roads were under construction, homes had been started, \$350 million had been invested and more than 400 people were on the job at the luxury home project in Kona.

Then Ibarra in 2003 ordered that all work stop, shutting the entire project down. Ibarra ruled Hokuli'a was actually an urban-type luxury home development, not a viable farming project, and therefore was an illegal use of lands earmarked by the state for agriculture.

His ruling delighted critics of the so-called "fake farms," large homes built on agricultural lands where only nominal farming is done in a show of conforming to a state requirement that homes on agricultural lands must be "farm dwellings."

Ibarra's ruling was attacked by business people, who pointed out developer 1250 Oceanside Partners obtained county permission to proceed with the project years before Ibarra decided the project violated state land-use law.

In other words, one branch of government gave its approval to the project, prompting the developer to begin work at huge expense. Years later, Ibarra overruled the county and stopped the project, a decision that cost the developer many millions of dollars more.

The ruling was also a jolt to developers and county officials who planned or allowed luxury projects on ag lands. County officials and much of the business community had long regarded upscale developments such as Hokuli'a as economic drivers of the Big Island economy.

One study sponsored by an organization of large landowners found luxury homes such as those planned for Hokuli'a made up just 2 percent of the land lots on the Big Island, but accounted for more than 20 percent of the county's property tax collections.



A portion of the 5.5-mile bypass road to ease congestion on the Mamalahoa Highway was nearly done when a Kona circuit judge ordered all work stopped by the developer of the Hokuli'a luxury home project.

ADVERTISER LIBRARY PHOTO | Feb. 26, 2006

Experts predicted the luxury homes' share of the county tax take would grow dramatically as more wealthy people looked to the Big Island for vacation or retirement homes.

David Kimo Frankel, a Big Island lawyer and former lobbyist for the Sierra Club Hawai'i Chapter, said Ibarra's ruling slowed the breakneck pace of development of large subdivisions and individual lots on agricultural lands as builders realized they had to take the legal requirements on ag lands more seriously.

Frankel also believes the ruling prompted state lawmakers to make some lasting changes, such as a law passed last year to prohibit new golf courses on agricultural lands.

"That will have a lasting curative effect," he said, because it will make development harder for luxury projects such as Hokuli'a, which sold house lots arranged around a golf course built on agricultural lands.

Kona lawyer Michael Matsukawa, who has lobbied the state Legislature to pass a law that would have declared Hokuli'a to be legal, said Ibarra erred because state lawmakers never intended that agriculture would be required on all agricultural lands.

Vast areas on the Big Island were classified as agricultural lands with no consideration of whether they were actually well-suited for farming, said Matsukawa. Many of those lands were covered with old lava flows, and have very limited agricultural uses.

While lawmakers clearly wanted to protect the best agricultural lands, state officials dating to the administration of former Gov. George Ariyoshi wanted poor agricultural lands opened up for other kinds of development, Matsukawa said.

Alan Murakami, one of the lawyers who challenged Hokuli'a in court, disagrees. To Murakami, lands were classified as agricultural and the uses of those lands were limited as a deliberate strategy for containing urban sprawl. The farming requirement limits the uses of the ag lands, which discouraged speculation.

As that system has broken down or been undermined by luxury homes that pose as farms, land prices surged upward and real farmers have been priced out of the market, he said.

While the suit has finally been resolved, the underlying controversy over what is a proper use of agricultural lands has not.

Some of the most upscale subdivisions on the Big Island sit on agricultural lands, and little if any farming is done on those lots, said Allan Ikawa, president and chief executive officer of Big Island Candies Inc. Ikawa lives on one such lot in Hilo, and his neighbor, Big Island Mayor Harry Kim, lives on another.

"I think the law needs to be clarified," Ikawa said. "There's no way we can farm anything" on the one-acre lots there, he said.

Exactly how to use low-grade agricultural lands will continue to be debated this year at the Legislature as lawmakers consider House Bill 1368, which is now pending before the Senate Water and Land Use and Judiciary and Hawaiian Affairs committees.

After Ibarra's ruling, developer 1250 Oceanside Partners appealed the case to the state Supreme Court, and at the same time launched what turned out to be a years-long lobbying effort to get the state Legislature to intervene.

Supporters of the project wanted state lawmakers to essentially overrule Ibarra by passing a law declaring the Hokuli'a project to be a legal use of ag lands, and they made their case by highlighting the problems created by Ibarra's ruling.

Early on, supporters of the project pointed to the jobs lost when hundreds of construction workers were laid off because of Ibarra's ruling. However, there was so much demand for construction workers in the overheated Kona economy that the out-of-work employees of Hokuli'a and its subcontractors quickly found jobs elsewhere.

Backers of Hokuli'a also warned the ruling could be economically devastating on the Big Island and elsewhere in the state because thousands of homes had been built on agricultural lands, but no farming was being done or planned on those lots. Ibarra's ruling put a legal cloud over those homes, supporters argued.

Unfortunately for the developer, the Hokuli'a ruling coincided with the early stages of an astonishing real estate boom on the Big Island. If Ibarra's ruling really had created a "legal cloud," it was difficult for nonlawyers to see how that mattered when sales and property values were soaring.

Even lot owners in Hokuli'a were making money, with most new buyers in the subdivision paying close to \$1 million per lot even after Ibarra's ruling halted all construction. Investors apparently didn't share the developer's belief that Ibarra's ruling would trigger a Big Island real estate crisis.

Two other problems related to Ibarra's ruling proved more convincing at the county and state levels.

One was liability. The developer had sold 192 lots in the project before Ibarra stopped construction, and people who bought lots in Hokuli'a sued the county for \$265 million last year.

The lot owners alleged the county inflicted damages on the lot owners by failing to issue building permits for the lots. Ibarra's order prohibited the county from issuing such permits.

County lawyers predicted the lot owners would ultimately lose in court, although the suit is still pending. State lawmakers cited the potential for huge liability for the county from the lawsuit in advancing a bill this year to declare the Hokuli'a project to be legal.

That bill, which passed the state House and is pending in the Senate, has been credited by a number of observers with speeding the settlement negotiations that finally resolved the case with Ibarra's ruling.

The other issue was traffic. As a condition of the county rezoning for the project, the Hokuli'a developer agreed to build a \$55 million, 5.5-mile bypass road to ease traffic congestion on the Mamalahoa Highway. A portion of that bypass road was nearly complete when Ibarra ordered all work stopped, and the road has never opened to the public.

Matsukawa said the desire to get the new road open encouraged Kona residents to organize and lobby for a resolution of the lawsuit.

It also led to the founding of a group called the Kona Coalition of Concerned Citizens, which is working to advance the bypass road and other projects that will ease traffic congestion in Kona. The Hokuli'a lawsuit was a wake-up call, he said.

"Now that we saw the consequences, it's like a big whack on the head," Matsukawa said. "We've got to get involved."

Jim Medeiros Sr., who joined in the lawsuit against Hokuli'a as president of the Protect Keopuka 'Ohana, said Ibarra's ruling made developers more sensitive to laws governing the treatment of ancient burials and storm runoff as well as the ag lands issue.

"This whole thing was a good thing," Medeiros said. For developers, "that's one of the things that came out of this — they've got to pay attention and follow the laws, and pay attention to where they're at, be sensitive to the culture and the environment, because the communities of today are watching."

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