

NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



**STATE OF HAWAII**  
**DEPARTMENT OF LAND AND NATURAL RESOURCES**  
HISTORIC PRESERVATION DIVISION  
KAKUHIHEWA BUILDING  
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KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

December 20, 2013

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

**SUBJECT:** **RESUMMITAL** of Enforcement Action against Richard Stewart for alteration of historic properties during the course of land alteration activities without a permit. Kalaoa Ahupa'a, North Kona Moku, Island of Hawaii.

**TMK:** (3) 7-3-005:015

**SUMMARY:** This item was originally on the December 8 agenda. The landowner requested, and was granted a deferral to a January meeting.

This Notice of Violation requests the Board find that Richard Stewart violated Hawaii Revised Statutes §6E-11(c) by altering historic properties without a County approved grading and grubbing permit, and requests the Board assess an administrative fine pursuant to Hawaii Revised Statutes §6E-11(f).

**DATES OF INCIDENT:** On or about March 11, 2013

**AGAINST:** **Richard Stewart**  
**78-7178a Pu'u Loa Road**  
**Kailua, Kona, Hi 96740**

## **I. SUMMARY**

In March 2013, private historic properties located at TMK (3) 7-5-005:015 (“property”) in Kalaoa Ahupua‘a of Kona, Island of Hawaii, State of Hawaii, were injured and altered during the course of land alteration activities. See Exhibit A, Staff Site Visit Report. These activities consisted of mechanical impacts to eight (8) individual historic properties. The project was not reviewed pursuant to Hawaii Revised Statutes (“HRS”) §6E-42 and its implementing regulations because the violator failed to get a County grubbing and grading permit in violation of County ordinance. See Exhibit A, Figure 3. This constitutes a civil and administrative violation under HRS §6E-11(c) and subjects the property owner conducting the activities to civil and administrative penalties under HRS §6E-11(f). See Exhibit B.

The property owner of the subject historic property is Richard Stewart. Given the location and distribution of walls and enclosures, it is likely that the historic sites were contributing elements of the Kona Field System, a pre- and post-contact agricultural complex, listed as State Inventory of Historic Places number 50-10-37-6601.

## **II. FACTUAL BACKGROUND**

### **A. History of Permit Review on this property**

SHPD received a request for comments on a proposed change of Zone from Ag-5 to Ra-5 application for this property in November 2009. As a part of the review, SHPD staff archaeologist, Morgan Davis, visited the property on November 3, 2009. Due to dense vegetation, poor visibility and a lack of any documentation for the parcel, Ms. Davis recommended an archaeological inventory survey be completed and reviewed prior to final subdivision approval, or ground alteration (See Exhibit C). The county did not issue a permit, because the SHPD recommendation had not been completed.

### **B. Investigation of Violation**

On March 11, 2013, Bob Northrop, County of Hawaii Building Inspector, notified SHPD that a County of Hawaii Grubbing Permit was required for the land clearing activities at the subject parcel. This notification led to a field investigation of the alleged violations. Michael Vitousek, Hawaii lead archaeologist, visited the subject parcel with Mr. Northrop on March 11, 2013. Mr. Northrop escorted Mr. Vitousek onto the property, where extensive mechanical clearing activities were noted. Mr. Vitousek recorded 8 violations. See also photos in Exhibit A.

The violations included:

1. Possible pre-contact habitation site, altered by land clearing activities. Observable alterations include recent scarring on rocks likely caused by a steel track excavator passing over it. Additionally, stones in the face of the platform were pushed over. See Exhibit A, Figure 4
2. Large dry-stacked stone enclosure located in the makai northwest corner of the subject parcel. There are two large depressions in the wall where the excavator appears to have passed over the wall to enter the enclosure. The stones in the area of the depressions have been reduced to rubble. It was apparent to the archaeologist that the walls had been recently impacted because

the intact portions of the wall had a layer of moss covering them, and the disturbed portions did not. This site was significantly damaged. See Exhibit A, Figure 5.

3. Impact to historic dry-stacked rock wall. Faced portion of the wall has collapsed. Rocks show mechanical scarring. See Exhibit A, Figure 6.

4. Impact to historic rock dry-stacked rock wall resulting in the partial collapse of the wall. Rocks show mechanical scarring. Non-impacted rocks are moss covered. See Exhibit A, Figure 7.

5. Impact to historic rock wall. Wall is collapsed where excavator completely destroyed a section of the wall. See Exhibit A, Figure 8.

6. Impact to pre-contact dry stacked retaining wall. Partial wall collapse is probably caused by mechanical arm of the excavator. See Exhibit A, Figure 9.

7. Destruction of Pre-contact agricultural mound. Excavator ran over the mound and flattened it. See Exhibit A, Figure 10.

8. Destruction of a Pre-contact agricultural mount. Excavator ran through the mound and destroyed a large segment of it. See Exhibit A, Figure 1.

### **C. Notice of Violation**

On March 11, during the site visit, Mr. Northrup posted a "correction notice" at the subject property. A Correction Notice requires that the owner of the subject property stop all action, in this case grubbing, make the corrections, and then apply for the appropriate permit. In these cases, the County does not normally issue a notice of violation, as no permit conditions have been violated. Rather, the County relies on the Department of Land and Natural Resources (DLNR) and SHPD to cure the violations of its statutes.

After the notice of violation was received, the landowner hired Alan Haun to complete the Archaeological Inventory survey on the property. It was turned in to SHPD on June 20, 2013. SHPD is waiting for these violations to be processed before reviewing the project.

## **III. LEGAL AUTHORITY FOR ENFORCEMENT**

### **A. Violation of HRS §6E-11**

On or about March 11, 2013, the property owner and contractor engaged in land development and land alteration activities without a county grading or grubbing permit. A notice of correction was posted at the subject property on March 11, 2013 (See Exhibit A), indicating that a grading and grubbing permit was needed.

HRS §6E-11(c) states that:

It shall be a civil and administrative violation for any person to take, appropriate, excavate, injure, destroy, or alter any historic property . . . during the course of

land development or land alteration activities to which section 6E-42 applies, without obtaining the required approval.

In this instance, a grading and grubbing permit was needed, which would have triggered HRS §6E-42, allowing for SHPD to review the project (again) and reach an agreed upon mitigation plan with the owner.

HRS §6E-42(a) states that:

Before any agency or officer of the State or its political subdivisions approves any project involving a permit, license, certificate, land use change, subdivision, or other entitlement for use, which may affect historic property, ... the agency or office shall advise the department and prior to any approval allow the department an opportunity for review and comment on the effect of the proposed project on historic properties, ...

The property owner has done grubbing and grading without a permit, thereby violating HRS §6E-11(c).

#### **B. Administrative Penalties for Violation of HRS §6E-11(c)**

As previously stated, the property owner conducted land alteration activities that excavated, injured, and altered a known historic property without obtaining the required County approval. This action constitutes a violation of HRS §6E-11(c).

Any person who violates HRS §6E-11(c) shall be fined not more than \$10,000 for each separate violation (HRS §6E-11(f)). Additionally, if the violator directly or indirectly has caused the loss of, or damage to, any historic property, the violator shall be fined an additional amount determined by the court or an administrative adjudicative authority to be equivalent to the value of the lost or damaged historic property. Each day of continued violation of this provision shall constitute a distinct and separate violation for which the violator may be punished. Equipment used by a violator for the taking, appropriation, excavation, injury, destruction, or alteration of any historic property, or for the transportation of the violator to or from the historic property, shall be subject to seizure and disposition by the State without compensation to its owner or owners. The civil and administrative penalties imposed pursuant to HRS chapter 6E shall be in addition to the criminal penalties provided by this chapter and any other penalties that may be imposed by law (HRS §6E-11(i)).

#### **IV. ANALYSIS**

The legislature has declared:

that the historic and cultural heritage of the State is among its important assets and that rapid social and economic developments of contemporary society threaten to destroy the remaining vestiges of this heritage (HRS §6E-1).

To this end, the legislature enacted HRS Chapter 6E and its implementing rules. Chapter 6E creates a historic preservation program to implement, among other things, a state review process

to assure that: (1) historic properties are recorded; and (2) that appropriate mitigation takes place in the event that development threatens to destroy the historic integrity of a resource.

For private properties, the review process is triggered when the State or a County issues a permit. At that point, HRS §6E-42 affords SHPD an opportunity to comment on the project, and the rules specify that if historic properties will be affected by the project, SHPD and the landowner should come to an agreement on mitigation before the project proceeds. In this case, HRS§6E-42 has been triggered because the landowner should have obtained a grubbing and grading permit from the County. Under 6E-11(c) this is a clear violation. However, some explanation of the magnitude of the violation is needed.

Eight (8) sites were damaged or destroyed by grading and grubbing activities on the subject property. It is highly likely that all of the damaged properties were a part of the Kona Field system, a unique agricultural system developed by Hawaiians to husband both water and soil along the slopes of Hualalai and Mauna Loa (see Exhibit D, Brief description of the Kona Field System). Early farmers and ranchers in Hawaii adapted the field system to their needs so much of it survived until rapid development reached Kona in the 1980's. Today, much of the field system is gone. SHPD believes that those places left should be preserved where possible, and recorded where not possible. The appropriate application of 6E-42 allows for SHPD to negotiate appropriate mitigation. When landowners by-pass the permit process, SHPD and the residents of Hawaii are affected by the destruction of these irreplaceable historic resources.

Based on the facts and circumstances of this case, the property owner did not comply with SHPD's request for an Archaeological Inventory Survey (AIS) in 2009. Knowing that they would not get any permit without first completing the AIS, they proceeded to mechanically alter the land without the required County permits, thereby by-passing SHPD review. Their actions damaged or destroyed at least eight (8) historic sites, all potentially part of the Kona Field System, which is listed on the National Register of Historic Places. This is a violation under HRS §6E-42 and HRS §6E-11(c). The property owner's failure to comply with these statues and rules should result in a penalty of \$500 per site, and \$5,000 for the impacts to the overall Kona Field system landscape.

**V. RECOMMENDATION:** That the Board:

1. Find that Richard Stewart has violated HRS §6E-11 (c) by altering or damaging a known historic property without a permit.
2. Find that Richard Stewart has damaged 8 individual sites and also impacted the Kona Field System Landscape.
3. Fine Mr. Stewart \$500.00 per individual site and \$5,000 for impacts to the Kona Field System Landscape, for a total fine of \$9,000
4. Assess administrative fees of \$400.00.

Total Fine and Fees: \$9,400

All fines and fees to be paid to the Hawaii Historic Preservation Special Fund.

Respectfully Submitted



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Michael Vitousek  
Lead Hawaii Archaeologist

APPROVED FOR SUBMITTAL



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William J. Aila, Jr. Chairperson