

STATE OF HAWAI'I  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Office of Conservation and Coastal Lands  
Honolulu, Hawai'i

Board of Land and Natural Resources  
Department of Land and Natural Resources  
State of Hawai'i  
Honolulu, Hawai'i

FILE NO.: Violation OA-14-02  
REF: OCCL: LY

September 12, 2014

**REGARDING:** Enforcement File OA-14-02  
Unauthorized Landscaping, Drainage Improvements, and Earth Retention Structures

**LANDOWNER:** State of Hawai'i

**LOCATION:** Diamond Head State Monument

**TMK:** (1) 3-1-042:017 (por.)

**PARCEL SIZE:** 6.465 acres

**SUBZONE:** Resource

**DESCRIPTION OF AREA:**

The subject parcel is located in Honolulu, O'ahu, Hawai'i, on the southern slope of Diamond Head Crater (see **Exhibit 1**). The parcel is part of the Diamond Head State Monument (DHSM), encumbered by Governor's Executive Order No. 3642 and is under the jurisdiction of the DLNR Division of State Parks. The parcel is located in the Resource Subzone of the Conservation District (see **Exhibit 2**). The area in question is located on the southern boundary of the parcel. The site is largely undeveloped and covered with Kiawe trees. Two concrete drainage swales meet at a point near the alleged encroachment area.

To the south of the subject parcel is TMK (1) 3-1-042-017 which is currently owned by Poka Place, LLC. Poka Place, LLC is the successor in interest to Jack Cione and Maydelle Nevans Cione who bought the property through an auction conducted by the Department in the 1960's. The Poka Place lot includes a main residence as well as a guest residence, a carport and pool. Between the two residences is a 10-foot wide storm drainage easement in favor of the State.

## RECENT HISTORY

In July 2013, OCCL opened an investigation into the alleged unauthorized uses on Conservation lands. During a site visit conducted on July 8, 2013, staff found that Poka Place and/or their predecessor(s) in interest, had constructed various improvements within the State Park property and within the Conservation District without the authorization of the Department or the BLNR.

Improvements observed on property included the following (see **Exhibit 3**):

- An irrigated landscaped area with ornamental lawn furnishings, a waterfall and a pond feature on the northeastern side of the encroachment area;
- Earth retention structures above the irrigated landscaped area and parallel to the guest residence on the northwestern side of the encroachment area; and
- A terraced, landscaped area on the northwestern side of the encroachment area near the guest residence;

On July 12, 2013, a Notice of Alleged Violation (NOV) was sent to land owner Poka Place, LLC (see **Exhibit 4**).

On January 7, 2014, correspondence was received from Edmund K. Saffery and Marissa L.L. Owens from Goodsell Anderson Quinn & Stiefel representing the landowner (see **Exhibit 5**). In their correspondence, they stated that in response to the NOV received, Poka Place, LLC hired Alpha Engineers, Inc. (AEI) to conduct a study regarding the purpose, importance, and impact of the improvements within the encroachment area to Poka Place. The study was included as a part of their correspondence package and is briefly summarized below (see **Exhibit 5a**).

The study separates the existing improvements into two main areas, the retaining wall area and the irrigated landscape area (see **Exhibit 6**). According to the study, purpose of the existing land uses within the encroachment area are as follows:

Retaining Wall Area: The cement rubble masonry (CRM) wall parallel and adjacent to the guest residence, near the northwest corner of the property was installed to stabilize the slope and protect the guest residence from falling/sliding debris.

The other CRM walls in the area were constructed to terrace the area and provide a measure of drainage control and water quality improvement of the runoff from the slopes of the DHSM.

Irrigated Landscaping Area: The irrigated landscape area within the DHSM includes a CRM wall that dams the flow of water from the area in which two existing concrete swales from the DHSM meet and form a small valley. The ponding behind the CRM wall acts as a detention basin that reduces flooding of the downstream area. It also acts as a boulder basin that traps heavy debris behind the wall preventing damage to the main residence.

The main area of the irrigated landscape area is located below the CRM dam and includes a small pond, waterfall, irrigation system, CRM walls, and paved rock walkways. They provide a measure of erosion control, slope stability, and open space.

The report recommended that the CRM wall parallel to the guest residence as well as the CRM dam remain in place (primary importance improvements) and that the other improvements be removed and the area restored (secondary importance improvements)(see Exhibit 7).

As a result of the study, Poka Place, LLC proposed the following resolution:

1. That Poka Place remove the terraces encroaching into the DHSM and restore the area to its natural state;
2. That the retaining wall adjacent to the guest residence, as well as the wall acting as a “dam” above the irrigated landscaping area be allowed to remain in place in order to continue to serve the critical role these walls play in stabilizing the slope face of the DHSM property and directing runoff from State land which would otherwise damage the structures on Poka Place property and/or pose a danger to the persons residing there; and
3. That the irrigated landscaping area below the “dam” wall be allowed to remain in place as a means of improving erosion control and slope stability for the slop face of the DHSM and as a measure of protection for the Poka Place structures and residents.

A subsequent site visit was conducted by Staff on May 29, 2014 to confirm the locations and improvements as described and depicted in the AEI report.

## DISCUSSION

Chapter 13-5, Hawai‘i Administrative Rules (HAR) and Chapter 183C, Hawai i Revised Statutes (HRS), regulate land uses in the Conservation District by identifying a list of uses that may be allowed by Conservation District Use Permit (CDUP). The chapters also provide for penalties, collection of administrative costs, costs associated with land and/or habitat restoration, and damages to state land for uses that are not allowed or for which no permit has been obtained.

Land use is defined in HAR §13-5-2(2) as

- (1) *The placement or erection of any solid material on land if that material remains on the land more than fourteen days, or which causes a permanent change in the land area on which it occurs;*
- (2) *The grading, removing, harvesting, dredging, mining, or extraction of any material or natural resource on land;*
- (3) *The subdivision of land; or*
- (4) *The construction, reconstruction, demolition, or alteration of any structure, building, or facility on land.*

The Poka Place improvements meets this definition of land use as it caused a permanent change in the land area, involved the grading land, and involved the construction of unauthorized structures.

The closest identified land use for the earth retention structures would be found under HAR §13-5-22, P-13 LAND AND RESOURCE MANAGEMENT (C-2) and the closest identified land use for the landscaping improvements would be found under and HAR §13-5-23, L-2 LANDSCAPING (B-1). The landowner has not applied for a Conservation District Use Permit for any land use on the parcel.

### ANALYSIS:

The penalty range for the unauthorized land uses will be substantially determined based on the type of permit that would have been required, had the landowner applied to the DLNR to conduct the identified land use(s). Therefore, based on the *Conservation District Violation Penalties Schedule Guidelines and Assessment of Damages to Public Land or Natural Resources, Section 2.1, PENALTY CALCULATION (see Exhibit 8)*:

- The earth retention structures, pursuant to HAR §13-5-22 would require a CDUP Departmental Approval, therefore the Penalty Range is from \$2,000.00 to \$10,000.00; and
- The landscaping improvements pursuant to HAR §13-5-23 would require a CDUP Site Plan Approval, therefore the Penalty Range is from \$1,000.00 to \$2,000.00.

### FINDINGS:

The unauthorized landscaping and construction of earth retention structures are in violation of Chapter 183C, HRS and Title 13-5, HAR. Based upon our investigation, OCCL finds that:

1. The location of the improvements, Tax Map Key: (1) 3-1-042:047, is in the Conservation District and is classified as *Resource* Subzone;
2. That these improvements require a CDUP pursuant to HAR §13-5-22, *Identified Land Uses in the Protective Subzone*, P-13, LAND AND RESOURCE MANAGEMENT and HAR §13-5-23, *Identified Land Uses in the Limited Subzone*, L-2, LANDSCAPING;<sup>1</sup>
3. That these improvements were not authorized by the Department of Land and Natural Resources under HAR §13-5.

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<sup>1</sup> Within the Conservation District, there are five subzones as follows: Protective (P), Limited (L), Resource (R), General (G), and Special Subzone (S). Excluding the Special Subzone, the four remaining subzone are arranged in a hierarchy of environmental sensitivity, ranging from the most environmentally sensitive (Protective) to the least sensitive (General). As the DHSM parcel is located within the Resource Subzone, pursuant to HAR §13-5, all identified land uses and the associated permit or site plan approval requirements listed for the Protective and Limited Subzones also apply to the Resource Subzone, unless otherwise noted.

**AS SUCH STAFF RECOMMENDS AS FOLLOWS:**

That, pursuant to HRS §183C, the Board find the landowner in violation of HRS §183C-7; and HAR §13-5-22 and §13-5-23, and is subject to the following:

1. That Poka Place LLC is fined \$10,000.00 in one instance for violating the provisions of HRS §183C-7 and HAR §13-5-22 for unauthorized construction of earth retention structures by failing to obtain the appropriate approvals within the Conservation District;
2. That Poka Place LLC is fined \$2,000.00 in one instance for violating the provisions of HRS §183C-7 and HAR §13-5-23 for unauthorized landscaping within the Conservation District;
3. That Poka Place LLC is fined an additional \$2,000.00 for administrative costs associated with the subject violations (\$1,000.00 for OCCL and \$1,000 for State Parks);
4. That Poka Place LLC shall pay all designated fines and administrative costs (\$14,000.00) within ninety (90) days from the date of the Board's actions;
5. That Poka Place LLC shall apply for an after-the-fact Conservation District Use Permit (CDUP) Departmental Permit for the earth retention walls and landscaping improvements within one hundred twenty (120) days of the Board's action on this matter;
6. That Poka Place LLC shall provide engineered approved stamped plans to be submitted along with the CDUP application;
7. That the CDUP for the earth retention structures and landscaping will need to be approved by the Department, who has the final authority to sign, modify, or deny the permit; and that if the permit is denied walls will need to be removed and the area restored to its natural state;
8. That Poka Place LLC shall remediate and restore the terraced landscaping areas, pursuant to approval of plans by the Department.
9. That Poka Place LLC shall remediate the irrigated landscaping area to the extent in which the drainage purpose of the area is maintained, but the extraneous improvements (i.e. waterfall and pond) are removed and restored pursuant to approval of plans by the Department.
10. That Poka Place LLC either remove or replace the introduced and/or invasive species that are part of the terraced landscaping area and the irrigated landscaping area with either endemic or indigenous plants to Hawai'i, or allow the area to regrow naturally.
11. That Poka Place LLC, and its successors and assigns, shall hold the State of Hawai'i harmless from and against any loss, liability, claims, or demand for property damage, personal injury, and death arising from the construction of improvements over the

existing drainage easement as well as any alteration to the natural drainage pattern of the property.


- 12. That no further work shall occur on the subject parcel within the Conservation District, without the Board of Land and Natural Resources approval; Chairman's approval and/or OCCL approval. If Poka Place, LLC conducts further work in the subject parcel without approval, they will be fined an additional \$15,000.00 a day; and
- 13. That in the event of failure of Poka Place, LLC to comply with any order herein, the matter shall be turned over to the Attorney General for disposition, including all administrative costs.

Respectfully submitted,



Lauren Yasaka  
Office of Conservation and Coastal Lands

Approved for submittal:




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WILLIAM J. AILA, Jr., Chairperson  
Board of Land and Natural Resources

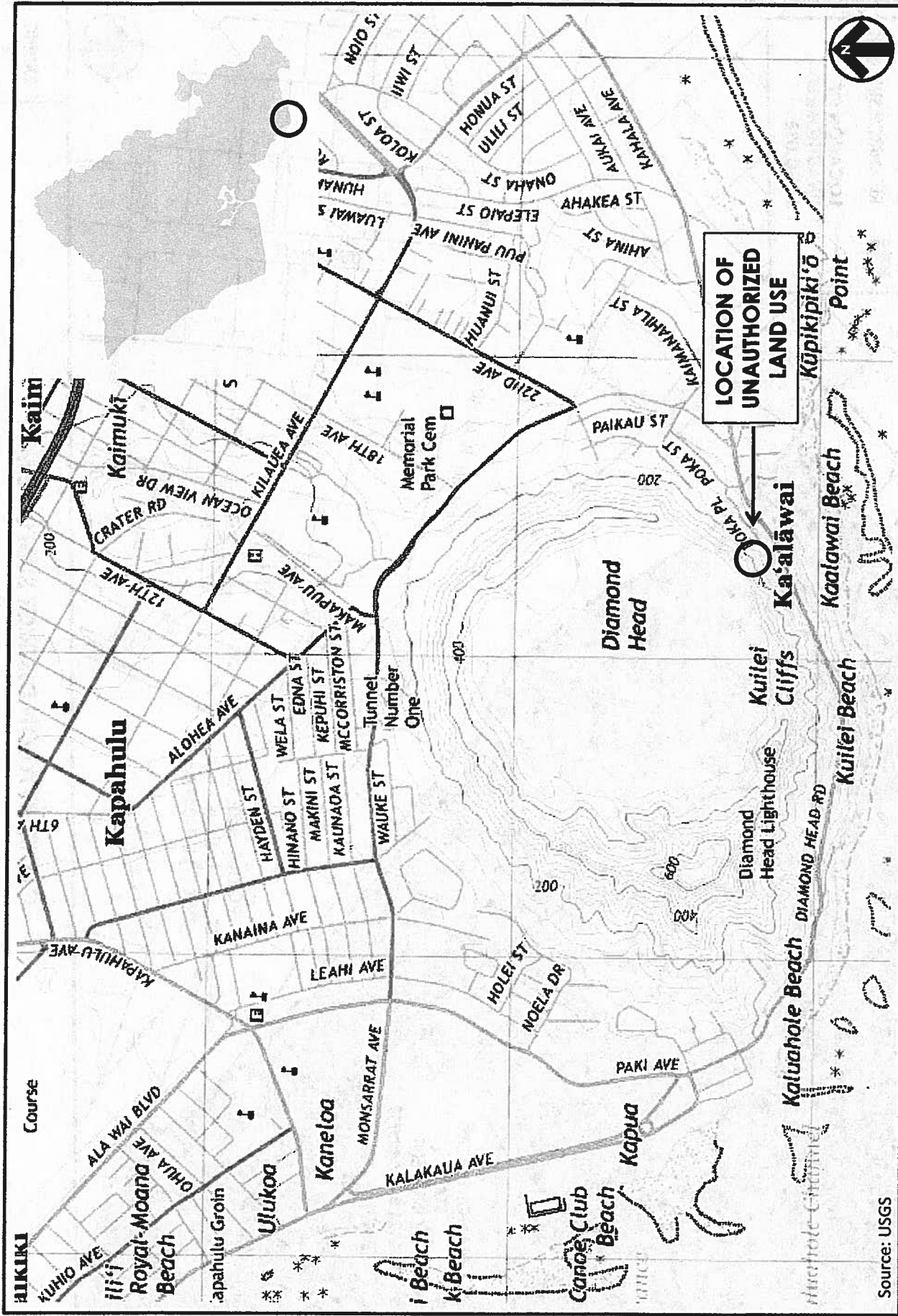


EXHIBIT  
1

LOCATION MAP

Source: USGS

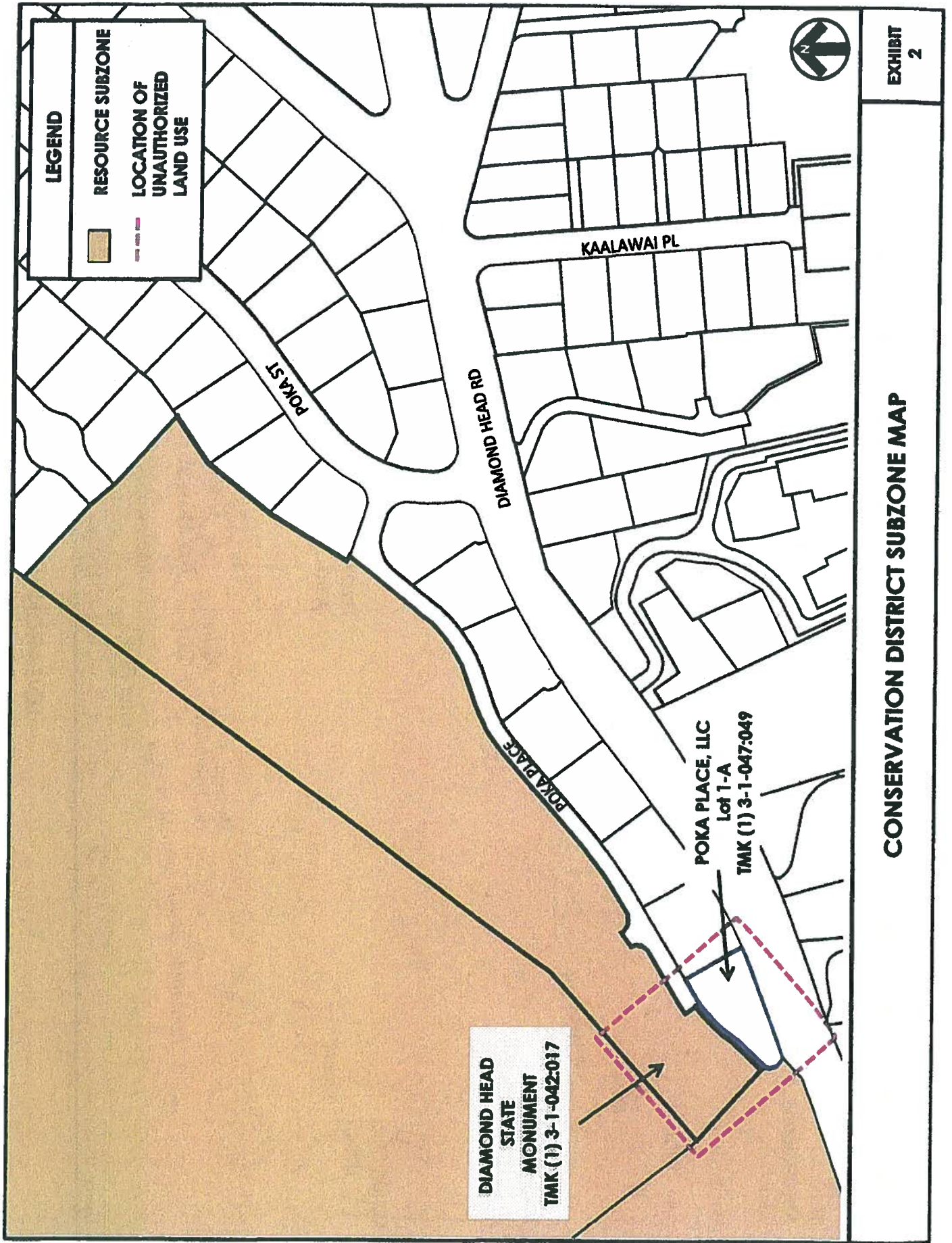
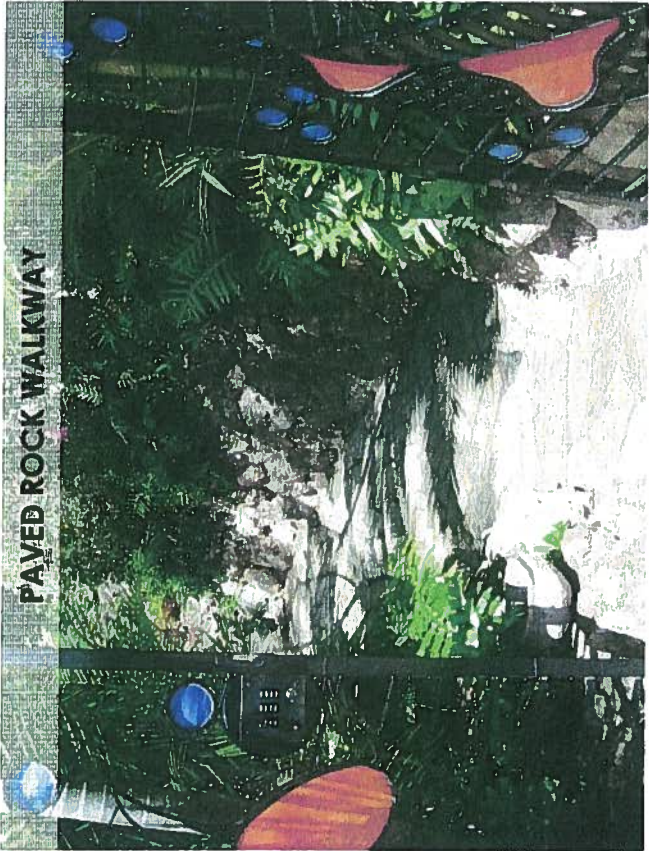


EXHIBIT  
2

CONSERVATION DISTRICT SUBZONE MAP





PAVED ROCK WALKWAY



IRRIGATED LANDSCAPING AREA



POND

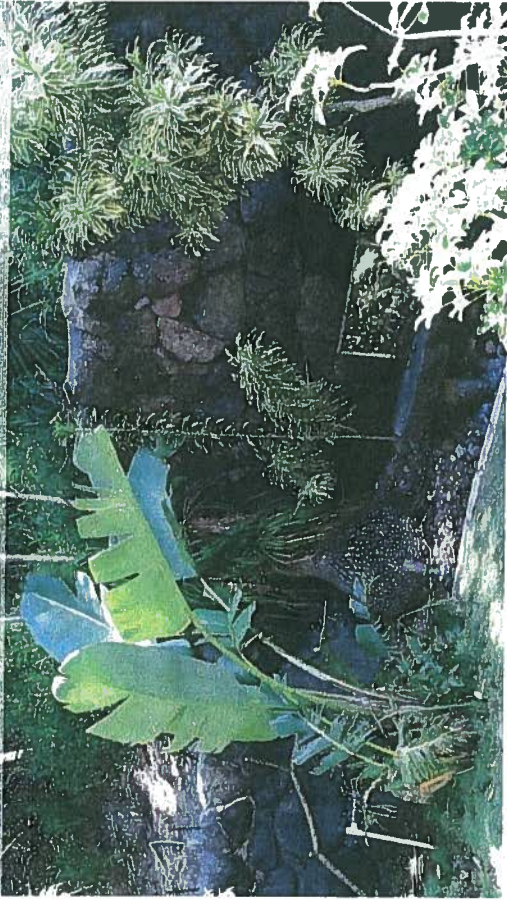
PHOTOS

EXHIBIT  
3

EARTH RETENTION WALLS NEAR MAIN RESIDENCE



IRRIGATED LANDSCAPING AREA -  
EARTH RETENTION WALL & SITTING AREA



TERRACED LANDSCAPING AREA



EARTH RETENTION STRUCTURE PARALLEL  
TO GUEST RESIDENCE



PHOTOS

NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

WILLIAM J. AILA, JR.  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

ESTHER KIA'AINA  
FIRST DEPUTY

WILLIAM M. TAM  
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

NOTICE OF ALLEGED VIOLATION

JUL 12 2013

Enf.: OA-14-2

CERTIFIED MAIL RETURN RECEIPT

7009 3410 0000 4942 9507

Poka Place, LLC.

C/O Goodsill Anderson Quinn & Stifel

Attn: Edmund K. Saffery, Esq.

First Hawaiian Center, Suite 1600

999 Bishop Street

Honolulu, HI 96813

Dear Mr. Saffery:

**SUBJECT:** Alleged Unauthorized Landscaping, Drainage Improvements, and Earth Retention Structures Constructed within Conservation District and Public Land, Located at Diamond Head, Island of Oahu, TMK: (1) 3-1-042:017

NOTICE IS HEREBY GIVEN that your client may be in violation of both conservation district land use laws and public land laws. Your client's property (TMK: (1)3-1-047:049) abuts Diamond Head State Monument (TMK: (1) 3-1-042:017) which comprises public lands set aside to the Department of Land and Natural Resources, Division of State Parks, and zoned within the state land use conservation district.

A site inspection conducted on July 8, 2013 revealed that your client, or predecessor[s] in interest, had constructed various improvements within the state park property and within the conservation district without the authorization of the Department or the Board of Land and Natural Resources. A partial property survey map was prepared by your client that demarcates, in part, the property boundary between parcel #017 (State Park) and #049 (your client). The property boundary was staked when we visited the property on July 8, 2013.

The various improvements are considered encroachments or unauthorized structures on public land, and also constitute zoning violations within the state land use conservation district. The various improvements we observed consisted of a retaining wall, terraces, and irrigated landscaping all of which were either installed or maintained by your client, or representatives of your client, or predecessor[s] in interest

This letter is written to notify you that pursuant to 183C, HRS (Conservation District) the Board of Land and Natural Resources may subject your client to fines of up to \$15,000.00 per violation in addition to administrative costs, cost associated with land or habitat restoration, and damages

EXHIBIT 4

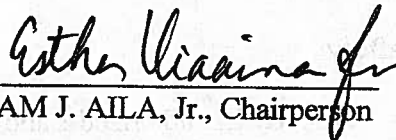
to public land or natural resources, or any combination thereof. After written or verbal notification from the department, willful violation of this chapter or any rule adopted in accordance with this chapter may incur an additional fine of up to \$15,000 per day per violation for each day in which the violation persists.

In addition, it appears that the improvements are built on state property without permission. Section 171-6 (12), HRS, empowers the Board to impose fines, assess costs, and require the land be restored to its original condition.

While it is the intent of our office to schedule a violation proceeding before the Board of Land and Natural Resources (BLNR), in the near future, we thought it would be prudent to provide you with written notice of these allegations. You will be notified of the specific issues, as well as the time and place of the BLNR meeting in advance of the meeting.

Should you have any questions or wish us to clarify or discuss anything, please contact Sam Lemmo of the Office of Conservation and Coastal Lands at (808) 587-0377.

Sincerely,



WILLIAM J. AILA, Jr., Chairperson

C: Department of the Attorney General (Land Trans)  
ODLO/DOCARE-Oahu  
City and County of Honolulu  
Dept. of Planning and Permitting

GOODSILL ANDERSON QUINN & STIFEL

A LIMITED LIABILITY LAW PARTNERSHIP LLP

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January 7, 2014

**VIA HAND DELIVERY**

William J. Aila, Jr., Chairperson  
Sam Lemmo, Office of Conservation & Coastal Lands  
Department of Land and Natural Resources  
P.O. Box 621  
Honolulu, HI 96809

2014 JAN 10 P 12:46  
OFFICE OF CONSERVATION & COASTAL LANDS  
STATE OF HAWAII

**Re: Notice of Alleged Violation for Unauthorized Landscaping; TMKs:  
(1) 3-1-042:017, (1) 3-1-047:049**

Dear Mr. Aila and Mr. Lemmo:

This law firm represents Poka Place LLC (“Poka Place”), the owner of a residential lot located at 3703 Poka Place, Honolulu, Hawaii (the “Property”). The Property borders land constituting part of the Diamond Head State Monument (“DHSM”). This letter is written in response to the Notice of Alleged Violation dated July 12, 2013 (“NOV”) issued to Poka Place concerning alleged unauthorized landscaping improvements located at Diamond Head, Island of Oahu, TMK: (1) 3-1-042:017.

As you know, the NOV was issued following a site inspection conducted by representatives of the DLNR on July 8, 2013. As discussed below, following that inspection, Poka Place retained the services of Alpha Engineers, Inc. (“AEI”) to review the NOV in order to determine the impact, if any, on the Property if the various improvements discussed in the NOV are removed. AEI’s findings, which we only recently received, are attached hereto for your information and reference.

**The Alleged Violations Noted In The NOV**

In the NOV, the DLNR separates the alleged encroachments into three separate categories: retaining walls, terraces and irrigated landscaping. In order to respond to the potential violations noted in the NOV, AEI was asked to, inter alia, conduct an assessment and analysis of these improvements in order to determine their

William J. Aila, Jr.  
January 7, 2014  
Page 2

purpose, importance, and impact on Poka Place's property (such as the residential structures, carport, pool and walkways on Poka Place's lot).

As observed during the July 8, 2013 inspection at the Property, the affected land, including the portion within the adjoining DHSM, is very steep, with the existing ground at the center of the lot sloping about 22 percent with elevations ranging from about 130 feet mean sea level north of the lot to 113 feet mean sea level south of the lot. Because of the topography of the land in and adjacent to the Property, drainage, run off and debris/rock fall originating on land in the DHSM presents significant safety issues to Poka Place's property and anyone residing there. As discussed below and in the AEI report, the improvements noted in the NOV all serve a purpose related to controlling the runoff and debris which comes from the DHSM and the dangers arising from it.<sup>1</sup>

1. **Retaining Walls**

One of the critical improvements mentioned in the NOV is a retaining wall located parallel to and four feet from Poka Place's guest residence. This retaining wall, which is highlighted in yellow on Figure 3 in the AEI report, was installed to stabilize the slope and protect the guest residence from falling and sliding debris.

A smaller wall, found above the irrigated landscaping area and running parallel to the main residence, highlighted in pink on Figure 3 in the AEI report, is equally important. This wall "dams" water flowing from the DHSM and reduces the flooding of the area beneath.<sup>2</sup> It also traps heavy debris and therefore prevents damage to the main residence and other downstream structures and individuals.

As noted in the report, if Poka Place is required to remove these improvements entirely, the slope face of the adjacent DHSM property will be rendered unstable and the safety of the residence and the people residing on Poka Place's lot will be severely jeopardized. Given that fact, it is Poka Place's position that from a safety and

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<sup>1</sup> A diagram depicting improvements of "primary importance" and "secondary importance," as determined by AEI, is attached as "Figure 4" to the AEI report.

<sup>2</sup> This wall is discussed in the AEI report under the heading of "Irrigated Landscaping Area."

William J. Aila, Jr.  
January 7, 2014  
Page 3

liability standpoint, allowing these retaining walls to remain in place is in the interests of both Poka Place and the State of Hawaii.<sup>3</sup>

2. **Terraces**

During the July 8, 2013 inspection, DLNR staff also noted a series of walls built to terrace the area above the guest residence. While these walls might at first blush appear to be ornamental, they do in fact play a role, working in coordination with the retaining wall immediately adjacent to the residence structure, in providing erosion control, slope stability and a measure of drainage and water quality control of the runoff that comes onto the Property from the adjacent land owned by the State. The terraces also enhance the safety of the Poka Place structures, though, as noted in the AEI report, they are not as vital as the retaining wall at the base of the DHSM in preventing damage and risk of injury to persons staying at the Poka Place residence.

3. **Irrigated Landscaping Area**

The main area of the irrigated landscaped area can be found below the retaining wall which acts as a dam of the flow emanating from the small valley noted on Figure 3 in the AEI report. This area is approximately 500 square feet and includes an irrigation system, additional walls and paved rock walkways. As noted in the AEI report, this area provides erosion control and slope stability that enhances the safety of the Poka Place structures.

**Proposed Resolution**

In light of the findings contained in the AEI report, particularly as they relate to the role played by the improvements cited in the NOV in protecting the Poka Place Property and residence from damage stemming from runoff and debris originating on State land in the DHSM, we would like to propose the following resolution:

1. Poka Place will remove the terraces encroaching into the DHSM and restore the area to its natural state. The cost of restoration, as noted at the end of the AEI report, is approximately \$20,900.00.

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<sup>3</sup> A disk which includes footage of water flow and flooding at the Property is included herein for your reference. As the disk shows, the water flow and flooding presents a real and serious concern.

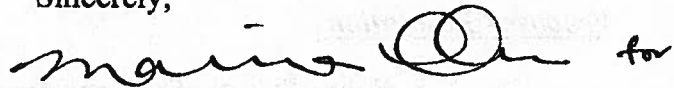
William J. Aila, Jr.  
January 7, 2014  
Page 4

2. The retaining wall adjacent to the guest residence, as well as the wall acting as a "dam" above the "Irrigated Landscaping Area", will be allowed to remain in place in order to continue to serve the critical role these walls play in stabilizing the slope face of the DHSM property and directing runoff from State land which would otherwise damage the structures on our client's property and/or pose a danger to the persons residing there.
3. The irrigated landscaping area below the "dam" wall will be allowed to remain in place as a means of improving erosion control and slope stability for the slope face of the DHSM and as a measure of protection for the Poka Place structures and residents.

We would note that the foregoing proposal, if implemented, will restore most of the affected area of the Diamond Head State Monument at issue in the NOV while reducing the State's potential risk of liability to our client for runoff and debris originating on State land.

Please contact us after you have had an opportunity to review the foregoing proposal with DLNR staff. We look forward to hearing from you.

Sincerely,



Edmund K. Saffery  
Marissa L.L. Owens

EKS/MLLO:rc  
Enclosures



**FINAL**

**SITE IMPROVEMENTS ASSESSMENT**

**AT**

**3703 POKA PLACE  
HONOLULU, OAHU, HAWAII**

**Prepared For The:**

**POKA PLACE LLC  
1582 Kapiolani Boulevard, Suite 1110  
Honolulu, Hawaii 96814**

**Prepared By:**

**Alpha Engineers, Inc.  
99-144 Iwaiwa Place  
Aiea, Hawaii 96701**

**November 2013**

**EXHIBIT 5a**

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## **SITE IMPROVEMENTS ASSESSMENT**

**AT**

**3703 POKA PLACE**

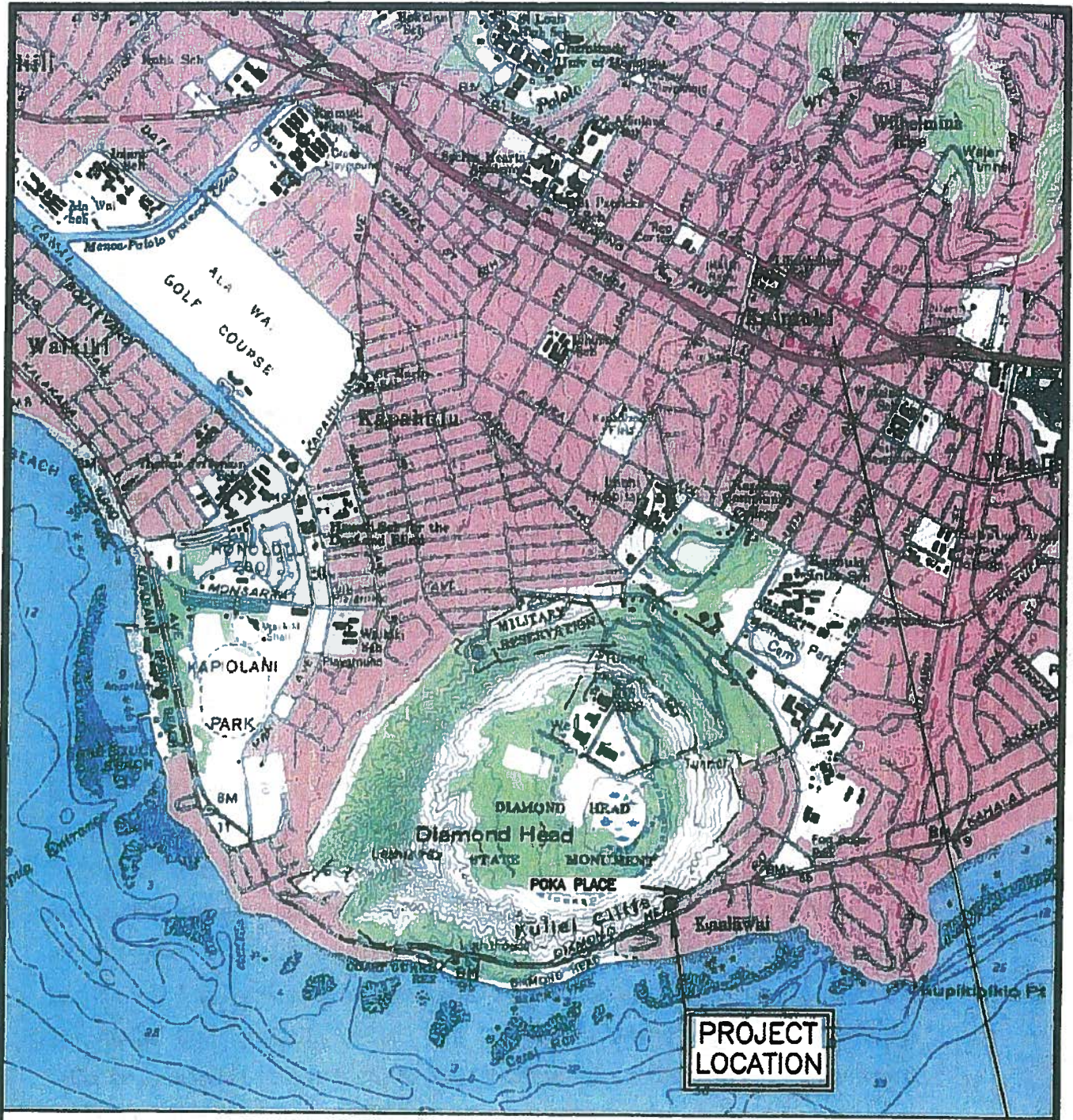
**HONOLULU, OAHU, HAWAII**

### **INTRODUCTION**

The lot at 3703 Poka Place is located within the Diamond Head area on the Island of Oahu (Figure 1). The Tax Map Key is 3-1-47: 49 and the lot area are 11,006 square feet or 0.253 acres. Access to the lot is from a 24 feet wide road easement from the end of Poka Place to the northeast (Figure 2). The Diamond Head State Monument (DHSM) is to the north and west of the lot with Diamond Head Road to the south.

### **BACKGROUND**

A "Notice of Alleged Violation" letter (Appendix A) from the Department of Land and Natural Resources, State of Hawaii, dated July 12, 2013 was received by the attorneys (Goodsill Anderson Quinn & Stifel) representing the Poka Place LLC, owners of the property at 3703 Poka Place. The letter states that a site inspection was conducted on July 8, 2013 and revealed that various improvements (retaining walls, terraces, and irrigated landscaping, Figure 3 and Appendix B) were constructed within the DHSM property and within the conservation district without the authorization of the State of Hawaii. The letter continues that "The various improvements are considered encroachments or unauthorized structures on public land, and also constitute zoning violations within the state land use conservation district." which may result in fines of up to \$15,000 per violation of the state land use conservation district, administrative costs, cost associated with land or habitat restoration, and damages to public land or natural resources, or any combination thereof.



<p><b>3703 POKA PLACE</b>  <b>HONOLULU, OAHU, HAWAII</b>  <b>T.M.K.: 3-1-047: 049</b>          Prepared By: Alpha Engineers, Inc.</p>	<p><b>VICINITY</b>  <b>PLAN</b></p>	<p><b>FIGURE</b>  <b>1</b></p>
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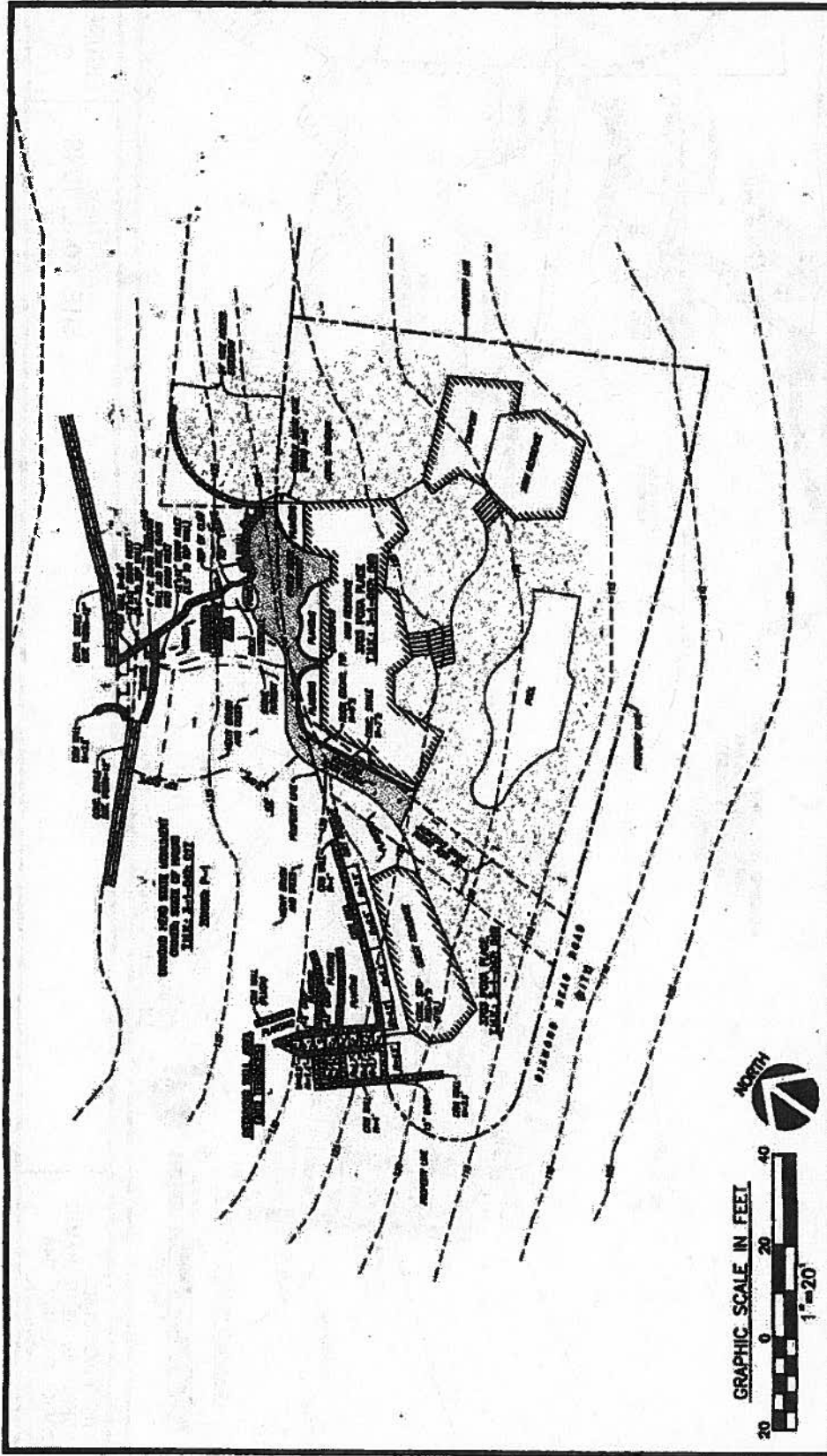
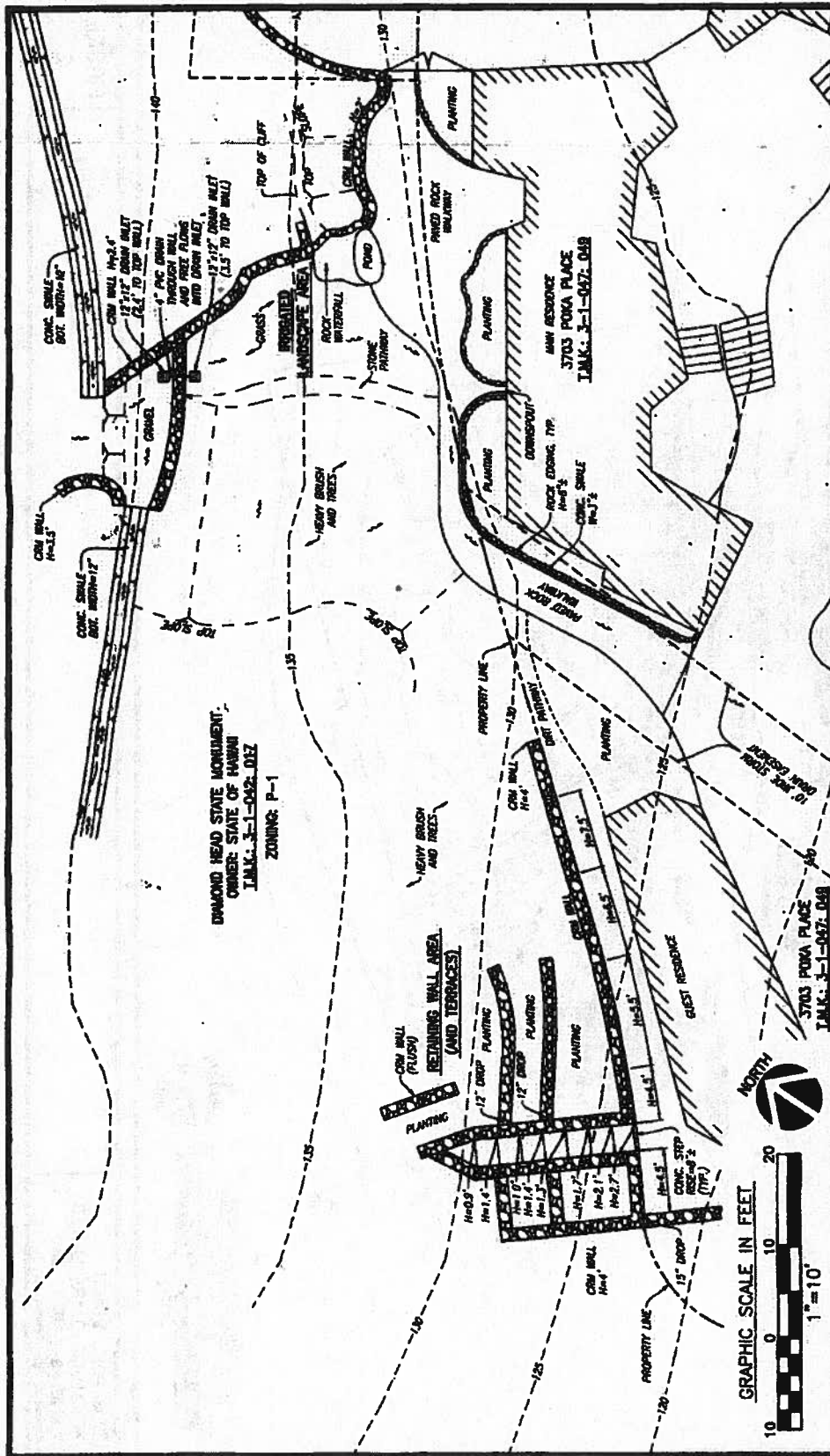


FIGURE  
2

GENERAL PLAN

3705 POKA PLACE  
 HONOLULU, OAHU, HAWAII  
 T.M.K.: 3-1-047; 049  
 Prepared By: Alpha Engineers, Inc.



**EXISTING SITE CONDITIONS PLAN**

**FIGURE 3**

**3703 POKA PLACE  
HONOLULU, OAHU, HAWAII  
T.M.K.: 3-1-047-049**

Prepared by Alpha Engineers, Inc.

### Purpose of Report

The purpose of the Site Improvements Assessment is to determine the impact on the other lot improvements (single-family structures, carport, pool, walkways, etc.) should the State of Hawaii require the removal of various site improvements (retaining walls, terraces, and irrigated landscaping) that were constructed within the DHSM property and within the conservation district.

### EXISTING CONDITIONS

#### Existing Improvements

The lot is zoned residential district (R-10) and has a main single-family residence and a single-family residence for guests. Other structures include a carport and pool (Figure 2).

North of the lot is the DHSM which is owned by the State of Hawaii and is zoned restricted preservation (P-1). Site improvements within the DHSM include retaining walls (CRM walls), terraces, and irrigated landscaping (including a pond and waterfall).

#### Topography

The topography of the lot is steep. The existing ground at the center of the lot slopes about 22 percent with elevations ranging from about 130 feet mean sea level (msl) north of the lot to 113 feet msl south of the lot (Figure 2).

#### Soils

The soil of the northern area of the lot consists of Rock land (rRK) which is made up of areas where exposed rock covers 25 to 90 percent of the surface. The rock outcrops and very shallow soils are the main characteristics. The rock outcrops are mainly basalt and andesite.

### Drainage

Offsite runoff is conveyed to the lot from the DHSM. A large portion of this runoff is collected within a small valley along the DHSM slope which lies to the north and center of the lot. Runoff from the valley is discharged into the lot and flows along the walkway, between the main and guest residences and into Diamond Head Road. Within the lot there is a 10 feet wide storm drain easement that roughly aligns with the path of the runoff (Figure 2).

Runoff from other areas of the DHSM sheet flows into the lot.

### ANALYSIS OF SITE IMPROVEMENTS

#### Retaining Walls Area

The cement rubble masonry (CRM) wall parallel to and offset four feet from the guest residence, near the northwest corner of the lot varies in height from about 4.5 feet to 7.5 feet (Figure 3). It was installed to stabilize the slope and protect the structure from falling/sliding debris.

The other CRM walls within the same area were constructed to terrace the area and provide a measure of drainage control and water quality improvement of the runoff from the slopes of the DHSM.

Removal of the CRM wall near the guest residence would require the excavation of a portion of the adjacent slope within the DHSM to stabilize the slope. A slope of 1.5H:1V excavated in the rock material requires a horizontal length into the slope that varies from about 12 feet to 23 feet. The excavation would also remove the CRM walls within the terraced area.

Generally, demolition work and excavation in rock of this magnitude would require the use of heavy equipment: excavators equipped with hoe rams, front end loaders and dump trucks but due to the site conditions (steep slopes and



minimal space) it is not possible. Thus, hand tools would be used which would greatly increase the cost and time to accomplish the work.

A curb should be constructed along the northern edge of the guest residence to prevent water from flowing under the structure. The water may cause the ground to swell (and shrink) resulting in uneven floors, doors and windows "out of plumb" and cracks in the structure.

#### Irrigated Landscaping Area

The irrigated landscape area within the DHSM includes a 2.4 feet high CRM wall that "dams" the flow of the small valley (Figure 3). The ponding behind the CRM wall is a detention basin that reduces flooding of the downstream area. It also acts as a boulder basin that traps heavy debris behind the wall preventing damage to downstream improvements. During periods of heavy rainfall, runoff fills the detention basin and overflows the "dam" and flows toward the main residence. There are rock curbs adjacent to the residence that maintain the flow within the walkway (away from the structure). However, there are gaps in the rock curb and those gaps should be provided with a continuous rock curb.

The main area of the irrigated landscape area is below the CRM wall dam, is about 500 square feet and includes a small pond, waterfall, irrigation system, CRM walls, and paved rock walkways. They provide a measure of erosion control, slope stability and open space.

Removal and/or restoration of the area of the irrigated landscape area would require the demolition of the landscaping, irrigation system, pond and waterfall. To restore the slope, the level areas should be backfilled with the finished grade paved with grouted rubble paving using onsite rocks to closely match the surrounding area.

## **CONCLUSION AND RECOMMENDATION**

### **Retaining Walls**

Of primary importance is the CRM wall located north and parallel to the guest residence (Figure 4). The CRM wall provides slope protection of the guest residence from falling debris and/or slides. Restoring this area to its original state requires removing the CRM wall which will render the slope face unstable and jeopardize the safety of the guest residence and the people residing there.

Of secondary importance are the other CRM walls used to terrace the immediate area for landscaping/gardening (Figure 4). These walls and terraces provide erosion control, slope stability and a measure of drainage and water quality control of the runoff.

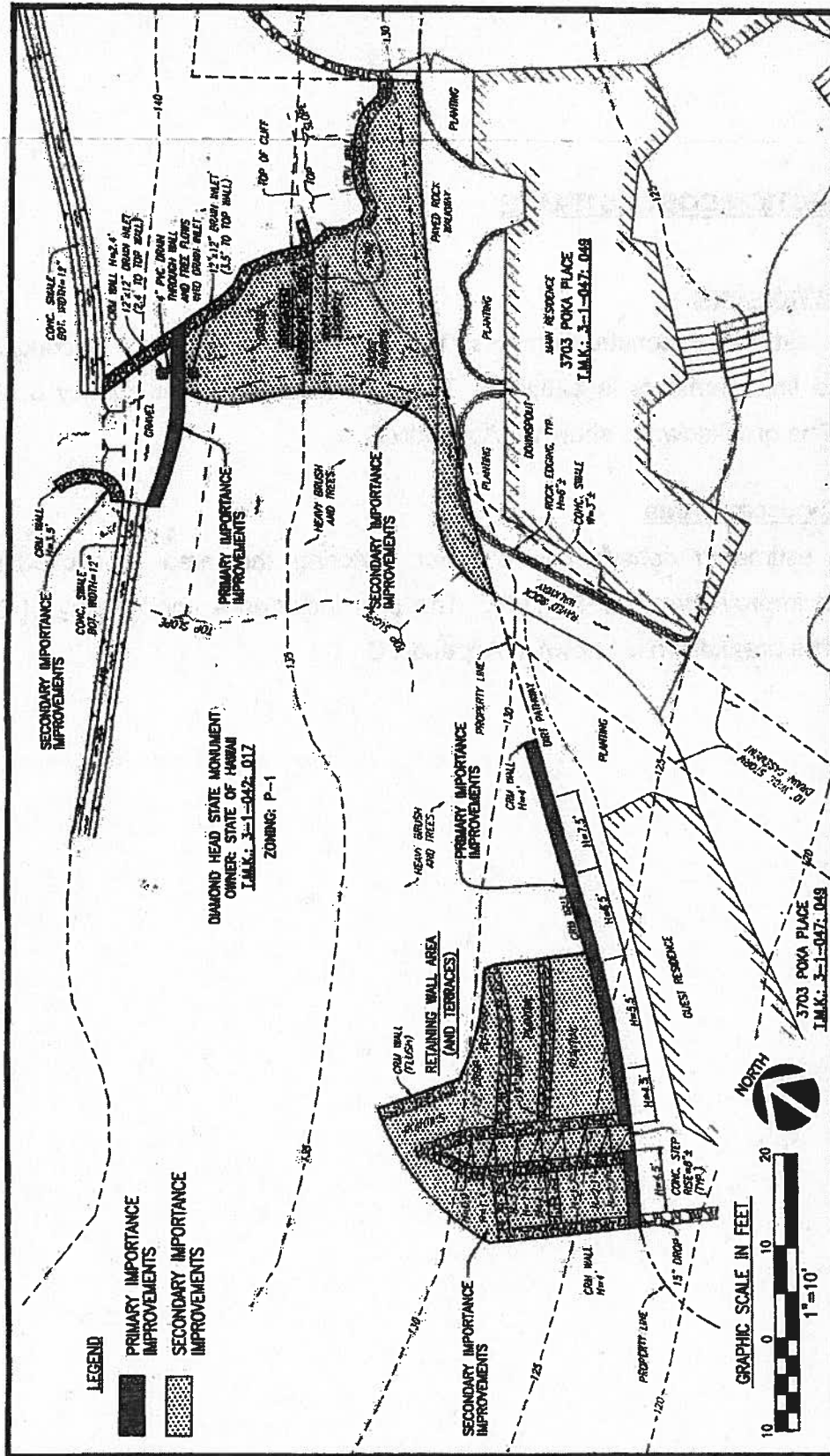
### **Irrigated Landscape Area**

Of primary importance is the CRM wall acting as a dam and detention basin of the small valley (Figure 4). The wall traps boulders and debris, detains runoff of smaller storms and improves stormwater quality. Removal of the CRM wall may increase the damaging impact of boulders, debris and runoff to downstream improvements including the main residence.

Of secondary importance are the other CRM walls above and below the dam, and the irrigated landscape area (Figure 4).

### **Recommendation**

A compromise with the State of Hawaii is recommended involving maintaining the primary importance improvements and restoring the area of secondary importance improvements. This compromise restores almost the entire affected area of the DHSM.



CONCLUSION AND  
RECOMMENDATION  
PLAN

3703 POKA PLACE  
HONOLULU, OAHU, HAWAII  
T.M.K.: 3-1-047: 049  
Prepared By: Alpha Engineers, Inc.

## **CONSTRUCTION COST ESTIMATE**

### **Retaining Walls Area**

The total estimated construction cost for restoring the area of secondary importance improvements is \$20,900. The cost includes a contingency of 20 percent. The breakdown is shown in Appendix C.

### **Irrigated Landscape Area**

The total estimated construction cost for restoring the area of secondary importance improvements is \$34,100. The cost includes a contingency of 20 percent. The breakdown is shown in Appendix C.

**APPENDICES**

**Appendix A – "Notice of Alleged Violation" Letter**

NEEL ABERCROMBIE  
GOVERNOR OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

WILLIAM J. AILA, JR.  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION OF WATER RESOURCES MANAGEMENT

ESTHER KAI'ALINA  
FIRST DEPUTY

WILLIAM M. TAM  
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONSERVANCIES  
COMMISSION OF WATER RESOURCES MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
DIVISION  
FORESTRY AND WILDLIFE  
TERRESTRIAL PRESERVATION  
KAOLOAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

NOTICE OF ALLEGED VIOLATION

JUL 12 2013

Enf.: OA-14-2

CERTIFIED MAIL RETURN RECEIPT

7009 3410 0000 4942 9507

Poka Place, LLC.  
C/O Goodwill Anderson Quinn & Stifel  
Attn: Edmund K. Saffery, Esq.  
First Hawaiian Center, Suite 1600  
999 Bishop Street  
Honolulu, HI 96813

Dear Mr. Saffery:

**SUBJECT:** Alleged Unauthorized Landscaping, Drainage Improvements, and Earth Retention Structures Constructed within Conservation District and Public Land, Located at Diamond Head, Island of Oahu, TMK: (1) 3-1-042:017

NOTICE IS HEREBY GIVEN that your client may be in violation of both conservation district land use laws and public land laws. Your client's property (TMK: (1)3-1-047:049) abuts Diamond Head State Monument (TMK: (1) 3-1-042:017) which comprises public lands set aside to the Department of Land and Natural Resources, Division of State Parks, and zoned within the state land use conservation district.

A site inspection conducted on July 8, 2013 revealed that your client, or predecessor[s] in interest, had constructed various improvements within the state park property and within the conservation district without the authorization of the Department or the Board of Land and Natural Resources. A partial property survey map was prepared by your client that demarcates, in part, the property boundary between parcel #017 (State Park) and #049 (your client). The property boundary was staked when we visited the property on July 8, 2013.

The various improvements are considered encroachments or unauthorized structures on public land, and also constitute zoning violations within the state land use conservation district. The various improvements we observed consisted of a retaining wall, terraces, and irrigated landscaping all of which were either installed or maintained by your client, or representatives of your client, or predecessor[s] in interest

This letter is written to notify you that pursuant to 183C, HRS (Conservation District) the Board of Land and Natural Resources may subject your client to fines of up to \$15,000.00 per violation in addition to administrative costs, cost associated with land or habitat restoration, and damages

to public land or natural resources, or any combination thereof. After written or verbal notification from the department, willful violation of this chapter or any rule adopted in accordance with this chapter may incur an additional fine of up to \$15,000 per day per violation for each day in which the violation persists.

In addition, it appears that the improvements are built on state property without permission. Section 171-6 (12), HRS, empowers the Board to impose fines, assess costs, and require the land be restored to its original condition.

While it is the intent of our office to schedule a violation proceeding before the Board of Land and Natural Resources (BLNR), in the near future, we thought it would be prudent to provide you with written notice of these allegations. You will be notified of the specific issues, as well as the time and place of the BLNR meeting in advance of the meeting.

Should you have any questions or wish us to clarify or discuss anything, please contact Sam Lemmo of the Office of Conservation and Coastal Lands at (808) 587-0377.

Sincerely,

  
WILLIAM J. AILA, Jr., Chairperson

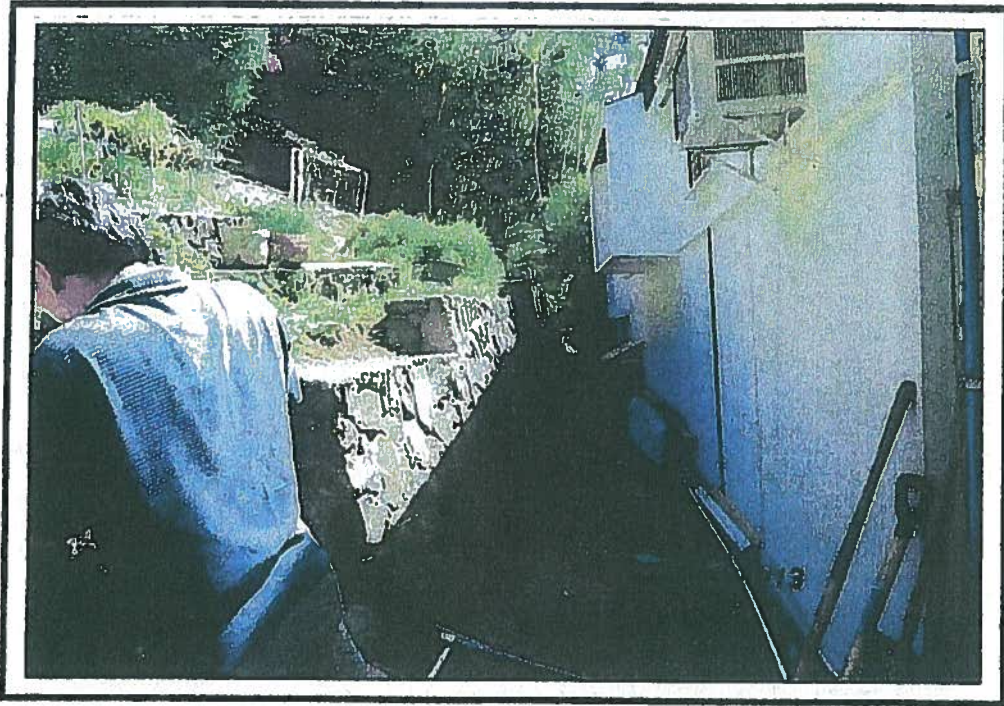
C: Department of the Attorney General (Land Trans)  
ODLO/DOCARE-Oahu  
City and County of Honolulu  
Dept. of Planning and Permitting

Appendix B – Photos of Retaining Wall and Irrigated Landscape Area



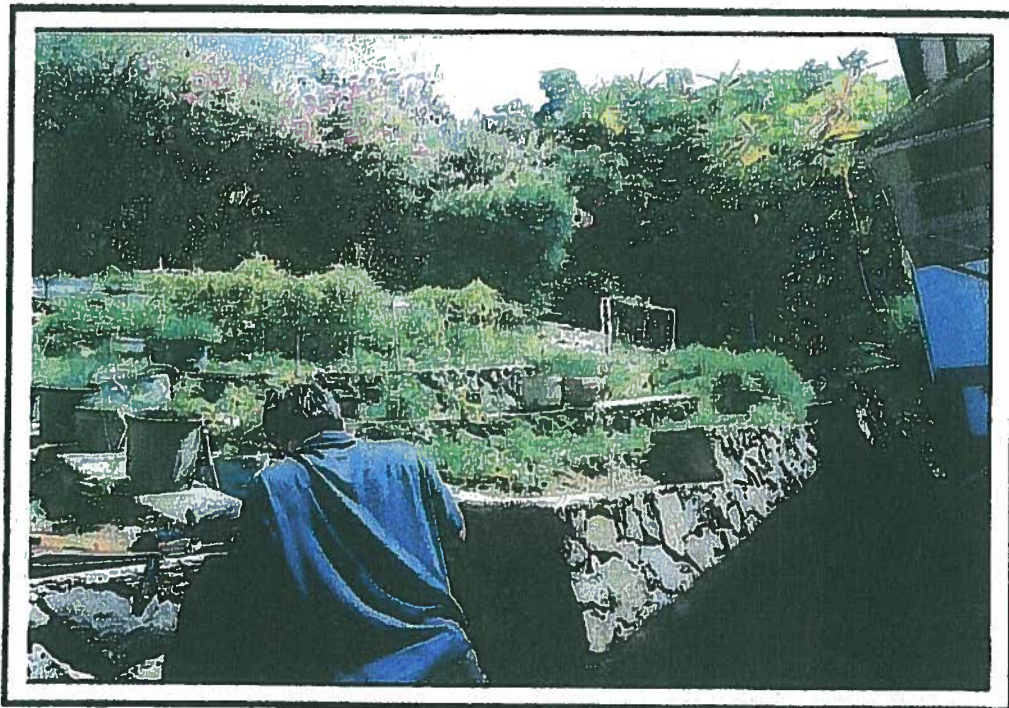
**SITE IMPROVEMENTS ASSESSMENT - 3703 POKA PLACE**

Pictures taken on August 9, 2013



Near northwest corner of guest residence, looking east along CRM wall.

1



Near northwest corner of guest residence, looking east toward terraced area.

2

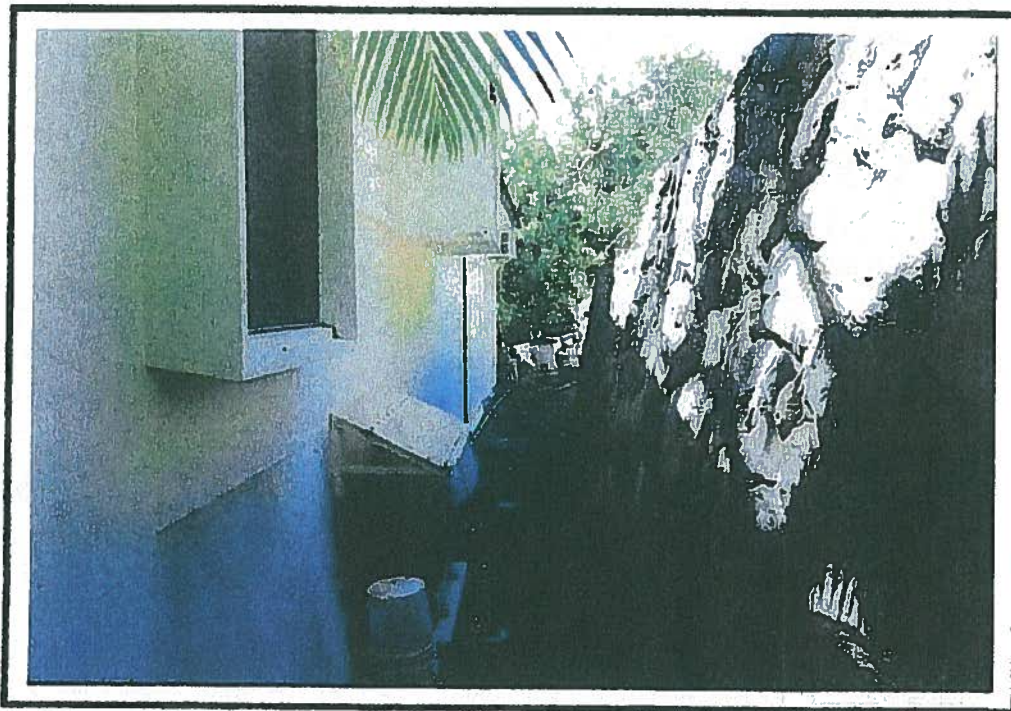
**SITE IMPROVEMENTS ASSESSMENT - 3703 POKA PLACE**

Pictures taken on August 9, 2013



Near northwest corner of guest residence, looking north toward terraced area.

3

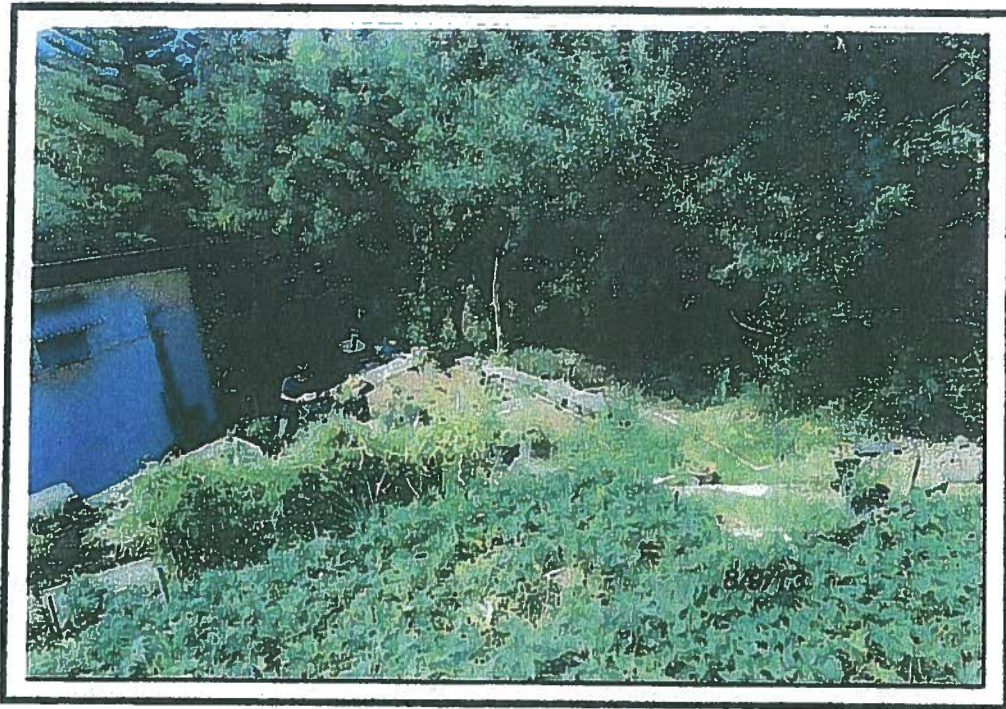


Near northeast corner of guest residence, looking west along CRM wall.

4

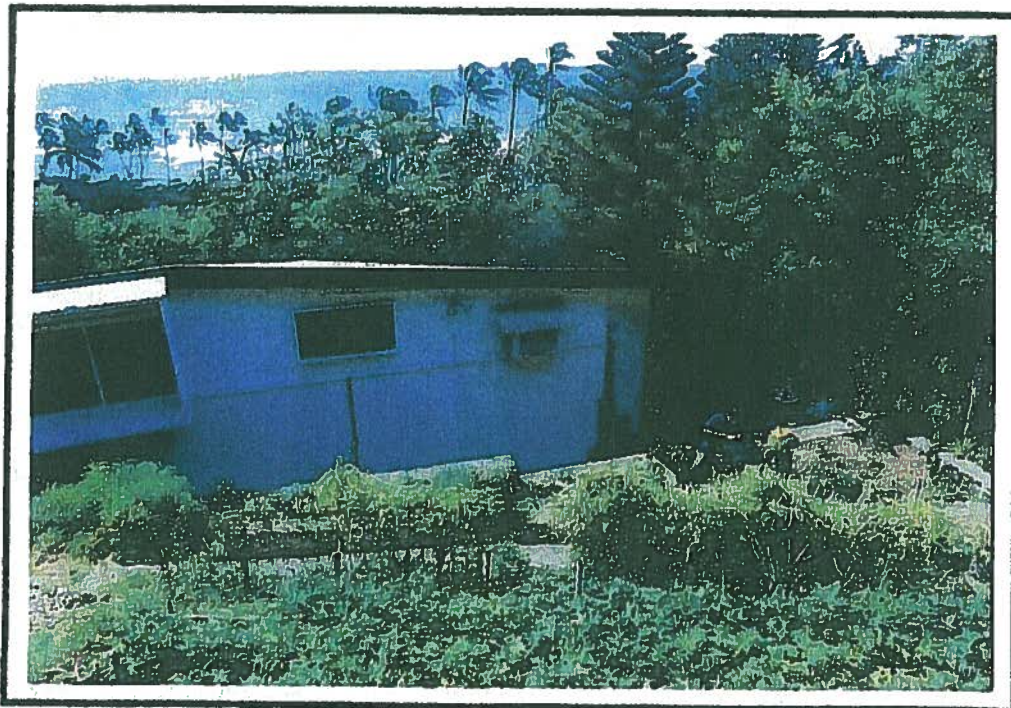
**SITE IMPROVEMENTS ASSESSMENT - 3703 POKA PLACE**

Pictures taken on August 9, 2013



At terraced area, looking south toward northwest corner of guest residence.

5

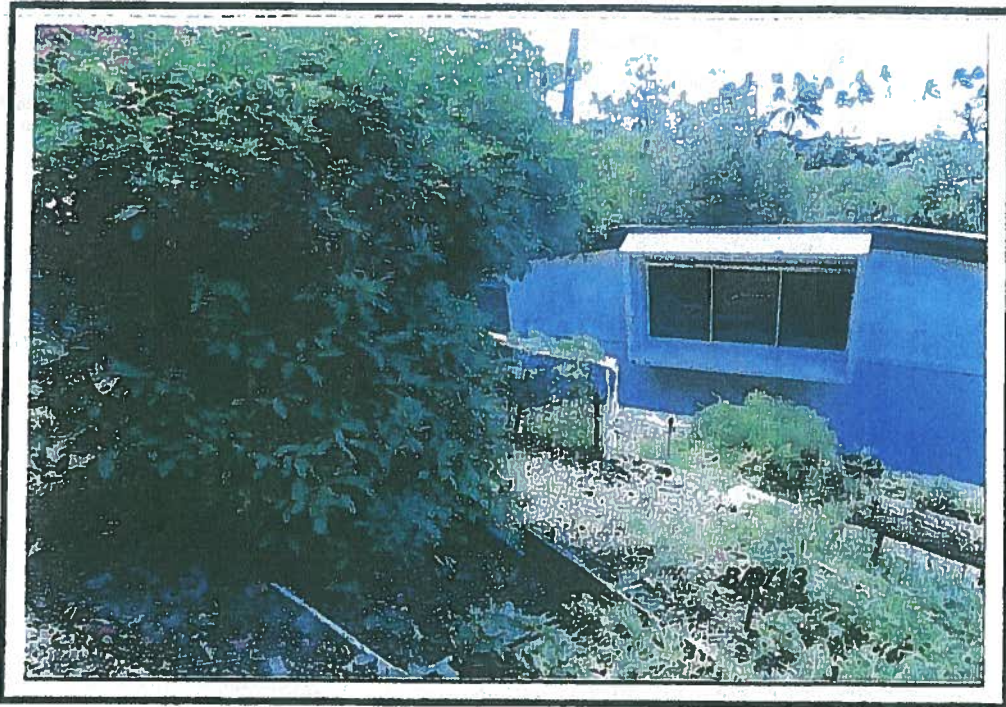


At terraced area, looking south toward guest residence.

6

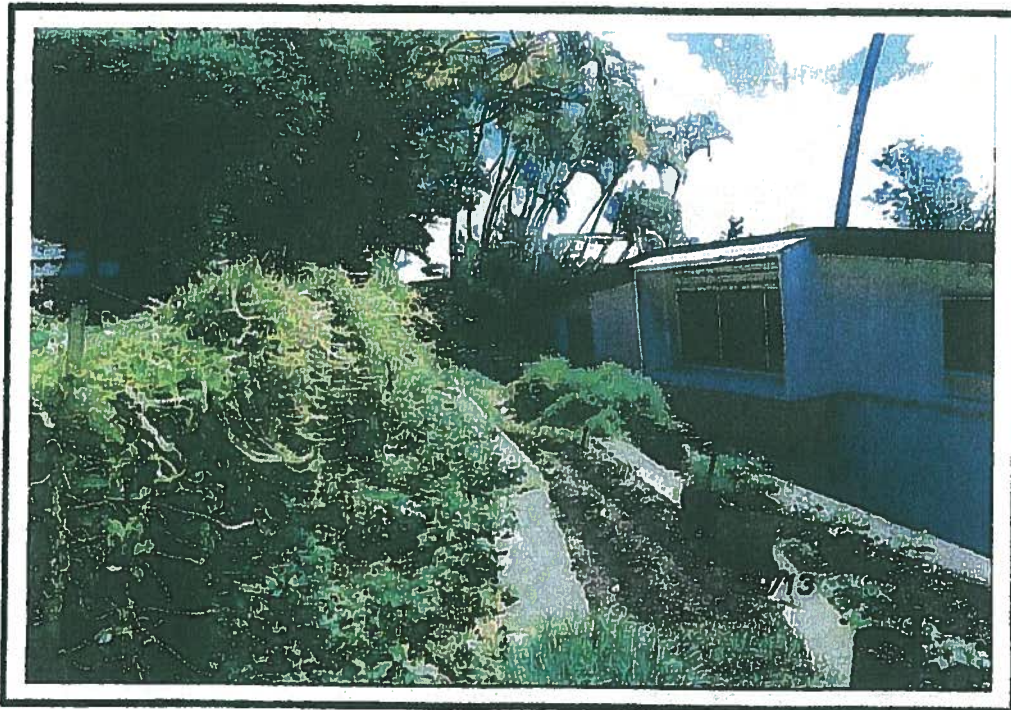
**SITE IMPROVEMENTS ASSESSMENT - 3703 POKA PLACE**

Pictures taken on August 9, 2013



At terraced area, looking southeast toward guest residence.

7

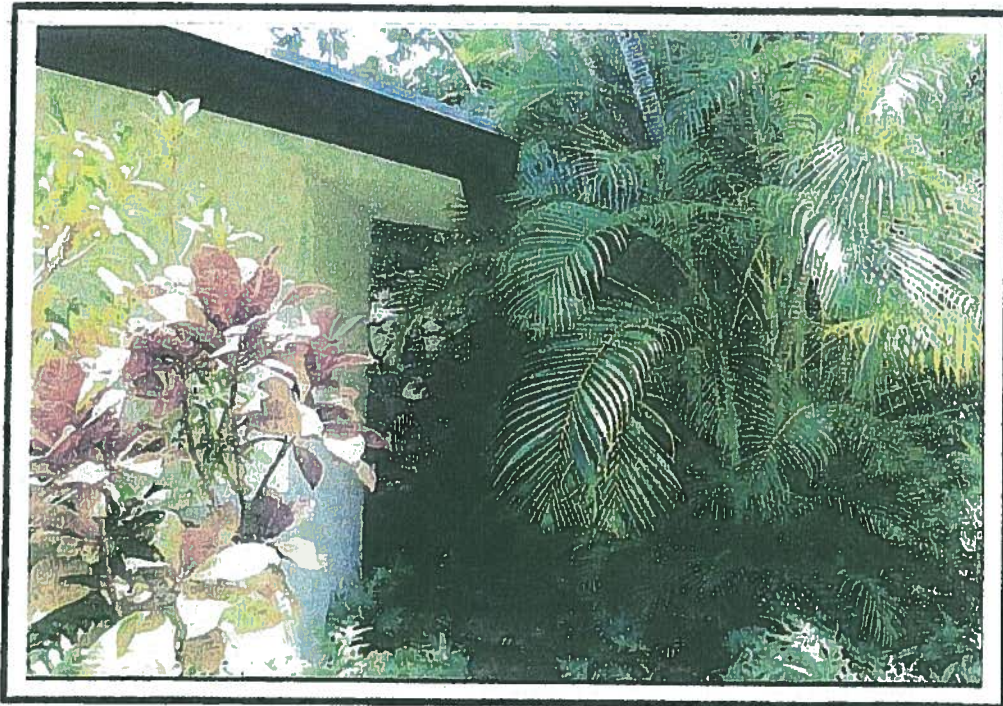


At terraced area, looking west toward guest residence.

8

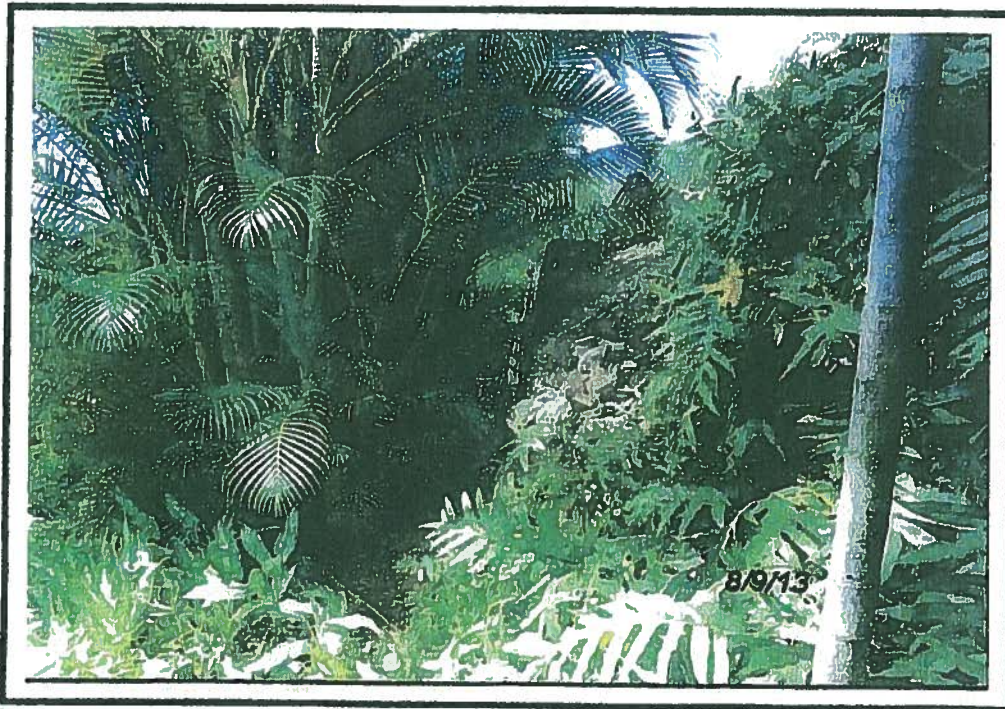
**SITE IMPROVEMENTS ASSESSMENT - 3703 POKA PLACE**

Pictures taken on August 9, 2013



Near southeast corner of guest residence, looking north at CRM wall.

9

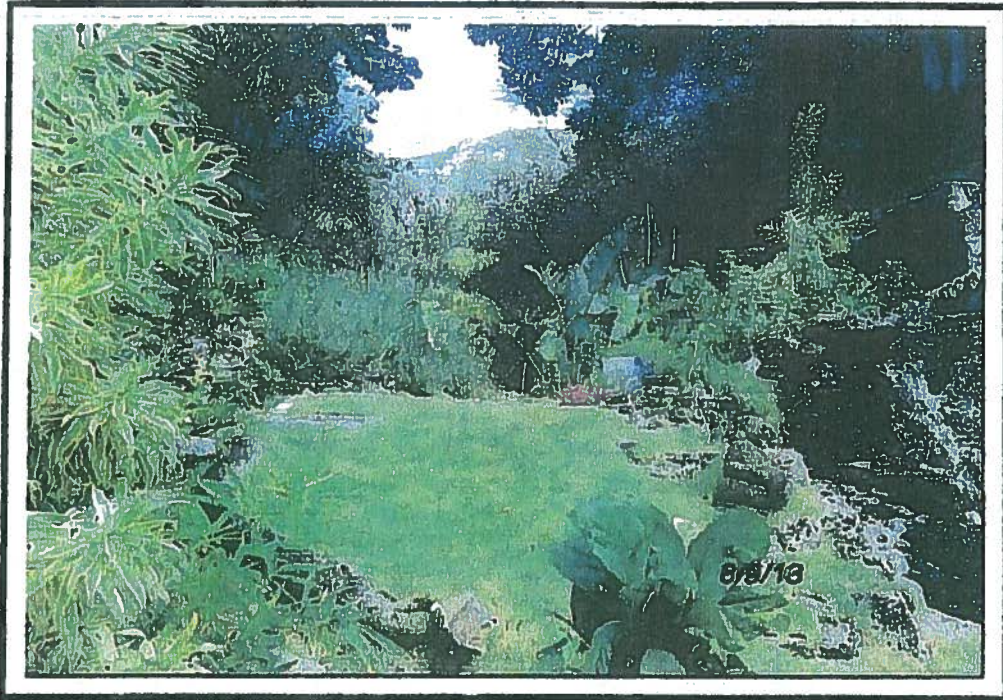


At dirt pathway between main and guest residences, looking west along CRM wall. Note existing rock formation at end of wall.

10

**SITE IMPROVEMENTS ASSESSMENT - 3703 POKA PLACE**

Pictures taken on August 9, 2013



At mid-point of norther side of main residence, looking north at irrigated landscaped area.

11



At irrigated landscaped area (within DHSM property), looking north at small valley. At foreground, note the CRM wall across bottom of valley acting as a dam.

12

**SITE IMPROVEMENTS ASSESSMENT - 3703 POKA PLACE**

Pictures taken on August 9, 2013



At dam, looking south toward main residence.

13



At dam, looking down toward CRM wall and drain inlet.

14

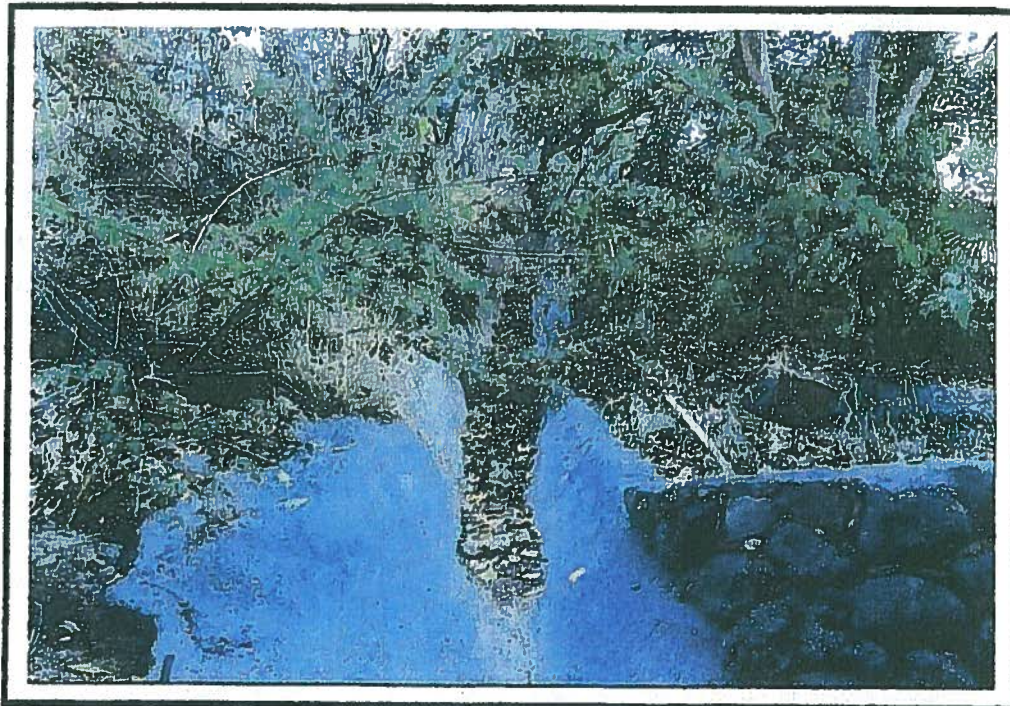
**SITE IMPROVEMENTS ASSESSMENT - 3703 POKA PLACE**

Pictures taken on August 9, 2013



North of dam, looking north toward the small valley within the DHSM.

15



At dam, looking east toward the cement lined cut-off ditch.

16



# **SITE IMPROVEMENTS ASSESSMENT - 3703 POKA PLACE**

Pictures taken on August 9, 2013



At dam, looking west toward the cement lined cut-off ditch.

17



At dam wall, looking south and down. Note 4" pipe from inlet at dam. Pipe discharges runoff into another inlet. Don't know location of the outlet (from this inlet shown).

18

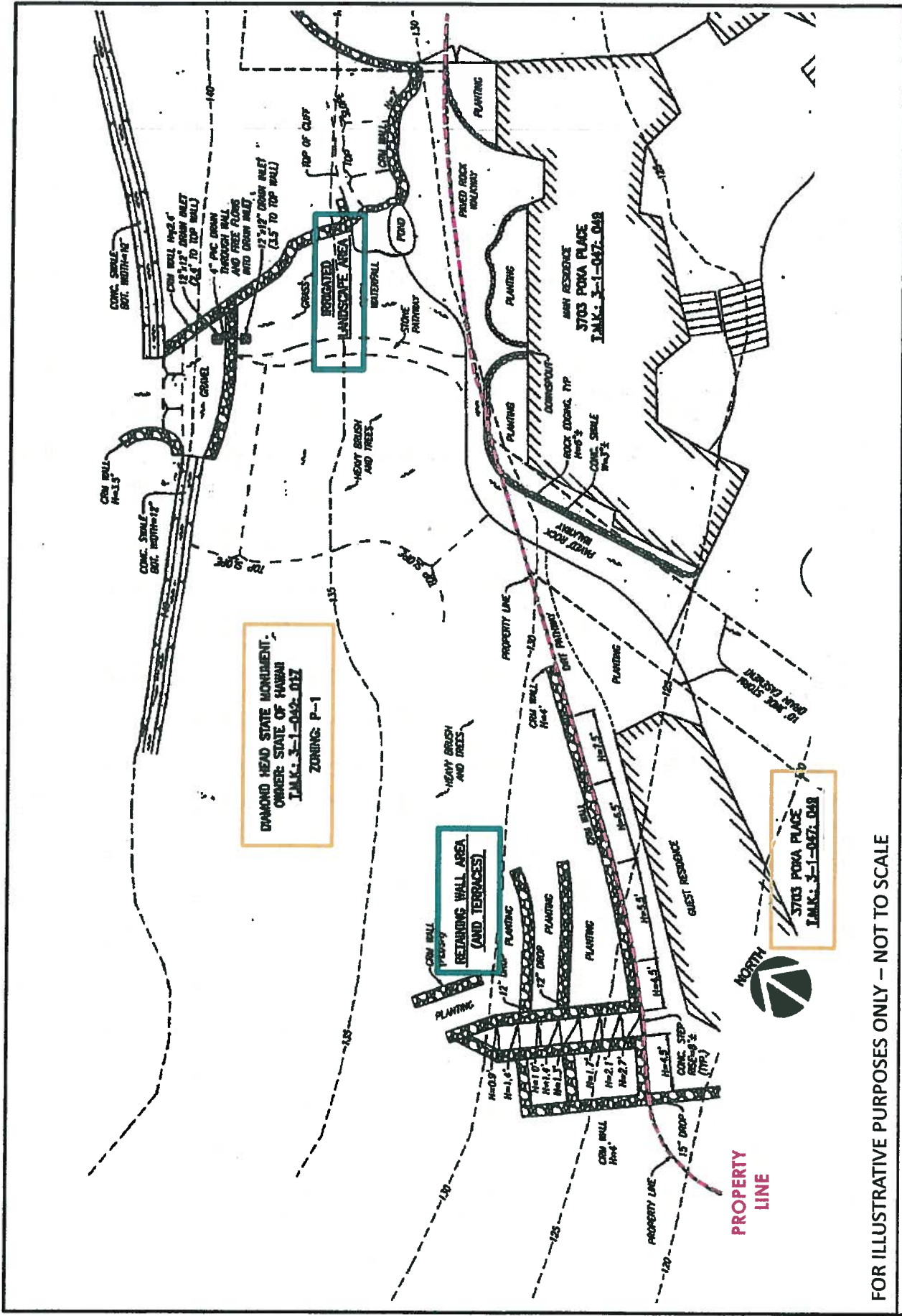
**Appendix C – Construction Cost Estimate of Restoring Areas of Secondary  
Importance Improvements**

**SITE IMPROVEMENTS ASSESSMENT AT  
3703 POKA PLACE**

**CONSTRUCTION COST ESTIMATE OF RESTORING AREAS OF SECONDARY  
IMPORTANCE IMPROVEMENTS**

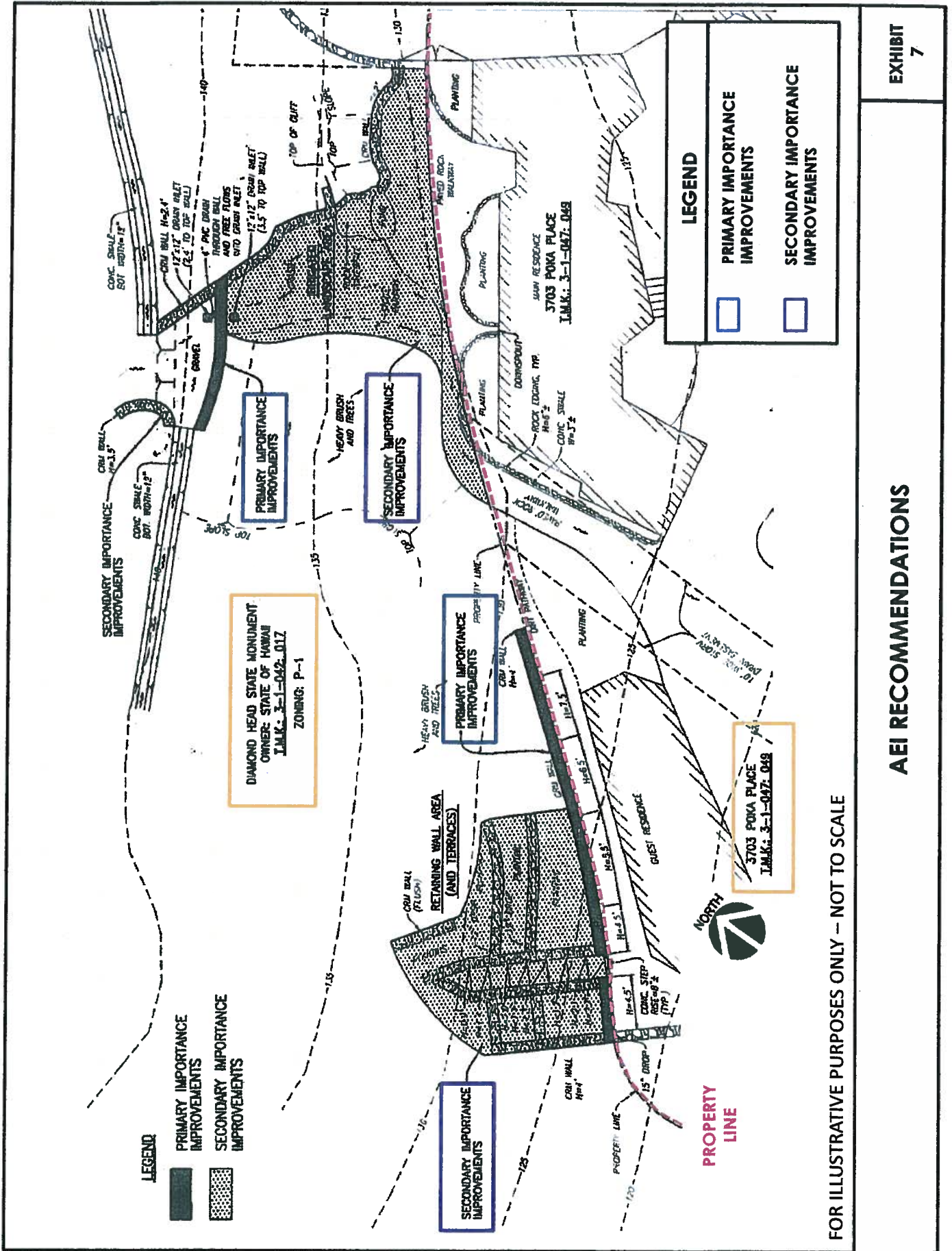
October 25, 2013

NO.	ITEM	QUANTITY	UNIT	UNIT COST	TOTAL COST
<b>RETAINING WALLS</b>					
1.	Demolition of terrace walls and stairs	125	LF	\$50.00	\$6,250
2.	Backfill of terraced areas	78	CY	\$100.00	\$7,778
3.	Grassing	600	SF	\$3.00	\$1,800
4.	Curb along guest residence (north side only)	40	LF	\$40.00	\$1,600
SUBTOTAL COST					\$17,428
Contingency of 20%					\$3,486
<b>TOTAL COST</b>					<b>\$20,913</b>
<b>IRRIGATED LANDSCAPE AREA</b>					
1.	Demolition of CRM walls, irrigation system, landscaping, pond, water fall, and paved rock rockways		LS		\$10,000
2.	Backfill of leveled areas		LS		\$3,000
3.	Grouted rubble paving	300	SF	\$50.00	\$15,000
4.	Curb along gaps of main residence	10	LF	\$40.00	\$400
SUBTOTAL COST					\$28,400
Contingency of 20%					\$5,680
<b>TOTAL COST</b>					<b>\$34,080</b>



FOR ILLUSTRATIVE PURPOSES ONLY - NOT TO SCALE

EXISTING USES



AEI RECOMMENDATIONS



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**APPENDIX A: GUIDELINE FRAMEWORK TABLES**

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**CONSERVATION DISTRICT VIOLATION PENALTIES SCHEDULE GUIDELINES AND ASSESSMENT OF DAMAGES TO PUBLIC LAND OR NATURAL RESOURCES**

September 2009

*Relating to penalties for violations within the Conservation District Act 217*

## 1 INTRODUCTION

Hawaii Revised Statutes (HRS) §183C-7 was amended on July 7, 2008 to increase the maximum penalty for a Conservation District violation to up to \$15,000 per violation, in addition to administrative costs, costs associated with land or habitat restoration, and damages to public land or natural resources, or any combination thereof.

This document, *Conservation District Violation Penalties Schedule Guidelines and Assessment of Damages to Public Land and Natural Resources* is intended to provide the Office of Conservation and Coastal Lands (OCCL) with a framework to systematically carry out its enforcement powers, in the determination and adjudication of civil and administrative penalties. These guidelines are to be used for internal staff guidance, and should be periodically reviewed to determine their effectiveness, and whether refinements are needed. These guidelines are consistent with HAR §13-1, Subchapter 7, Civil Resource Violation System (CRVS).

## 2 CONSERVATION DISTRICT VIOLATION PENALTIES SCHEDULE GUIDELINES

The charging and collecting of penalties is an enforcement tool that may be used to ensure future compliance by the responsible party and others similarly situated. The penalty amount(s) shall be enough to ensure immediate compliance with HAR §13-5 and HRS §183C, and cessation of illegal activities. Penalties will be assessed for each action committed by an individual(s) that conducts an unauthorized land use and that impairs or destroys natural resources protected under Chapter §183C, HRS.

The Staff will treat each case individually when assigning conservation district penalties using the following framework, and additional considerations and factors for upward or downward adjustments. The staff of the OCCL (Staff) will use these penalty schedule guidelines to issue violation notices and to make recommendations to the Board of Land

and Natural Resources (Board), Chairperson of the Board of Land and Natural Resources (Chairperson), or Presiding Officer, whom may ultimately adjudicate the Conservation District penalties. These guidelines presume that all cases in which a violation has occurred, the Chairperson, Board, or Presiding Officer may also assess administrative costs, damages to public land or natural resources, and costs associated with land or habitat restoration.

### 2.1 PENALTY CALCULATION

The penalty range for these actions will be substantially determined based on the type of permit that would have been required if the individual(s) had applied to the Department of Land and Natural Resources (Department) or Board for pre-authorization to conduct the identified use, under Hawaii Administrative Rules (HAR) §13-5-22, 23, 24, 25. Assessing the penalties according to the Conservation District permit type accounts for the level of review or scrutiny the unauthorized use would have received by the Department or Board in order to avoid damage to the natural resource. This graduated permit review framework corresponds to the level of actual or potential "harm to the resource"<sup>1</sup> caused by the violation.

Once the baseline for the penalty range has been established according the required permit, the penalty may be adjusted appropriately upward or downward according to the "harm to resource" caused or potentially caused by the violator's action and additional considerations and factors (See 2.1.4),<sup>2</sup> within the assigned penalty range. Where Staff was unable to associate the unauthorized use with a typical land use identified in HAR §13-5, Staff may try to associate the action with the most similar identified land use in HAR §13-5, or according to the "harm to the resource" caused by the violation. Table 1

<sup>1</sup> "Harm to resource" is an actual or potential impact, whether direct or indirect, short or long term, impact on a natural, cultural or social resource, which is expected to occur as a result of unauthorized use of construction, shoreline alteration, or landscape alteration (See Appendix B: Definitions) Adapted from Florida Department of Environmental Protection 2000 Administrative Fees and Damage Liability, Ch. 62B-54.

<sup>2</sup> Penalty amounts may be adjusted up or down, based on additional considerations, such as the actual extent of the direct damage, significance of any off-site indirect impacts, environmental record of the violator, responsiveness of violator, etc. (See 2.1.4 Additional Considerations and Factors).



was created to demonstrate the penalty ranges for the type of required permit and "harm to resource" (See 2.1.1 or Appendix A).

The first two of the following sections explain the identified and non-identified land use framework. The next four sections: Tree Removal, Additional Considerations and Factors, Continuing Violations and Permit Non-Compliance, and In-Kind Penalties, provide guidance for the upward or downward adjustment of penalties based on the initial framework discussed in Section 2.1.1, Identified land use penalties.

**2.1.1 Identified Land Use Penalties**

The violation penalty range associated with each required permit will be assessed in accordance with the following harm to resource indices in this graduated framework.

Table 1. Penalty Guideline Framework

Harm to resource or potential for harm to resource	Identified land use permit designation with the letter	Penalty Range
Major	D (Board)	\$10,000-\$15,000
Moderate	C (Departmental)	\$2,000-\$10,000
Minor	B (Site Plan)	\$1,000-\$2,000
Very Minor	(B) (Site Plan)	Up to \$1,000

**Major Harm to the Resource/ Board Permit (D)**

Violations identified with the required permit prefix (D) may incur a penalty in the range of \$10,000 - \$15,000 as a Board permit would have been required to minimize the possibility of causing "major harm to the resource." Examples of "major harm(s) to the resource" may include actions that cause substantial adverse impact to existing natural resources within the surrounding area, community, ecosystem or region, or damage to the existing physical and environmental aspects of the land, such as natural beauty and open space characteristics. Such actions may include, but are not limited to, unauthorized single-family residences or unauthorized structures, grading or alteration of topographic features, aquaculture, major marine construction or dredging, unauthorized shoreline structures, major projects of any kind, mining and extraction, etc.

**Moderate Harm to the Resource/Departmental Permit (C)**

Violations identified with the required permit prefix (C) may incur a penalty in the range of \$2,000-\$10,000, as a Departmental permit would have been required, due to the possibility of causing "moderate harm to the resource." Examples of "moderate harm(s) to the resource" may be adverse impacts that degrade water resources, degrade native ecosystems and habitats, and/or alter the structure or function of a terrestrial, littoral or marine ecosystem. Such actions may include, but are not limited to, unauthorized landscaping causing ground disturbance, unauthorized alteration, renovation or demolition of existing structures or facilities, such as buildings and shoreline structures, maintenance dredging, agriculture, and animal husbandry, etc.

**Minor Harm to the Resource/Site Plan Approval (B) Permit**

Violations identified with the required permit prefix (B) may incur penalties as a site plan approval would have been required to assure that "minor harm(s) to the resource" are minimized. "Minor harm(s) to the resource" may incur a penalty of \$1,000-\$2,000 and could be actions causing limited to short-term direct impacts including, but not limited to, small-scaled construction, construction of accessory structures, installation of temporary or minor shoreline activities or similar uses.

**Very Minor Harm to the Resource/(B) Permit**

In instances in which a permit with the B prefix should have been sought but are considered to have only caused "very minor harm(s) to resource" a penalty of up to \$1,000 may be incurred. These "very minor harm(s) to the resource" could be actions in which the impact on the water resource or terrestrial, littoral or marine ecosystem was temporary or insignificant, and was not of a substantial nature either individually or cumulatively.

**2.1.2 Non- Identified Land Use Penalties**

Violations in which an unauthorized use is not identified in HAR §13-5-22, 23, 24, 25, Staff may try to associate the action with the most similar identified land use in HAR

§13-5 or according to the "harm to the resource" caused by the violation. Refer to the above section, *Identified Land Use Penalties*, for the most similar required permit prefix. To categorize the violation as a "harm to resource" when no similar use is identified in HAR §13-5, Staff will refer to Table 1 and the definitions of the four violation types of "harm to resource" (See Appendix B: Definitions).

### 2.1.3 Tree Removal

Violation penalties for the removal of any federal or state listed threatened, endangered, or commercially valuable tree may incur a fine of up to \$15,000 per tree. Removal of any native tree may incur a fine of up to \$1,000 per tree. The removal of any invasive tree shall be considered as removal/clearing of vegetation.

The Board, Department, or Presiding Officer also has the option of considering the removal of more than one tree as a single violation, similar to the removal/clearing of vegetation.<sup>1</sup> If violation is considered as one violation, a fine amount of up to \$15,000 may be incurred, utilizing the guidelines for Major, Moderate, Minor, and Very Minor outlined in this schedule. However, the removal of any federally or state listed threatened or endangered tree shall be considered on a one violation per tree basis, with a maximum penalty of up to \$15,000 per tree.

### 2.1.4 Vegetation Removal/Vegetation Clearing

Past Staff recommendations and Board decisions have treated some cases of tree or removal as one citation of vegetation clearing/vegetation removal, this practice may be continued in violations resulting in minor or very minor harm to the resource. In accordance with the identified land uses within HAR §13-5 the assessment of vegetation removal has been based on a single citation of removal/clearing determined by the square footage of vegetation removed (See Table 3 Vegetation Removal). However, the

<sup>1</sup> While Staff and Board decisions in MA-01-09, OA-05-40 and HA-06-08 have treated the removal of one-state, invasive, or noxious trees as one citation of "clearing" with mandatory remediation plans.

Department may see fit to assess the removal/clearing of threatened, endangered, or commercially valuable plants similar to the modified tree removal framework and may be penalized on an individual plant basis of up to \$15,000 per plant.

Table 3. Vegetation Removal

Action	Consumable Harm to Resource	Penalty Range
Removal of more than 10,000 sq. ft.	Major	\$10,000-\$15,000.
Removal of Vegetation or of 2,000-10,000 sq. ft. of vegetation	Moderate	\$2,000-\$10,000
Removal of less than 2,000 sq. ft. vegetation	Minor	\$1,000-\$2,000
Clearing of invasive or noxious vegetation	Very Minor	Up to \$1,000 <sup>1</sup>

Note: The clearing of threatened, endangered or commercially valuable plants will be addressed on a case-by-case basis, but depending on the importance of the species may incur a penalty of up to \$15,000 per plant. According to Table 2, the clearing of vegetation may incur a penalty of up to \$1/ sq.ft., so clearing 10,000 sq. ft. Staff could assess a penalty of \$10,000.

### 2.1.5 Additional Considerations and Factors

After Staff applies the Conservation District violation graduated penalty framework to identify the violation penalty range (1, 2, and 3 found above), the Staff may incorporate several considerations into the final assessed conservation district penalty including but not limited to, those factors identified in HAR §13-1-70 Administrative Sanctions Schedule; Factors to be Considered.

### 2.1.6 Continuing Violations and Permit Non-Compliance

Each day during which a party continues to work or otherwise continues to violate conservation district laws, and after the Department has informed the violator of the offense by verbal or written notification, the party may be penalized up to \$15,000 per day (penalties for every day illegal actions continue) by the Department for each separate offense.

<sup>1</sup> Provided the harm to the resource and offset damage were minimal.

Violation of existing approved Conservation District Use Permit (CDUP) conditions will be assessed on a case-by-case basis. Existing permit violations, in which deadlines are not met, may be individually assessed by the Staff as to prior violator conduct, knowledge, and compliance. Violation of permit conditions involving initiation and/or completion of project construction, notification of start and completion dates, failure to file legal documents, etc., may be considered very minor within the existing framework, although it should be noted that such actions may result in permit revocation. Failure to perform proper cultural, archeological, or environmental impact studies or failure to implement proper best management practices as identified in the standard permit conditions may be assessed more severely by Staff, as a moderate or major harm to the resource, due to the potential of greater adverse impacts to natural resources from the violator's failure to comply with the permit conditions, may have occurred.

#### 2.1.7 In-Kind Penalties

Once the penalty amount has been established through the framework above, the Department may determine that the full payment or some portion of the penalty may be paid as an in-kind penalty project.<sup>5</sup> This would not serve as a way to avoid payment but as a way to reduce the cash amount owed while allowing the Department to consistently enforce its rules. The in-kind penalty project is not designed to credit the violator for restoration or remediation efforts that may be already required, but to offset a portion of the cash penalty assessed. The in-kind penalty should be enough to ensure future compliance with HAR §13-5 and HRS §183C, by the violator and to deter other potential violators from non-compliance.

In-kind penalties will only be considered if (1) the responsible party is a government entity, such as a federal agency, state agency, county agency, city agency, university, or school board, or if (2) the responsible party is a private party proposing an environmental

restoration, enhancement, information, or education project. In-kind penalties are limited to the following specific options:

- a. **Material and/or labor support for environmental enhancement or restoration projects.** The Department will give preference to in-kind projects benefiting proposed government-sponsored environmental projects. For shoreline violations, this may include state beach nourishment projects and dune restoration projects.
- b. **Environmental Information and Environmental Education projects.** Any information or education project proposed must demonstrate how the information or education project will directly enhance the Department's, and preferably the OCEC's, mission to protect and conserve Hawaii's Conservation District Lands.
- c. **Capital or Facility Improvements.** Any capital or facility improvement project proposed must demonstrate how the improvement will directly enhance the Department's and/or public's use, access, or ecological value of the conservation property.
- d. **Property.** A responsible party may propose to donate land to the department as an in-kind penalty. Donations will be handled by the Department's Legacy Lands program or similar program.

<sup>5</sup> In-Kind Penalty framework has been adapted from Florida Department of Environmental Protection, 2007, Program Directive 923, Settlement guidelines for civil and administrative penalties.

### 3 ASSESSMENT OF DAMAGES TO PUBLIC LAND OR NATURAL RESOURCES

Penalties to recoup damages to public lands or natural resources for the purposes of enforcement and remediation may be assessed in addition to Conservation District violation penalties assessed by the aforementioned guidelines. The assessed total value of the initial and interim natural resource(s) damaged or lost (compensatory damages) and the cost of restoration or replacement of the damaged natural resource(s) (primary restoration cost) along with any other appropriate factors, including those named in HAR §13-1-70, may be adjudicated by the Board. The total value may be estimated on a per annum basis, and then may be used to calculate the net present value of the initial and interim loss of natural resource benefits, until the ecosystem structure, function, and/or services are restored.

The cost of a full-scale damage assessment by the Department would be an administrative cost, which could be recouped by the Board from the landowner or offender pursuant §HRS 183C-7. In some cases, the damage to public lands or natural resources may occur on more than one ecosystem or habitat type, (e.g., sandy beaches, seagrass beds, and coral reefs). In such instances, damages for all impacted systems will be handled cumulatively.

Since all the ecosystem services provided by the ecosystem in question cannot be quantified (e.g., the aesthetic value), the values obtained are lower bound estimates, and may be applied to systems similar to the referenced ecosystem using the benefit transfer method. These valuations, to account for the loss of ecosystem services and the cost to restore them, may be applied to Hawaiian ecosystems on public lands: such as Koa and Ohia forests, coral reefs, seagrass beds, wetlands, dune and beach ecosystems, and other important Hawaiian ecosystems.

While each case is unique and individual in nature, the Department may not be able to conduct detailed damage assessments in each case, and may refer to past precedent,

#### 2.1.8 Penalty Adjudication

Violation penalties may be adjudicated similarly to the harm to resource indices in the penalty guideline framework.

Comparable Harm to Resource	Identified Land Use Permit and Penalty Range	Penalty Adjudicator
Major	\$10,000-\$15,000	Board
Moderate	\$2,000-\$10,000	Board
Minor	\$1,000-\$2,000	Chairperson or Presiding Officer
Very Minor	up to \$1,000	Chairperson or Presiding Officer

#### Major and Moderate Harm to the Resource

The Board may adjudicate penalties to violations categorized as causing or potentially causing major or moderate harm(s) to the resource. The Board may also adjudicate cases in which repeat violations, repeat violators, or egregious behavior were involved, or moderate to significant actual harm to the resource occurred. The Board may also adjudicate the payment of part or all of the penalty as part of an in-kind penalty.

#### Minor and Very Minor Harm to the Resource

The Board may delegate to the Chairperson or a Presiding Officer the power to render a final decision in minor and very minor conservation district violations in order to provide expeditious processing and cost effective resolution. The Chairperson or appointed Presiding Officer may adjudicate penalties to minor and very minor violations characterized by inadvertent or unintentional violations and those violations which caused minor or very minor harm to the resource.

economic ecosystem valuations, and other published environmental valuations to estimate and assess damages on smaller scales (for valuations and publication examples see Appendix C: References and Appendix D: Damages Examples). Using the benefit transfer method to apply past precedents and published valuations in some situations would allow the Department to focus its administrative duties and time on remediation and restoration efforts. However, as ecological valuation and research continue, more comprehensive estimates may be produced and utilized.

The Board may allow restoration activities and damage penalties to be conducted and/or applied to a site different from the location of the damaged area where similar physical, biological and /or cultural functions exist. These assessed damages are independent of other, city, county, state and federal regulatory decisions and adjudications. Thus, the monetary remedies provided in HRS §183C-7 are cumulative and in addition to any other remedies allowed by law.

### 3.1 PRIMARY RESTORATION DAMAGES

The cost of land or habitat restoration or replacement, the cost of site monitoring, and site management may be assessed and charged as primary restoration damages. Restoration efforts will aim to return the damaged ecosystem to a similar ecological structure and function that existed prior to the violation. In cases in which the damaged ecosystem was predominately composed of non-native species, restoration efforts must re-vegetate Conservation District land and public lands with non-invasive species, preferably native and endemic species when possible. The use of native and endemic species may thus result in the restoration of ecological structure and function critical for the survival of endemic Hawaiian species.

Returning the damaged and or severely degraded site to a condition similar to or better than its previous ecological structure and function (e.g., a terrestrial system such as a Koa (*Acacia koa*) forest) would include: (1) calculating the level of ecosystem services to be restored from carbon sequestration, climate regulation, nutrient cycling, air and water purification, erosion control, plant and/or wildlife habitat, and any other services which

may be valued; (2) purchase, production and out-planting of Koa seedlings; and (3) monitoring, maintenance, and management for the time period of mature growth of ~40-60 years, to achieve mature canopy structure, native under-story, and an acceptable level of lost ecosystem structure, function and/or services restored.

### 3.2 COMPENSATORY DAMAGE CALCULATION

Compensatory damages to public lands or natural resources may be assessed and charged to the violator to compensate for ecosystem damage and lost initial and interim ecosystem services to the public. All Divisions of the Department may coordinate their resources and efforts along with existing ecosystem valuations and publications (See Appendix C and D for examples) to derive the estimated total value of the natural resource damaged until the ecosystem structure, function, and services are estimated to be recovered.

The total value of the natural resource that is lost or damaged may include the initial and interim values of the ecosystem services provided by the natural resource or habitat, and the social-economic value of the degraded site, until the ecosystem structure, function, and/or services are restored. Assessing the damages to the resource could include: estimating the loss of ecosystem services of carbon sequestration, climate regulation, nutrient cycling, plant and/or wildlife habitat, biodiversity, air and water purification, erosion control, coastal protection, the loss of benefits to tourism, fisheries, society, cultural inspiration and practices, and any other services which may be valued.

These natural resource damages may be assessed using economic valuation techniques to estimate the total value(s) of the natural resource(s) damaged on a per area basis, including: total ecosystem service value, total annual benefits, the market value of the natural resource, or any other factor deemed appropriate. The total value of the present and interim natural resource damage may be estimated by calculating the net present value of these lost benefits, values and services. The net present value may be calculated using a discount rate to scale the present and future costs to the public, of the interim losses of ecosystem services over the restoration time. The restoration time may be

estimated as the number of years for the damaged natural resource or ecosystem to reach maturity and/or the ecosystem structure and function to be restored similar to the pre-violation state. The discount of future losses and accrued benefits may be used in the valuation of mitigation efforts performed by the violator. For example the restoration conducted immediately after damage occurred may be calculated to have a higher present benefit worth than the benefit of restoration activities undertaken a year or two later.

In other instances, a habitat equivalency analysis (HEA) or a resource equivalency analysis (REA) may be used to scale equivalent habitat or wildlife losses for estimating both ecosystem damage penalties and restoration efforts.

### 3.3 ADJUDICATION OF DAMAGES

The adjudication of primary restoration damages and compensatory damages will be adjudicated by the Board due to the complexity of the assessment process and to assure proper checks and balances, including adequate public notice and a public hearing.

In addition to the damages and penalty violations assessed, the Department is allowed to recoup all administrative costs associated with the alleged violation pursuant to HRS §183C-7(b). All penalties assessed will be in compliance with HRS §183C-7(c) and will not prohibit any person from exercising native Hawaiian gathering rights or traditional cultural practices.

## APPENDIX A: GUIDELINE FRAMEWORK TABLES

Table 1. Penalty Guideline Framework

Harm to resource or potential for harm to resource	Identified land use permit violating with the letter	Penalty Ranges
Major	D (Board)	\$10,000-\$15,000
Moderate	C (Departmental)	\$2,000-\$10,000
Minor	B (Site Plan)	\$1,000-\$2,000
Very Minor	(B) (Site Plan)	Up to \$1,000

Table 2. Vegetation Removal

Action	Commensurate Harm to Resources	Penalty Ranges
Removal of more than 10,000 sq. ft.	Major	\$10,000-\$15,000
Removal of Vegetation or of 2,000-10,000 sq. ft of vegetation	Moderate	\$2,000-\$10,000
Removal of less than 2,000 sq. ft. vegetation	Minor	\$1,000-\$2,000
Clearing of invasive or noxious vegetation	Very Minor	Up to \$1,000 <sup>a</sup>

Note: According to Table 2, the clearing of vegetation may incur a penalty of up to \$17/sq. ft., as clearing 10,000 sq. ft. Staff could assess a penalty of \$170,000. The clearing of threatened, endangered or commercially valuable plants will be addressed on a case-by-case basis, but depending on the importance of the species may incur a penalty of up to \$15,000 per plant.

## APPENDIX B: DEFINITIONS

### Definitions:

- (1) "Baseline" means the original level of services provided by the damaged resource.
- (2) "Benefit Transfer Method" estimates economic values by transferring existing benefit estimates from studies already completed for another location or issue.<sup>7</sup>
- (3) "Board" means the Board of Land and Natural Resources.
- (4) "Board Permit" means a permit approved by the Board of Land and Natural Resources.
- (5) "Chairperson" means the chairperson of the board of land and natural resources
- (6) "Civil Resource Violations System" or "CRVS" means a system of administrative law proceedings as authorized under chapter 19D, HRS, and further prescribed in Subchapter 7, 13-1, HAR, for the purpose of processing civil resource violations.
- (7) "Compensatory Damages" means damages for compensation for the interim loss of ecosystem services to the public prior to full recovery.
- (8) "Contested Case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing.
- (9) "Department" means the Department of Land and Natural Resources.
- (10) "Departmental Permit" means a permit approved by the Chairperson.
- (11) "Discounting" means an economic procedure that weights past and future benefits or costs such that they are comparable with present benefits and costs.
- (12) "Ecosystem Services" means natural resources and ecosystem processes, which may be valued according to their benefits to humankind.

*For example: carbon sequestration, climate regulation, nutrient cycling, plant and/or wildlife habitat, biodiversity, air and water purification, erosion control, coastal protection, the loss of benefits to tourism,*

<sup>7</sup> Ecosystem Valuations [http://www.ecosystemvaluation.org/benefit\\_transfer.htm](http://www.ecosystemvaluation.org/benefit_transfer.htm)

*recreation, scientific discovery, fisheries, society, cultural inspiration and practices, and any other services which may be valued.*

- (13) "Grossly negligent" violation means conscious and voluntary acts or omissions characterized by the failure to perform a manifest duty in reckless disregard of the consequences.<sup>8</sup>
- (14) "Harm to resource" means an actual or potential impact, whether direct or indirect, short or long term, acting on a natural, cultural or social resource, which is expected to occur as a result of unauthorized acts of construction, shoreline alteration, or landscape alteration as is defined as follows:
  - (a) "Major Harm to resource" means a significant adverse impact(s), which can cause substantial adverse impact to existing natural resources within the surrounding area, community or region, or damage the existing physical and environmental aspects of the land, such as natural beauty and open space characteristics
  - (b) "Moderate Harm to Resource" means an adverse impact(s), which can degrade water resources, degrade native ecosystems and habitats, and/or reduce the structure or function of a terrestrial, littoral or marine system (but not to the extent of those previously defined as those in (a)).
  - (c) "Minor Harm to Resource" means limited to short-term direct impacts from small scaled construction or shoreline or vegetation alteration activities.
  - (d) "Very Minor Harm to Resource" means an action in which the impact on the water resource or terrestrial, littoral or marine ecosystem was insignificant, and was not of a substantial nature either individually or cumulatively.

*For example, "major harm to the resource(s)" would be associated with a major land use violation that would have likely required a Board Permit, such as building a house, while a "minor harm to the resource(s)" may be*

<sup>8</sup> Definition adapted from Florida Department of Environmental Protection, 2000 Administrative Fines and Damages Liability, Ch. 62B-54.

*associated with minor land uses requiring an administrative Site Plan Approval, for building a small accessory structure.*

- (15) "Knowing" violation means an act or omission done with awareness of the nature of the conduct.
- (16) "Net Present Value" means the total present value (PV) of a time series of cash flows.
- (17) "OCCL Administrator" means the Administrator of the Office of Conservation and Coastal Lands.
- (18) "Party" means each person or agency named or admitted as a party.
- (19) "Person" means an appropriate individuals, partnership, corporation, association, or public or private organization of any character other than agencies.
- (20) "Presiding Officer" means the person conducting the hearing, which shall be the chairperson, or the chairperson's designated representative.
- (21) "Primary Restoration Damages" means the costs to restore the damaged site to its prior baseline state.
- (22) "Site Plan" means a plan drawn to scale, showing the actual dimensions and shape of the property, the size and locations on the property of existing and proposed structures and open areas including vegetation and landscaping.
- (23) "Willful violation" means an act or omission which is voluntary, intentional and with the specific intent to do something the law forbids, or fail to do something the law requires to be done.

#### APPENDIX C: REFERENCES

- Cesar, H., van Beukering, P., Pintz, S., Dierking J. 2002. Economic valuation of the coral reefs of Hawaii. NOAA Final Report NA 160A1449.
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- Florida Department of Environmental Protection. 2000. Administrative Fines and Damage Liability. Ch. 62B-54. <http://www.dep.state.fl.us/legal/Rules/beach/62b-54.doc>
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- Florida Department of Environmental Protection. 2000. Rules and procedures for application for coastal construction permits. Ch. 62B-41. <http://www.dep.state.fl.us/beaches/publications/pdf/62b-41.pdf>



## APPENDIX D: DAMAGES EXAMPLES

### Examples of Damage Assessments and Possible Remediation Efforts

The following are only brief past estimates used in Hawaii and other states; they are by no means comprehensive or limiting. These are intended to be examples for possible assessments and remediation efforts not as templates. As previously stated each case will be handled individually to account for unique ecological, economic and cultural impacts. The following are organized by habitat type.

#### Coral

##### Florida Department of Environmental Protection (Civil Damages):

The DEP can impose fines of up to \$1,000/m<sup>2</sup> of reef damaged and is dependent on the absence of extenuating circumstances such as weather conditions, disregard of safe boating practices, navigational error, whether the vessel operator was under the influence of drugs or alcohol etc.

##### Cesar et al. 2002 (Ecosystem Service Valuation)

Cesar et al. used a Simple Coral Reef Ecological Economic Model (SCREEM) to assess Hawaiian coral reefs based on the annual benefits of the coral reefs to recreation/tourism, property amenities, biodiversity, fisheries and education. The annual benefits and total economic value could then be expressed on a 'per area' basis. This study found the total annual benefits of the coral reefs of Hanauma Bay to be \$37.57 million (\$2,568/m<sup>2</sup>), of the coral reefs in Kihnei to be \$28.09 million (\$65/m<sup>2</sup>) and the coral reefs on the Kona coast to be \$17.68 million (\$19/m<sup>2</sup>).

##### Pilaa enforcement (KA-02-10) (Primary Restoration Cost)

Damage to Coral reef ecosystems was assessed for restoration activities according to Florida guidelines, as \$5,830,000 for 5,380 m<sup>2</sup> of coral reef damage. This calculation

was similar to the estimated cost of remediation efforts \$390,000 to clean 5,000 yd<sup>3</sup> of beach sand. However between 30,000-50,000 yd<sup>3</sup> was estimated to be impacted, totaling \$2,300,000-\$3,900,000. While cleaning the sediment from the reef was estimated to cost approximately \$845,000 (for the 13 acres, or \$65,000 for 10m<sup>2</sup>). This totaled between \$3,100,000 and \$4,700,000, and did not include coral colony re-establishment. An additional \$630,000 was estimated for the 10-year monitoring period, (however studies by Cesar et al. 2003 estimated a 25 year period for recovery of ecological impacts).

*Thus damage to corals may be calculated as follows:*

- # Number of square meters of coral damaged
- X Multiplied by \$1,000 (or estimated value of coral on per/area basis)
- (#m2 x \$1000)

Plus the estimated net present value of ecosystem services lost until recovery. (This may be more if damage to an area such as Hanauma Bay with increased recreational economic revenue.)

- +Plus cost of Remediation
- +Plus Cost of cleaning sediment from reef
- +Plus Cost of cleaning sediment/mud from beach sand
- +Plus Cost of coral reestablishment
- +Plus Cost of Monitoring
- +Plus Cost of Management

**Seagrass beds (Compensatory Damage)**

The Florida DEP fines offenders \$100/yd<sup>2</sup> of damage to seagrass beds for the first yd<sup>2</sup> damaged and \$75/yd<sup>2</sup> per each additional yd<sup>2</sup> damaged.

- \$100 for the first yard damaged
- + \$75 per each additional yard
- or net present total value of ecosystem services lost until recovery
- +vegetation planting
- +monitoring

**Sand Beaches (ex. Of Primary Restoration Costs)**

Minimum penalty cost of restoration and potential negative ecological, social and environmental impacts should be included in the assessment of damaged, degraded or lost sandy beaches. As one of Hawaii's greatest natural resources the following should be included in the minimum penalty assessment, however, as ecological valuation and research continues, more comprehensive estimates may be produced. In KA-02-10 Piana, \$390,000 fine was estimated to clean 5,000 yd<sup>3</sup> of beach.

- Cost of lost revenue due to altered Beach resources (compensatory)
- +primary restoration costs
- +Plus cost of cleaning of sediment/mud from beach area (if necessary)
- +Plus cost of beach nourishment (sand replacement)
- +Plus cost of native dune vegetation

(In some circumstances the loss of beach resources may be assessed in conjunction with other ecological impacts listed above, such as coral reefs and sea grass beds.)

**APPENDIX E: PENALTY CALCULATION WORKSHEET**

Violator's Name(s): \_\_\_\_\_  
 TMK: \_\_\_\_\_  
 OCCL Staff Member: \_\_\_\_\_  
 Date: \_\_\_\_\_

**Part 1- Penalties**

Violation Prefix Type	Harm to Resource (D,C,B) (actual & potential)	Tree or Vegetation Status	Penalty Range	Adjustments (Mark Adj. Choice #1-8)	Multi-day (# days)	Total
1						
2						
3						
4						
5						
6						
7						
8						
9						
10						

Penalty Total: \_\_\_\_\_

**Penalty Adjustments and Descriptions (please attach additional adjustments and descriptions, including but not limited to those listed in §13-1-70)**

1. Actual environmental damage extent (onsite)

Description: \_\_\_\_\_

2. Actual environmental damage extent (offsite)

Description: \_\_\_\_\_

3. Does the violator's have a history of violations? \_\_\_\_\_

4. Was the violation repetitious or of a long duration? \_\_\_\_\_

5. Was the violator Responsive and exhibit a level of cooperation of with the Department and/or Staff? \_\_\_\_\_

6. Does the Violator have a Financial Hardship? \_\_\_\_\_

7. Did the violator receive Economic or commercial gain through non-compliance? \_\_\_\_\_

8. Other. \_\_\_\_\_

Description: \_\_\_\_\_

Total Adjustment: up/down \_\_\_\_\_

Multi-day penalties \_\_\_\_\_

Number of days to multiply penalty: \_\_\_\_\_

Reasoning: \_\_\_\_\_

Total multi-day: \_\_\_\_\_

