

**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
OFFICE OF CONSERVATION AND COASTAL LANDS  
Honolulu, Hawaii**

April 24, 2015

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

**REGARDING:** Conservation District Enforcement KA 13-18 Alleged Unauthorized Land Uses Located in the Conservation District

**LANDOWNER:** Carl David

**LOCATION/  
Tax Map Key:** Kūhiō Hwy, Hā'ena, Kaua'i  
(4) 5-9-002:065

**SUBZONE:** Limited

**DESCRIPTION OF AREA:**

The subject parcel is located on the north shore of Kaua'i and was created by the Hā'ena Hui Partition of 1967. The general area may be characterized as rural. Neighboring lots contain residential dwellings. The area lies within the Limited subzone of the Conservation District and within flood hazard VE. A stream is to the east and undeveloped land lies to the south (mauka) of the property.

**ALLEGED UNAUTHORIZED LAND USES [Exhibits A-E]**

The following chronology discusses the alleged unauthorized land uses:

- November 24, 2012 A DOCARE Officer conducted a cursory site inspection of the subject property due to a number of complaints regarding noise, sanitation and unauthorized land uses. The site inspection revealed a house trailer, an outhouse, storage shed, an open air pavilion and rock walls. **[Exhibit F]**
- December 5, 2012 Notice was sent to the landowner identifying the alleged unauthorized land uses; the statute describing potential Board imposed fines for unauthorized land uses; notice that any information provided may be used in civil proceedings; and contact information for OCCL. **[Exhibit G]**
- January 22, 2013 The OCCL is in receipt of Attorney Walton Hong's response on behalf of Carl and Shelly David. Mr. Hong's correspondence stated Mrs. David had acquired the property in 2008 and noted what was brought to the property and improvements that were made. This would include: A portable house trailer; construction of a storage shed, an outdoor pavilion, a Balinese style antique sleeping bed; restroom facilities connected to a septic system

approved by the State Department of Health; and lining the existing hollow-tile wall with rocks. **[Exhibit H]**

March 15, 2013 OCCL responds to Mr. Hong's correspondence to inform him that the parcel is in the Limited subzone of the Conservation District and there are no records of authorization for improvements. To resolve matters, it was requested that all improvements be removed and the property be remediated. No action taken could result in Board imposed fines for the unauthorized land uses. **[Exhibit I]**

June 5, 2013 The OCCL is in receipt of Mr. Hong's correspondence stating: "The subject property has been under foreclosure proceedings. The current owners of the property, Joseph Carl David and Shelly Rielh David, are exploring various options to address the foreclosure issues and avoid the sale of the property. Unfortunately, the foreclosure matter is of the utmost priority for the Davids at this time. Once the foreclosure matter is resolved, the Davids fully intend to address the violation matter with your department. In the meantime, they ask for your understanding and consideration in delaying the addressing of the matter. **[Exhibit J]**

August 5, 2013 The OCCL is in receipt of Mr. Hong's correspondence stating: "The parties could not reach an agreement to hold off the foreclosure. The Commissioner has scheduled the auction for August 15, 2013, at 12 noon...We will keep you posted as to the results of the foreclosure auction." **[Exhibit K & L]**

May 30, 2014 Carl David as the grantee of the deed to the property is recorded in the Bureau of Conveyances. **[Exhibit M]**

September 2014 Staff contacted Mr. Hong regarding a status update of the matter. Mr. Hong stated he needed to consult with his client.

December 9, 2014 Site inspection by staff revealed unauthorized land uses still exists on the property and **additional improvements** [gates] were conducted. **[Exhibit N]**

The Department has not authorized any of the land uses on the subject parcel.

## **RESOLUTION OF UNAUTHORIZED LAND USES:**

### **Conservation District**

The Hawai'i Revised Statutes (HRS), Chapter 183C, and the Hawai'i Administrative Rules (HAR), Chapter 13-5, regulate land uses in the Conservation District by identifying land uses that may be allowed by Conservation District Use Permit (CDUP). §13-5-2, HAR defines "land use" as:

- (1) The placement or erection of any solid material on land if that material remains on the land more than thirty 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 house trailer, storage shed, rock-lined hollow-tile wall, outdoor pavilion, Balinese style antique sleeping bed, restroom facilities connected to a septic system approved by the State Department of Health have been on the land for over 30-days, and therefore qualify as land uses as defined in HAR, §13-5-2.

HAR, §13-5-6, Penalty states: (a) Any person, firm, government agency, or corporation violating any of the provisions of this chapter or permits issued pursuant thereto shall be punished as provided in chapter 183C, HRS.

HRS, §183C-7 **Penalty for violation** notes (a) The department shall prescribe administrative procedures as it deems necessary for the enforcement of this chapter and (b) Any person violating this chapter or any rule adopted in accordance with this chapter shall be fined not more than \$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. 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.

Based on the **Conservation District Violation Penalties Schedule Guidelines and Assessment of Damages to Public Land or Natural Resources**, Section 2.1 Penalty Calculation; Where Staff was unable to associate the unauthorized use with a typical land use identified in Hawaii Administrative Rules (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. **[Exhibit O]**

Under the Penalties Schedule Guideline, the unauthorized house trailer is considered a “Major” unauthorized land use since the identified land use, a single family residence, would require a Board Permit under the permit prefix “D”. This violation follows a penalty range of \$10,000 to \$15,000.

The outdoor pavilion and a Balinese style antique sleeping bed may be unidentified land uses that may be considered “Moderate” as the most similar land use would be a shelter, which would require a Departmental Permit under the permit prefix “C”. This violation follows a penalty range of \$2,000 to 10,000.

The rock-lined hollow-tile walls and gates are considered “Moderate” under the Penalties Schedule Guideline since the construction of these existing unauthorized features would require

a Departmental permit under the permit prefix "C". This violation follows a penalty range of \$2,000- \$10,000.

The storage shed and restroom facilities are considered "Minor" since the construction of these existing features [if these land uses were accessory to a permitted land use] would require a Site Plan Approval under the permit prefix "B". This violation follows a penalty range of \$1,000 - \$2,000.

The unauthorized placement of the portable house trailer, outdoor pavilion, Balinese style antique sleeping bed, storage shed, restroom facilities connected to a septic system, rock-lined hollow-tile walls and gates are land uses that occurred in the Conservation District without approval and therefore allegedly violated the above referenced chapters and rules.

### **DISCUSSION**

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 Department to conduct identified land uses. While the outdoor pavilion, Balinese style antique sleeping bed and portable house trailer are not permanent structures; the structures have remained on the land for more than 30-days and by definition are a land use.

The house trailer may be an identified land use that requires a Board Conservation District Use Permit (CDUP) pursuant to the HAR, §13-5-23, L-3 Single Family residence.

The function of the Balinese style antique sleeping bed and separate outdoor pavilion must be reviewed by the Department to determine if there is an identified land use in which an after the fact authorization may be applied for.

The rock-lined hollow-tile walls and gates are identified land uses that require a Departmental Conservation District Use Permit pursuant to the HAR, §13-5-22, P-13, Land and Resource Management.

Staff notes, while the landowner and his counsel stated they would like to resolve this matter expeditiously, actions did not demonstrate this. Upon hearing of the foreclosure action, staff patiently waited to be contacted of the outcome as correspondences from the landowners representative stated, "We will keep you posted as to the results of the foreclosure auction."

Based upon public record, it appears the foreclosure action resulted in the Davids being able to retain the property. However staff was not notified as stated. Staff had to initiate contact with the landowners counsel every few months for a status update. No action to resolve this matter was forthcoming from the landowner. The unauthorized land uses continue to exist and the violations have been pending for over two years.

Photos taken 12/2014 illustrate wooden gates that were not present in former photos. It appears improvements continued on the parcel while the landowner had knowledge that alleged violations were pending on the parcel. **[Exhibit P]**

## **FINDINGS**

1. That the landowner did in fact, authorize, cause or allow: the placement of a house trailer; outdoor pavilion; Balinese style antique sleeping bed; a storage shed; restroom facilities; rock-lined hollow-tile walls;
2. That the landowner continued to conduct improvements to the property by installing gates without authorization while a violation was pending on the parcel; and
3. That the unauthorized land uses occurred within the State Land Use Conservation District, Limited Subzone.

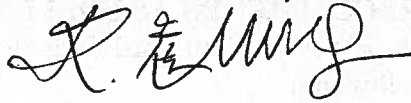
### **AS SUCH, STAFF RECOMMENDS AS FOLLOWS:**

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

1. The landowner is fined \$15,000 for violating the provisions of HAR, §13-5-23, for the placement of a house trailer; an outdoor pavilion; and a Balinese style antique sleeping bed within the Conservation district, Limited subzone prior to obtaining the appropriate approvals within the Conservation District;
2. The landowner is fined \$15,000 pursuant to HRS, §183C-7(b) for willful violation of a written notification from the Department by continuing to conduct improvements to the property by installing wooden gates without authorization;
3. The landowner is fined \$10,000 for violating the provisions of HAR, §13-5-23, for the unauthorized construction of a storage shed, septic system and rock-lined hollow-tile walls, by failing to obtain the appropriate approvals within the Conservation District;
4. The landowner is fined an additional \$700.00 for administrative costs associated with the subject violations;
5. The landowner shall pay all designated fines and administrative costs that totals \$40,700 within 180 days of the date of the Board's action;
6. The landowner shall remove or file an After the Fact Conservation District Use Application within 60-days for the house trailer, outdoor pavilion and Balinese style antique sleeping bed, rock-lined hollow-tile walls, wooden gates, storage shed and septic system;
7. Should the landowner wish to retain identified land uses by filing an After the Fact Conservation District Use Application, a Conservation District Use Permit shall be obtained within 2-years of the Board's action;
8. The landowner shall comply with all applicable statutes, ordinances, rules, and regulations of the Federal, State and County governments;

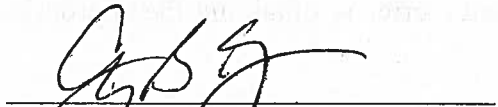
9. That in the event of failure of the landowner to comply with any order herein, the landowner shall be fined an additional \$15,000 per day until the order is complied with;
10. That in the event of failure of the landowner to comply with any order herein, this matter shall be turned over to the Attorney General for disposition, including all administrative costs; and
11. The above noted conditions of Enforcement file KA 13-18 shall be recorded with the deed instrument pursuant to HAR, §13-5-6(e).

Respectfully submitted,



K. Tiger Mills, Staff Planner  
Office of Conservation and Coastal Lands

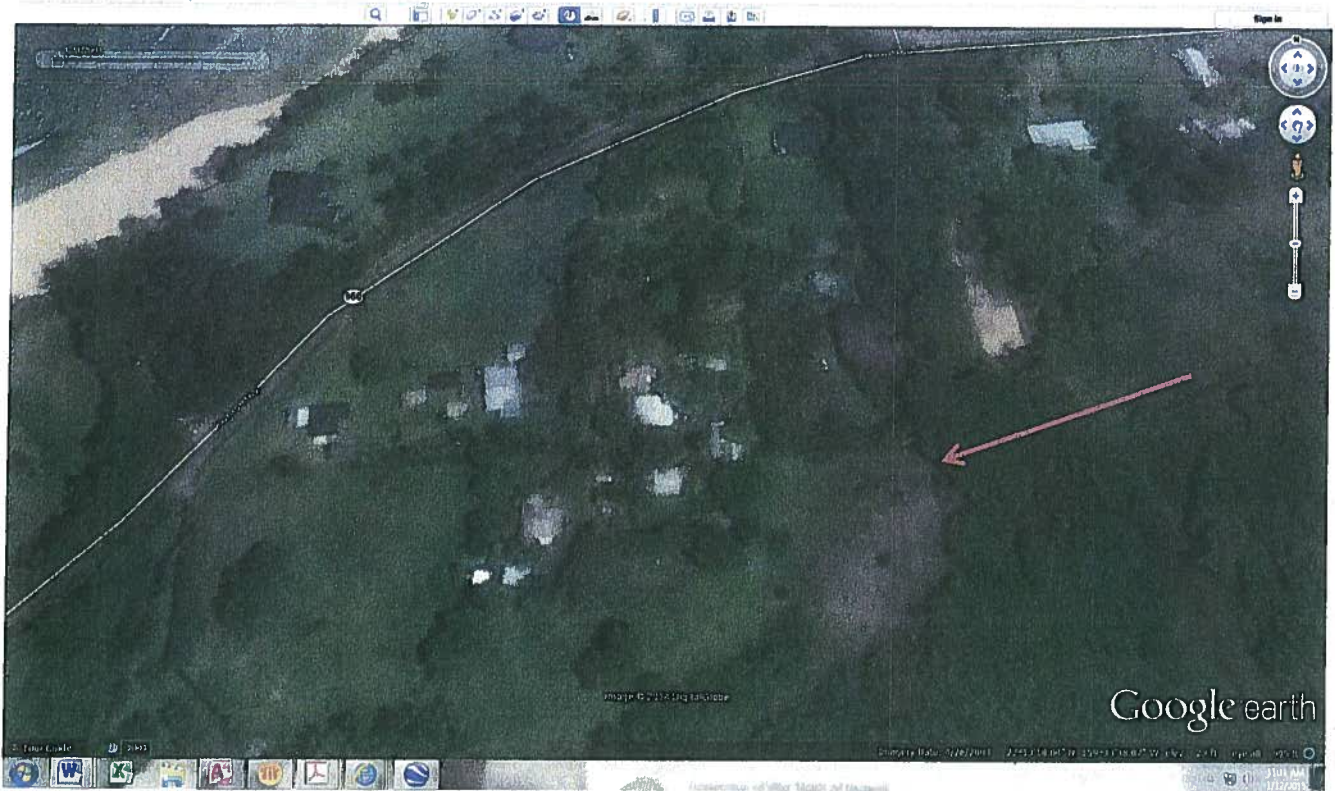
Approved for submittal:



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Carty S. Chang, Interim Chairperson  
Board of Land and Natural Resources

4/28/2003



TMK: (4) 5-9-002:065

3/20/2005

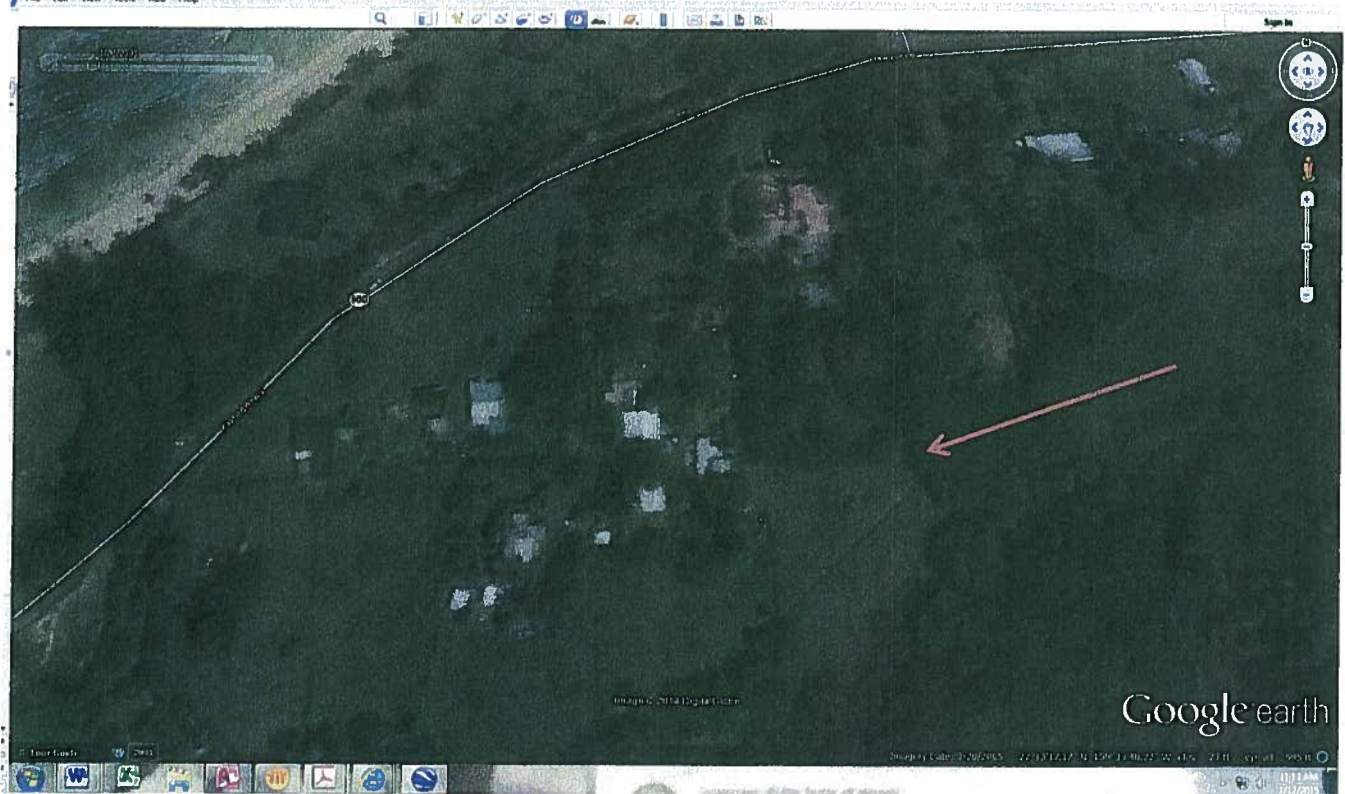
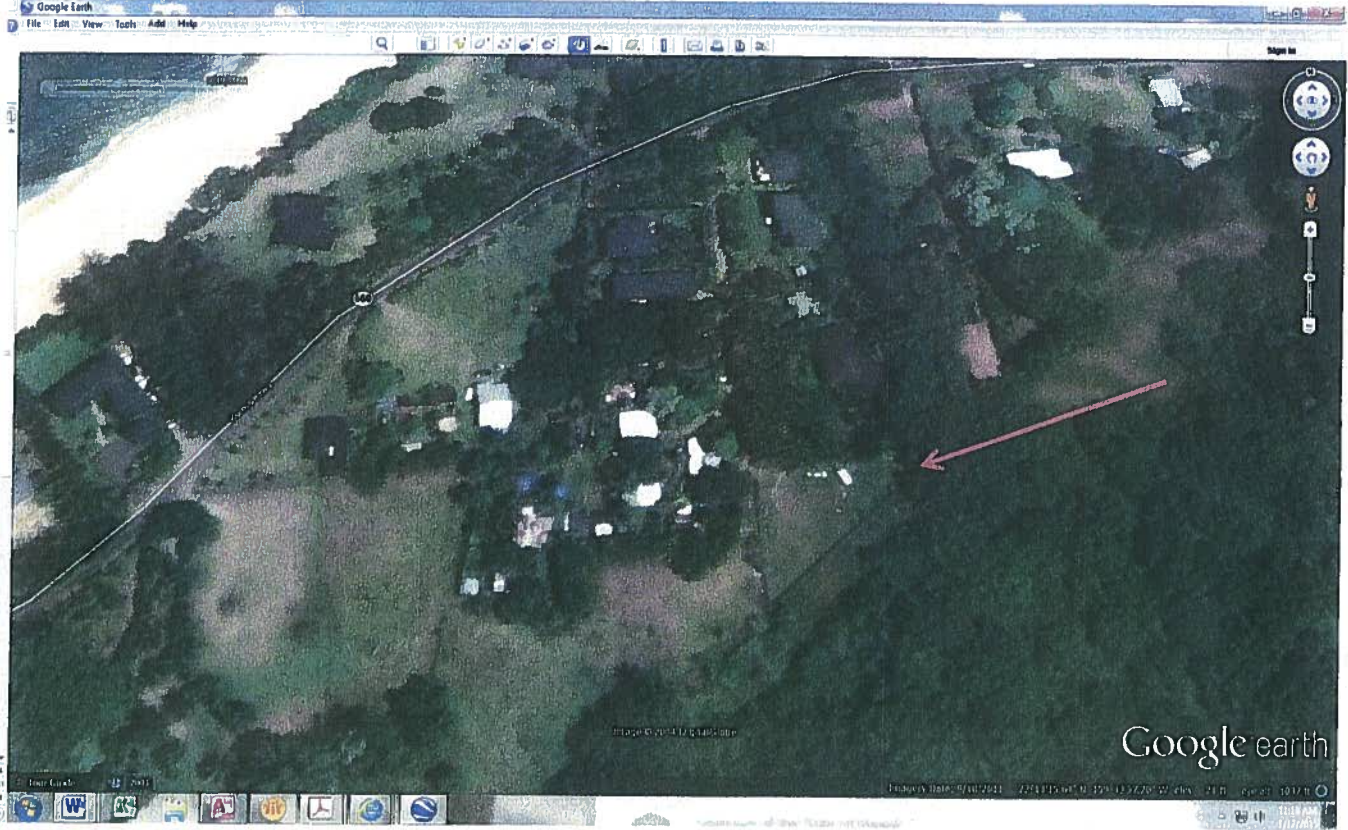


EXHIBIT A

9/10/2011



TMK: (4) 5-9-002:065

3/28/2012



EXHIBIT B





Google Earth 12/16/2013

TMK: (4) 5-9-002:065

EXHIBIT C



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Owner and Parcel Information			
Owner Name	DAVID,CARL	Today's Date	January 8, 2015
Mailing Address	PO BOX 386 HANALEI, HI 96714	Parcel Number	590020650000
Location Address	KUHIO HWY	Project Name	
Tax Classification	Residential	Parcel Map	Show Parcel Map
Neighborhood Code	5861-1	Land Area (acres)	0.3166
Legal Information	LOT 61 HAENA HUI 13792 SF DES	Land Area (approximate sq ft)	13,791

Assessment Information					Show Historical Assessments
Year	Tax Classification	Total Market Value	Total Assessed Value	Total Exemption	Total Net Taxable Value
2015	Residential	\$ 574,500	\$ 574,500	\$ 0	\$ 574,500

Improvement Information				
Year Built	Effective Year Built	Living Area	Bedrooms/Full Bath/Half Bath	Sketch
2013	2013	687	2/1/1	Sketch Building 1

Other Building and Yard Improvements			
Description	Quantity	Year Built	Area
METAL UTILITY SHED	1	2009	200

Permit Information			
Date	Permit Number	Reason	Permit Amount
No permit information associated with this parcel.			

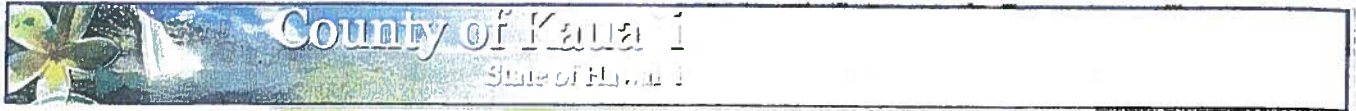
Sales Information										
Sale Date	Price	Instrument #	Instrument Type	Instrument Description	Date Recorded	Document #	Cert #	Book/Page	Conveyance Tax	Document Type
05/29/2014	\$ 1,000	14-A-52630738	FEE CONVEYANCE		05/30/2014				1.5	
05/19/2014	\$ 1,000	14-A-52530834	FEE CONVEYANCE		05/20/2014				1.5	
05/19/2014	\$ 1,000	14-A-52530834	FEE CONVEYANCE		05/20/2014				1.5	
11/29/2013	\$ 312,000	13-A-51050297	FEE CONVEYANCE		12/23/2013				312	
08/22/2012	\$ 0	12-A-46230169	FEE CONVEYANCE		08/28/2012					
07/11/2008	\$ 679,000	08-113786	FEE CONVEYANCE		07/16/2008				1358	
08/21/2007	\$ 10,000	07-154083	FEE CONVEYANCE		08/28/2007				10	
11/25/2003	\$ 10,000	03-265920	FEE CONVEYANCE		12/03/2003				10	
11/24/2003	\$ 460,000	03-265918	FEE CONVEYANCE		12/03/2003				460	
06/20/2000	\$ 175,000	0000089835	FEE CONVEYANCE		06/29/2000				175	

Current Tax Bill Information		2014 Tax Payments			Show Historical Taxes				
Tax Period	Description	Original Due Date	Taxes Assessment	Tax Credits	Net Tax	Penalty	Interest	Other	Amount Due
2014-2	Real Property Tax	02/20/2015	\$ 1,938.94	\$ 0.00	\$ 1,938.94	\$ 0.00	\$ 0.00	\$ 0.00	\$ 1,938.94
2014-2	"TRASH FEE"	02/20/2015	\$ 0.00	\$ 0.00	\$ 36.00	\$ 0.00	\$ 0.00	\$ 0.00	\$ 36.00
Tax bill computed to 01/31/2015			\$ 1,938.94	\$ 0.00	\$ 1,974.94	\$ 0.00	\$ 0.00	\$ 0.00	\$ 1,974.94

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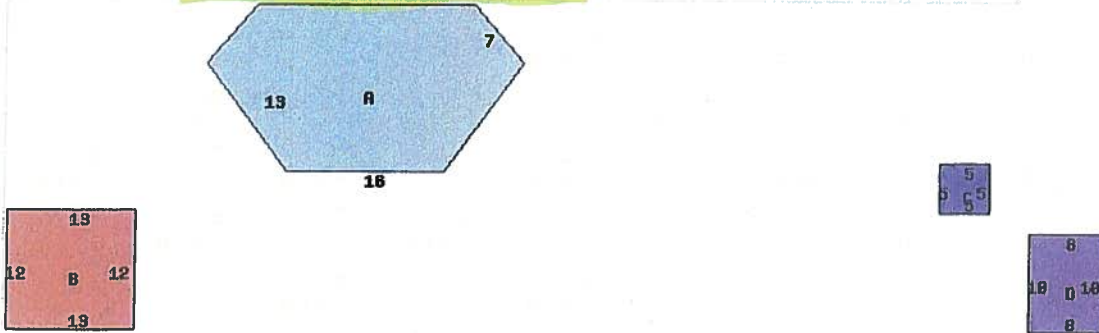
The Kauai County Tax Assessor's Office makes every effort to produce the most accurate information possible. No warranties, expressed or implied, are provided for the data herein, its use or interpretation. Website Updated: January 8, 2015  
 © 2010 by the Kauai County Tax Assessor's Office | Website design by [gpublic.net](#)

EXHIBIT D



Parcel Number: 590020650000

Building Number: 1



Color	Area Type Description	Ground Floor Square Feet
A	MAIN AREA	426
B	1ST STY FRAME	156
C	1ST STY FRAME	25
D	1ST STY FRAME	80

Enlarge

Close Window

EXHIBIT E



EXHIBIT F,



EXHIBIT F<sub>2</sub>

NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
OFFICE OF CONSERVATION AND COASTAL LANDS  
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 PRESERVE COMMISSION  
LAND  
STATE PARKS

REF:OCCL:TM

ENF: KA 13-18

**CERTIFIED MAIL**

7009 3410 0000 4942 9309

David C & Shelly R. Joseph  
P.O. Box 386  
Hanalei, HI 96714

DEC - 5 2012

SUBJECT: Alleged Unauthorized Land Uses in the Conservation District Located at Kuhio Hwy,  
Haena Hui Lot 61, Haena, Kaua'i, TMK: (4) 5-9-002:065

Dear Mr. and Ms. Joseph:

On November 24, 2012, a cursory site inspection was conducted of your property due to a number of complaints regarding sanitation and alleged unauthorized land uses. The site inspection revealed mobile campers, an outhouse, storage shed, an open air pavilion and stacked rock walls (**Exhibit A, B & C**).

The OCCL notes your property appears to lie within the Conservation District Limited subzone. The OCCL regulates land uses within the Conservation District. However the OCCL has no record of authorizations for the noted improvements. Therefore there appears to be alleged Conservation District use violations.

Be aware, pursuant to 183C-7, HRS, the Board of Land and Natural Resources may subject parties to fines of up to \$15,000.00 per violation in addition to administrative costs for unauthorized land uses in the Conservation District. After written or verbal notification from the Department, willful violation may incur an additional fine of up to \$15,000.00 per day per violation for each day in which the violation persists.

Should you have evidence of authorization for any of the noted uses, please forward that information to our Office. Further you may wish to propose resolutions to resolve the alleged unauthorized uses. However please note any information provided may be used in civil proceedings.

You will find Chapter 13-5, Hawaii Administrative Rules (HAR), the rules and regulations of the Conservation District, on our website at [hawaii.gov/dlnr/occl](http://hawaii.gov/dlnr/occl). Please respond to this correspondence within 30 days. Should you have any questions regarding this matter, contact Tiger Mills of our Office at (808) 587-0382.

Sincerely,

Samuel J. Lemmo, Administrator  
Office of Conservation and Coastal Lands

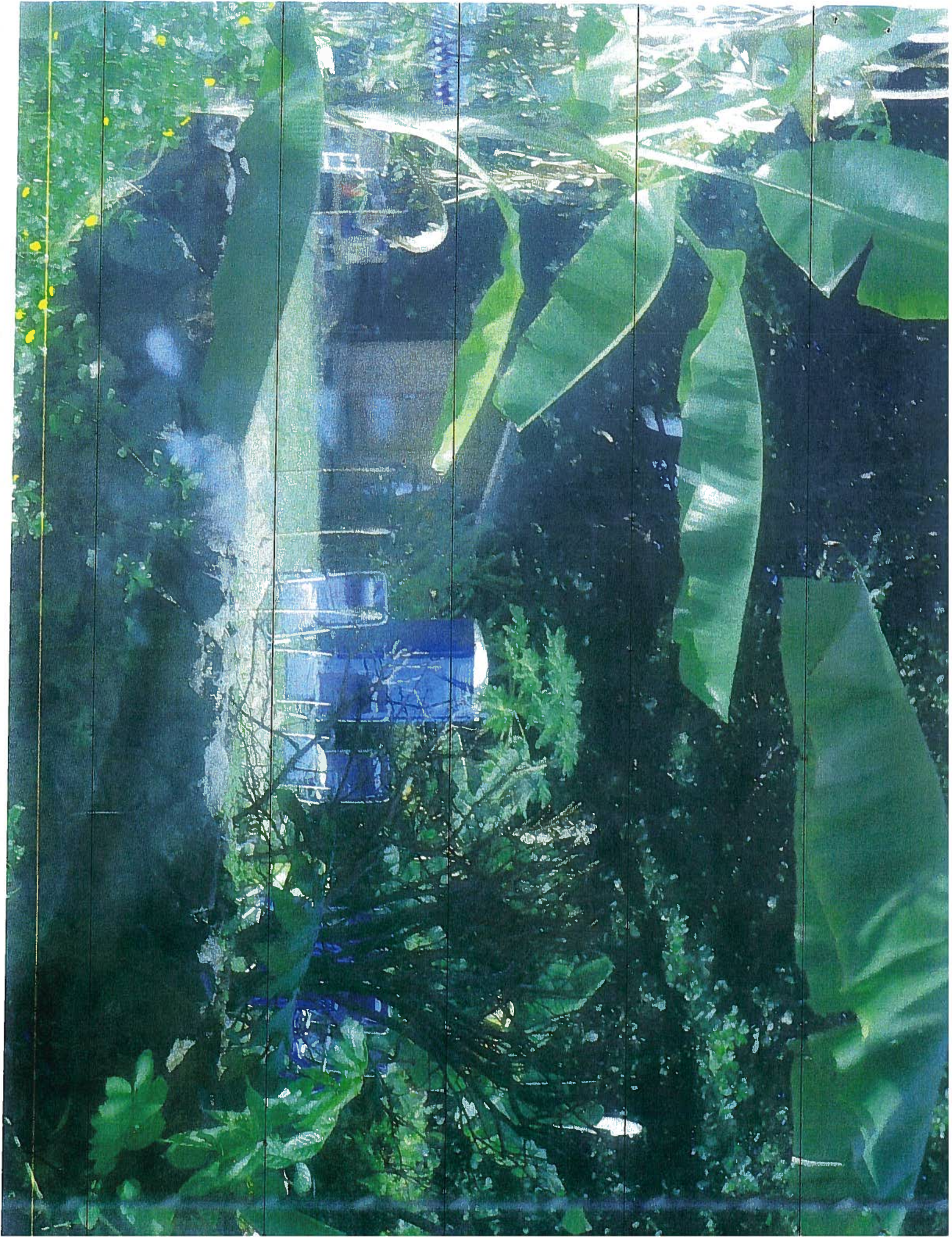
C: Chairperson  
KDLO/DOCARE-Kaua'i  
County of Kaua'i, Planning Dept.

EXHIBIT G









WALTON D.Y. HONG

LAW OFFICES OF

WALTON D.Y. HONG

ATTORNEY AT LAW  
A Law Corporation  
3135 AKAHI STREET, SUITE A  
LIHUE, KAUAI, HAWAII 96766-1106

January 18, 2013

TELEPHONE (808) 245-4757

DELECOPIER (808) 245-5175

RECEIVED  
DEPT. OF LAND & NATURAL RESOURCES  
STATE OF HAWAII

2013 JAN 22 A 11: 57

DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

Department of Land and Natural Resources  
Office of Conservation and Coastal Lands  
Attention: Mr. Samuel J. Lemmo  
P.O. Box 621  
Honolulu, HI 96809

Re: Haena Hui Lot 61, Kauai  
TMK: (4<sup>th</sup>) 5-9-02-65  
Carl and Shelly David  
ENF: KA 13-18

Dear Mr. Lemmo,

We have been retained by Carl and Shelly David, owners of the above-referenced property, and am responding to your letter of December 5, 2012. I apologize for the tardiness of this response letter, but I left a message for Tiger Mills before I left on a trip to China; I only returned last week.

Mrs. David acquired the property in 2008. At that time, she and her husband resided in Minnesota, and would periodically visit and maintain the property. To provide accommodations for them during their visits, they brought in a portable house trailer. Over the years since they acquired the property, they undertook actions to improve the property. These included the construction of a storage shed, an outdoor pavilion, a Balinese style antique sleeping bed (which has not been used for sleeping or habitation purposes), and restroom facilities connected to a septic system approved by the State Department of Health. Incidentally, the portable toilet shown in the photograph attached your letter was being used only temporarily for a party given by the Davids, and has long since been removed. They also lined an existing hollow tile wall with rocks in an effort to beautify the property.

Prior to undertaking these actions, the Davids made inquiry with the County Planning Department, and were informed originally that any structure not exceeding 120 square feet (subsequently changed to 200 square feet) in floor area would not require a building permit. Based on those representations, the Davids proceeded with the said improvements within the permissible limits. They were not aware of any distinction between the State Land Use "Urban" and "Conservation" district boundaries, and the different permitting requirements under those respective district boundaries.

EXHIBIT H

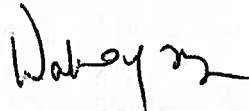
Department of Land and Natural Resources  
Attention: Mr. Samuel J. Lemmo  
January 18, 2013  
Page 2 of 2

It was only when I met with the Davids last week and explained the different levels of zoning and requirements did they begin to comprehend the nature of the alleged violations. With this knowledge, the Davids are willing to work with your department to resolve this matter in a reasonable and appropriate manner.

Accordingly, we are seeking your suggestions as to a course of action acceptable to your Department or the Board of Land and Natural Resources to resolve the issue of alleged violations. As soon as an acceptable course is determined, we will move expeditiously to address the matter.

Thank you for your consideration and assistance in this matter. If there are any questions, please feel free to contact me.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Walton D. Y. Hong', with a stylized flourish at the end.

Walton D. Y. Hong

WDYH:wh

cc: Mr. and Mrs. David

NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



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

ESTHER KIA'AINA  
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CONSERVATION AND COASTAL LANDS  
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FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
OFFICE OF CONSERVATION AND COASTAL LANDS  
POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

REF:OCCL:TM

ENF: KA 13-18

Walton D.Y. Hong  
3135 Akahi Street, Suite A  
Lihue, Hawai'i 96766-1106

MAR 15 2013

SUBJECT: Alleged Unauthorized Land Uses in the Conservation District Located at Kuhio Hwy,  
Ha'ena Hui Lot 61, Ha'ena, Kaua'i, TMK: (4) 5-9-002:065

Dear Mr. Hong:

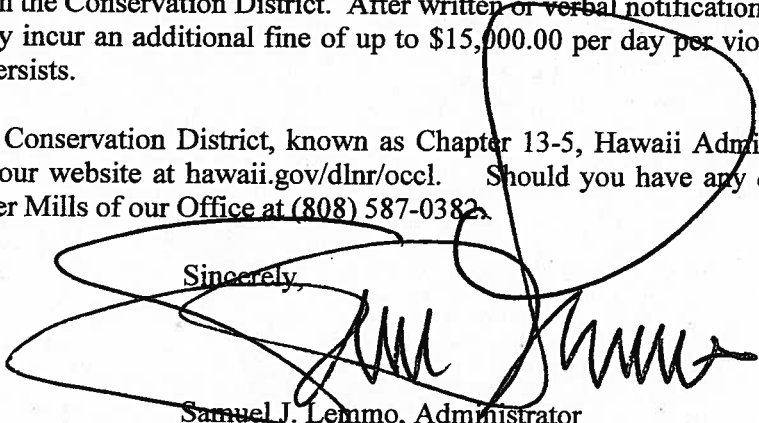
The Office of Conservation and Coastal Lands (OCCL) is in receipt of your response regarding the subject matter. According to your information, Ms. Shelly David acquired the property in 2008. Your clients would periodically visit and maintain the property. As they resided in Minnesota, they brought in a portable house trailer. Improvements made on the property include the construction of a storage shed, an outdoor pavilion, a Balinese style antique sleeping bed which, according to your information, has not been used for sleeping or habitation purposes, and restroom facilities connected to a septic system. In addition, an existing hollow tile wall has been lined with rocks in an effort to beautify the property.

The OCCL notes, the subject area lies within the Limited subzone of the Conservation District. We have no record of authorization for any improvements upon the property. To resolve this matter, your clients may wish to remove all improvements and remediate the property within 90 days. A site inspection will be conducted to verify the removal of the unauthorized land uses. Once this matter is resolved, your client may apply for land uses within the Conservation District Limited subzone.

Should no action be taken, please be aware, pursuant to 183C-7, HRS, the Board of Land and Natural Resources may subject parties to fines of up to \$15,000.00 per violation in addition to administrative costs for unauthorized land uses in the Conservation District. After written or verbal notification from the Department, willful violation may incur an additional fine of up to \$15,000.00 per day per violation for each day in which the violation persists.

The rules and regulations of the Conservation District, known as Chapter 13-5, Hawaii Administrative Rules (HAR), may be found on our website at [hawaii.gov/dlnr/occl](http://hawaii.gov/dlnr/occl). Should you have any questions regarding this matter, contact Tiger Mills of our Office at (808) 587-0382.

Sincerely,

  
Samuel J. Lemmo, Administrator  
Office of Conservation and Coastal Lands

C: Chairperson  
KDLO/DOCARE-Kaua'i  
County of Kaua'i, Planning Dept.

EXHIBIT 1

LAW OFFICES OF

WALTON D.Y. HONG

WALTON D.Y. HONG

TELEPHONE (808) 245-4757  
TELECOPIER (808) 245-5175

ATTORNEY AT LAW  
A Law Corporation  
3135 AKAHI STREET, SUITE A  
LIHUE, KAUAI, HAWAII 96766-1106

RECEIVED  
OFFICE OF CONSERVATION  
& COASTAL LANDS

June 3, 2013

2013 JUN -5 A 10:33

DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

Department of Land and Natural Resources  
Office of Conservation and Coastal Lands  
Attention: Mr. Samuel J. Lemmo  
P.O. Box 621  
Honolulu, HI 96809

Re: ENE: KA 13-18  
Alleged Unauthorized Land Uses  
Kauai TMK: (4) 5-9-002-065

Dear Mr. Lemmo,

This is a follow-up to your letter of March 15, 2013, and my conversation with Tiger Mills of your department last week.

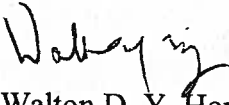
The subject property has been under foreclosure proceedings. The current owners of the property, Joseph Carl David and Shelly Riehl David, are exploring various options to address the foreclosure issues and avoid the sale of the property. Unfortunately, the foreclosure matter is of the utmost priority for the Davids at this time.

Once the foreclosure matter is resolved, the Davids fully intend to address the violation matter with your department. In the meantime, they ask for your understanding and consideration in delaying the addressing of the matter.

I will keep you informed as to the status of the foreclosure proceedings.

Thank you for your assistance. If there are any questions, please feel free to contact me.

Yours very truly,

  
Walton D. Y. Hong

WDYH:wh

cc: Carl David

EXHIBIT J

LAW OFFICES OF

WALTON D.Y. HONG

WALTON D.Y. HONG

ATTORNEY AT LAW  
A Law Corporation  
3135 AKAHI STREET, SUITE A  
LIHUE, KAUAI, HAWAII 96766-1106

TELEPHONE (808) 245-4757  
TELECOPIER (808) 245-5175  
STATE OF HAWAII  
DEPARTMENT OF LAND & NATURAL RESOURCES

2013 AUG -5 A 9: 22

August 1, 2013

DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

Department of Land and  
Natural Resources  
Office of Conservation and Coastal Lands  
Attn: Ms. Tiger Mills  
P. O. Box 621  
Honolulu, HI 96809

Re: **ENE: KA13-18**  
**Alleged Unauthorized Land Uses**  
**Kauai TMK: (4) 5-9-002-065**

Dear Ms. Mills:

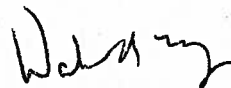
This letter will confirm my conversation with you this date, regarding the status of the foreclosure proceedings on the above-referenced property.

Unfortunately, the parties could not reach an agreement to hold off the foreclosure. The Commissioner has scheduled the auction for August 15, 2013, at 12:00 noon on the steps of the Kauai Judiciary Complex.

We will keep you posted as to the results of the foreclosure auction.

Thank you for your patience in this matter. If there are any questions regarding the above, please feel free to contact me.

Yours very truly,



Walton D. Y. Hong

WDYH:ckf

cc: Mr. Carl David

EXHIBIT K

Back

# NOTICE OF FORECLOS...

## NOTICE OF FORECLOSURE SALE

### NOTICE OF FORECLOSURE SALE

First Hawaiian Bank vs. Shelly Riehl David, et al.  
Civil No. 12-1-0160, In the Circuit Court of the Fifth Circuit,  
State of Hawaii

Lot 61  
Haena Hui  
Haena, Kauai, Hawaii

TMK: (4) 5-9-002-065 (Fee Simple)

Lot containing 13,792 square feet, more or less, and an undivided 1/9th interest in Road Lot "G", Kuhio Highway, Haena, Kauai, Hawaii.

AUCTION DATE: Thursday, August 15, 2013 at 12:00 noon, Front Steps, Fifth Circuit Court Building, 3970 Kaana Street, Lihue, Kauai, Hawaii 96766.

TERMS OF SALE: No upset price. Property sold in "as is" condition at public auction with 10% of highest bid payable in cash, certified or cashiers check at close of auction, balance payable upon delivery of title. Potential bidders must be able to provide proof of ability to comply with 10% of bid requirement prior to participating in the public auction. Mortgagee is authorized to purchase at said foreclosure sale and may satisfy the down payment by way of offset up to the amount of the secured debt. Buyer shall pay all costs of closing including escrow, conveyance and recordation fee, conveyance taxes and is responsible for securing possession of the property upon recordation. At the Court's discretion, the 10% deposit may be forfeited in full or in part if the buyer fails to pay the balance of the purchase price. The Commissioner will deliver title by a Commissioner's Quitclaim Deed. SALE SUBJECT TO COURT CONFIRMATION.

No scheduled open houses. Inspection to be by prior arrangement with Commissioner.

For further information contact:

JOSEPH N. KOBAYASHI

P.O. Box 589

Kapaa, Kauai, Hawaii 96746

Telephone: (808) 822-9000

Facsimile (808) 822-9436

(TG1539513 7/18, 7/25, 8/1/13)

EXHIBIT L



**Bureau of Conveyances - Official Public Records**

**Document Number A52630738**

<b>No. of Pages</b>	6 pages
<b>Fee</b>	\$6.00
<b>Recording Date</b>	2014-05-30
<b>Description</b>	DEED
<b>Grantor</b>	RIEHL REMINGTON H TR
<b>Grantee</b>	DAVID CARL
<b>TMK</b>	4-5-9-002-065-
<b>Notes</b>	D LOT 61 HAENA HUI

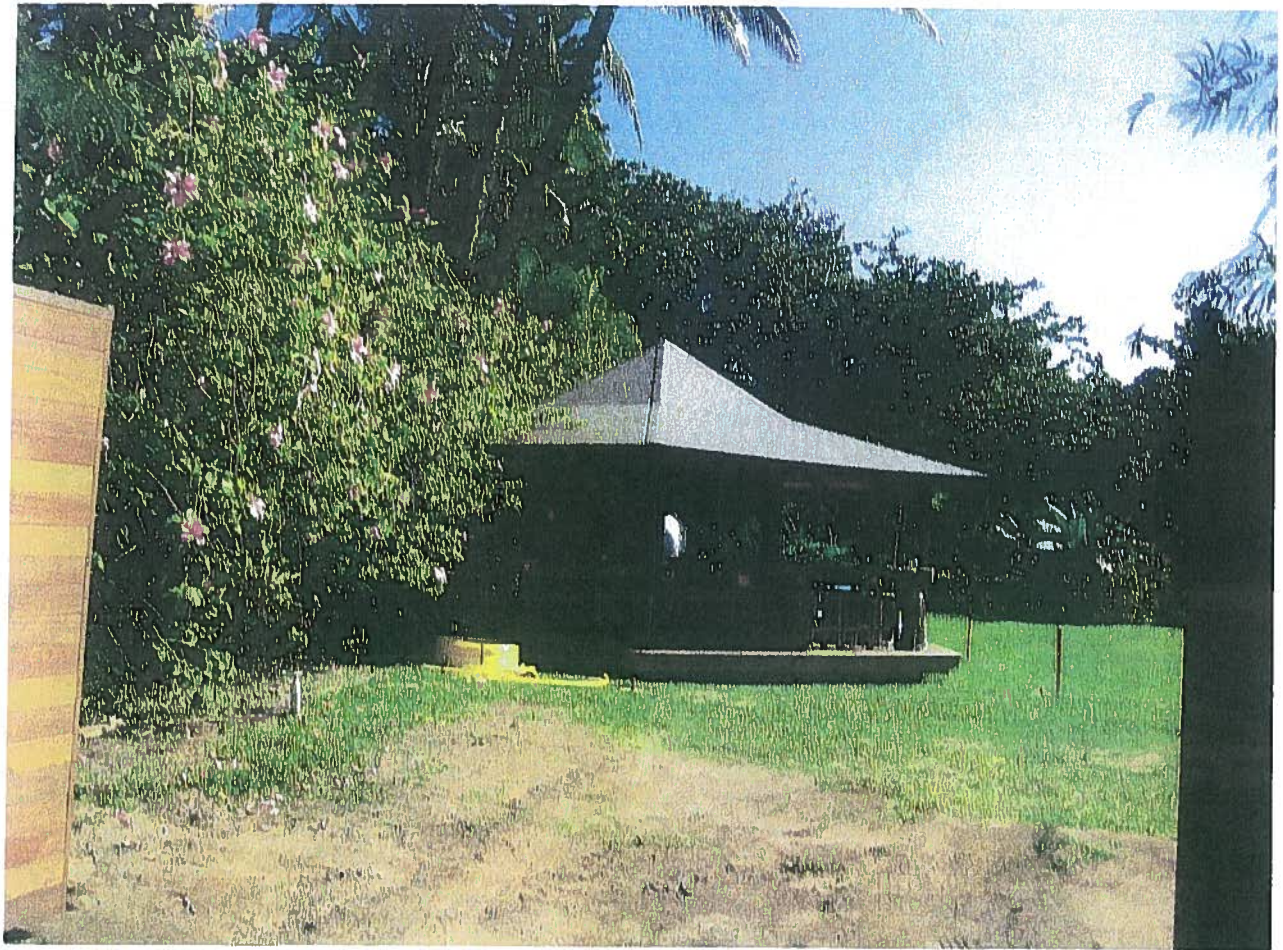
Choose the type of document to purchase:

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EXHIBIT N



**TABLE OF CONTENTS**

**1 INTRODUCTION.....1**

**2 CONSERVATION DISTRICT VIOLATION PENALTIES SCHEDULE GUIDELINES.....1**

**2.1 PENALTY CALCULATION.....2**

2.1.1 Identified Land Use Penalties.....3

2.1.2 Non- Identified Land Use Penalties.....4

2.1.3 Tree Removal.....5

2.1.4 Vegetation Removal/Vegetation Clearing.....5

2.1.5 Additional Considerations and Factors.....6

2.1.6 Continuing Violations and Permit Non-Compliance.....6

2.1.7 In-Kind Penalties.....7

2.1.8 Penalty Adjudication.....9

**3 ASSESSMENT OF DAMAGES TO PUBLIC LAND OR NATURAL RESOURCES.....10**

3.1 PRIMARY RESTORATION DAMAGES.....11

3.2 COMPENSATORY DAMAGE CALCULATION.....12

3.3 ADJUDICATION OF DAMAGES.....13

APPENDIX A: GUIDELINE FRAMEWORK TABLES

APPENDIX B: DEFINITIONS

APPENDIX C: REFERENCES

APPENDIX D: DAMAGES EXAMPLES

APPENDIX E: PENALTY CALCULATION WORKSHEET

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

September 2009

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" caused by the violation.

Once the baseline for the penalty range has been established according to 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 acts of construction, shoreline alteration, or land-use alteration (See Appendix B: Definitions) Adapted from Florida Department of Environmental Protection 2000 Administrative Fines 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 other adverse 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 2.1.1.1, 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 beginning 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>3</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>3</sup> While Staff and Board decisions in HA-01-09, OA-05-40 and HA-06-08 have treated the removal of non-native, 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	Commensurable 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. of vegetation	Minor	\$1,000-\$2,000
Clearing of Invasive or noxious vegetation	Very Minor	Up to \$1,000*

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., as 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.

\* Provided the harm to the resource and offsite 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

<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.

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 OCCL'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.

### 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 beginning 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

Table 2. Vegetation Removal

Action	Comparable 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*

Note: According to Table 2, the clearing of vegetation may incur a penalty of up to \$1/ sq. ft., as clearing 10,000 sq. ft. Staff could assess a penalty of \$10,000. 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.

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

## 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 199D, 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)

(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 Damage 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 Kihei 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)
- (#m<sup>2</sup> 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 Hanalei 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 continue, more comprehensive estimates may be produced. In KA-02-10 Pilaa, \$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: \_\_\_\_\_  
 OCOL Staff Member: \_\_\_\_\_  
 Date: \_\_\_\_\_

**Part 1- Penalties**

Violation Type	Permit Prefix (D,C,B)	Harm to Resource (actual & potential)	Tree or Vegetation Status	Penalty Range (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: \_\_\_\_\_

TMK: (4) 5-9-002:065



November 24, 2012



December 9, 2014

EXHIBIT P