

**STATE OF HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawai'i**

File No: OA-3754
180-Day Exp. Date: February 14, 2016

February 12, 2016

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

REGARDING: After-the-Fact Conservation District Use Application (CDUA)
OA-3754 for Poka Place Diamond Head Improvements

APPLICANT Poka Place LLC

LANDOWNER: State of Hawai'i
Department of Land & Natural Resources
Division of State Parks

AGENT: Ho'okulena LLC
1539 Kanapu'u Drive
Kailua, HI 96734

LOCATION: Diamond Head State Monument, Honolulu, O'ahu

TAX MAP KEY: (1) 3-1-042:017

AREA OF PARCEL 6.465 acres

USE: 2,000 Square Feet

SUBZONE: Resource

DESCRIPTION OF AREA AND CURRENT USE:

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 encroachment area.

To the south of the subject parcel is TMK (1) 3-1-042:049 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 of Land and Natural Resources (DLNR) 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.

The predominant soil type in the area is Rock land (rRk). This type of soil can be found in areas with a slope of 5 to 70 percent. The soil is well-drained and has a high run-off rate. A typical profile includes silty clay bedrock.

According to the Federal Emergency Management Agency's (FEMA) Flood Insurance Rate Maps (FIRM), the project site is located within Zone X, which is described as areas outside of the 100- and 500-year floodplains with minimal flooding. The project site is not within the tsunami evacuation zone.

Drainage from the site is conveyed from the DHSM property onto the Poka Place property. A large portion of this runoff is collected within a small valley along the DHSM slope to the north and center of the Poka Place property. Runoff from the valley is discharged onto the Poka Place property and flows along the walkway between the main and guest residences and then onto Diamond Head Road.

The existing, naturalized vegetation of the project site is comprised of brassia, kiawe, koa haole, and Christmas berry trees. In addition there is a predominance of bougainvillea shrubs. Domestic plants within the irrigated landscaped area include areca palms, song of India, Spathipuhullum, bromeliads, laua'e, and a vegetable garden comprised of various vegetables. Fauna at the site is dominated by introduced, alien species. Alien birds common in an urban setting are mainly observed while the house cat, small Indian mongoose, chickens, and rats are also known to be common in the area. There are no known threatened or endangered flora or fauna species within the project area.

An archaeological assessment was prepared in 1998 in conjunction with the Final Environmental Impact Statement for the DHSM Master Plan Update. The study notes that Diamond Head's importance is centered on mythology rooted in the goddess Pele. The crater, where Pele would have resided was considered kapu, therefore, no Hawaiian would think of living, working, or visiting the site. This would explain why no evidence of pre-cook human habitation has been found in the crater. Further, one of Kamehameha's main heiau, Pāpā'ena'ena (also known as Le'ahi Heiau), was situated at the base of the southern slopes of Diamond Head. Therefore, the kapu on Diamond Head and the crater was broken years ago when Pāpā'ena'ena lost its mana and people ceased to worship there. While the assessment covered the entirety of the DHSM, the project area is located away from the crater area and comprises only approximately 2,000 square feet of the overall DHSM property.

PREVIOUS ENFORCEMENT ACTION

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 Parks property and within the Conservation District without the authorization of the Department or the BLNR.

Improvements observed on property included the following:

- 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. The landowner responded to the NOV via a letter dated January 7, 2014 from their representative Goodsell Anderson Quinn & Stiefel. The letter included a study conducted by Alpha Engineers, Inc. (AEI) that detailed the purpose, importance, and impact of the improvements within State Parks area. The study separates the existing improvements into two main areas, the retaining wall area and the irrigated landscape area (see **Exhibit 3**). According to the study, the purpose of the existing land uses within the DHSM 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 Landscape 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).

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 landscape 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 landscape 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 (**refer back to Figure 3**)

On September 12, 2014, pursuant to HRS §183C, the Board found the landowner in violation of HRS §183C-7; and HAR §13-5-22 and §13-5-23, subject to the following (**see Exhibit 4 & 5**):

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.

Staff notes that the fine was paid in full on October 8, 2014.

PROPOSED AFTER THE FACT USES:

The existing site improvements that are the subject of this ATF CDUA request includes the following:

Retaining Wall Area (see Exhibit 6 & 7):

The only retaining wall requested to be left in place is the large CRM wall which runs parallel to the guest residence. It is approximately 60 linear feet in length and approximately 1.25 feet wide. Its height varies from approximately 4.5 feet to 7.5 feet. The wall was installed to stabilize the slope and protect the guest residence from falling/sliding debris. There is an opening in the wall that allows for a set of stairs that are used to access the terraced landscaping area. The stairs leading up towards the terraced landscaping area will be removed, therefore, the landowner is proposing to connect the wall to create a continuous structure. This will involve constructing an approximate three (3) foot section of new wall which will use similar construction materials as the existing wall so that the visual appearance will be seamless.

The terraced walls and landscaping above the large CRM retaining wall will be removed and the area restored with native plants (see Exhibit 8).

Irrigated Landscape Area (see Exhibit 9 & 10):

There are three (3) existing CRM walls located above and down the northeastern side of the Irrigated Landscape Area that the landowner is requesting to remain. According to the project engineer, the walls help to maintain the drainage function of the area as well as provide for slope stability of the area. The wall shown on the northwestern side of the site plan is curved and is approximately 10 linear feet in length, 1.25 feet wide and 3.5 feet high. The second wall is parallel to the main residence. This wall acts as a dam and also creates a detention basin which collects the flow of water from the area and 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. This wall is approximately 17.5 linear feet in length, 1.25 feet wide and 2.4 feet tall. The third and largest wall runs perpendicular to the main residence. This wall is approximately 50 linear feet in length, 1.25 feet wide and 2 to 2.4 feet tall.

The other hardscape, waterfall, pond, irrigation, plantings, and any other extraneous improvements will be demolished and/or removed and the area restored with native plants (refer back to Exhibit 8)

Restoration & Remediation Work Methodology:

Removal of the other retaining walls, non-native planted vegetation, and other extraneous improvements will be done primarily with hand tools, including picks, pry bars, hoes, shovels, wheel barrows, etc. It is anticipated that a jack hammer will be used to break apart some of the concreted sections. The jack hammer will be stationed on Diamond Head Road with hoses running up the hillside to the site. Construction best management practices (BMPs) will be implemented to mitigate any impacts generated from the project. BMPs include keeping work areas clean and clearing out waste and litter at the work site daily. Likewise, trucks and equipment will be cleaned off-site or in designated and contained areas. Machinery and vehicles will use off-site fueling stations and spill will be immediately dealt with. Potential run-off will be controlled and diverted from areas of exposed soil, as well as including downslope sediment barriers (fences) composed of permeable geotextile fabric

attached to supporting posts to intercept any flow of sediment laden runoff. All applicable laws and regulations will be adhered to. Accumulated sediment will be removed from barriers and sedimentation devices; worn or damaged silt fence fabrics will be replaced or repaired; damaged structural controls will be replaced or repaired; and damaged soil stabilization measures will be repaired. In addition, impacts from noise will be mitigated by limiting work hours from 9:00 AM to 5:30 PM, Monday through Friday. All applicable laws and regulations will be complied with and any applicable permits will be obtained if necessary.

To remove the material and debris from the site, two methods are being considered. The first involves the use of smaller trucks going to and from the site along Poka Place to remove the rocks and vegetation. The other method would involve placing a chute (sectional construction type or made on site) from the site, down to Diamond Head Road which will guide the material/debris to a semi-, dump, or other larger sized truck that will be parked on Diamond Head Road. As not to disrupt traffic, work will be conducted from the morning to early afternoon and coordinated to avoid the typical traffic hours where people are traversing to and from work/school. Plant material will be disposed at one of the City and County of Honolulu green-waste facilities while construction will be disposed of at a City and County approved facility for construction waste.

Once removal of improvements is completed, it is proposed that the area be replanted with a mixture of Bermuda grass and Finger grass as ground cover (**refer back to Exhibit 8**). This is consistent with the predominant existing vegetation in the area. The seed mix will be distributed on the sloping grade over and erosion control mat to mitigate any potential runoff and erosion from the hillside. A temporary irrigation system will be required to help establish the grass seeds. Native naupaka kahakai shrubs will be planted along with property line, above the existing retaining wall near the guest residence. The naupaka will have a permanent drip irrigation system to help sustain the shrubs.

OTHER ALTERNATIVES CONSIDERED:

Alternative 1: No Action alternative. This alternative would leave the project area in its current state and would be contrary to the decision made by the Board of Land and Natural Resources (the Board) that the adjoining property owner is required to remove the improvements that are on State property. Therefore, the "no action" alternative would not be considered viable.

Alternative 2: Removal of all improvements within the DHSM. This alternative would propose that all improvements be removed and the property restored to its natural condition. Consultation with Alpha Engineers revealed that the primary retaining wall near the guest residence was constructed to retain the earth (hillside area) behind the wall. However, as the guest residence is built approximately 5-feet from the property line, the wall is built in the DHSM property. Complete removal of the wall would leave the guest residence unprotected; therefore, it would not be feasible. If the wall was required to be completely removed, Poka Place LLC would pursue permission to grade the area in back of the wall to establish a stable hillside, thus providing some protection for the structure. This would be an even greater

disturbance to the land located within DHSM property. In addition, moving the wall completely into Poka Place LLC property is also not an option as it would be offset 0.0 feet to 1.7 feet from the guest residence and would thus eliminate access to this side of the residence which is essential for providing an evacuation route during emergency situation and access for maintaining the residence. The CRM walls associated with the terraced area are already identified for removal per action taken by the Board on September 12, 2014. The smaller, primary CRM wall located above the irrigated landscaped area creates a dam like structure and would not be feasible to remove as it acts like a detention basin that redirects and reduces runoff flow from the DHSM away from the main residence on the Poka Place, LLC property. In addition, it also acts as a boulder basin, trapping heavy debris behind the wall. The other improvements in the irrigated landscape area have already been identified for removal per action taken by the Board on September 12, 2014.

SUMMARY OF COMMENTS

The Office of Conservation and Coastal Lands referred the application to the following agencies and organizations for review and comment:

State

DLNR, Division of Forestry and Wildlife
DLNR, Division of State Parks
DLNR, Engineering Division
DLNR, Historic Preservation Division
DLNR, Land Division
Department of Health (DOH)
DOH, Office of Environmental Quality Control
Office of Hawaiian Affairs

City and County of Honolulu

Department of Planning and Permitting

Individuals & Organizations

Wai'ala'e/Kāhala Neighborhood Board

In addition, comments were also received during the Environmental Assessment review process. Below is a summary of comments received as well as the applicant's responses as applicable:

Department of Land and Natural Resources (DLNR)

Division of Forestry and Wildlife (DOFAW): No Comments

Engineering Division: We confirm that the project site, according to the Flood Insurance Rate Map (FIRM), is located in Zone X. The National Flood Insurance Program (NFIP) does not regulate developments within Zone X.

Division of State Parks: No Comments

Land Division Comments: No Comments

State Historic Preservation Division (SHPD): No historic properties affected.

Department of Health

Environmental Planning Office: The EPO strongly recommends that your review the standard comments and available strategies to support sustainable and health design provided at: <http://health.hawaii.gov/epo/home/landuse-planning-review-program/>. Projects are required to adhere to all applicable standards comments.

In addition, we suggest you review the requirements of the National Pollutant Discharge Elimination System (NPDES) permit.

Please note that all wastewater plans must conform to applicable provisions of the Department of Health's Administrative Rules, Chapter 11-62, "Wastewater Systems". We reserved the right to review the detailed wastewater plans for conformance to applicable rules.

The EPO recommends you review the need and/or requirements for a Clean Air Branch permit. If noise created during the construction phase of the project may exceed the maximum allowable levels as set for in HAR, Chapter 11-46, "Community Noise Control," a noise permit may be required and should be obtained before the commencement of work. EPO also suggests that the Hazard Evaluation and Emergency Response Office's Site Discovery and Response Section be contacted.

EPO encourages you to examine and utilize the Hawai'i Environmental Health Portal which provide links of our e-Permitting Portal, Environmental Health Warehouse, etc. You may also wish to review the revised Water

Applicant's Response: We note your suggestions.

Office of Environmental Quality Control: In a number of places, the Draft EA repeats that the project site is located within the Resource Subzone of the Conservation District, yet in the first paragraph of page 7, the project is stated as being in the General subzone please make sure to provide the correct information regarding subzone.

Additionally, on page 57, the 2nd paragraph under Historic Resources notes that the property is located about a mile from the ocean. This statement appears to require fact-checking to verify its accuracy. In a number of places, the Draft EA repeats the illogical statement from the City and County of Honolulu Department of Planning and Permitting that they have no jurisdiction of this land. This statement was made in response to the rational request for a Special Management Area (SMA) determination, due to the project's undeniable location within the City and County of Honolulu's SMA. However, while the applicant appears to have exercised due diligence in seeking input from the City and County, under the

circumstances, it seems specious to make the statement on page 55 that they “have worked with the...City in development the best alternatives for addressing management of the public resource.”

In the Draft EA’s discussion on alternatives, other than the Project as Described alternative, the No Action alternative is the only concept offered, which is then appropriately dismissed as unviable under the context of the alleged encroachment. For a more robust treatment of the issue, another option, such as removal of all improvements and restoration of the land to its original condition should also be discussed.

The Draft EA makes reference to the Construction Cost Estimate the applicant would presumably bear for restoring the areas they offer in their proposed compromise to resolve the alleged encroachments onto the recognized and highly-valued national Landmark and State Monument. We believed that a relevant economic analysis would be to objectively evaluate the diminished value wrought by the developed encroachments upon public Conservation lands at Diamond Head, which are proposed to remain in place. This negative value should be considered for inclusion into “costs” assigned to the applicants as part of the entitlement process that will enable certain encroachments to remain of State lands.

Applicant’s Response: The EA will be amended to state that the project site is within the Resource subzone. The distance from the subject property to the ocean will be amended to state approximately 650 feet (direct line).

In the early stages of the drafting of the Poka Place Draft EA, because of its proximity to the ocean, it was obvious that the Poka Place property was within the SMA. After evaluating the SMA maps online, it was determined that the Poka Place property was obviously within the SMA. Thus, staff at Ho’okuleana called the City and County of Honolulu, Department of Planning and Permitting (DPP) to discuss the SMA designation and necessity of an SMA permit. During this conversation, DPP Staff confirmed that the project TMK was in the SMA. After repeated discussions with DPP about the project location and plan, DPP staff stated that due to the nature of the proposal, an SMA permit would not be necessary and that the Poka Place project was consistent with similar actions and subsequent determinations on other properties. On October 15, 2014, Ho’okuleana LLC sent a letter to DPP requesting a formal SMA determination. On December 5, 2014, DPP responded stating that the subject parcel is entirely within the P-1 Restricted Preservation District and therefore, the City and County of Honolulu has no jurisdiction over this land. The letter further directed Ho’okuleana to contact the State of Hawai‘i, DLNR with any questions as they are the governing agency.

In addition, the Draft EA was forwarded to DPP for review and comment. Their comments made no reference to concerns or inaccuracies about the SMA permit and only addressed reference to native plant species and removal of non-native plants.

We appreciate your comment regarding alternatives. The Final EA will include an alternative that considers the removal of all improvements and restoration of the land to its original condition.

Regarding the "Construction Cost Estimate," action has been taken by the Board of Land and Natural Resources and this Draft EA and subsequent applications for appropriate permitting will be processed accordingly.

Department of Transportation

Comments: The subject project is not expected to significantly impact the State highway facility. However, a permit from DOT Highways Division is required for the transport of oversized and/or overweight materials and equipment on State highway facilities.

Applicant's Response: All required permits will be obtained.

City and County of Honolulu

Department of Planning and Permitting: Per Section 3.1.3.2 Mauka Conservation Areas of the Primary Urban Center Development Plan, in preservation areas, disturbance to native species should be avoided. As such, any removal of non-native plants from the proposed landscaped area should be replaced with indigenous plants.

Applicant's Response: The area will be restored with either endemic or indigenous species.

Individuals & Organizations

Mr. Martin E. Hsia: As the owner of the neighboring lot, Mr. Hsia expressed many concerns regarding the project mainly involving the following:

- the privatization of lands within the DHSM – by allowing Poka Place, LLC to keep the walls, the State is setting a precedence;
- the fact the Angus Mitchell and Paul Mitchell Trust are responsible for the encroachments and that they were aware that they were within State Conservation lands;
- that the Draft EA delineates an easement that has yet to be granted;
- there is a lack of alternatives other than keeping the retaining walls within the DHSM;
- that the restoration of the area would preclude the need for any of the existing retaining walls; and
- the Draft EA does not address parking of construction vehicles on Poka Place as no parking is allowed on the road easement;

Applicant's Response: The issue of the encroachments and the use of State lands has already been brought forth before the Board of Land and Natural Resources for action. The current EA and CDUA for the project is a result of that decision. As determined by the project engineers, the purpose of the existing walls were for erosion control and directing drainage to the State storm drain easement. The wall spanning across the drainage way also traps debris, thus, protecting not only onsite structure from damage, but also protecting neighboring properties and the State. The Angus Mitchell and Paul Mitchell Trust are different entities,

and the property is now owned by Poka Place LLC. As the EA is a disclosure document, the easement was presented as a possibility. If the encroachment is allowed to continue to exist, then a request for an easement (with payment of fair market value) will be made. An alternative addressing removal of all encroachments will be incorporated into the Final EA. There will be a nominal increase in trips made by small truck to and from the property along the access road for removal of debris and material. All parking will be done in accordance with posted signs and County parking regulations.

ANALYSIS

Following review of the application, representatives of the Applicant were notified by letter dated August 27, 2015, of the following:

1. The proposed project is an identified land use within the Conservation District, pursuant to Hawai'i Administrative Rules (HAR) §13-5-22 *Identified land uses in the protective subzone*, P-13 LAND AND RESOURCE MANAGEMENT (C-2) *Erosion control, including replanting of trees and groundcover, placement of biodegradable or synthetic materials for slope stabilization, construction of minor swales and check dams*, as well as, HAR, §13-5-23 *Identified land uses in the limited subzone*, L-2 LANDSCAPING (B-1) *Landscaping, defined as alteration (including clearing and tree removal) of plant cover, including chemical and mechanical control methods, in accordance with state and federal laws and regulations that results in no, or only minor ground disturbance, in an area less than 2,000 square feet. Any replanting shall be appropriate to the site location and shall give preference to plant materials that are endemic or indigenous to Hawai'i. The introduction of invasive plant species is prohibited.* However, pursuant to HAR, §13-5-33 (j) *A board permit shall be required when the chairperson determines that the scope of the proposed use or the public interest requires a board permit.* Therefore, while the Department recognizes that the Board had previously determined that the improvements would require an ATF Departmental CDUP, due to the fact that encroachments are located within the Diamond Head State Monument, we feel that it is in the public's best interest to process the application as a Board permit.
2. Pursuant to HAR §13-5-40 HEARINGS, a Public Hearing will not be required.
3. Pursuant to HAR §13-5-31 PERMIT APPLICATIONS, the permit requires that an environmental assessment be prepared in conformance with Chapter 343, Hawai'i Revised Statutes (HRS), as amended, and Chapter 11-200, HAR. A Finding of No Significant Impact (FONSI) is anticipated for the proposed project.
4. The subject area is within the Special Management Area (SMA). The applicant's responsibility includes complying with the provisions of Hawai'i's Coastal Zone Management law (Chapter 205A, HRS) that pertain to the Special Management Area (SMA) requirements administered by the various counties. Negative action on this

application can be expected should you fail to obtain and provide us, at least forty-five (45) days prior to the 180-day expiration date, one of the following:

- An official determination that the proposal is exempt from the provisions of the county rules relating to the SMA;
- An official determination that the proposed development is outside the SMA; or
- An SMA Use Permit for the proposed development.

The Final EA/Finding of No Significant Impact (FONSI) was issued by the DLNR Chairperson and published in the December 8, 2015 edition of the Office of Environmental Quality Control's *The Environmental Notice*.

The following discussion evaluates the merits of the proposed land use by applying the criteria established in Section 13-5-30, HAR.

1. *The proposed land use is consistent with the purpose of the Conservation District.*

The objective of the Conservation District is to conserve, protect, and preserve the important natural and cultural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety, and welfare.

While the proposed after-the-fact improvements were unauthorized and are within State owned Conservation lands, the improvements have appeared to not have had any irreversible or adverse effects to natural or cultural resources. After consideration of all options/alternatives, it would appear that requesting all of the improvements to be removed may cause more harm to the land and natural resources than allowing the proposed after-the-fact improvements to remain. In addition, the extraneous improvements and non-native plantings will be removed and the area restored with vegetation similar to that of the predominant existing vegetation as well as native naupaka.

Further, the proposed after-the-fact improvements are identified land uses in the Resource subzone of the Conservation District; as such, it is subject to the regulatory process established in Chapter 183C, HRS and detailed further in Chapter 13-5, HAR.

No rare, threatened or endangered plant or animal species or significant habitats are known to exist on the subject property. No Archaeological and cultural resources have been identified on the property.

2. *The proposed land use is consistent with the objectives of the subzone of the land on which the use will occur.*

The project site is located in the Resource subzone. The objective of this subzone is to limit uses where natural conditions suggest constraints on human activities.

The proposed after-the-fact improvements are identified land uses within the Conservation District, pursuant to HAR §13-5-22 *Identified land uses in the protective subzone*, P-13 LAND AND RESOURCE MANAGEMENT (C-2) *Erosion control, including replanting of trees and groundcover, placement of biodegradable or synthetic materials for slope stabilization, construction of minor swales and check dams*, as well as, HAR, §13-5-23 *Identified land uses in the limited subzone*, L-2 LANDSCAPING (B-1) *Landscaping, defined as alteration (including clearing and tree removal) of plant cover, including chemical and mechanical control methods, in accordance with state and federal laws and regulations that results in no, or only minor ground disturbance, in an area less than 2,000 square feet. Any replanting shall be appropriate to the site location and shall give preference to plant materials that are endemic or indigenous to Hawai'i. The introduction of invasive plant species is prohibited.*

In addition, the after-the-fact improvements appear not to have had any irreversible or adverse effects on natural or cultural resources. After consideration of all options/alternatives, it would appear that requesting all of the improvements to be removed may cause more harm to the land and natural resources than allowing the proposed after-the-fact improvements to remain. In addition, the extraneous improvements and non-native plantings will be removed and the area restored with vegetation similar to that of the predominant existing vegetation as well as native naupaka.

3. *The proposed land use complies with provisions and guidelines contained in Chapter 205A, HRS, entitled "Coastal Zone Management," where applicable.*

The project area is located within the Special Management Area (SMA). The applicant received a SMA determination letter from the City and County of Honolulu stating that subject parcel is located entirely within the P-1 Restricted Preservation District. The City and County of Honolulu has no jurisdiction over this land.

However, the proposed land use complies with following Coastal Zone Management guidelines as follows:

- (1) *Recreational Resources:* The property lies within the lower portion of Diamond Head Crater, within the DHSM, but away from the actual recreation activities in/at the monument. Due to the steep nature of the terrain and heavy vegetation, this area would not be suitable for use for recreational activities. In addition, the property is located approximately 650 feet from the ocean and will, therefore, have no impacts on coastal recreational activities.
- (2) *Historic Resources:* As mentioned earlier, an archaeological study for the DHSM was conducted in 1998. The study stated that the importance of the crater is linked to mythology, mainly the goddess Pele, and the area would have, therefore, been kapu. This would explain why no evidence of pre-cook human habitation has been found in the crater. Further, one of Kamehameha's main

heiau, Pāpā'ena'ena (also known as Le'ahi Heiau), was situated at the base of the southern slopes of Diamond Head. Therefore, the kapu on Diamond Head and the crater was broken years ago when Pāpā'ena'ena lost its mana and people ceased to worship there. In addition, the State Historic Preservation Division made the determination that no historic properties will be affected.

- (3) *Scenic and Open Space Resources:* The property lies within the bottom portion of Diamond Crater and within the DHSM. The intent of the project is to retain the taller vegetation on the property so that it screens the improvements from being seen from Diamond Head Road. In the short-term, there will be a visual impact caused by the hoses running up the hillside to power the jack hammer as well as the construction chute that will transport debris and material from the site down to a large type truck for transportation for disposal. However, once work is completed the hoses and chute will be removed and the visual appearance of the hillside returned to normal.
 - (4) *Coastal Ecosystems, (6) Coastal Hazards, (9) Beach Protection, & (10) Marine Resources:* The proposed project will use BMPs during construction and uncovered areas will be replanted as soon as reasonably possible to prevent erosion to minimize any potential erosion which could be released into storm drain system during a heavy rain event. In addition, the overall project itself will provide erosion control, slope stability, and control the drainage (including storm water runoff) in the area.
 - (7) *Managing Development & (8) Public Participation:* As a part of this permit process, as well as the environmental assessment review process, State and County agencies, as well as the public was notified of this application and was given the opportunity to comment.
4. *The proposed land use will not cause substantial adverse impacts to existing natural resources within the surrounding area, community, or region.*
- Staff believes the proposed land use will not cause substantial adverse impacts to existing natural resources within the surrounding area, community or region provided that mitigative measures are implemented and the applicant shall be required to take measures to minimize or eliminate the interference, nuisance, harm, or hazard that the project may cause. Short-term impacts associated with construction activities such as potential storm water runoff and noise and air quality impacts are anticipated, however, BMPs shall be implemented to mitigate any potential impacts.
- In addition, the retaining walls have been in existence for over a decade. They provide erosion control, slope stability, and maintain the drainage from the DHSM property onto the Poka Place property.
5. *The proposed land use, including buildings, structures and facilities, shall be compatible with the locality and surrounding area, appropriate to the physical conditions and capabilities of the specific parcel or parcels.*

Staff is of the opinion that the project is compatible with the locality and surrounding areas and is appropriate to the physical conditions and capability of the specified parcel. The walls have been in existence for over a decade and provide erosion control, slope stability, and maintain drainage from the DHSM property onto the Poka Place property.

6. *The existing physical and environmental aspect of the land, such as natural beauty and open space characteristics, will be preserved or improved upon, which ever is applicable.*

The property lies within the bottom portion of Diamond Crater and within the DHSM. The intent of the project is to retain the taller vegetation on the property so that it screens the improvements from being seen from Diamond Head Road. In the short-term, there will be a minor visual impact caused by the hoses running up the hillside to power the jack hammer as well as the construction chute that will transport debris and material from the site down to a large type truck for transportation for disposal. However, once work is completed the hoses and chute will be removed and the visual appearance of the hillside returned to normal. In addition, the non-native vegetation will be removed and the area will be replanted with vegetation similar to that of the predominant existing vegetation as well as native naupaka.

7. *Subdivision of the land will not be utilized to increase the intensity of land uses in the Conservation District.*

No subdivision of land is proposed.

8. *The proposed land use will not be materially detrimental to the public health, safety and welfare.*

Staff believes that the proposed after-the-fact improvements have not had any irreversible or adverse effects on natural and cultural resources or have had any impacts on public health, safety, and welfare. After consideration of all options/alternatives, it would appear that requesting all of the improvements to be removed may cause more harm to the land and natural resources than allowing the proposed after-the-fact improvements to remain. In addition, removal of the extraneous improvements and non-native plantings will incorporate BMPs so that the remediation work will not result in materially detrimental impacts to public health, safety and welfare.

CULTURAL IMPACT ANALYSIS:

In *Ka Pa'akai O Ka 'Aina v. Land Use Commission*, 94 Haw. 31 (2000), the Hawai'i Supreme Court laid out a framework for assessing cultural impacts. An assessment must include:

- (1) The identity and scope of “valued cultural, historic, or natural resources” in the area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area;
- (2) The extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the proposed action; and
- (3) The feasible action, if any, to be taken by the (agency) to reasonably protect native Hawaiian rights if they are found to exist.

An archaeological study for the DHSM was conducted in 1998. The study stated that the importance of the crater is linked to mythology, mainly the goddess Pele, and the area would have, therefore, been kapu. This would explain why no evidence of pre-cook human habitation has been found in the crater. Further, one of Kamehameha’s main heiau, Pāpā’ena’ena (also known as Le’ahi Heiau), was situated at the base of the southern slopes of Diamond Head. Therefore, the kapu on Diamond Head and the crater was broken years ago when Pāpā’ena’ena lost its mana and people ceased to worship there. In addition, the State Historic Preservation Division commented no historic properties will be affected by the grating of this permit.

Based on the remote and inaccessible location of the after-the-fact improvements, the consideration that the after-the-fact improvements are not physically or visually obtrusive (e.g. retaining walls and drainage features), and the fact that Poka Place LLC would not have exclusive use of the site even if they are able to obtain an easement, Staff believes that the proposed action does not affect or impair native Hawai’i rights and/or practices.

DISCUSSION

The proposed project follows the directive set forth by the Board of Land and Natural Resources as remediation to Poka Place LLC’s violation for unpermitted improvements onto State owned Conservation land located within the DHSM. While Staff recognizes the fact that the improvements were not originally permitted, the improvements have appeared to not have had any irreversible or adverse effects to any natural or cultural resources. After consideration of all options/alternatives, it would appear that requesting all of the improvements to be removed may cause more harm to the land and natural resources than allowing the proposed after-the-fact improvements to remain. In addition, the extraneous improvements and non-native plantings will be removed and the area restored with vegetation similar to that of the predominant existing vegetation as well as native naupaka.

However, Staff emphasizes that the improvements should have never been constructed without proper authorization from the Department in the first place. Furthermore, the Department does not, in any way, condone the use of Conservation lands and resources without consultation and prior authorization from the Department or Board.

Staff, therefore, recommends the following:

RECOMMENDATION

That the Board of Land and Natural Resources **APPROVE** After-the-Fact Conservation District Use Application OA-3754 for the Poka Place Diamond Head State Monument Improvements located on the island of O'ahu, TMK: (1) 3-1-042:017, subject to the following conditions:

1. The permittee shall comply with all applicable statutes, ordinances, rules, and regulations of the federal, state, and county governments, and applicable parts of this chapter;
2. The permittee, its successors and assigns, shall indemnify and hold the State of Hawaii harmless from and against any loss, liability, claim, or demand for property damage, personal injury, and death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors, and agents under this permit or relating to or connected with the granting of this permit;
3. The permittee shall obtain appropriate authorization from the department for the occupancy of State lands;
4. The permittee shall comply with all applicable department of health administrative rules;
5. The permittee shall provide documentation (e.g., book and page or document number) that the permit approval has been placed in recordable form as a part of the deed instrument, prior to submission for approval of subsequent construction plans;
6. Before proceeding with any work authorized by the department or the board, the permittee shall submit four copies of the construction plans and specifications to the chairperson or an authorized representative for approval for consistency with the conditions of the permit and the declarations set forth in the permit application. Three of the copies will be returned to the permittee. Plan approval by the chairperson does not constitute approval required from other agencies;
7. Unless otherwise authorized, any work or construction to be done on the land shall be initiated within one year of the approval of such use, in accordance with construction plans that have been signed by the chairperson, and shall be completed within three years of the approval of such use. The permittee shall notify the department in writing when construction activity is initiated and when it is completed;
8. All representations relative to mitigation set forth in the accepted application and environmental assessment or impact statement for the proposed use are incorporated as conditions of the permit;
9. The applicant shall plan to minimize the amount of dust generating materials and activities. Material transfer points and on-site vehicular traffic routes shall be centralized. Dusty equipment shall be located in areas of least impact. Dust control

- measures shall be provided during weekends, after hours and prior to daily start-up of project activities. Dust from debris being hauled away from the project site shall be controlled. Landscaping and dust control of cleared areas will be initiated promptly;
10. The permittee shall notify the Office of Conservation and Coastal Lands (OCCL) in writing prior to the initiation and upon completion of the project;
 11. Should historic remains such as artifacts, burials or concentration of charcoal be encountered during construction activities, work shall cease immediately in the vicinity of the find, and the find shall be protected from further damage. The contractor shall immediately contact SHPD (692-8015), which will assess the significance of the find and recommend an appropriate mitigation measure, if necessary;
 12. The permittee shall utilize Best Management Practices for the proposed project;
 13. During construction, appropriate mitigation measures shall be implemented to minimize impacts to the aquatic environment, off-site roadways, utilities, and public facilities;
 14. The permittee understands and agrees that the permit does not convey any vested right(s) or exclusive privilege;
 15. In issuing the permit, the department and board have relied on the information and data that the permittee has provided in connection with the permit application. If, subsequent to the issuance of the permit such information and data prove to be false, incomplete, or inaccurate, this permit may be modified, suspended, or revoked, in whole or in part, and the department may, in addition, institute appropriate legal proceedings;
 16. When provided or required, potable water supply and sanitation facilities shall have the approval of the department of health and the county department of water supply;
 17. Where any interference, nuisance, or harm may be caused, or hazard established by the use, the permittee shall be required to take measures to minimize or eliminate the interference, nuisance, harm, or hazard;
 18. Obstruction of public roads, trails, and pathways shall be avoided or minimized. If obstruction is unavoidable, the permittee shall provide alternative roads, trails, or pathways acceptable to the department;
 19. During construction, appropriate mitigation measures shall be implemented to minimize impacts to off-site roadways, utilities, and public facilities;
 20. The permittee shall obtain a county building or grading permit or both for the use prior to final construction plan approval by the department;

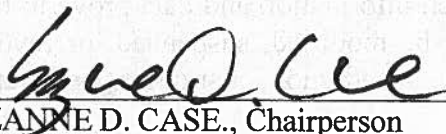
21. The permittee shall notify all neighbors prior to the commencement of work;
22. The permittee acknowledges that the approved work shall not hamper, impede, or otherwise limit the exercise of traditional, customary, or religious practices of native Hawaiians in the immediate area, to the extent the practices are provided for by the Constitution of the State of Hawaii, and by Hawaii statutory and case law;
23. Any landscaping will shall be appropriate to the site location and shall give preference to plant materials that are endemic or indigenous to Hawai'i. The introduction of invasive plant species is prohibited; and
24. Failure to comply with any of these conditions shall render this Conservation District Use Permit void under Chapter 13-5, as determined by the chairperson or board.

Respectfully submitted,

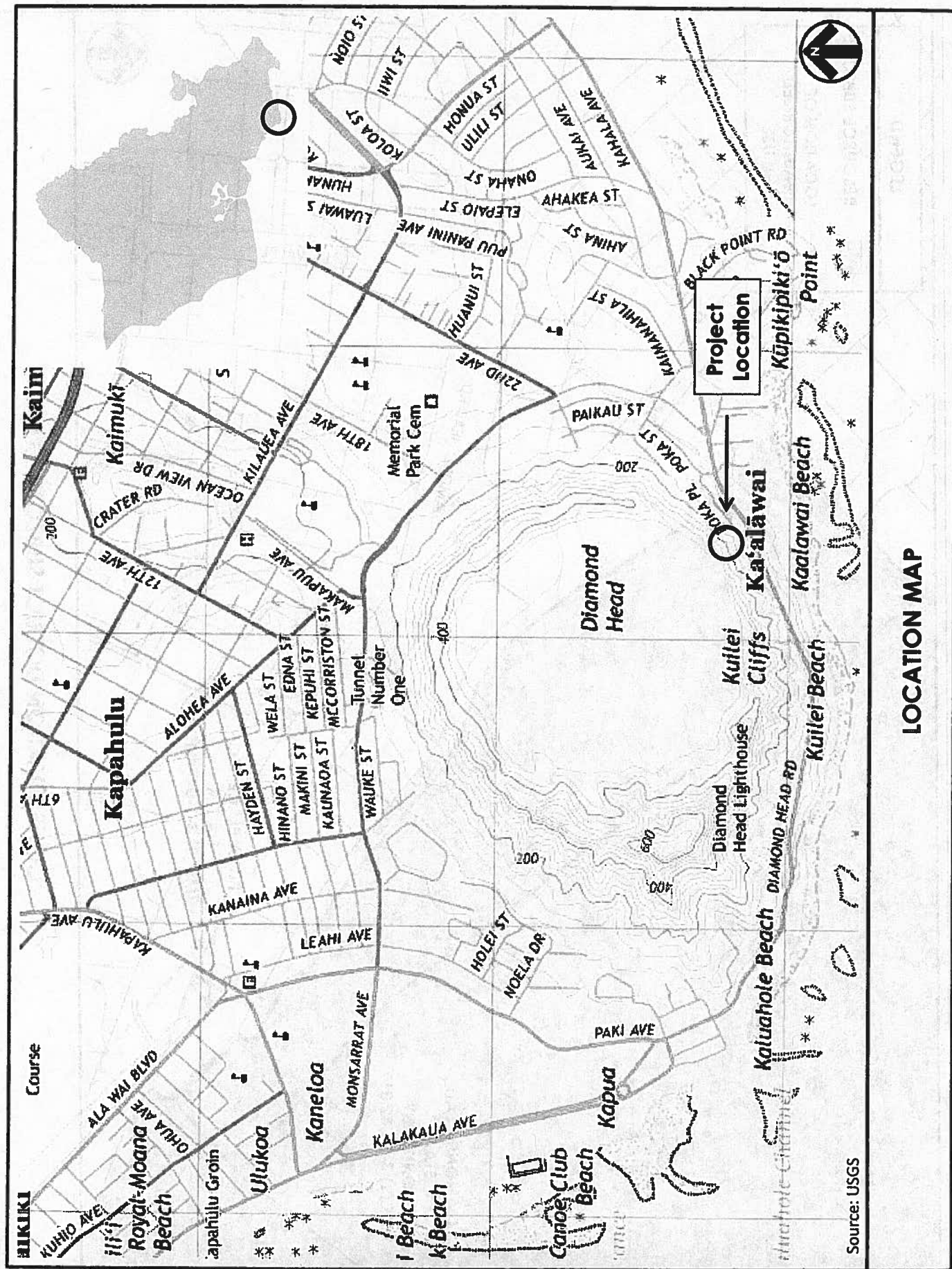


Lauren Yasaka
Office of Conservation and Coastal Lands

Approved for submittal:

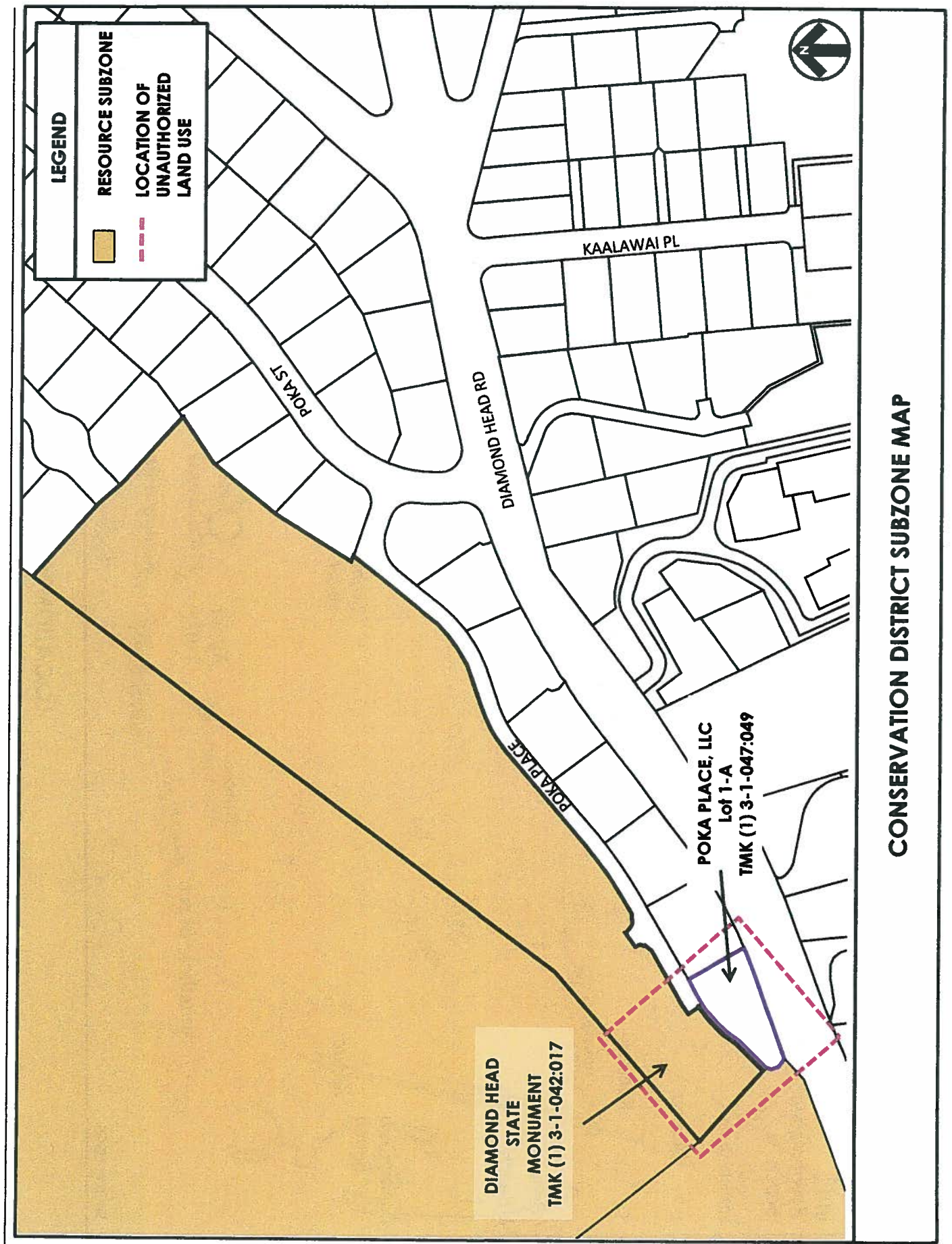


SUZANNE D. CASE., Chairperson
Board of Land and Natural Resources



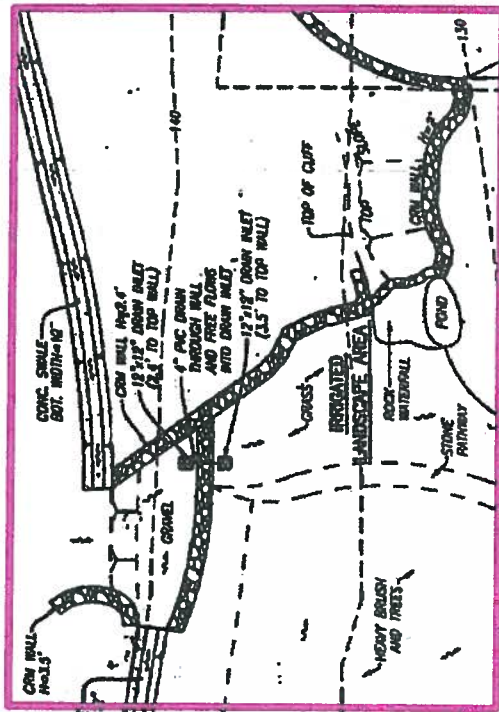
LOCATION MAP

Source: USGS



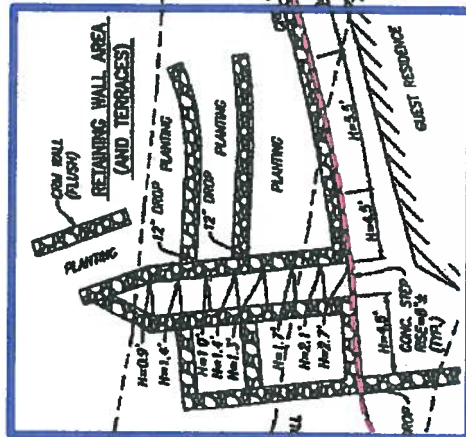
CONSERVATION DISTRICT SUBZONE MAP

IRRIGATED LANDSCAPE AREA



DIAMOND HEAD STATE MONUMENT.
OWNER: STATE OF HAWAII
TMK: 3-1-042-012
ZONING: P-1

RETAINING WALL AREA



3703 POKA PLACE
TMK: 3-1-047-048

EXISTING USES

FOR ILLUSTRATIVE PURPOSES ONLY -- NOT TO SCALE

**SEPT. 12, 2014
STAFF SUBMITTAL TO THE
BOARD OF LAND &
NATURAL RESOURCES
REGARDING
ENFORCEMENT FILE
OA 14-02**

STATE OF HAWAII
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.

EXHIBIT 4

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 Goodsill 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;¹
3. That these improvements were not authorized by the Department of Land and Natural Resources under HAR §13-5.

¹ 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.

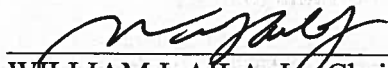
12. That no further work shall occur on the subject parcel within the Conservation District, without the Board of Land and Natural Resources approval; Chairman's approval and/or OCCL approval. If Poka Place, LLC conducts further work in the subject parcel without approval, they will be fined an additional \$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:



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

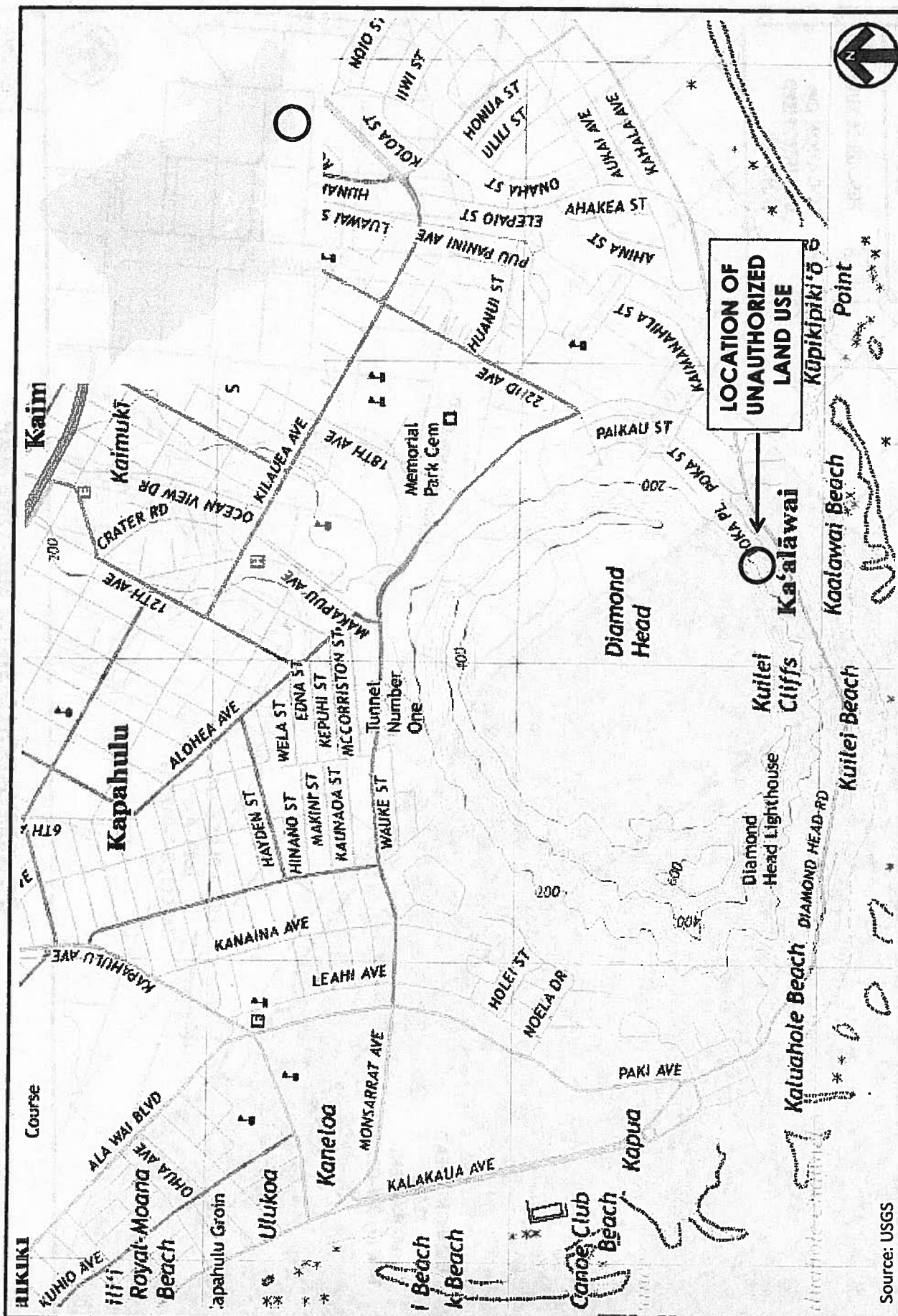


EXHIBIT
1

LOCATION MAP

Source: USGS

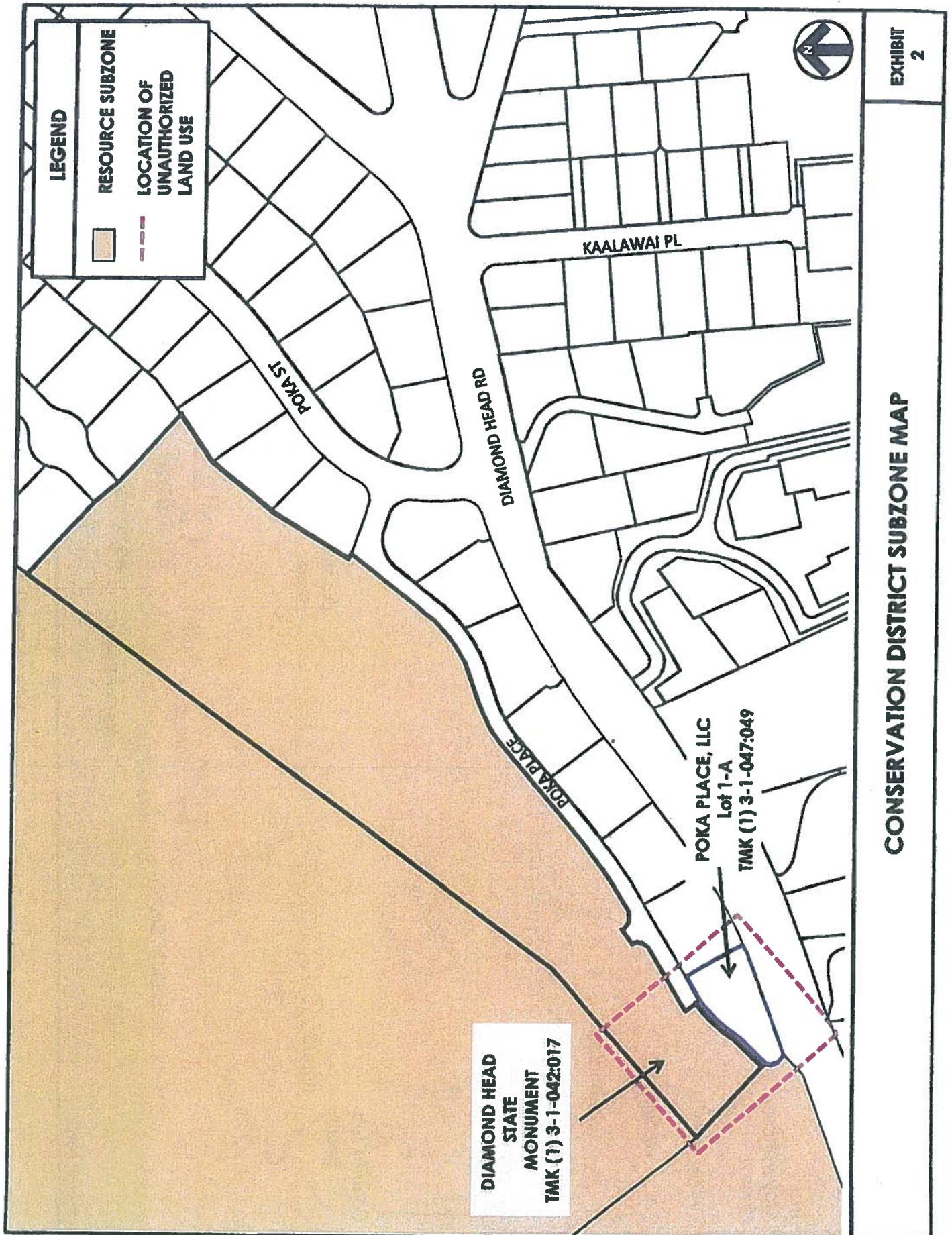


EXHIBIT
2

CONSERVATION DISTRICT SUBZONE MAP

EXHIBIT 4

EXHIBIT 2

PAVED ROCK WALKWAY



IRRIGATED LANDSCAPING AREA



POND



PHOTOS

EXHIBIT
3

EARTH RETENTION WALLS NEAR MAIN RESIDENCE



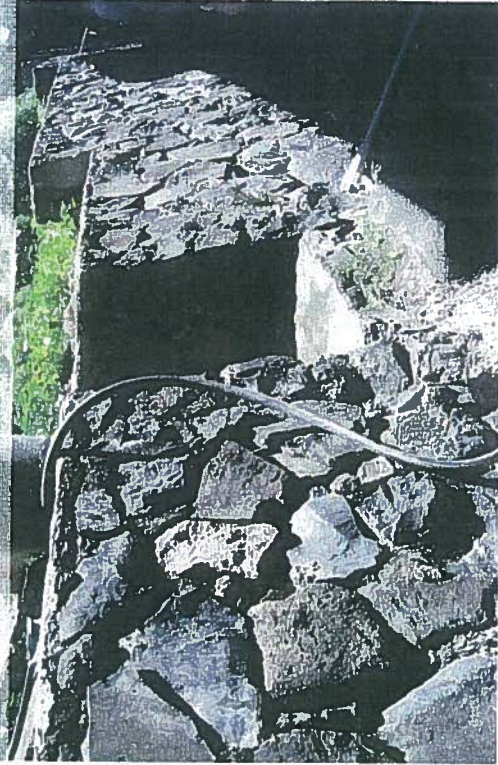
IRRIGATED LANDSCAPING AREA -
EARTH RETENTION WALL & SITTING AREA



TERRACED LANDSCAPING AREA



EARTH RETENTION STRUCTURE PARALLEL
TO GUEST RESIDENCE



PHOTOS

EXHIBIT
3

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

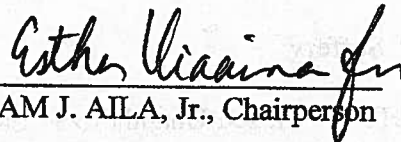
to public land or natural resources, or any combination thereof. After written or verbal notification from the department, willful violation of this chapter or any rule adopted in accordance with this chapter may incur an additional fine of up to \$15,000 per day per violation for each day in which the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

EXHIBIT

4

EXHIBIT 4

GOODSILL ANDERSON QUINN & STIFEL

A LIMITED LIABILITY LAW PARTNERSHIP LLP

EDMUND K. SAFFERY

FIRST HAWAIIAN CENTER, SUITE 1600 • 999 BISHOP STREET
HONOLULU, HAWAII 96813

MAIL ADDRESS: P.O. BOX 3196
HONOLULU, HAWAII 96801

TELEPHONE (808) 547-5600 • FAX (808) 547-5880
info@goodsill.com • www.goodsill.com

DIRECT DIAL:
(808) 547-5736

INTERNET:
esaffery@goodsill.com

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
DEPT OF LAND & NATURAL RESOURCES
STATE OF HAWAII
OFFICE OF CONSERVATION & COASTAL LANDS

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.¹

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.² 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

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

² 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.³

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.

³ 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.

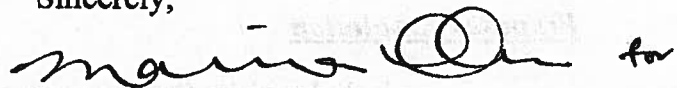
William J. Aila, Jr.
January 7, 2014
Page 4

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

EXHIBIT 4

EXHIBIT 5

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 4

EXHIBIT 5a

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EXHIBIT

4

EXHIBIT 5a

SITE IMPROVEMENTS ASSESSMENT

AT

3703 POKA PLACE

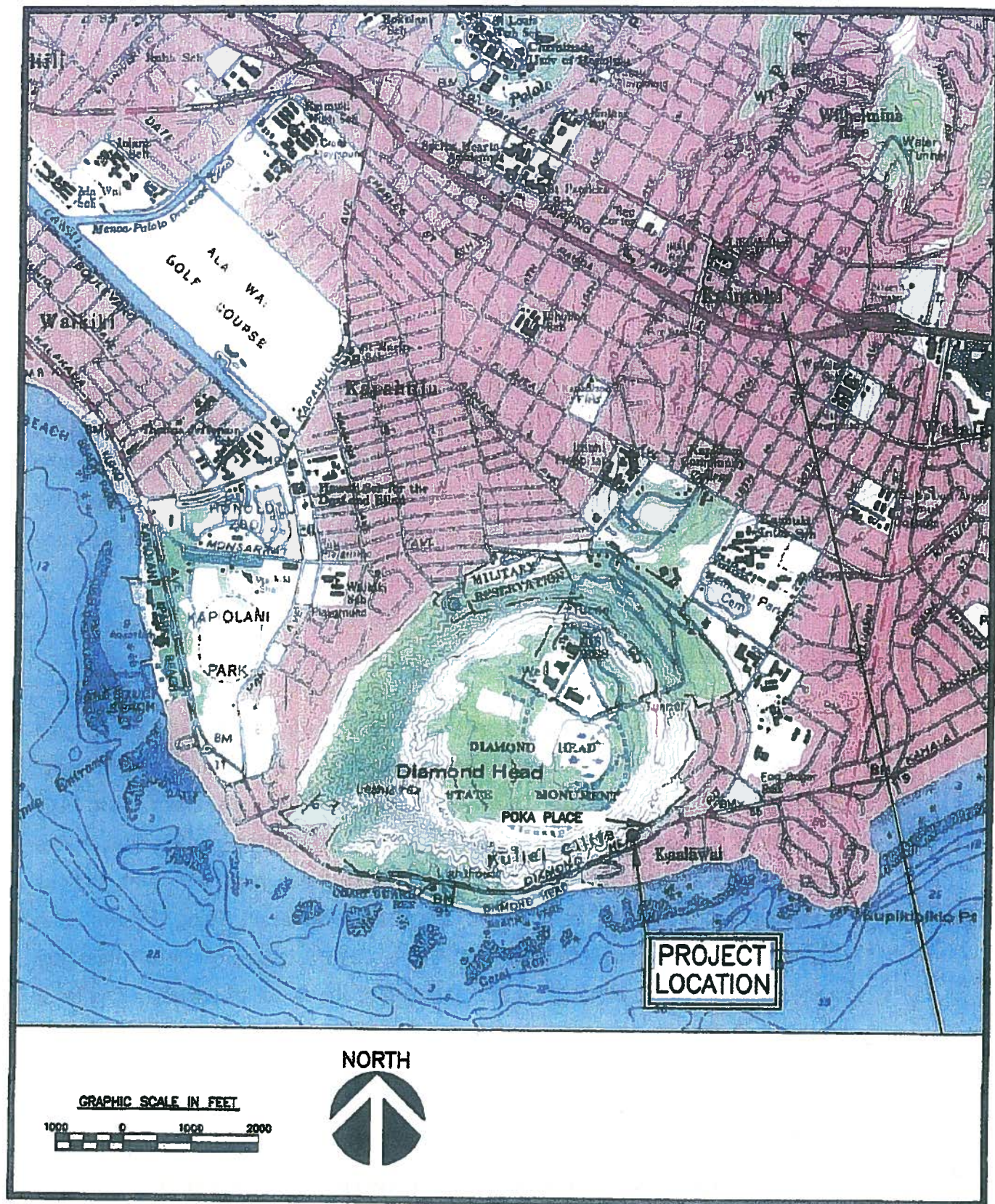
HONOLULU, OAHU, HAWAII

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

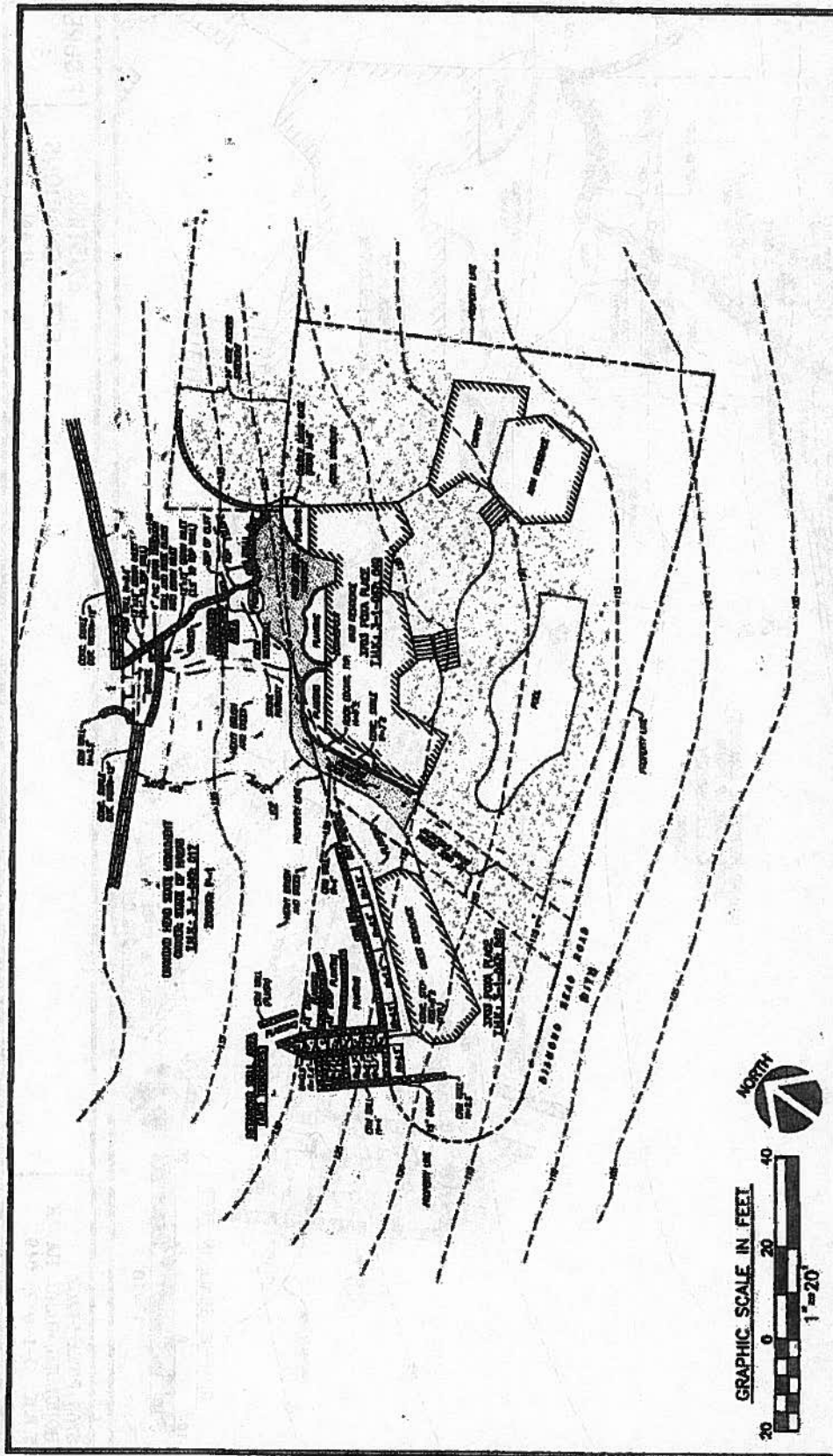
A "Notice of Alleged Violation" letter (Appendix A) from the Department of Land and Natural Resources, State of Hawaii, dated July 12, 2013 was received by the attorneys (Goodsill Anderson Quinn & Stifel) representing the Poka Place LLC, owners of the property at 3703 Poka Place. The letter states that 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.

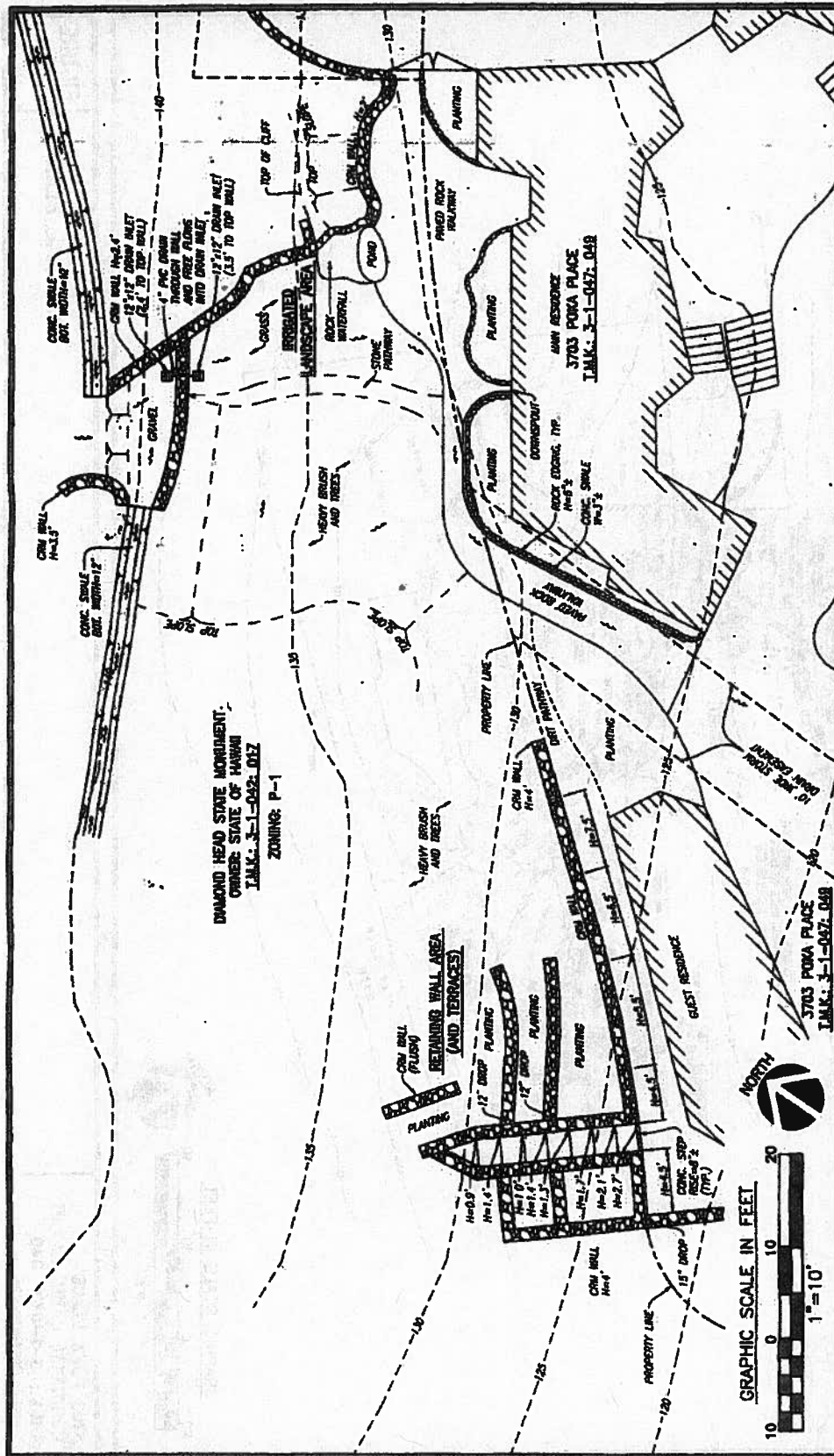


3703 POKA PLACE
 HONOLULU, OAHU, HAWAII
 T.M.K.: 3-1-047: 049
 Prepared By: Alpha Engineers, Inc.

VICINITY
 PLAN

FIGURE
 1





**EXISTING
SITE CONDITIONS
PLAN**

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

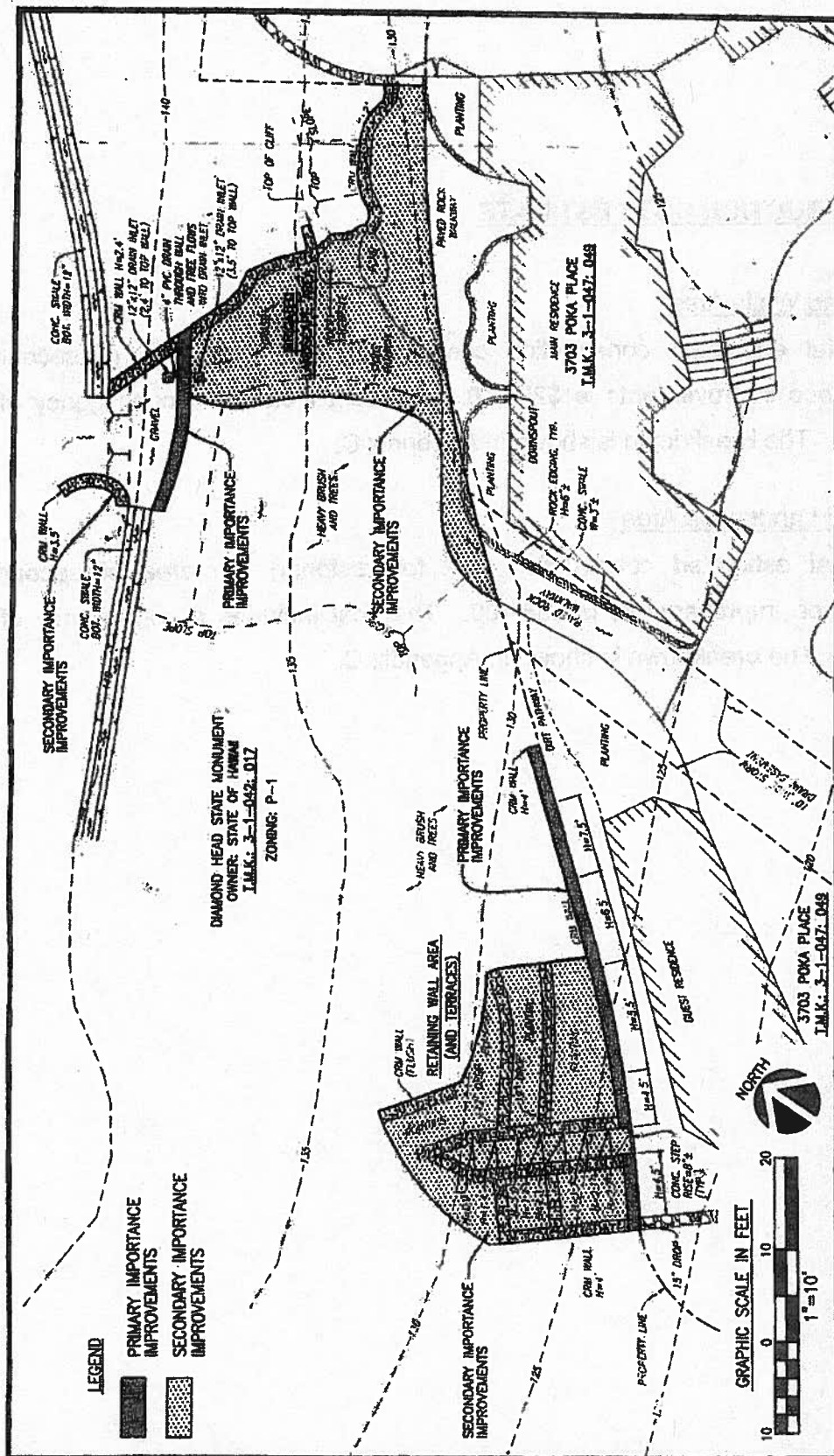
Irrigated Landscape Area

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.



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

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



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

WILLIAM T. AFLA, JR.
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCES MANAGEMENT

ESTHER KIA'AINA
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONSERVATION
COMMISSION ON WATER RESOURCES MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
DIVISION
FORESTRY AND WILDLIFE
THROUGH 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 EXHIBIT 5a

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

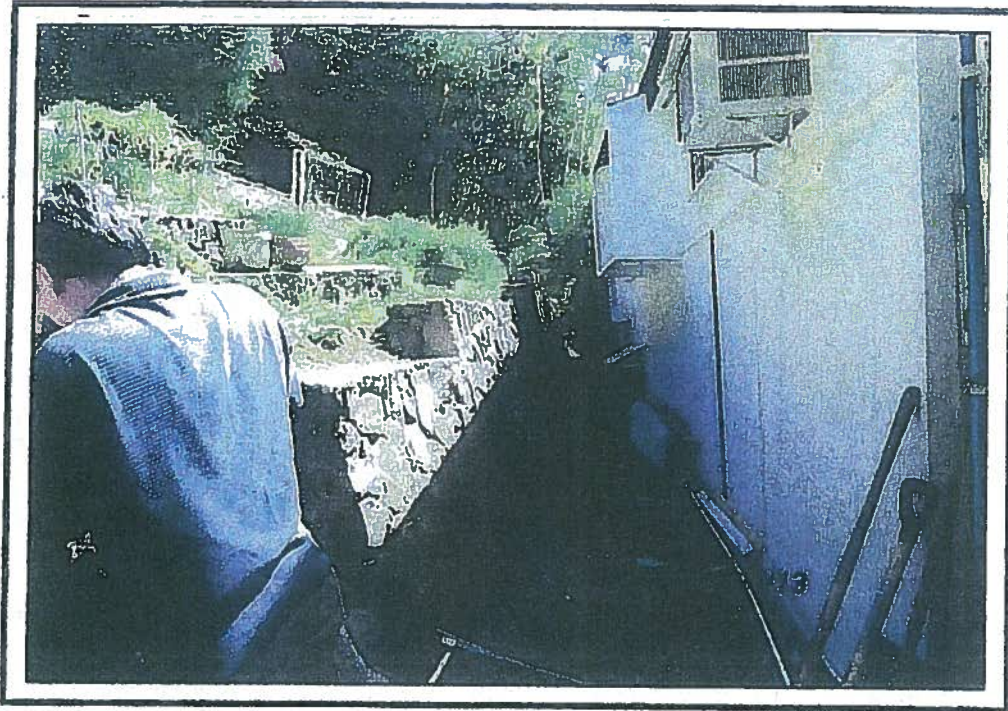
EXHIBIT 4

EXHIBIT 5a

Appendix B – Photos of Retaining Wall and Irrigated Landscape Area

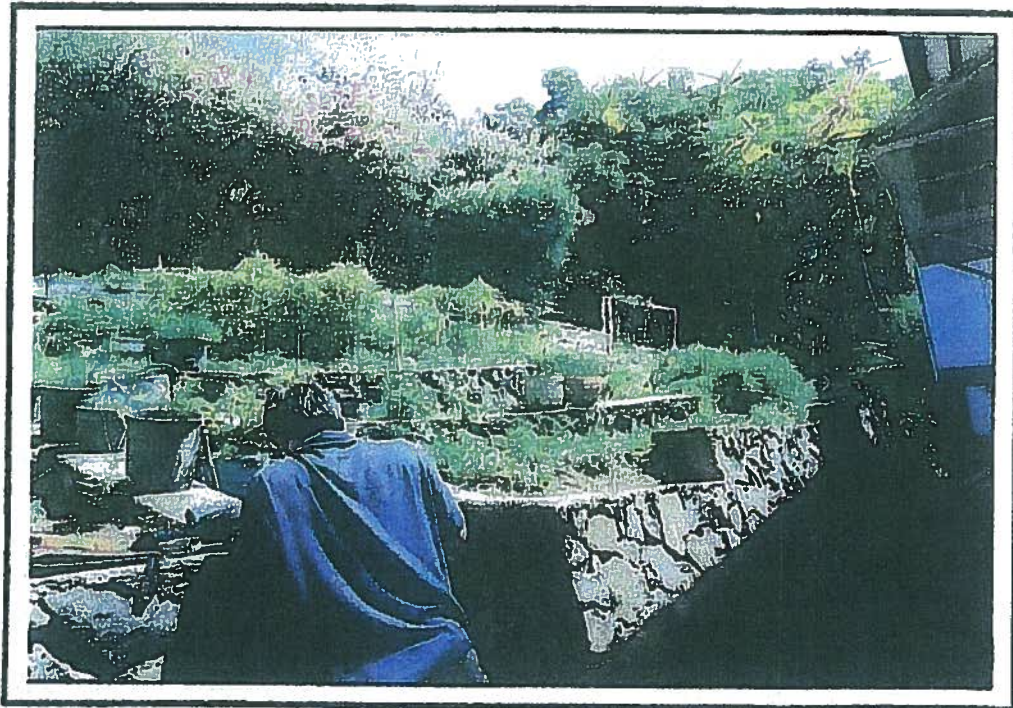
SITE IMPROVEMENTS ASSESSMENT - 3703 POKA PLACE

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.

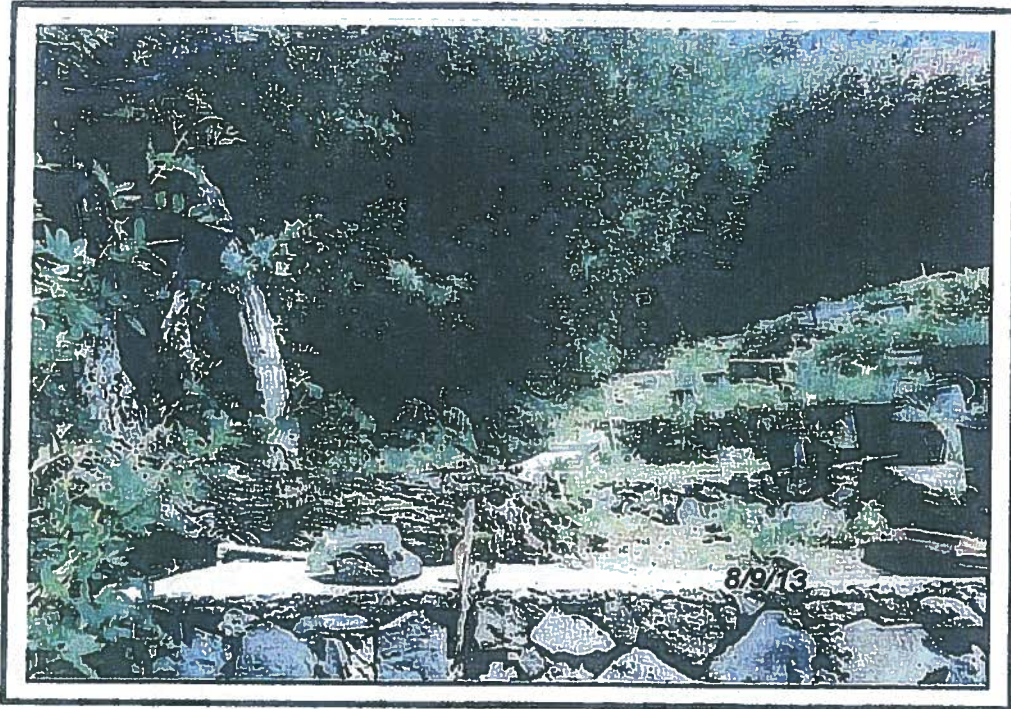
2

EXHIBIT 4

EXHIBIT 5a

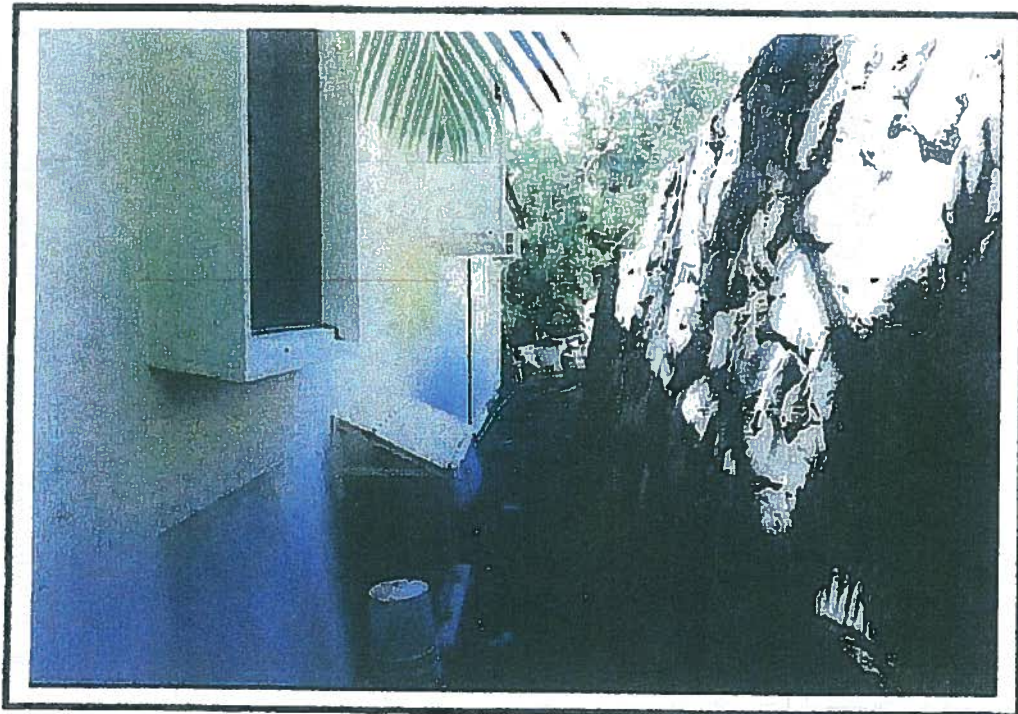
SITE IMPROVEMENTS ASSESSMENT - 3703 POKA PLACE

Pictures taken on August 9, 2013



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

3

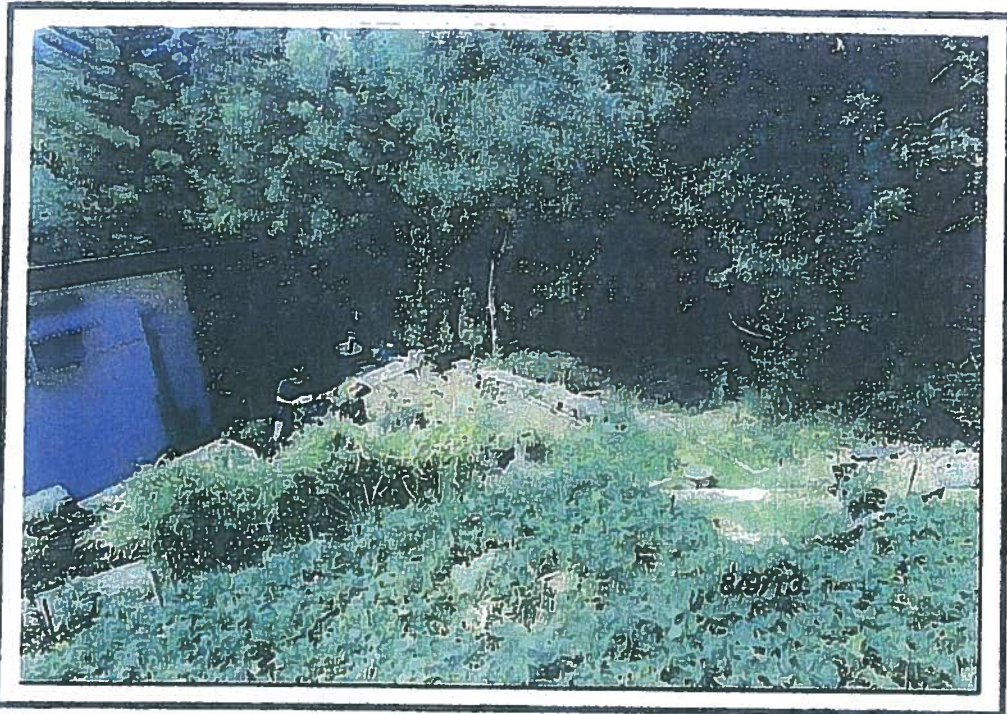


Near northeast corner of guest residence, looking west along CRM wall.

4

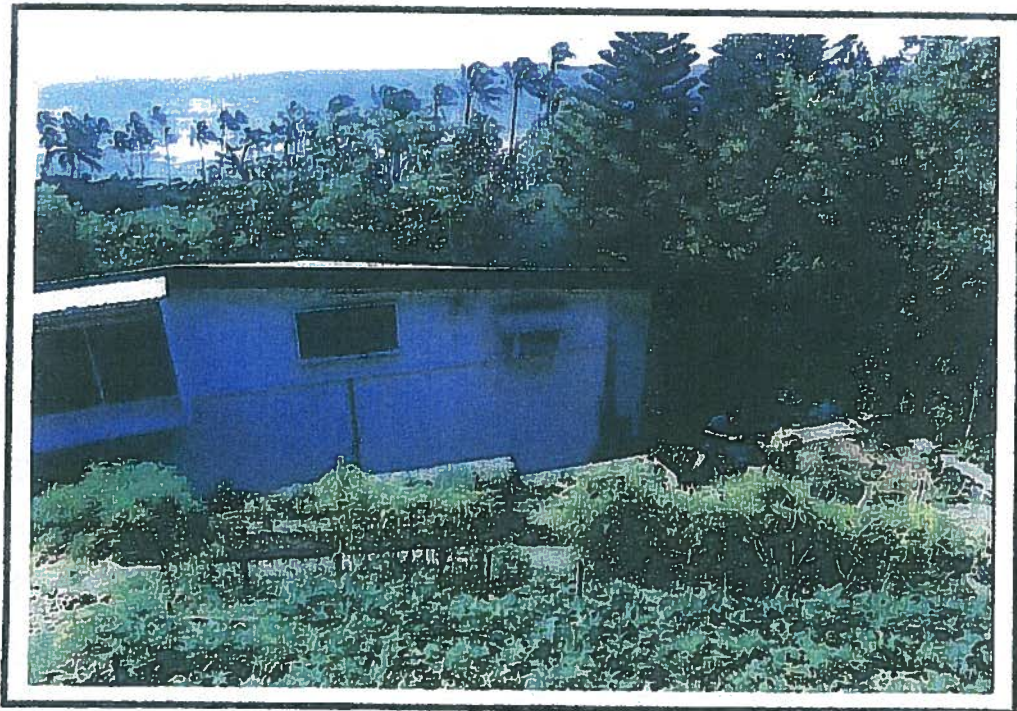
SITE IMPROVEMENTS ASSESSMENT - 3703 POKA PLACE

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.

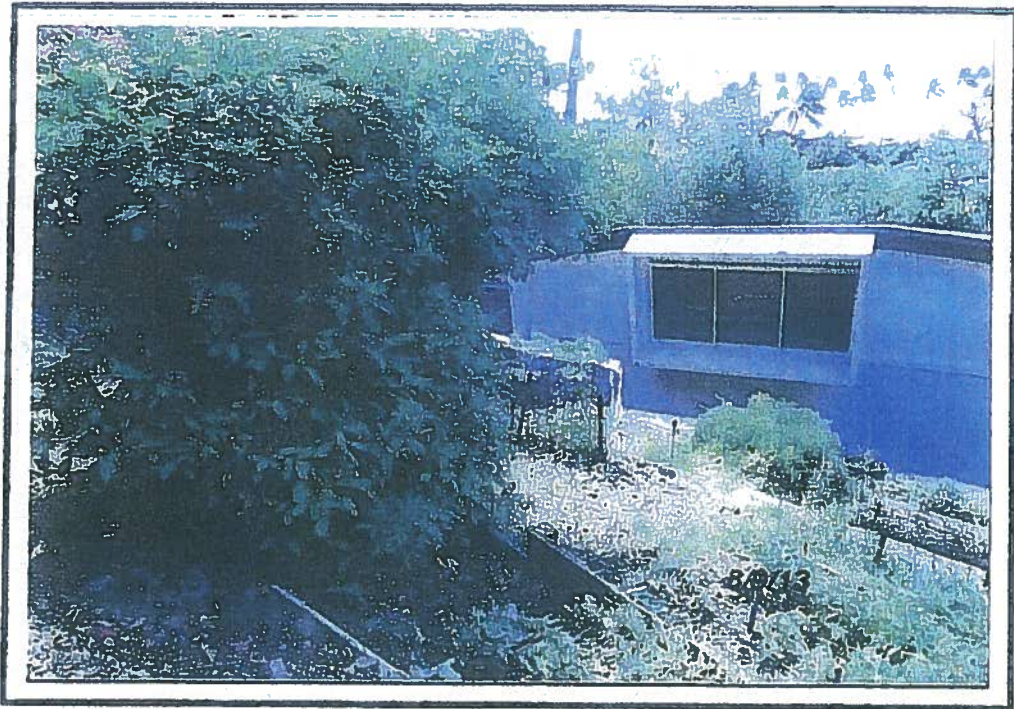
6

EXHIBIT 4

EXHIBIT 5a

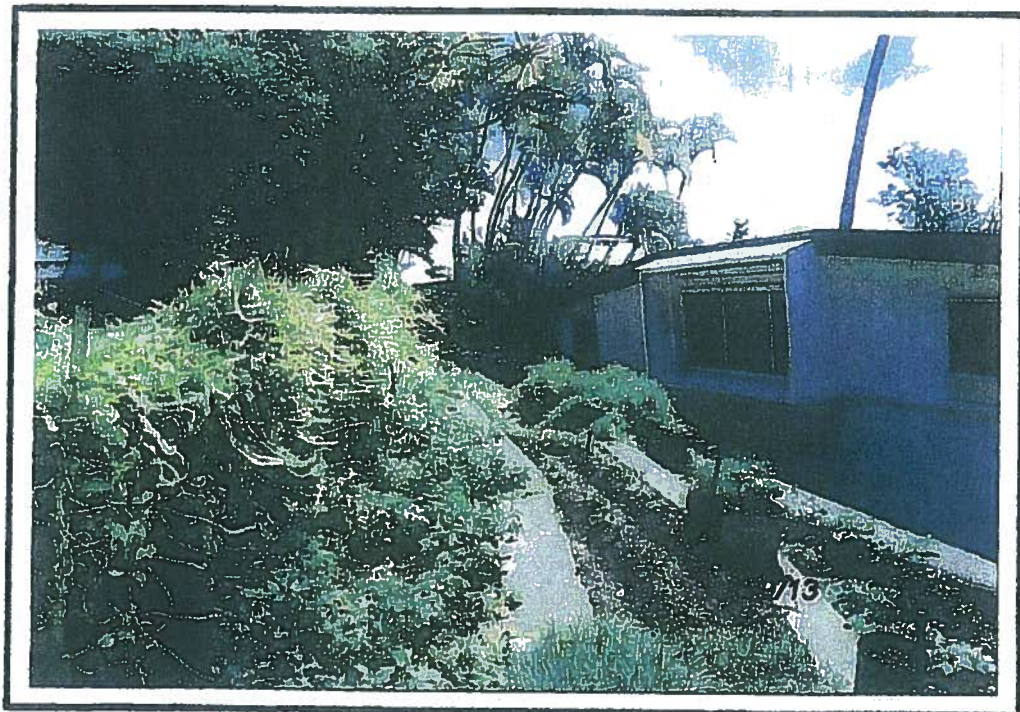
SITE IMPROVEMENTS ASSESSMENT - 3703 POKA PLACE

Pictures taken on August 9, 2013



At terraced area, looking southeast toward guest residence.

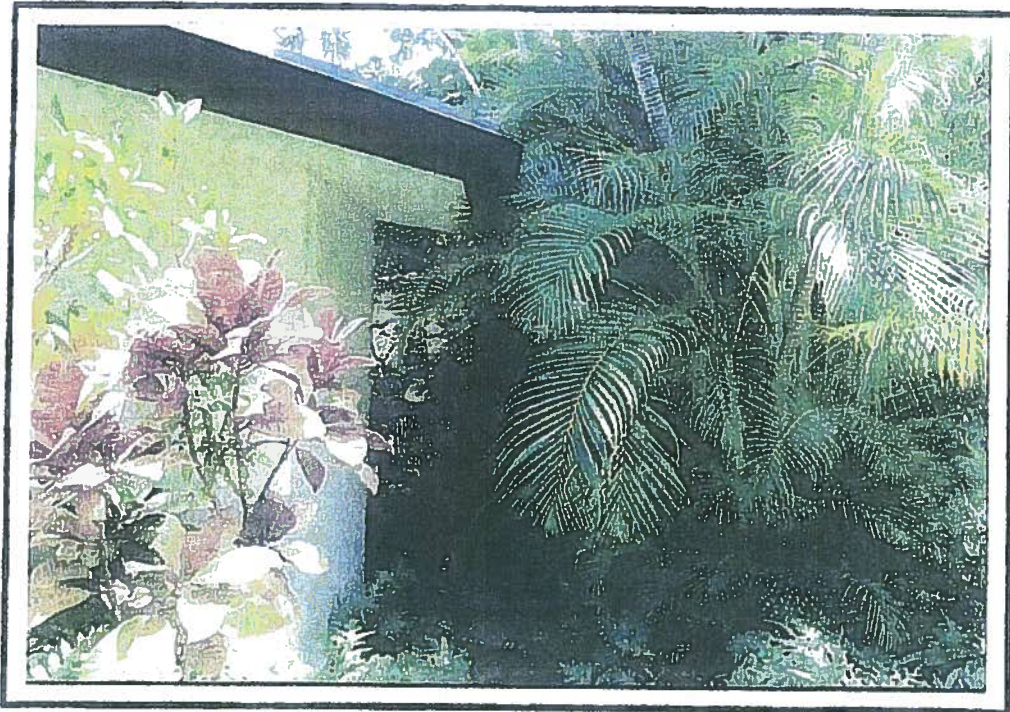
7



At terraced area, looking west toward guest residence.

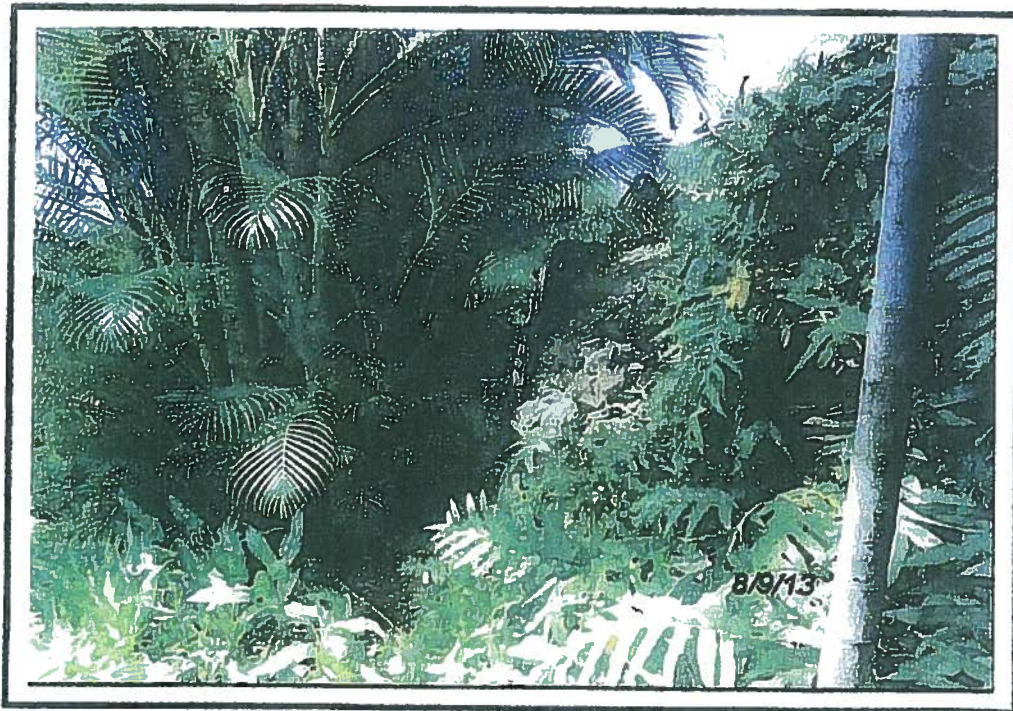
8

SITE IMPROVEMENTS ASSESSMENT - 3703 POKA PLACE
Pictures taken on August 9, 2013



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

9

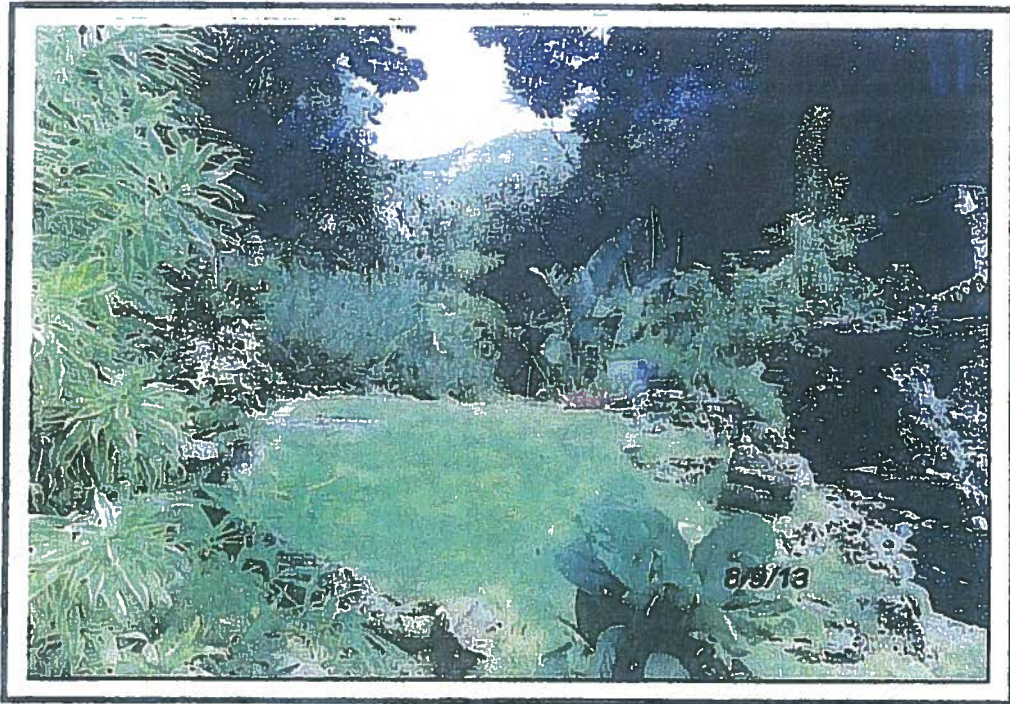


At dirt pathway between main and guest residences, looking west along CRM wall. Note existing rock formation at end of wall.

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

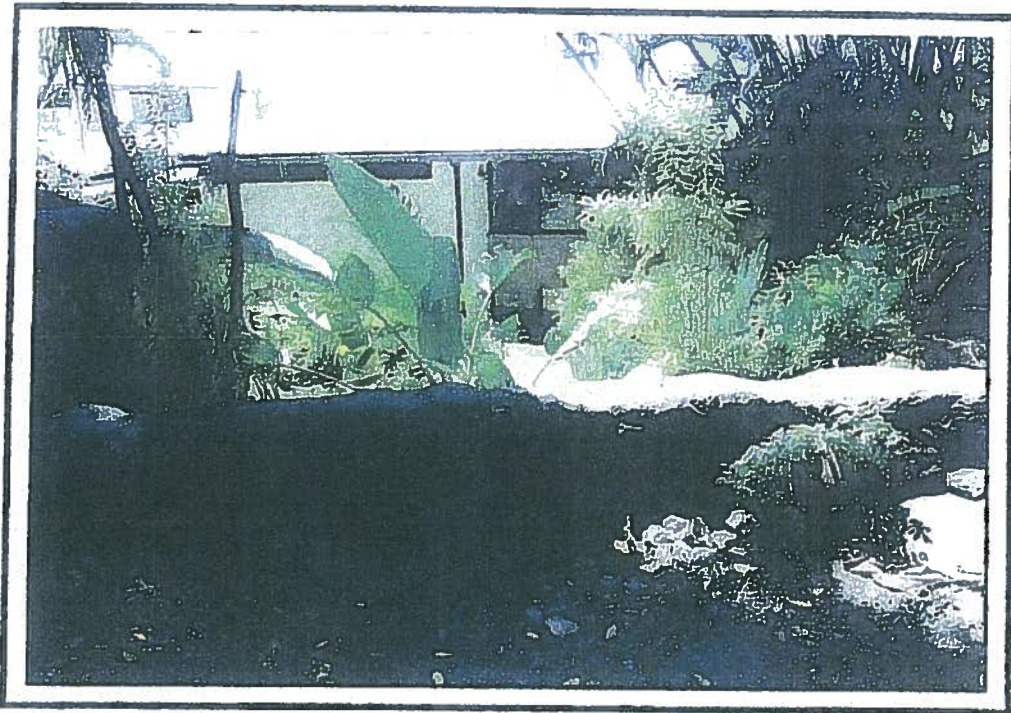


At irrigated landscaped area (within DHSM property), looking north at small valley. At foreground, note the CRM wall across bottom of valley acting as a dam.

12

SITE IMPROVEMENTS ASSESSMENT - 3703 POKA PLACE

Pictures taken on August 9, 2013



At dam, looking south toward main residence.

13

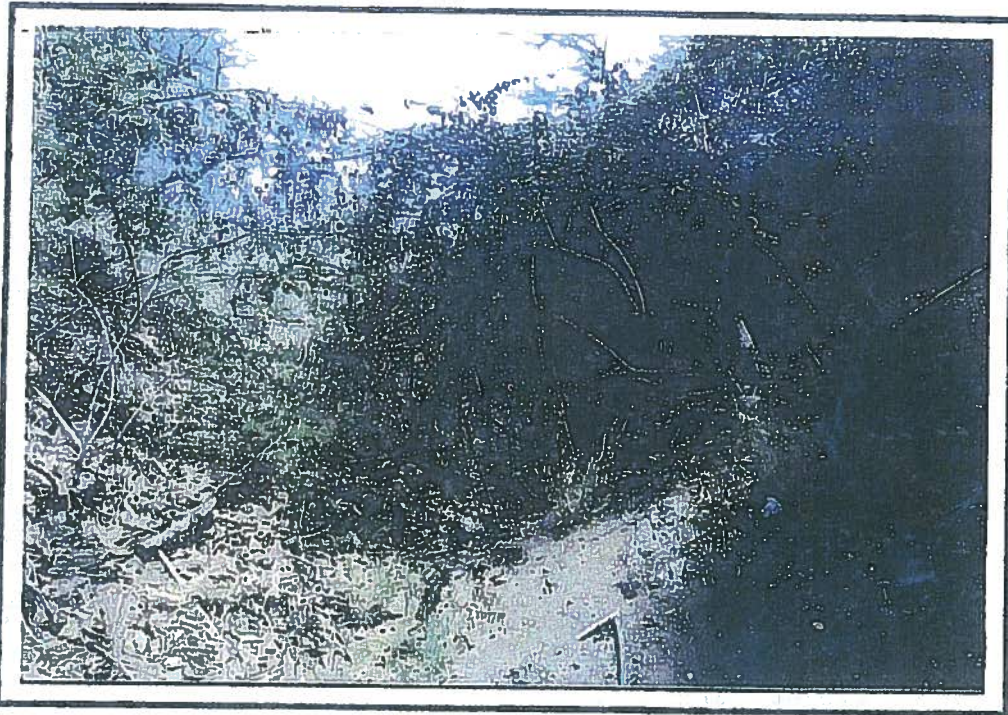


At dam, looking down toward CRM wall and drain inlet.

14

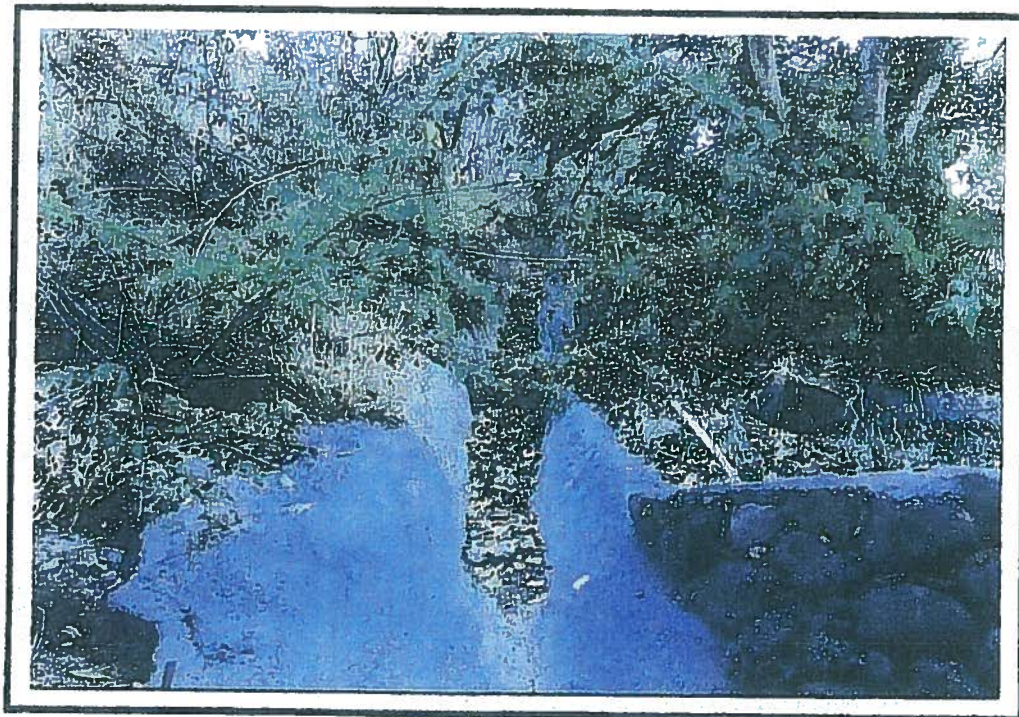
SITE IMPROVEMENTS ASSESSMENT - 3703 POKA PLACE

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

EXHIBIT 4

EXHIBIT 5a

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

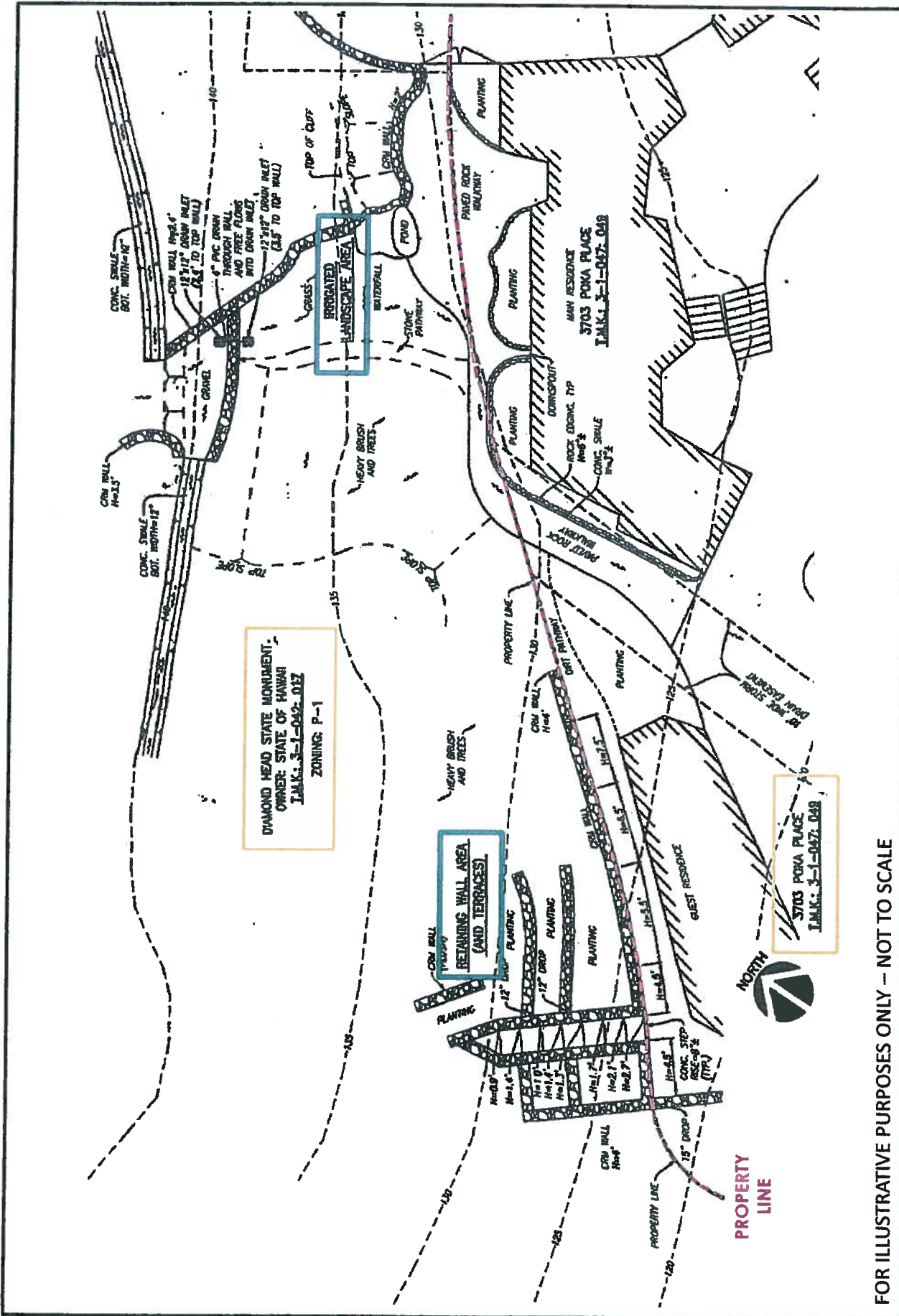
EXHIBIT 4

EXHIBIT 5a

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

October 25, 2013

| NO. | ITEM | QUANTITY | UNIT | UNIT COST | TOTAL COST |
|-----|--|----------|------|-----------|-----------------|
| | RETAINING WALLS | | | | |
| 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 |
| | TOTAL COST | | | | \$20,913 |
| | IRRIGATED LANDSCAPE AREA | | | | |
| 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 |
| | TOTAL COST | | | | \$34,080 |



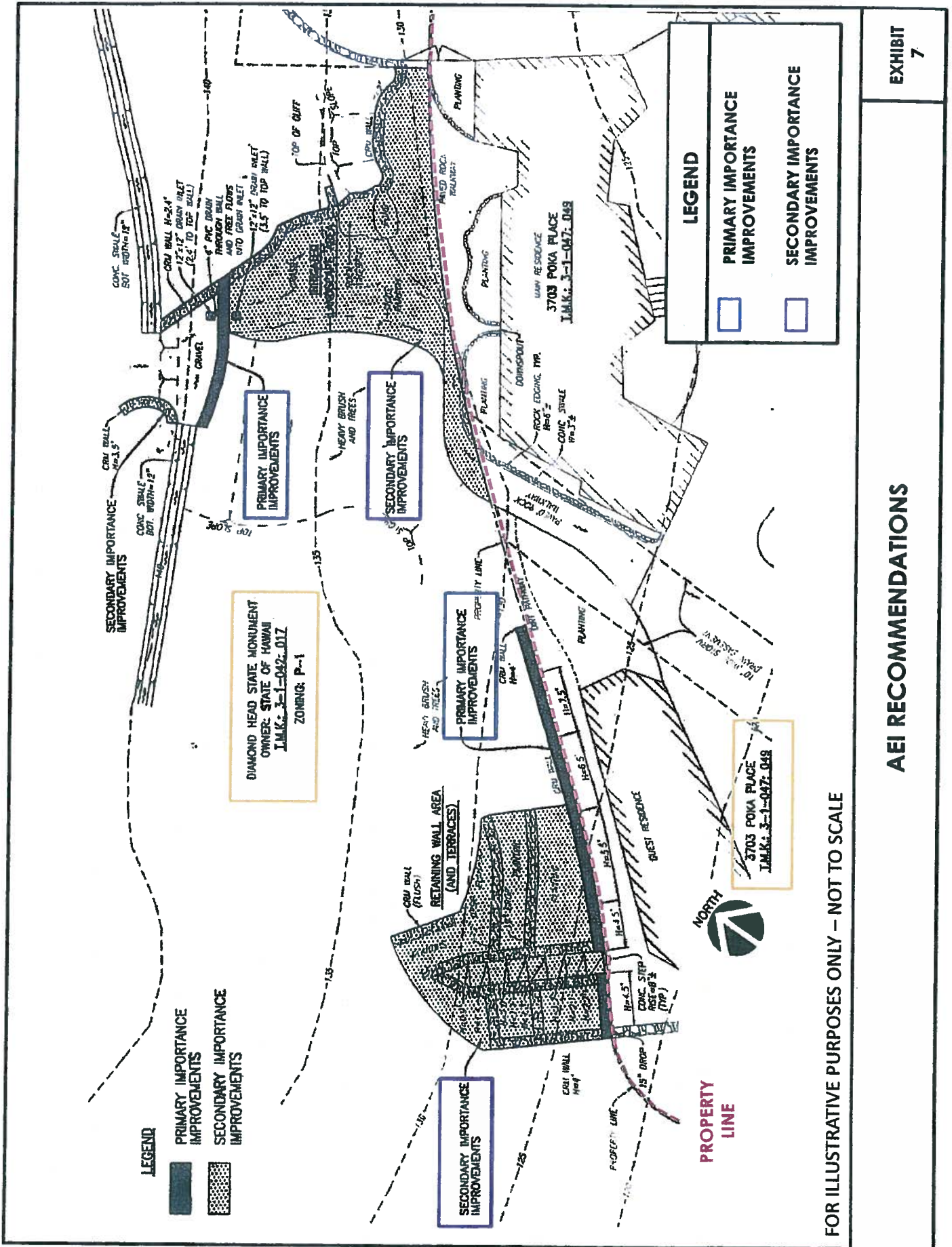


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CONSERVATION DISTRICT VIOLATION PENALTIES SCHEDULE GUIDELINES AND ASSESSMENT OF DAMAGES TO PUBLIC LAND OR NATURAL RESOURCES

September 2009

Relating to penalties for violations within the Conservation Districts

Act 217

EXHIBIT

4

EXHIBIT 8

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 HRS §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 HRS §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"¹ 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),² 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

¹ "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 conservation, disturbance alteration, or landscape alteration (See Appendix B Definitions) Adopted from Florida Department of Environmental Protection 2000 Administrative Process and Damage Liability, Ch. 829.34.

² 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 indirect impacts, environmental record of the violator, requirements 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 according 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 | A (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/Site 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.³ 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

³ While Staff and Board decisions in MA-01-09, DA-03-10 and HA-06-03 have treated the removal of non-native, invasive, or poisons 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 | Commensurate 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. | Minor | \$1,000-\$2,000 |
| Vegetation 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 \$17/sq.ft., so clearing 10,000 sq.ft. Staff could assess a penalty of \$170,000.

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 sufficient damage were sustained.

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.⁵ 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

⁵ In-Kind Penalty Framework has been adopted from Florida Department of Environmental Protection, 2007, Program Directive #21, Solutions 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 §13C-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 Kona 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.

| Violations | Identified Harm to Resource 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 koo*) 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 actual-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 harm and permit restoration 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 | A (Site Plan) | Up to \$1,000 |

Table 2. Vegetation Removal

| Action | Commensurate 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.

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.⁷
- (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, H.A.R. 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.

⁷ Ecosystem Valuations http://www.ecosystemvaluation.org/benefits_methods.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.⁸

- (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 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

⁸ Definition adapted from Florida Department of Environmental Protection, 2000 Administrative Fines and Damage Liability, Ch. 12B-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 Beekering, P., Piniz, S., Dieking J. 2002. Economic valuation of the coral reefs of Hawaii. NOAA Final Report NA 160A1449.
- Conservation International. 2008. Economic Values of Coral Reefs, Mangroves, and Seagrasses: A global Compilation. Center for Applied Biodiversity Science, Conservation International, Arlington VA, USA.
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NóAA Coastal Services Center. Habitat Equivalency Analysis.
www.csc.noaa.gov/coastal/economics/habitatequ.htm

Maine Land-Use Regulation Commission. 2007. 2008 Workshop Draft Comprehensive

Land Use Plan: for areas within the jurisdiction.

http://www.maine.gov/doc/lur/reference/cluprev/CLUP_PWDraft_pg5.shtml

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/m² 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/m²), of the coral reefs in Kaneohe to be \$28.09 million (\$65/m²) and the coral reefs on the Kona coast to be \$17.68 million (\$19/m²).

Pilae 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 m² of coral reef damage. This calculation

EXHIBIT

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was similar to the estimated cost of remediation efforts \$390,000 to clean 5,000 yd³ of beach sand. However between 30,000-50,000 yd³ 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 10m²). 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 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/yard² of damage to seagrass beds for the first yard² damaged and \$75/yard² per each additional yard² 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 Plan, \$390,000 fine was estimated to clean 5,000 yd³ 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 I- Penalties

| Violation Type | Penalty Prefix (D,C,B) | Harm to Resource (actual & potential) | Type or Vegetation Status | Penalty Range | Adjustments (Mark Adj. Choice #1-3) | 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: _____

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EXHIBIT 8

END OF EXHIBIT 4

EXHIBIT 4

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



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

JESSE K. SOUKI
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
KAOHOLAWE 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:LY

ENF: OA 14-02

CERTIFIED MAIL/RETURN RECEIPT
7013 0600 0001 9170 1912

SEP 18 2014

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

SUBJECT: Enforcement Action Regarding Unauthorized Landscaping, Drainage Improvements, and Earth Retention Structures located at the Diamond Head State Monument
Honolulu, O'ahu, Hawaii
Tax Map Key: (1) 3-1-042:017 (por.)

Dear Poka Place, LLC:

This is to inform you that on September 12, 2014, the Board of Land and Natural Resources has found the Poka Place, LLC in violation of HRS §183C and HAR §13-5, in regards to unauthorized land uses within the Resource subzone of the Conservation District located at the Diamond Head State Monument, Honolulu, O'ahu, TMK: (1) 3-1-042: portion of 017 and is subject to the following:

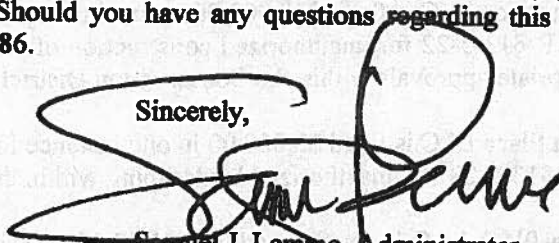
1. That Poka Place LLC is fined \$10,000.00 in one instance for violating the provisions of HRS §183C-7 and HAR §13-5-22 for unauthorized construction of earth retention structures by failing to obtain the appropriate approvals within the Conservation District;
2. That Poka Place LLC is fined \$2,000.00 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;

EXHIBIT 5

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.

Please acknowledge receipt of this letter, with the above noted conditions, in the space provided below. Please sign two copies. Retain one and return the other within 30 days. All fine payments should be made payable to the State of Hawai'i. Should you have any questions regarding this matter, contact Lauren Yasaka of our Office at (808) 587-0386.

Sincerely,



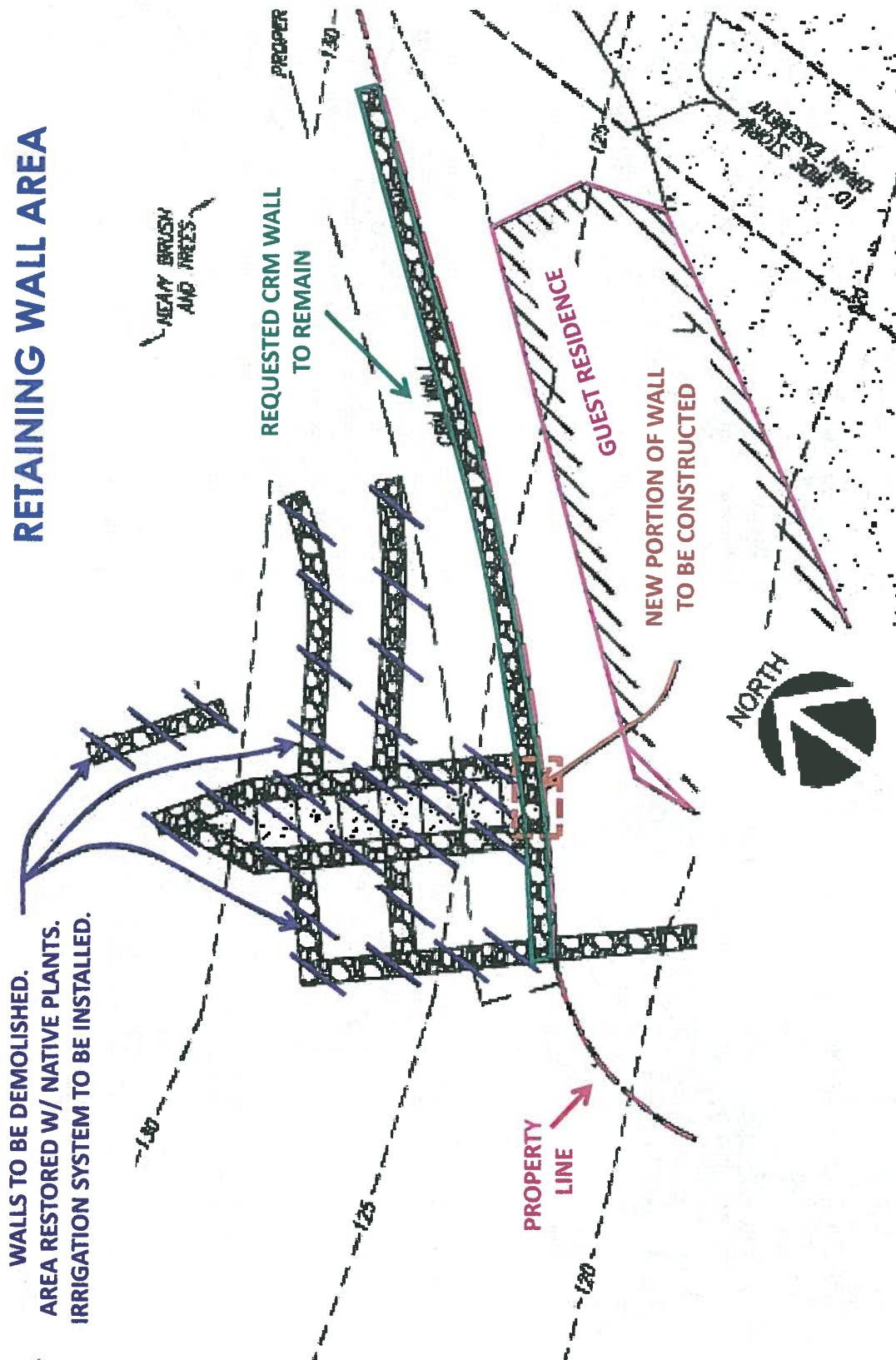
Samuel J. Lemme, Administrator
Office of Conservation and Coastal Lands

Receipt acknowledged:

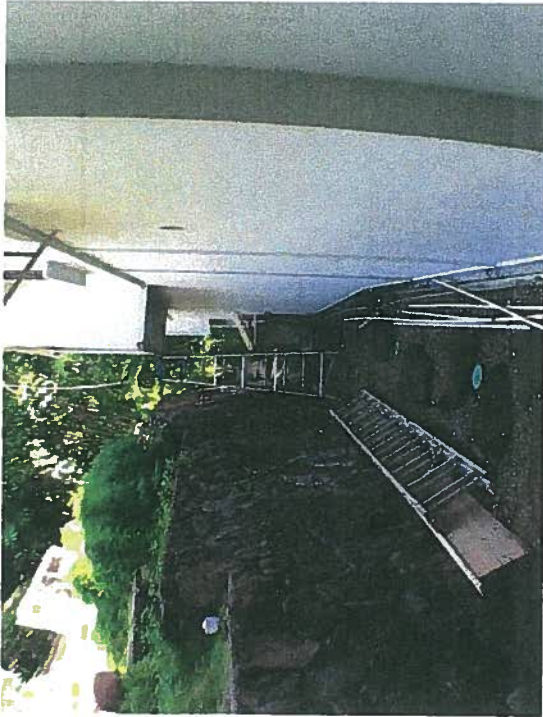

Applicant's Signature

Date October 2, 2014

c: Chairperson
O'ahu Board Member
ODLO
SP



RETAINING WALL AREA SITE PLAN



Retaining wall requested to remain



Retaining wall requested to remain; Steps & side walls to be removed; New retaining wall to fill opening



Terracing, walls, & non-native landscaping to be removed

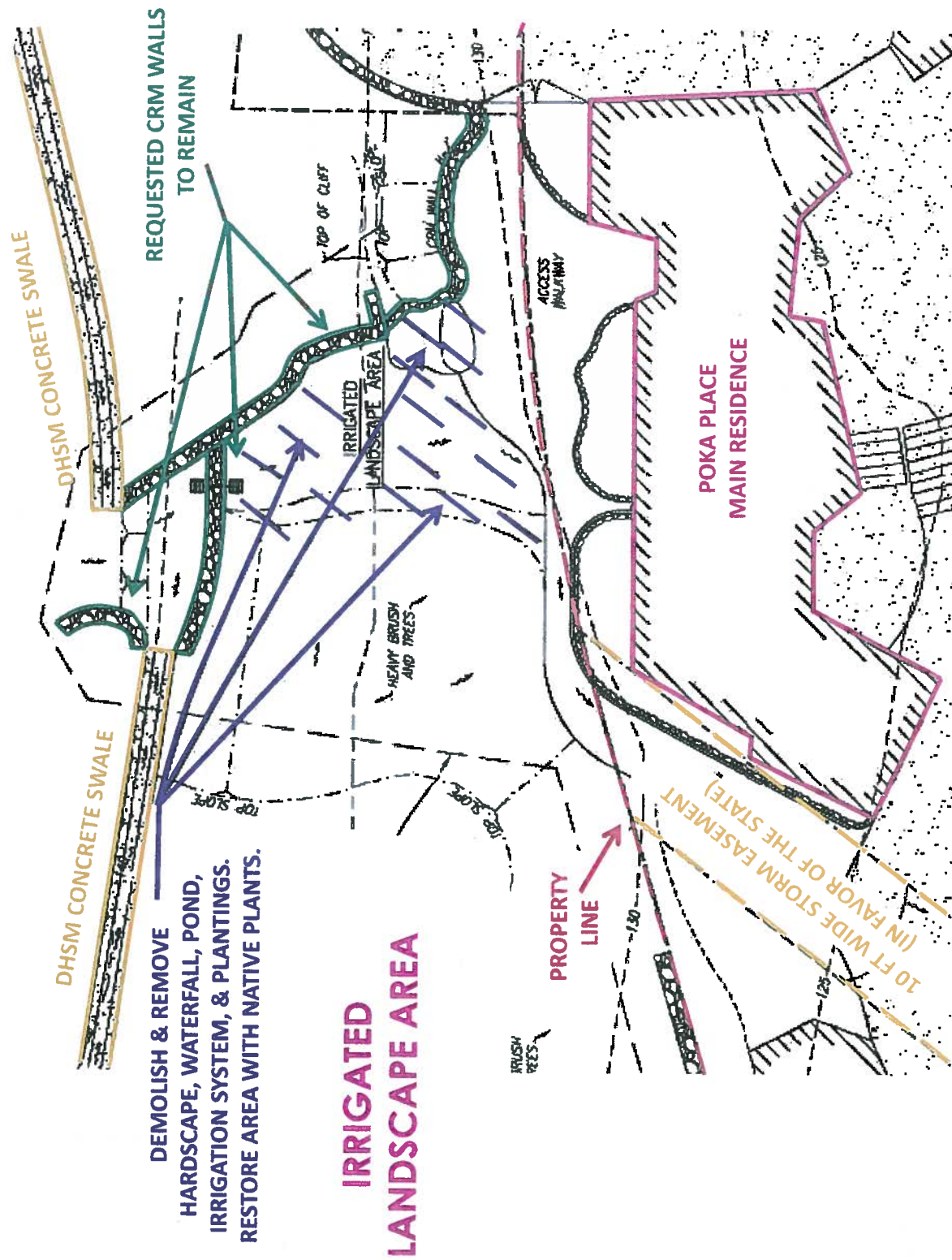


Terracing, walls, & non-native landscaping to be removed

PHOTOS OF RETAINING WALL AREA



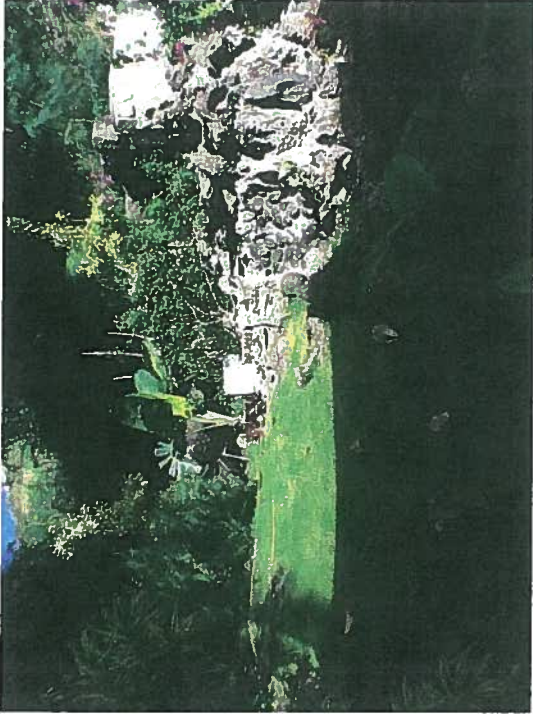
OVERALL LANDSCAPING PLAN



IRRIGATED LANDSCAPE AREA SITE PLAN



Pond, waterfall, & landscaping to be removed;
CRM wall to the right requested to remain



Landscaping and waterfall to be removed;
CRM wall to the right requested to remain



Retaining walls requested to remain

IRRIGATED LANDSCAPE AREA PHOTOS