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

January 12, 2007

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

REGARDING: Conservation District Enforcement File No. KA 06-72 Regarding Alleged Unauthorized Construction of Chain Link Fence Within the Conservation District Located Makai of 7380 Alealea Road, Wainiha, Hanalei, Kauai, TMK (4) 5-8-009:025

BY: Uli Mahina LLC.
David Smith

AREA OF USE: Approximately 124.5 Linear Feet

AREA OF PARCEL: 27,674 square feet

SUBZONE: Resource

DESCRIPTION OF AREA:

The subject property is located on the shores of Lae O Kaonohi Beach, Wainiha ahupua'a, Hanalei District, island of Kauai, TMK:(4) 5-8-009:025 within the Urban State Land Use District. Although the area is zoned in the Urban State Land Use District, areas makai of the shoreline are within the Conservation State Land Use District. The subject area is defined by wide white sandy beach. According to the Atlas of Natural Hazards in the Hawaiian Coastal Zone, the subject area is in a medium to high Overall Hazard Assessment area **(Exhibits 1, 2, 3 & 4)**.

ALLEGED UNAUTHORIZED LAND USES:

The Office of Conservation and Coastal Lands (OCCL) have received verbal complaints regarding the construction of a fence on the beach in June 2006. Staff notes, records on file with the Department regarding this subject parcel demonstrate unauthorized land uses

fronting the makai side of the subject parcel in 2004 and 2005. The County of Kauai appeared to have jurisdiction over past unauthorized land uses that appeared to be located within the Special Management Area **(Exhibit 5 & 6)**. However, Departmental records indicate that the last Certified Shoreline for the subject parcel was done on November 26, 2000. The Department believes the recent work was conducted within the Conservation District.

A Notice and Order to cease activity in the Conservation District was mailed to the property owner on June 22, 2006 in regards to the unauthorized fence **(Exhibit 7)**.

The property owners Counsel responded to the Notice and Order by correspondence dated August 4, 2006 and stated: "*Only as a last resort, and after all attempts to workout an arrangement with the Planning Department failed, did Mr. Smith proceed with construction a fence on his property. We understand, the fence was constructed behind a recent certified shoreline that was certified in November 2000. Further the fence was constructed as a necessary means to protect his property rights and the safety and security of his guests and tenants.*"**(Exhibit 8)**

A follow up letter notified Mr. Smith's Counsel that the matter would be brought before the Board. **(Exhibit 9)**.

In addition, the County of Kauai issued a Notice of Violation dated June 20, 2006, for Illegal Development/Placement of a Chain Link Fence within the Special Management Area and the Shoreline Setback Area **(Exhibit 10)**.

RESOLUTION OF UNAUTHORIZED LAND USES:

The Department and Board of Land and Natural Resources has jurisdiction over land lying makai of the shoreline as evidenced by the upper reaches of the wash of the waves other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limits of debris left by the wash of the waves, pursuant to §205A-1, Hawaii Revised Statutes (HRS), Definitions.

As evidenced by the wave run up, Staff believes that portions of the fence are located within the Conservation District. Based on the evidence available, the OCCL has sufficient cause to bring this matter to the Board since it is evident that portions of the fence are placed within the Conservation District pursuant to the Hawaii Administrative Rules (HAR), §15-15-20 Standards for determining "C" conservation district boundaries:

> It shall include lands having an elevation below the shoreline as stated by §205A-1, HRS, marine waters, fishponds, and tidepools of the State, and accreted portions of lands pursuant to §501-33, HRS, unless otherwise designated on the district maps. All offshore and outlying islands of the State are classified conservation unless otherwise designated on the land use district maps.

Conservation District

Chapter 13-5, Hawaii Administrative Rules (HAR) and Chapter 183C, Hawaii 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. The chapters also provide for penalties, collection of administrative costs and damages to state land for uses that are not allowed or for which no permit has been obtained. Chapter 13-5, HAR defines "land use" in part as: the placement or erection of any solid material on land or the grading, removing or dredging of any material or natural resource on land.

Hawaii Coastal Erosion Management Plan

In 1999, the Board adopted the Hawaii Coastal Erosion Management Plan (COEMAP) and approved specific criteria to guide Staff to resolved cases involving unauthorized shoreline structures.

In assessing cases involving unauthorized shoreline structures, specific criteria are as follows:

1. Protect/preserve/enhance public shoreline access;
2. Protect/preserve/enhance public beach areas;
3. Protect adjacent properties;
4. Protect property and important facilities/structures form erosion damages; and
5. Implement a "no tolerance" policy for recent or new unauthorized shoreline structures.

The Department considers each case based on the specific circumstances/history. For instance, the age of the structure, the quality of the surrounding beach resources, the nature of the surrounding development, and the risk to life and limb are all evaluated to help formulate a position with respect to the disposition of the matter. For structures built after the 1999 "no tolerance" policy for unauthorized shoreline structures, the customary policy is to remove the structure.

The unauthorized construction of the fence is a land use that occurred in the Conservation District without a permit, and therefore allegedly violates the above chapters. This report and staff recommended conditions seek to resolve this conservation district violation. Pursuant to Chapter 183C, HRS, the maximum fine for a conservation district violation is $2,000.00 per violation, or $2,000.00 per day.

DISCUSSION

Because the Department has a "no tolerance" policy in regards to shoreline structures constructed after 1999, OCCL Staff recommends that the fence within the Conservation District be removed.

This submittal and notice of the Board's meeting will be sent to the property owner's counsel by certified mail to the address of record in Hawaii.

FINDINGS

1. That the landowner did in fact, authorize, cause or allow the unauthorized construction of the structure to occur;

2. That portions of the structure lies within the State Land Use Conservation District, Resource subzone;

AS SUCH, STAFF RECOMMENDS AS FOLLOWS:

That, pursuant to Chapter 183C, Hawaii Revised Statutes (HRS), the Board finds the landowner in violation of Chapter 183C and Chapter 13-5, Hawaii Administrative Rules (HAR), and is subject to the following:

1. The landowner violated the provisions of Chapter 183C, Hawaii Revised Statutes (HRS), and Chapter 13-5, Hawaii Administrative Rules (HAR), in one instance by constructing a shoreline fence structure. The landowner is fined a total of $2,000.00 for one Conservation District violation;

2. The landowner is fined an additional $200.00 for administrative costs associated with the subject violation;

3. The landowner shall pay all fines (total $2,200.00) within sixty (60) days of the date of the Board's action;

4. The landowner shall remove the fence within the Conservation District within thirty (30) days of the shoreline determination by Departmental Staff;

5. Within 45 days of the shoreline determination, a Departmental Representative shall inspect the shoreline for compliance;

6. The landowner shall comply with all applicable statutes, ordinances, rules, and regulations of the Federal, State and County governments;

7. That in the event of failure of the alleged to comply with any order herein, the landowner shall be fined an additional $2,000.00 per day until the order is complied with; and

8. That in the event of failure of the landowner to comply with any order herein, the matter shall be turned over to the Attorney General for disposition, including all administrative costs.

Respectfully submitted,

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

Approved for submittal:

PETER T. YOUNG, Chairperson
Board of Land and Natural Resources

KAUAI

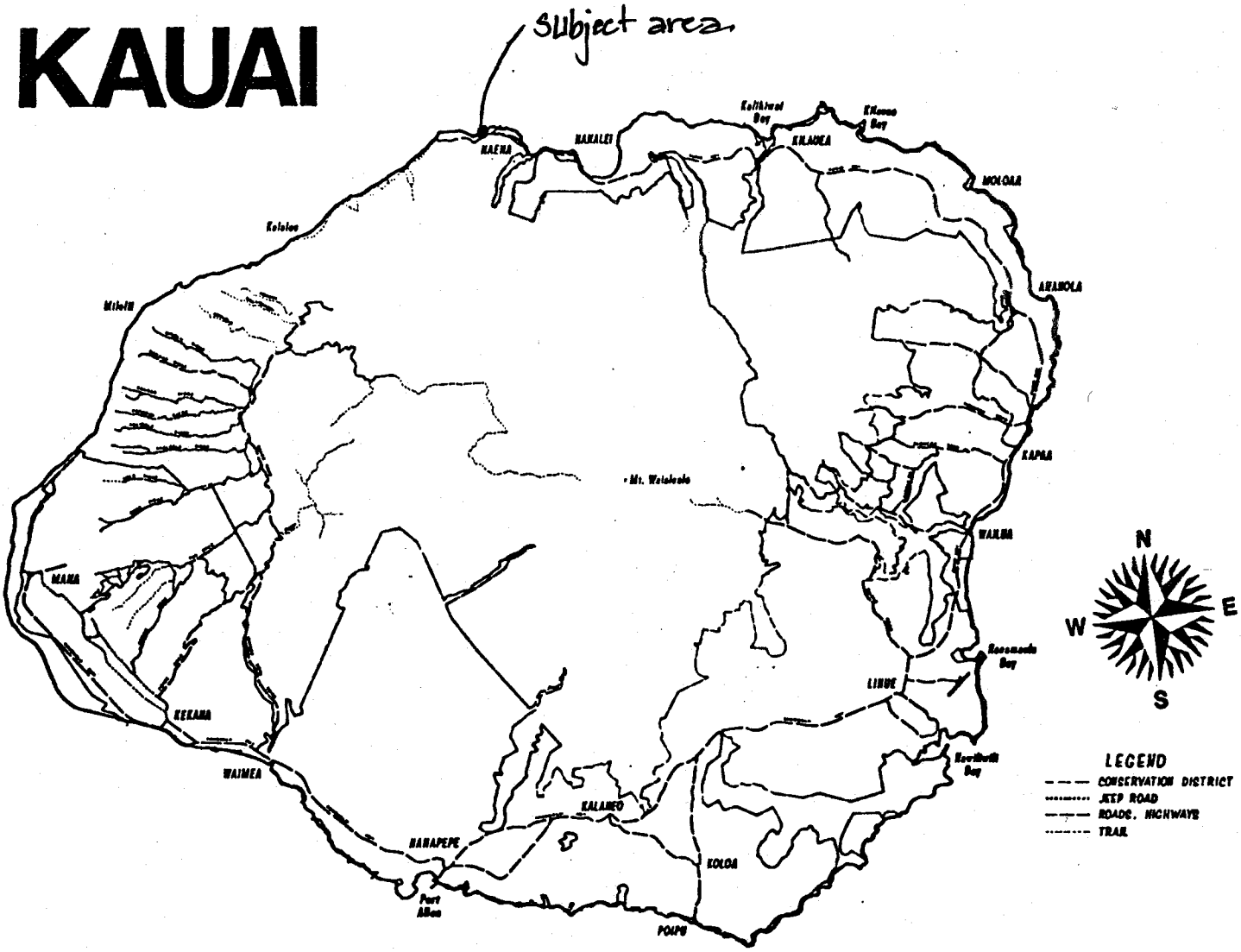
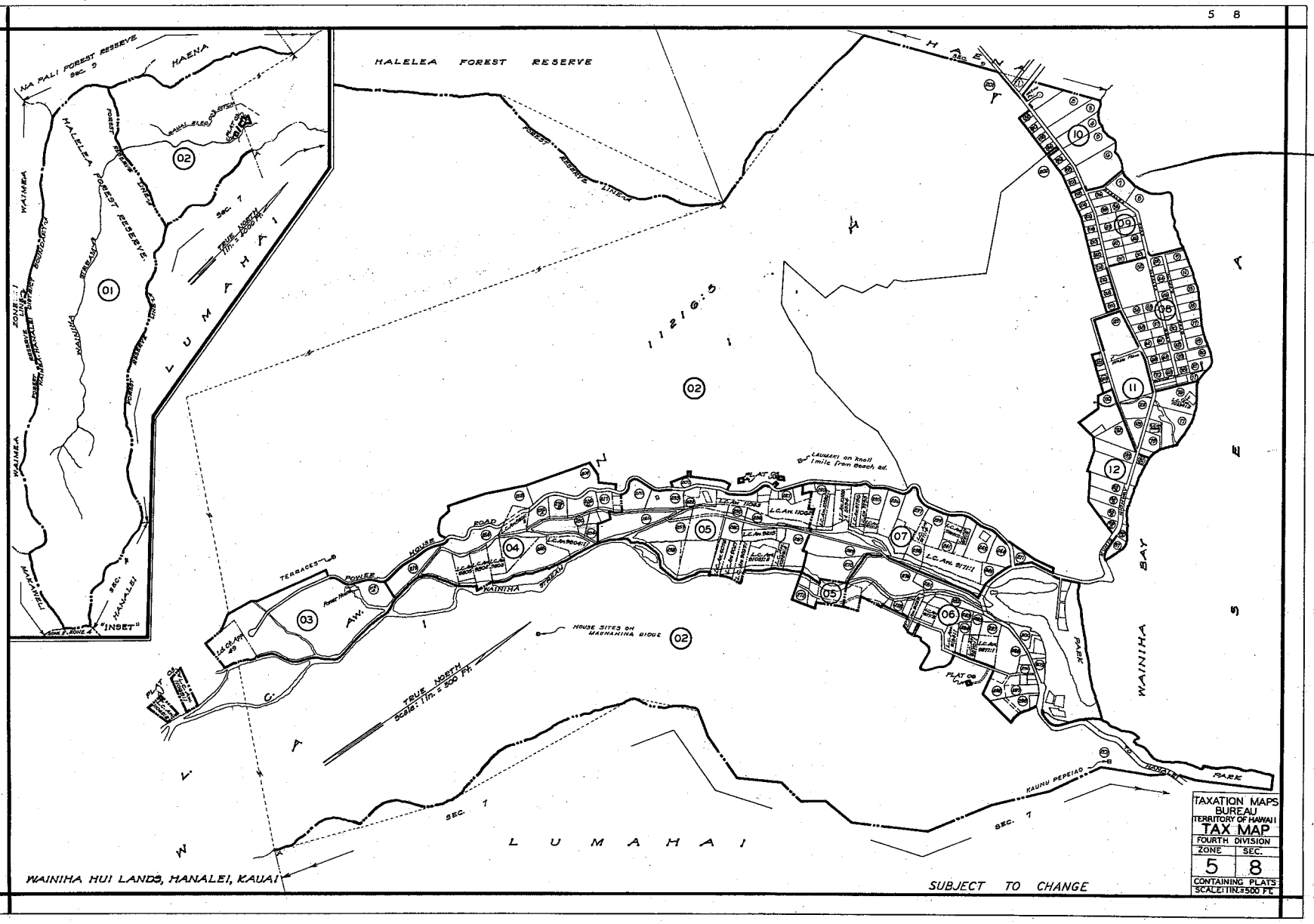


EXHIBIT 1

EXHIBIT 2



Dwg. No: 4108 - Revised
Source: Taxation Maps Bureau
By: J.T.H. & S.L. Date: February 1948

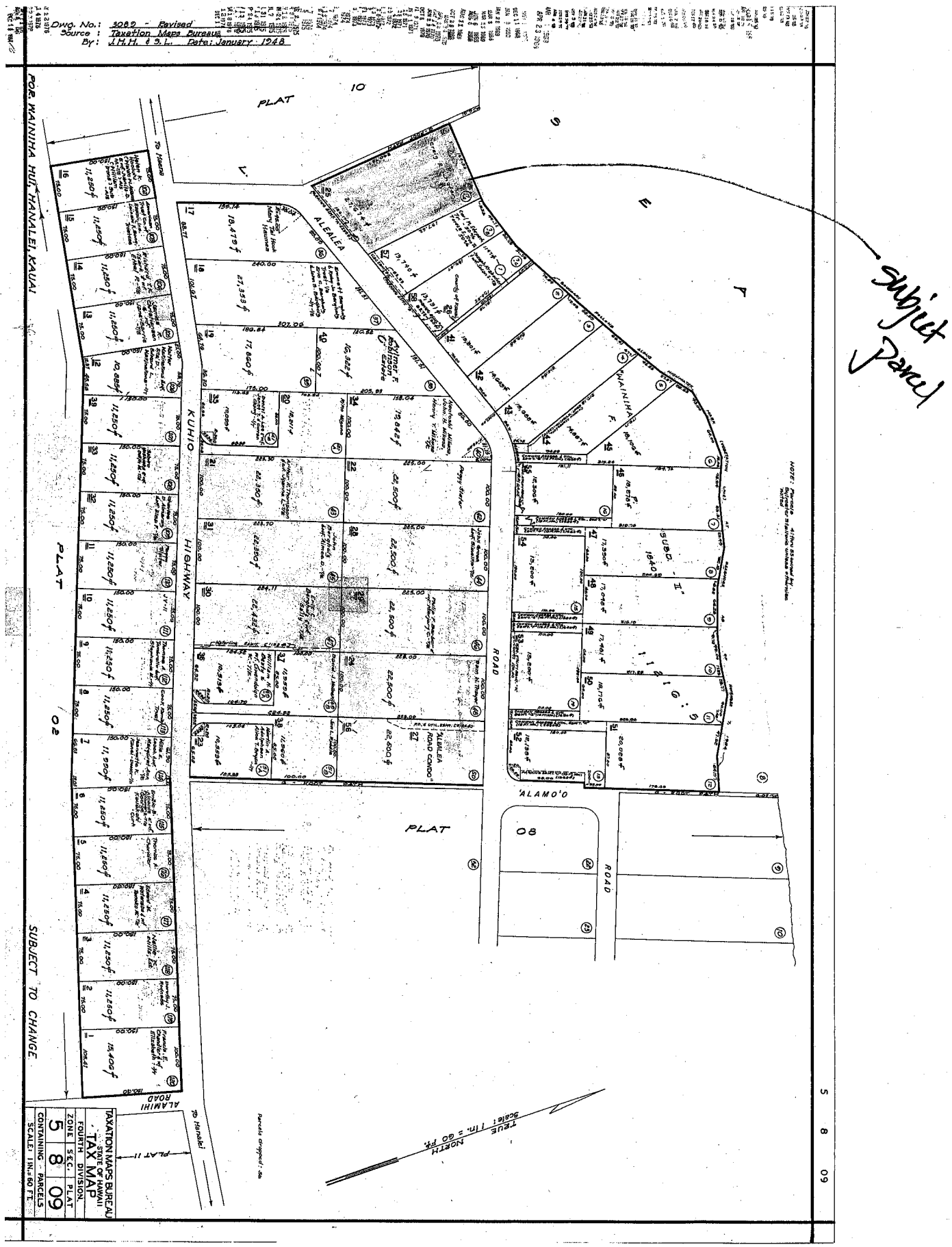
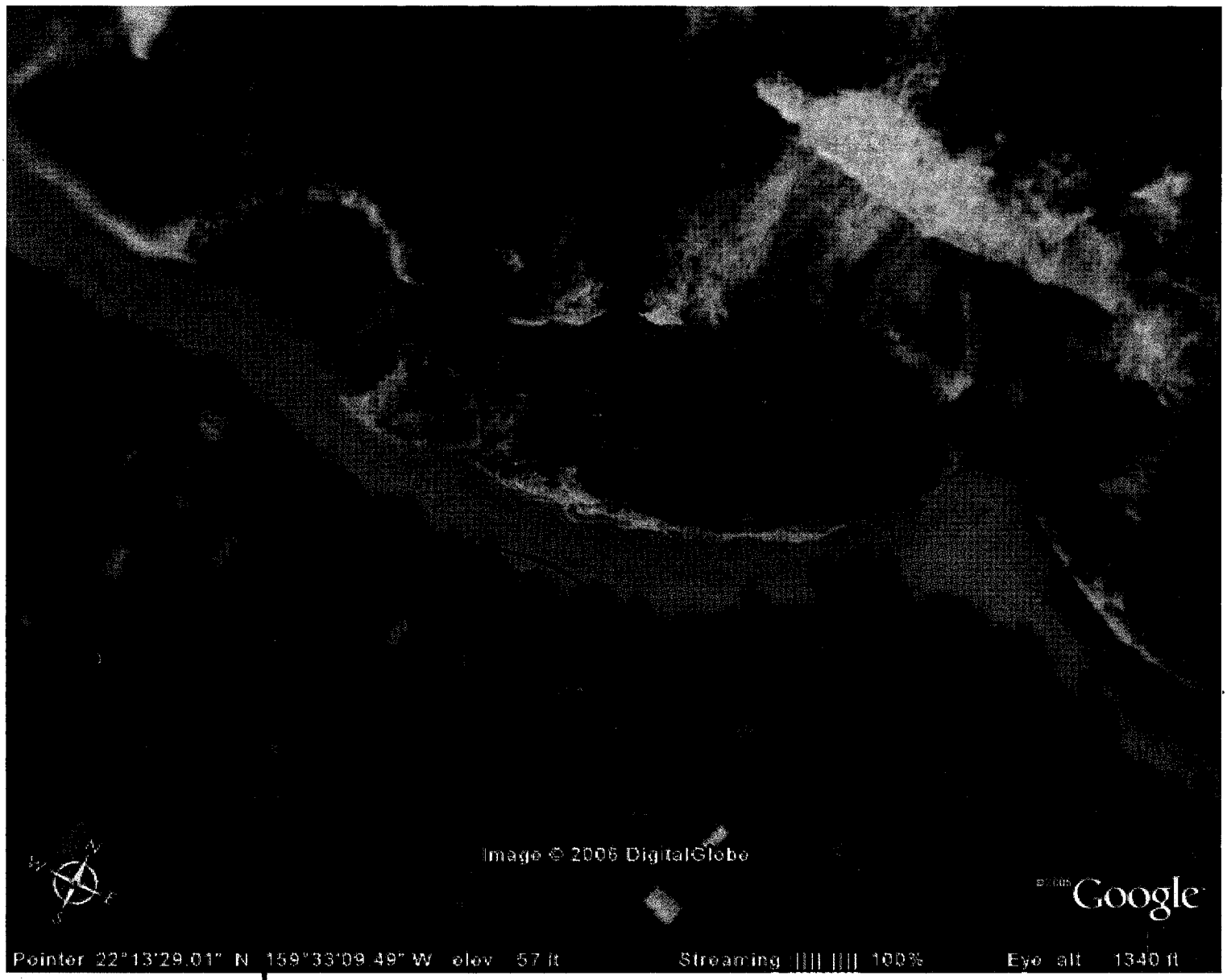

Dwg. No.: 3089 - Revised
Source: Taxation Maps Bureau
By: J.H.H. & S.L. Date: January 1948
PLAT 10
PLAT 02
PLAT 08
KUHIO HIGHWAY
ALEALEA ROAD
'ALAMO'O ROAD
ALAMIHI ROAD
To Hanalei
To Hanalei
POR. WAINIHA HUI, HANALEI, KAUAI
SUBJECT TO CHANGE
Subject Parcel
TRUE NORTH
Scale: 1 in. = 60 Ft.
TAXATION MAPS BUREAU
STATE OF HAWAII
TAX MAP
FOURTH DIVISION
ZONE 5 SEC. 8 PLAT 09
CONTAINING - PARCELS
SCALE: 1 IN. = 60 FT.
5 8 09

EXHIBIT 2



subject area

EXHIBIT 3

Haena

Island of Kauai
Coastal Hazard Intensity

Subject area

Hazard Type: G CS T SF W S E SL V/S OHA

B/Rfr S B/Rfr S B/Rfr R S/B R B/S R B/S R S R S R

Kailiu Point
Kee Beach
Coral
Kailiu 10
Ka Ulu a Paoa Heiau
Lohiaus House Site
HAENA STATE PARK
Wai Caves
Makana
Park
Haena Dry Cave
Pohakukane
Haena Point
Coral
Lae o Kaonohi
Haena
Well
Hale Homaha
Kepuhi Point
Kolokolo Point
East
Wainiho Bay
Lumahai Beach
Mauaahou
Maunapuluo
Puu Nopiki
WT
Wainiha
Well
Hanakapiai Beach
Campground
Campground
Kulanailiha
Puu Uahia
Lumahai River
Kealawela
Kaoda
Aikanaka
Karhani
Kolopua
Mahina Kehau
Pohakukumano
Hanakoa Shack
Pohakea
Falls
Falls
Alealau
Waialuakua
Pohakuokane
HALELEA
Powerhouse
Lumahai River

EXPLANATION

[For explanation of hazard types, see "Notes on Specific Hazards" in the Introduction]

G - Geology:
B-Beach; S-Stream; R-Rocky; H-Headland; D-Developed
fr-fringing reef; br-barrier reef; e-embayed coast; w-wetland

CS - Coastal Slope	<20% -1	2	3 - >45%	
T - Tsunami	Low - 1	2	3	4 - High
SF - Stream Flooding				
W - High Waves				
S - Storms				
E - Erosion				
SL - Sea Level				
V/S - Volcanic/Seismic				
- No Data				

Overall Hazard Assessment (OHA)
Low 1 2 3 4 5 6 7 High

SCALE: 1: 50,000
Contour Interval = 40 meters
0 0.5 1 mile
0 0.5 1 1.5 km
Cartography by Manoa Mapworks, Inc.

Base Credit: USGS 1:50,000 Western Kauai, Hawaii 5022 II W733 Edition 1-DMA

EXHIBIT 4

LINDA LINGLE
GOVERNOR OF HAWAII

PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

DAN DAVIDSON
DEPUTY DIRECTOR - LAND

YVONNE Y. IZU
DEPUTY DIRECTOR WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
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HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

Office of Conservation and Coastal Lands
POST OFFICE BOX 621

OCCL:.DE

July 2, 2004

MEMORANDUM

TO: Tarey Low, Kauai Island Branch Chief
Department of Conservation and Resource Enforcement (DOCARE)

FROM: Sam Lemmo , Administrator
Office of Conservation and Coastal Lands (OCCL).

SUBJECT: Shoreline Alteration (tree trimming, irrigation installation and vegetation planting) at TMK 5-8-09:25 Lot 7a, Wainiha, Hanalei.

Dear: Mr. Low

The State of Hawaii Department of Land and Natural Resources (DLNR), Office of Conservation and Coastal Lands (OCCL) has become aware of a possible Conservation District violation at the above mentioned TMK in Wainiha, Kauai. Based on the information provided to the OCCL, it appears an identified land use (tree trimming, irrigation installation and vegetation planting) may be occurring makai of the shoreline within the Conservation District.

Recent activities along the shoreline at the property have instigated concern and complaints from the community and have escalated into protests by several citizens, who are putting themselves in danger by sitting underneath the trees that are being cut down (Figure 1).

We request your assistance in investigating this case further by carrying out the following:

1. Immediately issue a verbal order to stop the activities to the owners (David and Carol Smith) at Alealea Rd TMK: 5-8-09:25. This order should specifically identify the tree cutting, planting and irrigation work along the shoreline at and mauka of the dune crest. The location of the shoreline is undetermined at this time. However evidence suggests that some of activities being carried out by the landowner may be within the Conservation District (Figure 2). If the owner fails to comply the Department will pursue a violation.

EXHIBIT 5

2. A previous shoreline certification map dated November 27, 2000, should not be used as an indication of the shoreline as it is outdated. Based on photographic evidence provided to the OCCL, it is apparent the high wash of the waves is significantly more mauka of the 2000 shoreline (Figure 3).
3. The OCCL asks that expired shoreline certification maps not be automatically and exclusively used as an indicator of the shoreline for jurisdictional purposes. In cases where shoreline vegetation may have been altered (such as much of the Haena and Wainiha coast), we request that DOCARE officers use their best judgment of the high wash of the waves during the season of high surf rather than the position of the vegetation line until a more thorough shoreline delineation can be made by the DLNR.
4. The OCCL may be carrying out a shoreline delineation in this area this winter to address the widespread shoreline alteration and its impact on the certification process.

I thank you for your assistance in this complex issue and hope that by identifying this as an alleged Conservation District violation it may help curtail the widespread practice of shoreline alteration in this area.

Sincerely,

Sam Lemmo, Administrator
Office of Conservation and Coastal Lands

Attachments: Figure 1 Subject Trees
Figure 2 High wash of waves.

cc: Chairperson's Office
Kauai Board Member
Kauai Land Agent
DOCARE-Oahu (Gary Moniz)
Land Division
DAGS Survey- Reid Sairot

Figure 1.
Subject Trees 7/1/04

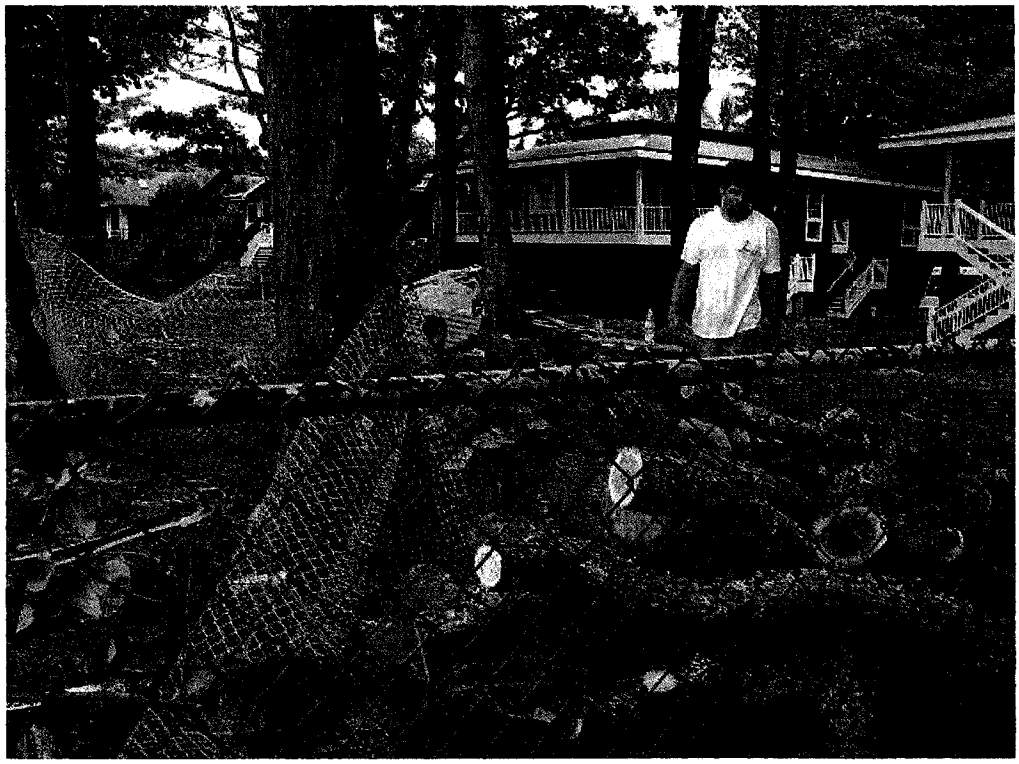
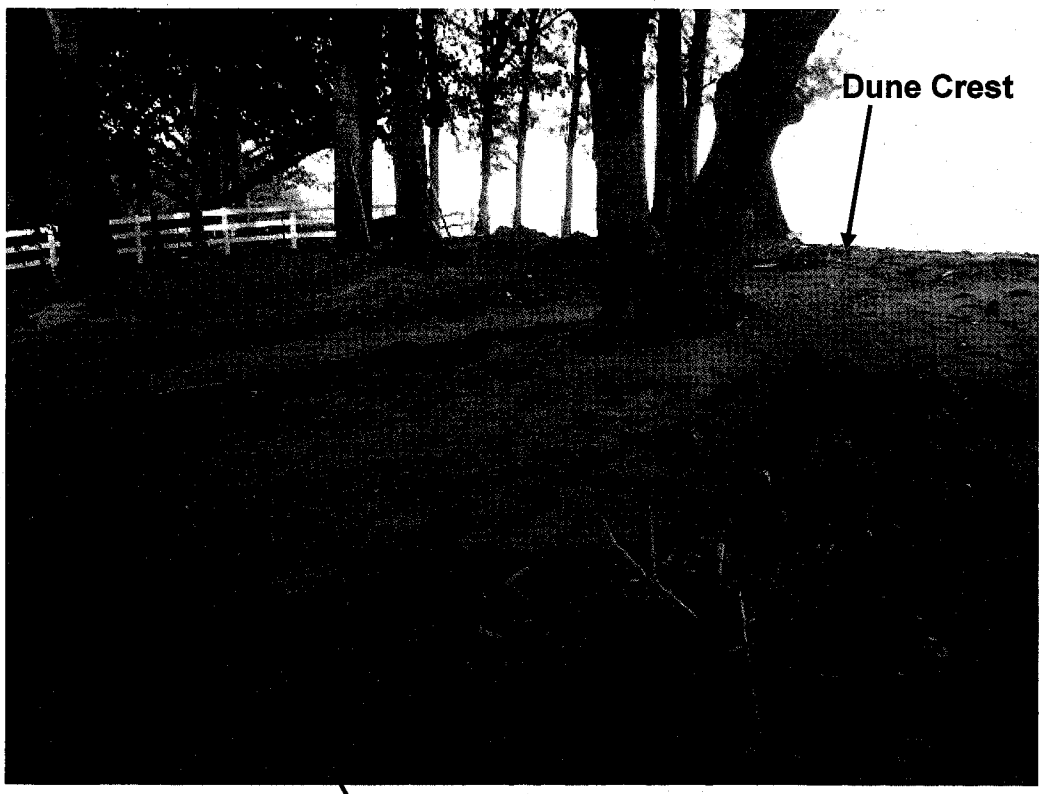


Figure 2.
Indication of High Wash of Waves



Debris line

Figure 3.
Approximate 2000 Shoreline

BRYAN J. BAPTISTE
MAYOR

GARY K. HEU
ADMINISTRATIVE ASSISTANT

IAN K. COSTA
DIRECTOR OF PLANNING

GARY L. HENNIGH
DEPUTY DIRECTOR OF PLANNING

RECEIVED
2004 JUL 13 PM 2:18
DOCUMENTS - KAUAI
DEPT OF LAND AND NATURAL RESOURCES

COUNTY OF KAUA'I
PLANNING DEPARTMENT
4444 RICE STREET
KAPULE BUILDING, SUITE A473
LIHU'E, KAUA'I, HAWAI'I 96766-1326

TELEPHONE: (808) 241-6677 FAX: (808) 241-6699

COPY

CERTIFIED

VIOLATION NOTICE

TO: David Smith
P. O. Box 2012
Santafe, NM 87504

DATE: July 8, 2004

SUBJECT: Illegal Development Within the Shoreline Setback Area and Violation of Conditions Stipulated Within SMA Use Permit SMA (U) 2002-09 on:
TMK# (4) 5-8-009:025 Hanalei District
Halelea, Haena, Kauai, Hawaii

Upon receiving a complaint, the Planning Department conducted field inspections of the subject property on **June 29 & 30, 2004** and found the following violations of the Special Management Area Rules and Regulations and the Shoreline Setback Rules and Regulations:

a. **Special Management Area Rules and Regulations** "No development shall be allowed within the Special Management Area without first obtaining a permit."

b. **Special Management Area Rules and Regulations Section 1.0 Pursuant to 1.4 (H) (2):** "Development" means any of the uses, activities or operations on land or in or under water within a Special Management Area that are included below:
(2) -grading, removing, dredging, mining, or the extraction of any materials. **The cutting down and removal of mature trees constitutes development and is contrary to the SMA Use Permit conditions stipulated within SMA(U) 2002-09, approved by the Planning Commission on June 25, 2002.**

c. **Shoreline Setback Rules and Regulations Sections 10 a. - Prohibited activities within the Shoreline Setback a.** 'The removal of sand, coral, soil, shells, or other beach compositions or natural plants and materials along the shorelines within the shoreline setback shall be prohibited." **The cutting and/or removal of Kamani and/or Ironwood trees within the shoreline setback area constitutes a violation.**

EXHIBIT 6

d. **Shoreline Setback Rules and Regulations Sections 10 b. - Prohibited activities within the Shoreline Setback** "No structure or any portion thereof, including seawalls, groins, revetments, and any other similar structures, whether built above, on, or below the ground surface, shall be permitted within the shoreline setback." **Illegal placement of sprinkler standpipes and associated underground waterlines within the 40-Foot Shoreline Setback Area is a prohibited activity.**

Pursuant to Chapter 8, Kauai County Code, the Shoreline Setback Rules and Regulations and the Special Management Area Rules and Regulations you are directed to comply with the following requirements immediately:

a. **Cease and desist any further landscaping development on subject property, and;**

b. **Submit a certified, to scale, plot plan indicating all areas of tree removal activity and which also indicates all remaining landscape conditions. The plot plan shall include a current/to date certified shoreline survey approved by the Dept. of Land and Natural Resources.**

c. **Remove all illegally placed sprinkler standpipes and associated underground waterlines from the Shoreline Setback Area (40 feet inland from a certified shoreline).**

Failure to contact the Planning Department within 15 calendar days upon receipt of this letter to provide a **written acceptable plan** for compliance provides us with no other alternative but to refer this matter to the Prosecutor's Office. Please call me at 241-6677.

LESLIE P. MILNES
CZM Planning Inspector

cc: County Attorney
Prosecuting Attorney
Dept of Public Works, Engineering
DLNR, Kauai Land Agent
DLNR, Office of Conservation and Coastal Lands
Avery Youn, Architect of Record

LINDA LINGLE
GOVERNOR OF HAWAII

PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
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LAND
STATE PARKS

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

NOTICE AND ORDER

June 21, 2006

Violation: KA-06-72

David Smith
Uli Mahina, LLC
2105 Foothills Road
Santa Fe, NM 87505

JUN 22 2006

SUBJECT: Unauthorized Fence Seaward of 7380 Alealea Rd. Identified As: TMK (4) 5-8-09:25

NOTICE IS HEREBY GIVEN that you are in violation of Hawaii Administrative Rules (HAR) Title 13, Chapter 5, entitled "Conservation District" providing for land use within the Conservation District, enacted pursuant to Chapter 183C, Hawaii Revised Statutes (HRS).

The Department of Land and Natural Resources (DLNR) has determined that:

1. The subject fence, identified seaward of Tax Map Key: (4) 5-8-09:25 is in the Conservation District and is classified as *Resource* Subzone;
2. The following uses were conducted on the subject premises: construction of a chainlink fence (Figure 1);
3. These uses were not authorized by the Department of Land and Natural Resources under Chapter 13-5, HAR.

YOU ARE HEREBY ORDERED TO CEASE any further activity seaward of the subject premises immediately. The DLNR recommends immediate removal of the subject fence. Should you fail to cease such illegal activity immediately or fail to remove the fence within thirty (30) days, this matter will be referred to the State of Hawaii, Board of Land and Natural Resources for disposition and you may be subject to fines up to $2,000 per day pursuant to Chapter 13-5, HAR, in addition to administrative costs incurred by the Department.

EXHIBIT 7

Please contact Sam Lemmo of the Office of Conservation and Coastal Lands at (808) 587-0381 to clear this matter.

By: _____
PETER T. YOUNG, Chairperson
Board of Land and Natural Resources

cc: Chairperson
Kauai District Board Member
KDLO
DOCARE (Kauai)
Kauai County Planning Department- Les Milnes
David Smith Uli Mahina, LLC 7380 ALEALEA RD, HANALEI HI, 96714
David Smith Uli Mahina, LLC P.O. BOX 2012 SANTA FE NM 87504

Figure 1. Subject Fence

BAYS
DEAVER
LUNG
ROSE
BABA
Attorneys at Law

16th Floor • Ali'i Place
1099 Alakea Street
Honolulu, Hawai'i 96813

P.O. Box 1760
Honolulu, Hawai'i 96806

Tel: (808) 523-9000
Fax: (808) 533-4184
E-mail: mail@legalhawaii.com
www.legalhawaii.com

A. Bernard Bays
Phillip L. Deaver
Harvey J. Lung
Crystal K. Rose
Karin L. Holma
Bruce D. Voss
Craig P. Wagnild

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Craig Y. Iha
Joshua E. Trevve
Prairie A. Bly

August 4, 2006

Via Facsimile 587-2999 and U.S. Mail

Mr. Peter Young
c/o Linda L.W. Chow, Esq.
Deputy Attorney General
Dept. of the Attorney General
465 South King Street, Room 300
Honolulu, Hawaii 96813

Re: Violation: KA-06-72

Dear Mr. Young:

We represent David Smith with regards to the above-referenced alleged violation concerning the construction of a fence along the seaward side of 7380 Alealea Road, TMK # (4) 5-8-09:25 (the "Subject Property" or the "Property"). This letter is in response to the Notice and Order dated June 21, 2006.

To provide some background on this case, Mr. Smith is the owner of the Subject Property, which is a beachfront residential property, located in Haena, on the North Shore of Kauai. Over the past two years, there have been serious problems with trespassers on the Property. These trespassers have intentionally damaged personal property and the native vegetation, and have threatened the tenants on the Property with physical violence. Most notably, the following incidents have occurred that have prompted action by Mr. Smith to protect his property rights, and to assure the safety and security of his guests and tenants:

1. There have been repeated incidents of people uprooting and killing the natural Naupaka and other native plants that grow along the shoreline.

2. Although there are "no trespassing" signs posted on the Property, trespassers have repeatedly broken into the Property and have used the showers, hoses, barbeques and deck furniture without authorization. Additionally, hoses, lawn furniture, beach toys, and gardening tools have been stolen from the Property.

EXHIBIT 8

3. Several tenants have recently been harassed and shouted at by transients and locals who have been loitering around the Property. Most recently, a local male threatened to fight one of the tenants on the Property.

4. Trespassers have regularly left their trash on the Property, including leftover food, alcohol containers, glass bottles, and aluminum cans.

5. Trespassers have damaged personal property, have broken off sprinkler heads, and have damaged the landscaping and irrigation system on several occasions, which has now cost well in excess of $20,000 for the repairs. Additionally, one of the downstairs storerooms on the Property was recently broken into and several of the side fences closest to the beach easement have been damaged and pushed down.

6. Unleashed neighborhood dogs regularly walk on the Property urinating and defecating on the lawn and garden areas. The owners have refused to remove their pets' waste. One incident was reported to the police. Neighborhood dogs have also dug up an archeological site and re-interment area located on the Property and which contains native Hawaiian remains.

7. Several times, dogs have barked aggressively at tenants. This was reported to the police.

8. Recently, an ATV was seen tearing through the Property and then through the shoreline Naupaka. At the time, one of the tenants had young children who were playing in the yard. Fortunately, no one was injured as a result of this incident. A police report was filed. Off-road vehicles have also recently been reported driving down the beach.

9. Several times, a person was witnessed driving a moped onto the property and deliberately resting the vehicle in the shoreline Naupaka on the Property. In addition, bicycles are regularly left on the shoreline Naupaka on the Property.

10. Neighbors have recently witnessed the illegal commercial loading and unloading of large groups of passengers onto power Zodiacs directly in front of the Property. It has been reported that the people using the Zodiacs have been throwing their waste on the Property and have been walking across the Property.

The above incidents have caused a tremendous amount of concern to Mr. Smith. In particular, the threats of violence and dangerous activities occurring on his property have been a serious concern to Mr. Smith that he felt compelled to address. Mr. Smith first attempted to work with the Planning Department to find a solution to these problems and to find a way to protect his property rights and the safety and security of his guests. Only as a last resort, and after all attempts to work out an arrangement with the Planning Department failed, did Mr. Smith proceed with constructing a fence on his Property. We understand, the fence was constructed behind a recent certified shoreline that was certified in November 2000. Further, the fence was

constructed as a necessary means to protect his property rights and the safety and security of his guests and tenants.

As you can see, Mr. Smith has had compelling reasons to construct the fence on his Property. Mr. Smith does, however, understand the concerns of DLNR and would like to work with DLNR to resolve the issues in this case and to protect the interests of all parties concerned. Accordingly, we would like to meet with you and Mr. Lemmo to discuss this matter and to see if a resolution can be reached.

Sincerely,

BAYS, DEAVER, LUNG, ROSE & BABA

By A. Bernard Bays
A. Bernard Bays
Attorney at Law, A Law Corporation
Its General Partner

ABB/MCC:lvi
cc: Mr. David Smith

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Total Postage & Fees	$

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AUG 23 2006

Sent To: A. Bernard Bays tm
Bays Deaver Lung, etc.
Street, Apt. No.; or PO Box No.: P.O. Box 1760
City, State, ZIP+4: Honolulu, HI. 96806
PS Form 3800, June 2002 See Reverse for Instructions

STATE OF HAWAII
LAND AND NATURAL RESOURCES
VATION AND COASTAL LANDS
ST OFFICE BOX 621
OLULU, HAWAII 96809

PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
DEPUTY DIRECTOR - LAND

DEAN NAKANO
ACTING 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

ENF: KA 06-72

AUG 23 2006

P.O. Box 1760
Honolulu, Hawaii 96806

Dear Mr. Bays,

SUBJECT: Alleged Unauthorized Land Uses Within the Conservation District Located at 7380 Alealea Road, Wainiha, Hanalei, Kauai, TMK:(4) 5-8-009:025

The Office of Conservation and Coastal Lands (OCCL) is in receipt of your correspondence dated August 4, 2006 regarding the unauthorized construction of a fence along the seaward side of the subject property. You have stated the fence was constructed behind a recent certified shoreline that was certified in November 2000. According to your information, your client, Mr. David Smith, constructed the unauthorized fence due to alleged trespassing by people and dogs, theft, property damage, littering and threats of physical violence to his guest and tenants. He believes the fence will help to assure the safety and security of his property and his tenants.

Although we sympathize with your client regarding the unlawful actions taken by individuals upon his property, those unlawful actions are a County police matter and should be regulated by them. Regarding alleged unlawful land use matters within the Conservation District this shall be regulated by the State. For your information, shoreline certifications are valid for a year. Therefore the certified shoreline of November 2000 is no longer valid. Based on the location of the upper-most wash of the waves, the OCCL believes the subject fence is within the Conservation District. Therefore this appears to be an alleged violation of the Conservation District. As such we shall bring this matter to the Board of Land and Natural Resources (Board) and shall notify you of the date and place of the Board meeting. You will have an opportunity to address the Board at that time.

Should you have any questions regarding this matter, please contact Tiger Mills of our Office of Conservation and Coastal Lands at 587-0382.

Sincerely,

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

c: Chairperson
KDLO
County of Kauai, Planning Department

EXHIBIT 9

BRYAN J. BAPTISTE
MAYOR

GARY K. HEU
ADMINISTRATIVE ASSISTANT

IAN K. COSTA
DIRECTOR OF PLANNING

MYLES S. HIRONAKA
DEPUTY DIRECTOR OF PLANNING

COUNTY OF KAUA'I
PLANNING DEPARTMENT
4444 RICE STREET
KAPULE BUILDING, SUITE A473
LIHU'E, KAUA'I, HAWAI'I 96766-1326

TELEPHONE: (808) 241-6677 FAX: (808) 241-6699

COPY

CERTIFIED MAIL

June 20, 2006

RECEIVED
OFFICE OF CONSERVATION
AND COASTAL LANDS
2006 JUN 26 A 10: 00
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

NOTICE OF VIOLATION

To: Uli Mahina LLC
c/o David Smith
2105 Foothills Road
Santa Fe, NM 87505

RE: Illegal Development/Placement of a Chain Link Fence within the Special Management Area and the Shoreline Setback Area on:
TMK: (4)5-8-009:025, Hanalei District, Halelea, Haena, Kauai, Hawaii

I have inspected the premises described above and have found the following violations of laws and regulations governing same, within the County of Kauai under the jurisdiction of the Planning Department:

ORDINANCES & SECTIONS	VIOLATION(S)
Special Management Area Rules and Regulations Section 1.0 Pursuant to 1.4 (H) (1) : "Development" means any of the uses, activities or operations on land or in or under water within a Special Management Area that are included below (1) Placement or erection of any solid material …	**The placement/construction of a chain link fence constitutes development and erecting of such fence without proper permits constitutes a violation.**
Shoreline Setback Rules and Regulations Sections 10 b. – Prohibited activities within the Shoreline Setback b. "No structure or any portion thereof … shall be permitted within the shoreline setback."	**The placement/construction of a chain link fence within the shoreline setback area constitutes a violation.**

EXHIBIT 10

__ Use of the property is contrary to existing laws.

__ You are hereby ordered to submit an SMA Use Permit(s) application for "Development established upon the premises as required by law within 15 calendar days from the date of this notice, and

_ You are hereby notified that no more work shall be done upon these premises or the use on said premises continued until the above violation(s) is/are corrected.

X **You are hereby ordered to remove all chain link fencing from the "Shoreline" and "Shoreline Setback Area" within 15 calendar days from the date of this notice.**

X **If no corrective action is taken, judicial action will be instituted.**

Failure to contact the Planning Department within 7 calendar days from the date of this letter to provide a written acceptable plan for compliance to the above noted requirements provides us with no other alternative but to refer this matter to the County Attorney's Office and Prosecutor's Office. Should you have any questions, please call me at 241-6677.

LESLIE P. MILNES
CZM Planning Inspector

cc: County Attorney
Prosecuting Attorney
Office of the Mayor
Dept of Public Works, Engineering
DLNR, Kauai Land Agent
DLNR, Office of Conservation and Coastal Lands ✓