

DAVID Y. IGE  
GOVERNOR OF HAWAII



**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

SUZANNE D. CASE  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA  
FIRST DEPUTY

JEFFREY T. PETERSON  
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

October 27, 2017

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

Land Board Members:

**SUBJECT:** Enforcement Action against Mr. Simon Vilaj for alterations of historic properties during the course of land alteration activities without a permit.  
The Historic Punalu'u Wharf.  
Punalu'u Ahupua'a, Ka'u, Island of Hawai'i.  
**TMK:** (3) 9-6-001:002

This Notice of Enforcement Action and Violation requests that the Board of Land and Natural Resources (BLNR) find that Mr. Simon Vilaj violated Hawaii Revised Statutes §6E-11(c) by altering historic properties without a County approved Special Management Area (SMA) or a State Conservation District Use (CDUA) permit, and requests that the Board assess administrative fines pursuant to Hawaii Revised Statutes §6E-11(f).

**I. SUMMARY**

- a. No later than June 23, 2017, private historic properties located in the Punalu'u Ahupua'a, Ka'u, Island of Hawai'i. TMK: (3) 9-6-001:002 ("property"), were injured and altered during the course of land alteration activities. These activities consisted of mechanical impacts to at least four (4) individual features of the historic Punalu'u Wharf. The project was not reviewed pursuant to Hawaii Revised Statutes ("HRS") §6E-42 and its implementing regulations because the violator failed to get a County SMA permit in violation of County ordinances and failed to obtain a State CDUA in violation of State of Hawaii statutes. This constitutes a potential civil and/or criminal and administrative violation under HRS §6E-11(c) and subjects the individual conducting the activities to potential civil/criminal and administrative fines under HRS §6E-11(f).

**II. BACKGROUND**

- a. On June 26, 2017, in response to a complaint that was filed with DOCARE on June 23, 2017, Mr. Sean Naleimaile, State Historic Preservation Division (SHPD) Hawai'i Island Archaeologist, conducted a site inspection of the subject parcel, where the remnants of the historic Punalu'u wharf are located. Numerous calls were fielded at the SHPD Hilo office after the original complaint requesting SHPD's input and response to the possible violation. On June 26, 2017, Mr. Naleimaile conducted a site visit and observed clear evidence that heavy equipment had impacted portions of the remnants of the Punalu'u

**ITEM I-1**

Wharf. Several features of the historic wharf had been impacted, damaged or partially destroyed due to mechanical disturbance.

### III. INVESTIGATION

- a. During the June 26, 2017 site visit, Mr. Nāleimaile was joined by DOCARE officer Mr. Lino Kamakau (see{DAExhibit 1: DOCARE Report) and County of Hawaii Planning Inspector Mr. Horace Yanagi.
- b. During the site visit, Mr. Naleimaile conducted interviews with long-time Ka'ū resident, Earl Louis. The resident provided information pertaining to the condition of the site prior to the recent impacts caused by the violation. The resident reported that the features impacted were intact prior to the damage caused to them by the backhoe operated by Mr. Vilaj of Hang Loose Tours.
- c. Mr. Nāleimaile then conducted a limited pedestrian survey of the wharf and the immediate surrounding area to examine its extent, as well as the extent of any additional impacts that may have occurred on or within the general vicinity of the area of the violation. Significant historic properties including Kane'ele'ele Heiau, a historic roadway and possible burials, are present in close proximity to the area of the violation.
- d. During the site visit and conversation with Mr. Kamakau and Mr. Yanagi, it was obvious that the impact caused by Mr. Vilaj was detrimental to the integrity of the historic property and that without the appropriate permits approved by the County and State a violation had taken place arising from the injury to several features of the historic property.

### IV. INVESTIGATION:

- a. Destruction to a concrete footing/pad with two (2) large bolts (Feature 1). The foundation had been crumbled and the large bolts were bent and flattened. During the interviews, it was ascertained that previous to the alteration, the foundation was intact and the large bolts were upright. It is apparent that the concrete foundations were damaged during recent land activities. The observable alterations are the broken wall blocks and mortar scattered across the area where the foundation was prior to the land altering activities, in the professional judgment of SHPD staff, this damage is recent and inconsistent with long term exposure to the elements. This impact constitutes an alteration, destruction or injury of a portion of the historic property. (See Figure 1)
- b. Destruction of a concrete foundation (Feature 2). During the interviews, it was ascertained that previous to the alteration, the makai foundation was intact. It is apparent that the concrete foundation was damaged during recent land activities. The observable alterations are the obvious cracks and breaks that are, in the professional judgment of SHPD staff, recent and are inconsistent with long term exposure to the elements. (See Figure 2)
- c. Destruction of a rock retaining wall (Feature 3). During the interviews, it was ascertained that prior to the violation, an east to west rock retaining wall existed near the makai edge of the site high-water mark of the site. The wall is now destroyed and the rocks that made up that wall have been pushed down and scattered along the southern portion of the impacted area. This impact constitutes an alteration, destruction or injury of a portion of the historic property. (See Figure 3)
- d. Damage to a concrete pillar (Feature 4), a supporting piling once used to support a portion of the structure. During the interviews, it was ascertained that previous to the alteration, the concrete pillar was mostly intact. Damage to the pillar is significant due to

its proximity to the crashing waves. The wharf was built in 1916 and has withstood years of ocean swells, however, due to the recent damage, newly exposed areas on the concrete pillar will substantially impact it and make it extremely vulnerable to continuing degradation caused by ocean surge. It is apparent that the concrete pillar was damaged during recent activities. The observable alterations are the obvious cracks, fractures and concrete rubble that are, in the professional judgment of SHPD staff, recent and are inconsistent with long term exposure to the elements. (See Figure 4)

- e. In discussions with the County of Hawai'i Planning Department, no evidence was found to support the described activities being sent to the County for its review and approval pursuant to applicable County of Hawai'i SMA Rules and Regulations or to the Department pursuant to applicable Hawaii Administrative Rules.
- f. A review of SHPD records also shows no evidence that the described activities were provided to SHPD for review and/or approval.

#### **V. REGULATORY CONTEXT AND VIOLATIONS:**

- a. The construction activities on the subject parcel were carried out without a County of Hawai'i special management area (SMA) permit and a State CDDA permit. County of Hawai'i staff Mr. Yanagi confirmed the need for a SMA permit for activities on the parcel within the County of Hawaii special management area. (Exhibit 1: County of Hawai'i Violation Order) Ms Kimberly Mills of the Department's Office of Coastal and Conservation Lands confirmed the need for a CDDA permit.
  - i. According to HRS §6E-42(a) Review of proposed projects,
    - 1. Before any agency or officer of the State or its political subdivisions approves any project involving a permit, license, certificate, land use change, subdivision, or other entitlement for use, which may affect historic property, aviation artifacts, or a burial site, the agency or office shall advise the department and prior to any approval allow the department an opportunity to review and comment on the effect of the proposed project on historic properties, aviation artifacts, or burial sites, consistent with section 6E-42, including those listed in the Hawaii Register of Historic Places.
- b. Because no County SMA or State CDDA Permit was applied for, the SHPD did not have the opportunity to review and comment on the effects of the proposed activities on historic properties as required by statute. If the proper County and State permits had been submitted, SHPD would have reviewed the project pursuant to HRS 6E-42 and requested that an archaeological inventory survey be conducted and submitted to SHPD to document historic properties on the parcel, and, as necessary, develop measures to avoid or mitigate any effects of the proposed activities on historic properties.
- c. Since a County SMA permit and a State CDDA permit were needed for the activities on this parcel and no permit was obtained, any alterations to historic properties can be considered and assessed as violations under HRS § 6E-11(c) which provides:

According to HRS § 6E-11(c), it shall be unlawful for any person, natural or corporate, to take, appropriate, excavate, injure, destroy, or alter any historic property or burial site during the course of land development or land alteration activities to which section 6E-42 applies without the required approval.

- d. As previously indicated HRS § 6E-42 applies because County SMA and a State CDUA permits were found to be required for any land alteration activities, requiring that SHPD be afforded the opportunity to comment upon the project's effects to historic properties resulting in the alteration or destruction of historic properties.
- e. Based on the investigation by Mr. Naleimaile, Mr. Simon Vilaj engaged in mechanical alteration activities without County SMA or State CDUA permits. On or about June 23, 2017, the County of Hawaii notified the property owner that activities within a special management area required an SMA prior to any construction activities.
- f. In this instance, SMA and CDUA permits were needed, which would have triggered HRS §6E-42, allowing for SHPD to review the project and reach an agreed upon mitigation plan with project proponent and the owner.
- g. Mr. Vilaj has violated HRS § 6E-11(c) by conducting land alteration activities on the parcel without the appropriate SMA and CDUA permits and the prerequisite historic preservation reviews and approvals.

**VI. Administrative Penalties for Violations of HRS § 6E-11(c):**

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

**VII. ANALYSIS:**

- a. The legislature has declared:
  - that the historic and cultural heritage of the State is among its important assets and that rapid social and economic developments of contemporary society threaten to destroy the remaining vestiges of this heritage (HRS §6E-1).
- b. The legislature enacted HRS Chapter 6E and the department has adopted implementing rules. Chapter 6E creates a historic preservation program to implement, among other things, a state review process to assure that: (1) historic properties are recorded; and (2) that appropriate mitigation takes place in the event that development threatens to destroy the historic integrity of a resource.



- c. For privately owned properties, the review process is triggered when the State or a County receives a permit application. At that point, HRS § 6E-42 affords SHPD an opportunity to comment on the project, and the rules specify that if historic properties will be affected by the project, SHPD and the project proponent and/or land owner should come to an agreement on mitigation before the project proceeds. In this case, HRS§ 6E-42 should have been triggered because the project proponent should have applied for and obtained a SMA permit from the County and a CDUA permit from the State but failed to do so. Under HRS § 6E-11(c) this is a clear violation.
- d. Based on the facts and circumstances of this case, Mr. Vilaj did not comply with County requirements to obtain permits prior to initiation of construction activities. Having not obtained the required permits prior to starting work, the violator by-passed SHPD review. The activities resulted in alteration or damage to historic properties. The recent actions resulted in damage to four (4) historic properties. This is a violation under HRS § 6E-42 and HRS § 6E-11(c). Mr. Vilaj's failure to comply with these statutes and rules could result in a penalty of \$10,000.00 per feature, and \$10,000.00 for the overall impacts to the historic Punalu'u Wharf as a whole and additional administrative fees.

#### VIII. FINES ASSESSED

Because this violation occurred with utter disregard for County ordinance and State of Hawaii statutes, and the historic properties damaged were plainly visible even to the untrained eye, accordingly SHPD recommends that the following fines be assessed to Mr. Vilaj in connection with the above described violations:

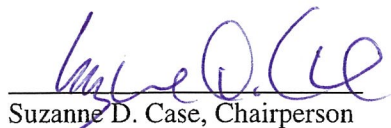
- a. Damage to four (4) individual features of the historic property assessed as four separate violations at \$10,000 per individual feature totaling \$40,000.
- b. Overall injury and destructive impacts to the integrity of the historic feature as a whole, assessed as a separate violation at \$10,000.
- c. Administrative fees of \$2,165.52 connected to the investigation and reporting of the violation.<sup>1</sup>
- d. Total Fines \$42,165.52
- e. All fines and administrative fees will be paid to the Hawai'i Historic Preservation Special Fund.

Respectfully Submitted



Alan S. Downer, Administrator  
State Historic Preservation Division

APPROVED FOR SUBMITTAL

  
Suzanne D. Case, Chairperson

<sup>1</sup> Administrative fee is based entirely on Mr. Naleimale's travel time from Hilo to Punalu'u and return, time spent in the field assessing and documenting damage, preparing and editing the draft assessment, 32 hours @ \$26.31 per hour, \$841.92, and Dr. Downer's time reviewing, editing, and preparing the Assessment for submission, 24 hours @ \$55.15, \$1,323.60; Total of \$2,165.52.



**Figure 1. Feature 1; Remnants of a basalt foundation that supported two large iron pins.**





**Figure 2. Feature 2: Additional photo showing the remnants of an additional destroyed basalt foundation (makai of feature 1)**





**Figure 3. Feature 3: Remnants of destroyed east-west retaining sea wall in order to provide access beyond the high-water mark.**



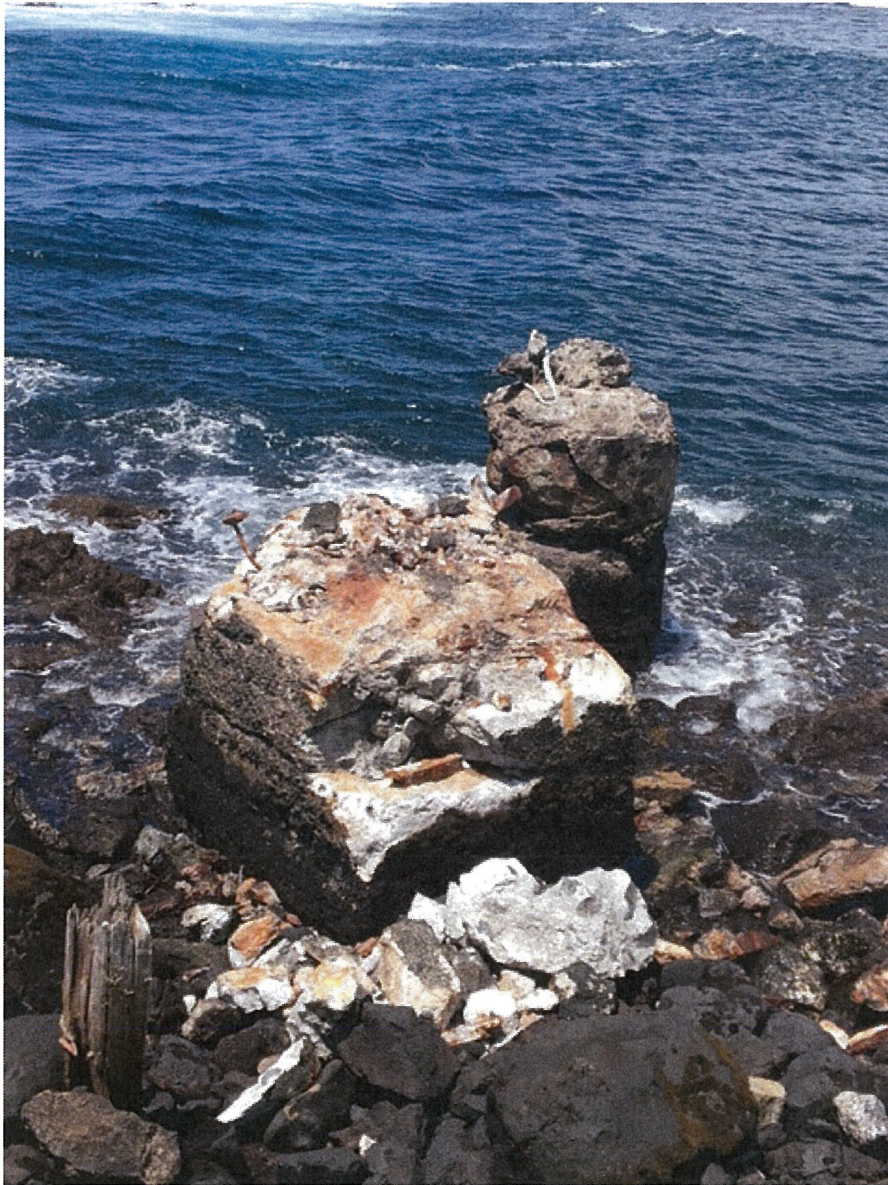
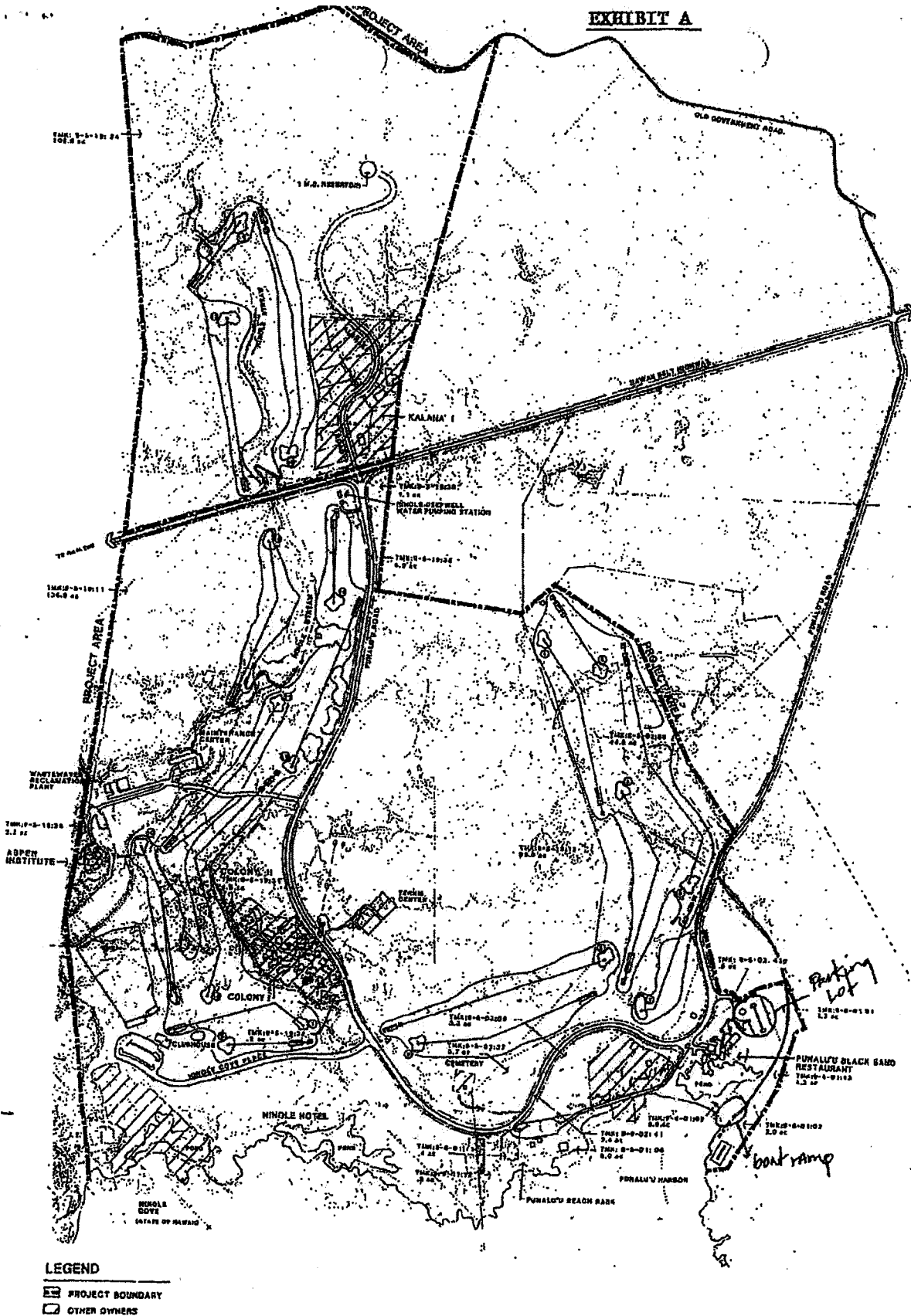


Figure 4. Feature 4: Extensive damage to a pillar.

<sup>i</sup> Administrative fee is based entirely on Mr. Naleimaile's travel time from Hilo to Punalu'u and return, time spent in the field assessing and documenting damage, preparing and editing the draft assessment, 32 hours @ \$26.31 per hour, 841.92; and Dr. Downer's time reviewing, editing, and preparing the Assessment for submission, 24 hours @ per hour \$55.15, \$1323.60; Total of \$2165.52.

# EXHIBIT A

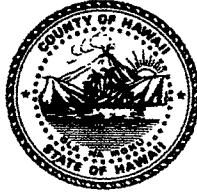


EXISTING DEVELOPMENT  
**Punalu'u Resort**  
 KA'U, ISLAND OF HAWAII



FIGURE 2

Harry Kim  
Mayor



Michael Yee  
Director

Daryn Arai  
Deputy Director

West Hawai'i Office  
74-5044 Ane Keohokalole Hwy  
Kailua-Kona, Hawai'i 96740  
Phone (808) 323-4770  
Fax (808) 327-3563

**County of Hawai'i**  
**PLANNING DEPARTMENT**

East Hawai'i Office  
101 Pauahi Street, Suite 3  
Hilo, Hawai'i 96720  
Phone (808) 961-8288  
Fax (808) 961-8742

**CERTIFIED MAIL**  
**7015 3010 0001 8963 4569**

July 19, 2017

SM Investment Partners  
680 Iwilei Road, STE 700  
Honolulu, Hawai'i 96817

Dear Sirs and Madams:

**Subject: Notice of Violation and Order**  
**Re: Special Management Area Violation**  
**Tax Map Keys: (3) 9-6-001:002, Punalu'u Beach, Punalu'u, Ka'u Hawai'i**

The Planning Department has received complaints regarding the construction/demolition activity ("development") that has occurred on the above referenced property without the necessary Special Management Area ("SMA") and Shoreline Setback reviews and approvals.

**BACKGROUND**

**Our initial research and investigation based on the complaint has revealed the following:**

1. The property is located within both the State Land Use Urban and Conservation Districts and the County's Open Zoning District. The property has a total land area of approximately 1.953 acres.
2. Records do not indicate that a street address has been assigned to the above-referenced property. The property is further identified as being TMK (3) 9-6-001:002.
3. The property is located within the SMA established by the Planning Commission pursuant to Chapter 205A, Hawai'i Revised Statutes ("HRS").
4. According to Planning Commission Rule No. 9 regarding the Special Management Area, Section 9-4(e) regarding Definitions, in part:

"(1) 'Development' includes the following:

(A) Placement or erection of any solid material, or any gaseous, liquid, solid or thermal waste.

(B) Grading, removing, dredging, mining, or extraction of any materials;

- (E) Construction, reconstruction, demolition, or alteration of the size of any structure.
- (3) Any proposed use, activity, or operation listed in Section 9-4(e)(2) shall be deemed to be "Development" until the Director has determined it to be exempted from the definition of "development."
5. According to Planning Department Rule No. 11 regarding Shoreline Setback, Section 11-3 Definition:
- a. "Activity" means any landscaping, excavating, grubbing, grading, filling or stockpiling of earth materials, including sand, coral, coral rubble, rocks, soil, or marine deposits.
  - b. "Shoreline" means 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 limit of debris left by the vegetation growth, or the upper limit of debris left by the wash of the waves, which has been certified by the Board of Land and Natural Resources in accordance with its rules.
  - c. "Shoreline setback area" shall include all of the land area between the shoreline and the shoreline setback line, provided that if the highest annual wash of the waves is fixed or significantly affected by a structure that has not received all permits and approvals required by law or if any part of any structure in violation of this rule extends seaward of the shoreline, then the term "shoreline setback area" shall include the entire structure.
  - d. "Shoreline setback line" means that line established by the Planning Department running inland from and parallel to the certified shoreline at a horizontal plane.
  - e. "Structure" includes, but is not limited to, any portion of any building, pavement, road, pipe, flume, utility line, fence, groin, wall, or revetment.

#### **FINDINGS**

A site inspection of the subject property was conducted on Monday, June 26, 2017 at approximately 11:50 hrs, with the following persons in attendance:

1. Mr. Lino Kamakau, DOCARE, Supervisor, Hawai'i Island
2. Mr. Sean Naleimaile, SHPD, East Hawai'i
3. Mr. Horace Yanagi, Planning Inspector, West Hawai'i Division

The above referenced persons proceeded with the site investigation which revealed the following:



1. Mechanically altered concrete footing/pad with two (2) iron rods with eyes at the end of the rods protruding from what remained of the footing/pad.
2. Destruction of a possible concrete structure which Planning Inspector Yanagi was led to believe resembled the concrete structure on the opposite side of the entry way to the old wharf where stenographically-embedded in the concrete structure is the wording "Built 1916 by K. Ishii."
3. Destruction/removal of a stacked rock wall which paralleled the shoreline. This rock wall appears to have been constructed to prevent the ocean water from coming on land where members of the community tend to picnic on the old concrete slabs located next to the wharf.
4. The partial destruction of a concrete piling situated makai of the shoreline during high tide. The destruction of this concrete piling was determined by freshly fractured concrete rubble located next to the bottom of the concrete piling structure.
5. There is evidence that construction activity/development occurred within the 40-foot shoreline setback area fronting the makai (southern) portion of the subject property. This determination was made by Planning Inspector Yanagi in discussion with SHPD representative Sean Naleimaile who concurs that the rock wall that used to be there would have been the man-made harden surface where the shoreline would have been certified.
6. There is a retaining rock wall between the existing boat ramp and the old wharf where the ocean water touches the bottom of the rock wall. (west side of the property along the shoreline) In order to get the backhoe to the location where the violator had demolished the concrete structures is within 40 feet from the face of this rock wall.
7. There are two (2) piles of dirt that were placed at the entry to where the old wharf was located. The purpose for placing these piles of dirt in this particular location within the 40-foot shoreline setback areas is unknown.
8. Two (2) separate piles of concrete rubble remain within the 40-foot shoreline setback area where the operator identified as Simon Vilaj of Hang Loose Tours had demolished two historic concrete structures. Should there be a storm type wave action, these two piles of concrete rubble and soil may enter into the ocean.
9. A review of records within the Planning Department could find no evidence of the above-described development being presented to the Department for its review and approval in accordance with applicable SMA Rules and Regulations.

### **VIOLATION**

Based on the site inspection conducted and report provided by Planning Inspector Horace Yanagi which occurred on June 26, 2017, the Planning Director affirms that you are in violation of the following:

1. Hawai'i Revised Statutes ("HRS") Chapter 205A regarding the Special Management Area and Shoreline Setback.
2. Planning Commission Rule No. 9 regarding the Special Management Area.
3. Planning Department Rule No. 11 regarding Shoreline Setback.

More specifically, HRS Section 205A-28, states that "No development shall be allowed in any county within the Special Management Area without obtaining a permit in accordance with this part." Furthermore, the Planning Commission Rules, Section 9-8(a) regarding Permit required for development states that "No development shall be allowed within the Special Management Area without obtaining a permit in accordance with this rule." Department records do not show any filings or documentation from the landowner or its representative presenting the proposed development to the Planning Department for its review and approval in accordance with the above-cited statute and rule.

### **FINES ASSESSED**

Planning Commission Rule Section 9-17 (Penalties) states:

1. (a) Any person who violates any provision of this rule shall be liable for (1) a civil fine not to exceed \$100,000; or (2) for the cost of returning the affected environment or ecology within the Special Management Area to the condition existing before the violation.
2. (b) In addition to other penalties, any person who is violating any provision of this rule shall be liable for a civil fine not to exceed \$10,000 a day for each day in which such violation persists.
3. (c) Any civil fine or other penalty provided under this rule may be imposed by the circuit court or by the Department after an opportunity for a hearing under Chapter 91, HRS.

Planning Department Rule 11-12 regarding Enforcement states:

- (a) The Planning Department shall enforce this rule.
- (b) Any structure or activity prohibited within the shoreline setback area that has not received appropriate approvals or a shoreline setback variance or that has not complied with conditions of said variance shall be removed or corrected.
- (c) Where the shoreline is affected by a manmade structure that has not been authorized with government agency permits required by law and if any part of the structure is on private property, then for purposes of enforcement of this rule, the structure shall be construed to be entirely within the shoreline setback area.

Planning Department Rule 11-14 Penalties states:

1. Any person who violates any provision of this rule shall be liable for an initial civil fine not to exceed \$10,000 per violation and a maximum daily fine of \$1,000 until the violation is corrected. A civil fine may be imposed by the department after an opportunity for a hearing under Chapter 91, Hawai'i Revised Statutes, unless said hearing is otherwise waived.

### **ORDER**

Pursuant to the authority provided to this office through Planning Department Rule No. 9, you are hereby ordered to complete the following corrective action(s) at your own expense by the **"Deadline Date" of August 16, 2017**, unless otherwise noted:

1. Any civil fine or other penalty provided under this rule may be imposed by the circuit court or may be imposed by the department after an opportunity for a hearing under Chapter 91, Hawai'i Revised Statutes. Imposition of a civil fine shall not be a prerequisite to any civil fine or other injunctive relief ordered by the circuit court.
2. Subject to the approval and direction of the State Department of Land and Natural Resources (DNLR), promptly remove all of the fragmented debris that was created by the demolition of the concrete structures identified in Finding Nos 1, 2 and 4.
3. Subject to the approval and direction of the State Department of Land and Natural Resources (DNLR), promptly remove the two (2) dirt piles placed within the 40-foot shoreline setback area.
4. Subject to the approval and direction of the State Department of Land and Natural Resources (DNLR), promptly replace/return the rock wall, to the best extent practicable, to the condition it existed prior to its removal.
5. You are being assessed a civil fine of \$15,000.00 for all of the violations listed above, representing a civil fine of \$5,000.00 for each of the violations noted within this Notice of Violation.
6. If all of the above stated Order and Corrective Actions are not met by the "Deadline Date", a daily civil fine starting at \$200.00 per day will be assessed beginning August 17, 2017, until all of the above corrective action has been completed. Daily fines will increase according to the Department's daily fine schedule until the violation is corrected.
  - a. Resolution of Notice of Violation requires completion of all Corrective Actions and payment in full of all civil fines.
  - b. Pay all fines due to this office to:

County of Hawai'i Planning Department  
74-5044 Ane Keohokālole Hwy  
Kailua-Kona, Hawai'i 96740

- c. Cashier's checks or money orders shall be made payable to the Director of Finance. Personal checks are not accepted.

This Order shall become final thirty (30) days after receipt of the Order. On or before the final date, any person(s) subject to this Order may appeal the Order

### **GENERAL INFORMATION**

#### **Can you get an extension to have more time to correct the violation?**

**Yes.** If you do not complete **all** of the corrective action by the "**Deadline Date**", you may want to submit before the "Deadline Date" a "request for a time extension." The request must include the following:

1. Describe in detail what corrective actions **you have completed** prior to requesting this time extension.
2. Submit a detailed schedule of each activity and the amount of additional time necessary to complete each activity and the date in which you expect the violation to be fully corrected.
3. A time extension **will not** be granted if you do not provide in detail what corrective actions have been completed prior to the deadline date.
4. The mere submission of a time extension request will not guarantee the approval for the request nor does it extend your right to appeal.

#### **Can you appeal this Notice of Violation?**

**Yes.** In accordance with Section 6-9.2 (a) of the Hawai'i County Charter, the Board of Appeals is authorized to hear and determine any appeal from the final decisions of the Planning Director.

1. An appeal shall be in writing, in the form prescribed by the Board of Appeals and shall specify the person's interest in the subject matter of the appeal and the grounds of the appeal. A filing fee of \$250 shall accompany any such appeal. The person appealing a decision of the director shall provide a copy of the appeal to the director and to the owners of the affected property and shall provide the Board of Appeals with the proof of service.
2. The appellant, landowner(s) if not the appellant, and the director shall be parties to an appeal. Other persons may be admitted as parties to an appeal, as permitted by the Board of Appeals.

For your convenience, we have enclosed the "County of Hawai'i Board of Appeals General Petition for Appeal of Decisions by Planning Director" form.

Address the Appeal to: Board of Appeals  
101 Pauahi Street, Suite 3  
Hilo, HI 96720

**Due Date for Appeal:**

**The appeal must be received within thirty (30) calendar days from the date of receipt of this Notice of Violation and Order.** An appeal to the Board of Appeals shall not stay the provisions of the Director's "Order" pending the final decision of the Board of Appeals. The appeal must be made in accordance with the Board of Appeals Rules of Practice and Procedures or it may result in the dismissal of the appeal.

**What happens if I lose my appeal?**

The assessment and accumulation of fines does not stop when you file for an appeal. If the Board of Appeals denies your appeal then you will be required to pay your fines from the day the fines began to the date the violation(s) has been corrected which must be verified by the Planning Department. You can also take corrective action as described in this letter and stop the daily fines, while appealing. If you do not take corrective action, daily fines will continue to accrue incrementally.

Should you acquire the services of an attorney/counsel representation then you are required to also submit a letter of consent with your response letter authorizing the County to correspond and respond to the attorney/counsel representation.

Should you have questions regarding completion of the Corrective Actions please contact Planning Inspector Mr. Horace Yanagi, and for questions regarding HRS 205A Coastal Zone Management, please contact Planning Division Manager Mr. Jeff Darrow at our Hilo Office at 961-8288.

Sincerely,



MICHAEL YEE  
Planning Director

HTY:hty

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Enclosure: County of Hawai'i Board of Appeals General Petition for Appeal of Decisions by Planning Director form.

cc: Ms. Amy Self, Esquire, Corporation Counsel  
Mr. Jeff Darrow, Planning Division  
Mr. Horace Yanagi, Planning Inspector  
West Hawai'i TMK File

SM Investment Partners

July 19, 2017

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Mr. Lino Kamakau

DOCARE

P.O. Box 310

Captain Cook, Hawai'i 96704

Mr. Sean Naleimaile, State Historic Preservation Division East Hawai'i Office

**State of Hawaii | Department of Land and Natural Resources | Division of Conservation and Resources Enforcement**

INVESTIGATION # 17-1375 HA	District East Hawaii	Lead Investigator Ford, Andrew	Report Status In Progress	Key Report <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
Date/Time Reported 06/23/2017 07:36AM	Location Kau East	Classification OCCL: Excavation without a CDUP	Correcting Reports 17-1376-HA	

**Investigation Report**

<b>BASIC</b>	1. CLASSIFICATION OCCL: Excavation without a CDUP						2. SOURCE Phone	
	3. COMPLAINANT'S NAME Earl LOUIS			4. SEX Male	5. RACE Hawaiian	6. AGE 52	7. BIRTH DATE 04/21/1965	8. OCCUPATION
	9. ADDRESS 96-3133 Puahala St, Pahala, HI, 96777			10. PLACE EMPLOYED/SCHOOL ATTENDING		11. HOME	12. WORK	13. CELL 808-333-5628
	14. LOCATION OF INCIDENT/INTERSECTING STREET Punalu'u at remains of Punalu'u Wharf				15. DATE/TIME OCCURRED 06/21/2017 02:30PM		16. DATE/TIME REPORTED 06/23/2017 07:36AM	
<b>VEHICLES</b>	17. TYPE Van	18. YEAR 2016	19. MAKE Ford	20. MODEL Transit	21. COLOR Black	22. LICENSE / HA No. TCB496	23. LENGTH -	24. STOLEN No
	25. REGISTERED OWNER Hang Loose Boat Tours		26. ADDRESS 75-5707 Alii Drive, Kailua Kona, HI, 96740			27. HOME	28. WORK	29. CELL 808-345-4262
	30. NOTES							
	31. TYPE	32. YEAR	33. MAKE	34. MODEL	35. COLOR	36. LICENSE / HA No.	37. LENGTH	38. STOLEN
<b>PEOPLE</b>	39. REGISTERED OWNER		40. ADDRESS			41. HOME	42. WORK	43. CELL
	44. NOTES							
	45. NAME Whitney CARDOZA		46. SEX Female	47. RACE	48. AGE 24	49. BIRTH DATE 06/28/1992	50. OCCUPATION	
	51. CATEGORY Witness		52. ADDRESS			53. HOME	54. WORK	
<b>PEOPLE</b>	55. NAME Demetrius OLIVEIRA		56. SEX Male	57. RACE	58. AGE 40	59. BIRTH DATE 10/15/1976	60. OCCUPATION	
	61. CATEGORY Complainant		62. ADDRESS			63. HOME	64. WORK	65. CELL
	66. NAME Simon VELAJ		67. SEX Male	68. RACE	69. AGE 35	70. BIRTH DATE 05/25/1982	71. OCCUPATION	
	72. CATEGORY Suspect		73. ADDRESS			74. HOME	75. WORK	76. CELL

**78. SYNOPSIS**

06-23-2017/0736 Hours. A phone message was received at the Hilo DOCARE Office from Earl LOUIS, reporting illegal digging with a backhoe at the site of the old sugar warehouse and wharf in Punalu'u. He called back at about 0830 and I spoke with him. His information was incomplete as he had not seen the incident but was reporting it for a friend. Contact was made with OCCL, SHPD, Land Division, and Hawaii County Planning department in an attempt to find out if any agencies were aware of this activity. None were aware of any current or planned excavation in the area. Accompanied by CREO W. YOUNG I proceeded to the area, arriving at about 1230. We saw that there had been recent excavation of rocks, damage and destruction of the old wharf remains, along with some dirt that was spread over the rocks. I interviewed the only available actual witness to the activity, Whitney CARDOZA. She stated that the activity was done in the afternoons on 06-21/22-2017. She stated that the suspect, Simon VELAJ had said that he was coming back on the 23 at 0700 to do more, but came back without the excavator and was confronted by several locals and departed without doing any work. On 06-23-2017, VELAJ was issued a letter terminating an agreement that he and his company, Hang Loose Boat Tours had with SM Investment Partners, the property owner. No additional work has been reported since that date, up until this writing.

**KEY REPORT**

This is a key report. Refer to 17-1376-HA, SHPD: Historic Site Excavation/Destruction for additional violation information.

INV: CONTINUING

79. REPORT WRITTEN BY Ford, Andrew	80. BADGE No. 47	81. DATE/TIME WRITTEN 07/06/2017 02:39PM	82. SUPERVISOR APPROVING Weller, James	83. DATE/TIME APPROVED 7/17/17	84. BADGE No. 19
85. DISPOSITION					

State of Hawaii | Department of Land and Natural Resources | Division of Conservation and Resources Enforcement

INVESTIGATION # 17-1375 HA	DISTRICT East Hawaii	LEAD INVESTIGATOR Andrew Ford	KEY REPORT <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
DATE / TIME REPORTED 6/23/2017 7:36:00 AM	LOCATION Kau East	CLASSIFICATION OCCL: Excavation without a CDUP	CONNECTING REPORT(S) 17-1376-HA

Report Type: ☒ Continuation of Report ☐ Supplemental ☐ Follow Up

Date/Time Written:

Written By: Ford, Andrew

## Report

### SYNOPSIS

06-23-2017/0736 Hours. A phone message was received at the Hilo DOCARE Office from Earl LOUIS, reporting illegal digging with a backhoe at the site of the old sugar warehouse and wharf in Punalu'u. He called back at about 0830 and I spoke with him. His information was incomplete as he had not seen the incident but was reporting it for a friend. Contact was made with OCCL, SHPD, Land Division, and Hawaii County Planning department in an attempt to find out if any agencies were aware of this activity. None were aware of any current or planned excavation in the area. Accompanied by CREO W. YOUNG I proceeded to the area, arriving at about 1230. We saw that there had been recent excavation of rocks, damage and destruction of the old wharf remains, along with some dirt that was spread over the rocks. I interviewed the only available actual witness to the activity, Whitney CARDOZA. She stated that the activity was done in the afternoons on 06-21/22-2017. She stated that the suspect, Simon VELAJ had said that he was coming back on the 23 at 0700 to do more, but came back without the excavator and was confronted by several locals and departed without doing any work. On 06-23-2017, VELAJ was issued a letter terminating an agreement that he and his company, Hang Loose Boat Tours had with SM Investment Partners, the property owner. No additional work has been reported since that date, up until this writing.

### DLNR, COUNTY AND FEDERAL AGENCY CONTACTS

Prior to responding to the scene, contact was made with OCCL and SHPD. OCCL had no permit or requests on file to do this type of work, and SHPD was able to confirm that the ruins of the wharf and warehouse date back to 1916 and are listed as an historic site. Contact was also made with Hawaii County SMA Planner Esther IMAMURA, who state that no permits had been issued for the area of the boat ramp or wharf ruins.

On 06-23-2017/1731 Hours, I received an official email from K. MILLS, OCCL Senior Planner, who informed me that this will be her case at OCCL. She attached OCCL's responses to subject Simon VELAJ, and to SM Investment Partners, the entity that owns and manages the land in question.

On 07-12-2017 I contacted Rebecca FRAGER of the U.S. Army Corps of Engineers. She had been made aware of this case via anonymous tips that had been phoned in to the USACE Public Affairs office. I outlined what I had done and emailed her photos of the excavation, and historical photos that had been shared with me by members of the public. We agreed to keep each other informed of further developments.

Ford, Andrew  
Officer



47  
Badge No.

07-14-2017/1700  
Date / Time



INVESTIGATION # 17-1375 HA	DISTRICT East Hawaii	LEAD INVESTIGATOR Andrew Ford	KEY REPORT <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No
DATE / TIME REPORTED 6/23/2017 7:36:00 AM	LOCATION Kau East	CLASSIFICATION OCCL: Excavation without a CDUP	CONNECTING REPORT(S) 17-1376-HA

## Report (Continued)

### VIDEO INFORMATION AND HISTORIC PHOTOS SHARED

I was referred to local resident Demetrius OLIVIERA, who maintains a regular social media presence. OLIVIERA had posted several videos of the damage and of VELAJ interacting with the community. He also was able to get members of the public to post photos that showed the area pre 06-21-2017 for comparison. Those photos are contained in the Photo Log and referred to as "Historical photos". The videos posted have been downloaded and converted to standard DVD format and attached to this report.

### VELAJ INTERVIEWED

On 07-07-2017/1045 Hours, I interviewed Simon VELAJ after advising him of his rights. He had a written statement prepared and gave me a copy. He also stated the following:

- He only did excavation on Thursday 06-22-2016 between the hours of 1400-1800.
- He was only conducting clean-up activities
- All the dirt that was spread was from the same area, he pushed it seaward as he cleaned the area
- He had no intention to make a new boat ramp
- The back hoe was a rental from Hawthorne, and was transported to the area by BJ's Transpotation
- His intent was to make the area safer for the public and for his planned tours of the ocean areas of the national park and the lava flow areas.

VELAJ had nothing else to say and the interview was concluded at 1115 Hours. A copy of his written statement and the Advice of Rights form is attached to this report.

### DISPOSITION

It is recommended that these cases, 17-1375-HA and 17-1376-HA be CLOSED: Deferred to OCCL and SHPD respectively for their review and action. It is requested that copies of these reports be routed to OCCL and SHPD.

Ford, Andrew  
Officer

*Andrew Ford*

47  
Badge No.

07-14-2017/1700  
Date / Time

To whom it may concern:

On the day of June 23, 2017, I Simon Velaj, traveled to my property that was leased to me in Punaluu. I found over twenty people yelling and screaming at me after I had completed some cleaning of the parking lot. I knew that since I owned the lease to the property and had property insurance I was responsible for keeping the place safe and clean where I was going to conduct my business. Since I had my permit, lease and my insurance for the property I thought that working there would not disrespect anyone.

When I rented the place there were no signs indicating that there were any historical or sacred Hawaiian landmarks. All of a sudden, after the incident, almost everyone seems to suggest that this place has more historical value any officially marked historical Hawaiian landmarks. I personally did not mean to destroy anything that would have been sacred to anybody for the Hawaiian culture. The state of Hawaii and locals are trying to fine me with thousands of dollars of fines for a private land that was not officially marked as sacred or of historical value. If the DLNR and landlord informed me of any historical landmarks or sacred Hawaiian land, I would not have violated any officially marked historical landmarks or sacred sites.

When I started to clean the area up I moved a lot of trash that included broken glass, pampers, cigarettes, tampons and personal household trash that was dumped in the area. The area was used as a dump and not as a sacred landmark of this private property. No sacred rock was destroyed of which some have accused me of. On the old wharf the only thing I hammered out was old cleats that were rusted and sticking out of which I KNEW was VERY DANGEROUS. The reason I took them out was because I saw a tourist get hurt in that area and was bleeding in front of me. I felt responsible for the area under my responsibility and care I decided to remove the sharp metal object as they were seen as dangerous.

Simon Velaj  
75-5707 Alii Drive  
Kailua Kona, HI 96740

State of Hawaii  
Department of Land and Natural Resources  
Division of Conservation and Resources Enforcement

ADVICE OF RIGHTS

Report/Citation # 17-1375-4A

I am a Conservation Enforcement Officer. I want to inform you of your rights.

1. You have the right to remain silent. You do not have to answer any questions.
2. Anything you say may be used against you in a court of law.
3. You have the right to talk to a lawyer before we ask you any questions and to have him with you during questioning.
4. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.
5. If you decide to answer the questions now without a lawyer present, you will still have the right to stop answering at any time and talk to a lawyer.

The Advice of Rights was administered to

SIMON VELAT

By

[Signature]  
Conservation Enforcement Officer

HONOKOWIAU POLICE OFFICE  
Location

7-7-2017  
Date

1045  
Time

WAIVER OF RIGHTS

Initial

1. Do you understand the rights that I have just read to you? Yes ✓ No
2. Do you want a lawyer now? Yes ✓ No
3. Are you willing to answer questions and make a statement? Yes ✓ No
4. Do you want a lawyer during this interview? Yes      No ✓

[Signature]  
Witness

7-7-17  
Date

1045  
Time

[Signature]  
Subject's Signature

7-7-2017  
Date

1045  
Time

Refused to sign / /

All the foregoing was translated into



State of Hawaii | Department of Land and Natural Resources | Division of Conservation and Resources Enforcement

INVESTIGATION # 17-1375 HA	DISTRICT East Hawaii	LEAD INVESTIGATOR Andrew Ford	KEY REPORT [X] Yes [ ]
DATE / TIME REPORTED 6/23/2017 7:36:00 AM	LOCATION Kau East	CLASSIFICATION OCCL: Excavation without a CDUP	CONNECTING REPORT(S) 17-1376-HA

Report Description: OCCL: Excavation without a CDUP  
Date/Time Taken: 06-23-2017/1244  
Taken By: Ford, Andrew  
Scene: Punalu'u Wharf

Equipment: Sony HX-300  
Weather Conditions: P. Cloudy  
Lighting: Daylight  
Focus: Auto

1 Overview of area upon officer's arrival



2 Three remaining pillars



left mauka pillar gone, left makai pillar badly damaged

3 Remains of left mauka pillar



4 Dirt from unknown source spread on broken rocks





INVESTIGATION #  
17-1375 HA

DISTRICT  
East Hawaii

LEAD INVESTIGATOR  
Andrew Ford

KEY REPORT  
☒ Yes ☐ No

DATE / TIME REPORTED  
6/23/2017 7:36:00 AM

LOCATION  
Kau East

CLASSIFICATION  
OCCL: Excavation without a CDUP

CONNECTING REPORT(S)  
17-1376-HA

5 Makai pillars, left is 1-3 fee shorter than before



6 Soil spread



7 Damaged left makai pillar



8 Historic view of all four pillars



Anonymous photo, unknown date/time



INVESTIGATION #  
17-1375 HA

DISTRICT  
East Hawaii

LEAD INVESTIGATOR  
Andrew Ford

KEY REPORT  
☒ Yes ☐ No

DATE / TIME REPORTED  
6/23/2017 7:36:00 AM

LOCATION  
Kau East

CLASSIFICATION  
OCCL: Excavation without a CDUP

CONNECTING REPORT(S)  
17-1376-HA

**9 Historic view of pillars**



Anonymous photo, unknown date/time

**11 Historic view of pillars**



Anonymous photo, unknown date/time

**10 Historic view of pillars**



Anonymous photo, unknown date/time

**12 Aerial view**



Anonymous photo, unknown date/time



INVESTIGATION #  
17-1375 HA  
  
DATE / TIME REPORTED  
6/23/2017 7:36:00 AM

DISTRICT  
East Hawaii  
  
LOCATION  
Kau East

LEAD INVESTIGATOR  
Andrew Ford  
  
CLASSIFICATION  
OCCL: Excavation without a CDUP

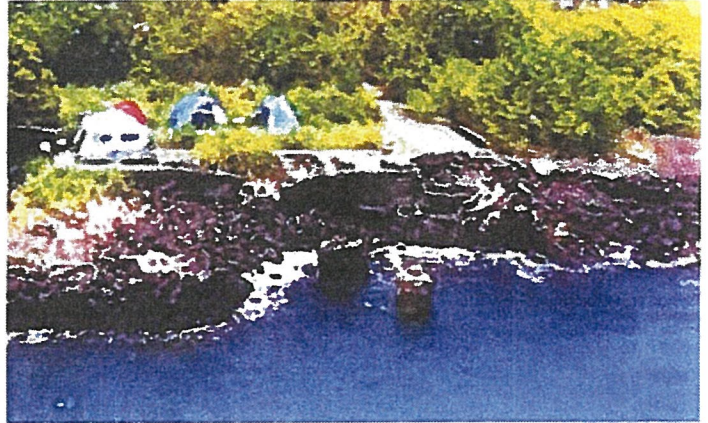
KEY REPORT  
☒ Yes ☐ No  
  
CONNECTING REPORT(S)  
17-1376-HA

13 Aerial view



Anonymous photo, unknown date/time

14 Aerial view



Anonymous photo, unknown date/time

15 Aerial view



Anonymous photo, unknown date/time

16 Right makai pillar showing "BUILT 1916"





DAVID Y. IGE  
GOVERNOR OF  
HAWAII



**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

SUZANNE D. CASE  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

KEKOA KALUHIWA  
FIRST DEPUTY

JEFFREY T. PEARSON, P.E.  
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

REF:OCCL:TM

ENF.: HA 17-36

**JUN 28 2017**

**NOTICE OF ALLEGED VIOLATION**

**CERTIFIED MAIL RETURN RECEIPT**

7014 2120 0003 1908 2345

Simon Velaj  
Hang Loose Boat Tours, LLC  
75-5707 Ali'i Drive  
Kailua-Kona, HI 96740

**SUBJECT:** Alleged Unauthorized Alteration of Historic Properties and Unauthorized Land Use Within the Conservation District Located at Punalu'u Wharf, Ka'u, Hawai'i, TMK: (3) 9-6-001:002

Dear Mr. Velaj:

NOTICE IS HEREBY GIVEN you may be in violation of the Hawaii Revised Statutes (HRS), Chapter 6E, Historic Preservation and Hawaii Administrative Rules (HAR) 13-5, providing for land uses within the Conservation District, enacted pursuant to HRS, Chapter 183C.

A site inspection conducted on June 26, 2017, revealed remnants of the historic Punalu'u Wharf have been impacted allegedly with heavy equipment, and significant ground disturbance has occurred with the State Land Use Conservation District;

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

**HISTORIC PRESERVATION**

Pursuant to HRS, §6E-11(c) It shall be a civil and administrative violation for any person to take, appropriate, excavate, injure, destroy, or alter any historic property or burial site during the course of land development or land alteration activities to which HRS, §6E-42 applies, without obtaining the required approvals.

Pursuant to HRS, 6E-11(f), Any person who violates this section shall be fined not more than \$10,000 for each separate violation. If the violator directly or indirectly has caused the loss of, or damage to, any historic property or burial site, the violator shall be fined an additional amount determined by the court or an administrative adjudicative authority to be equivalent to the value



of the lost or damaged historic property or burial site. Each day of continued violation of this provision shall constitute a distinct and separate violation for which the violator may be punished. Equipment used by a violator for the taking, appropriation, excavation, injury, destruction, or alteration of any historic property or burial site, shall be subject to seizure and disposition by the State without compensation to its owner or owners.

## **CONSERVATION DISTRICT**

Pursuant to HAR, §13-5-6, no land use (s) shall be conducted in the Conservation District unless a permit or approval is first obtained from the Department of Board.

Pursuant to HAR, §13-5-2, "Land use" means:

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

Pursuant to HAR, §13-5-6, any person, firm, government agency, or corporation violating any of the provisions of this chapter or permits issued pursuant thereto shall be punished as provided in Chapter 183C, Hawaii Revised Statutes (HRS).

Pursuant to HRS, 183C-7, the Board of Land and Natural Resources may subject individuals to fines of up to \$15,000.00 per violation in addition to administrative costs. Should you fail to immediately cease such activity after written or verbal notification from the department, willful violation may incur an additional fine of up to \$15,000.00 per day per violation for each day in which the violation persists.

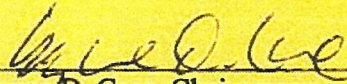
This notice is to inform you that the alleged alteration and destruction of historic properties, and permanent change in the land area within the Conservation District created by the land use was not reviewed nor authorized by the Department of Land and Natural Resources under HRS, 6E nor HAR, Chapter 13-5. The matter will be scheduled for a decision by the Board of Land and Natural Resources at a time and date to be announced. In the meantime, if you have received any authorizations for the alleged unauthorized work please inform the Department within 30-days so we can consider such information. Please note any information provided may be used in civil proceedings. Should you have any questions, contact Tiger Mills of the Office of Conservation and Coastal Lands at (808) 587-0382.



Simon Velaj  
Hang Loose Boat Tours, LLC

ENF: HA 17-36

Sincerely,

  
Suzanne D. Case, Chairperson  
Board of Land and Natural Resources

C: SM Investment Partners  
HDLO/DOCARE-East Hawai'i  
County of Hawai'i-Planning Dept.



DAVID Y. IGE  
GOVERNOR OF HAWAII



**STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES**

OFFICE OF CONSERVATION AND COASTAL LANDS  
POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

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ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAOHOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

REF: OCCL: TM

ENF: HA 17-36

Roy Pfund  
SM Investment Partners  
600 Iwilei Road, Suite 700  
Honolulu, HI 96813

**JUN 30 2017**

**SUBJECT: Dirt and Fill Material Located Near the Shoreline Within the Conservation District Located at Punalu'u, Ka'u, Hawai'i, TMK: (3) 9-6-001:002**

Dear Mr. Pfund:

As you are aware, alleged unauthorized land uses were conducted upon SM Investment Partners property at the subject location. There appears to be dirt and fill material near the shoreline that may affect ocean resources (**Exhibit 1 & 2**). At this time the Office of Conservation and Coastal Lands (OCCL) is requesting this material be removed from the Conservation District. While we are aware that the landowner did not conduct the alleged unauthorized work, it is our understanding that the alleged violator is no longer able to access your property to mitigate the area to protect our ocean resources.

Please inform the OCCL as to how the landowner will be handling this very important matter. Should you have any questions regarding this correspondence, contact Tiger Mills of our Office at (808) 587-0382.

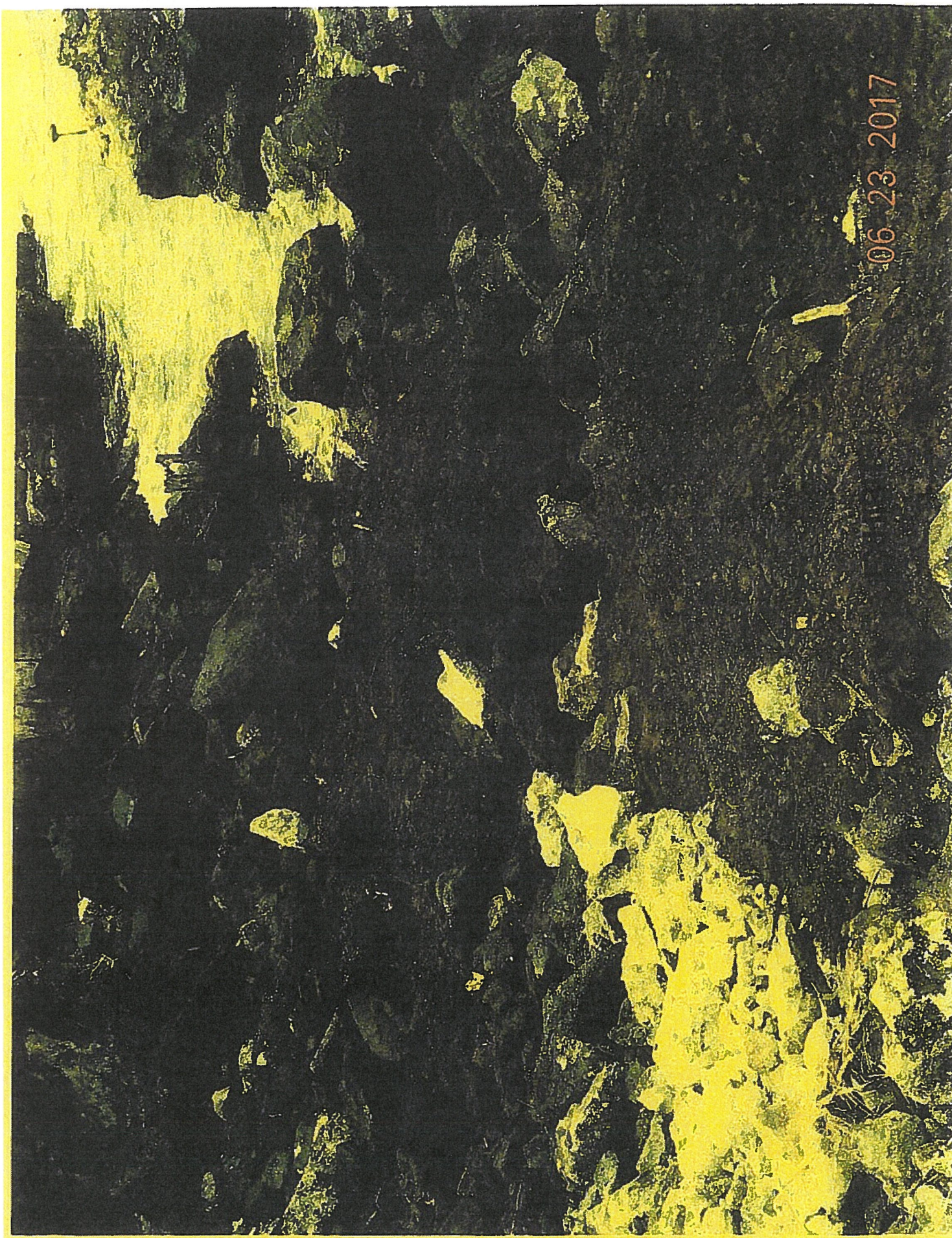
Sincerely,

A handwritten signature in black ink, appearing to read "Samuel J. Lemmo", is written over a large, stylized circular mark.

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

C: Chairperson  
HDLO/DOCARE-Hawai'i  
County of Hawai'i- Planning





06 23 2017







**S M INVESTMENT PARTNERS**  
680 Iwilei Road, Suite 700  
Honolulu, Hawaii 96817  
Telephone (808) 523-7750 • Facsimile (808) 522-7866

July 3, 2017

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

Re: **DLNR Letter dated June 30, 2017 Ref: OCCL: TM**

Dear Mr. Lemmo:

I am responding to your letter referenced above in which you are requesting a response on how the landowner will address the fill near the shoreline. Our preliminary plan is as follows:

1. Contrary to your understanding, we will allow access to Mr. Simon Velaj of Hang Loose Boat Tours, LLC for the purposes of removing the fill material that he placed there.
2. Given the sensitive nature of any future work on the site, the DLNR will need to provide Mr. Velaj with approved guidelines for the work and communicate this to the community so he will be able to accomplish the removal safely. Who would be the appropriate person to contact on this for follow up?
3. Finally, since the Punalu'u boat ramp is primarily for local public use, would the DLNR be interested in taking over management of the ramp?

We look forward to your response. Please let me know if you have any questions.

Very truly yours,



ROY PFUND

## LICENSE AGREEMENT

THIS LICENSE AGREEMENT ("Agreement") is made effective this 24 day of April, 2017 (the "Effective Date") by and between **S M Investment Partners**, a Hawaii limited partnership ("Licensor"), and **Hang Loose Boat Tours, LLC**, a Hawaii limited liability company ("Licensee"). Licensor and Licensee may each be referred to in this Agreement as a "Party", or collectively as the "Parties".

### **RECITALS**

WHEREAS, Licensor owns the real property and improvements thereon, including the golf course commonly known as Sea Mountain Golf Course (the "Golf Course"), located on the island of Hawaii and identified by TMK 9-6-01:02 (the "Parcel"); and

WHEREAS, Licensee desires to use a portion of the Parcel for the purposes of parking and launching Licensee's vessel used to conduct lava viewing ocean tours.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Grant of License.** Licensor hereby grants to Licensee a temporary, revocable license (the "Revocable License") to use a portion of the Parcel (the "Premises") as described below in subsections 1.A and 1.B, and further described in Exhibit A, as attached hereto and hereby incorporated by reference.

A. Parking Lot of approximately 10,873 square feet

B. Boat ramp, approximately 35' x 25'

2. **Revocable License.**

A. **Use.** Licensee shall use the Premises solely for the following purposes (the "Permitted Activities") and for no other purposes whatsoever without Licensor's prior written approval:

i. **Parking:** Parking for Licensee's customers, parking for Licensee's trailer and boat, and storage for Licensee's trailer and boat.

ii. **Boat ramp:** Use of the boat ramp for passengers to embark and disembark Licensee's vessel.

B. **Non-Exclusive use.** The Parties acknowledge and agree that the Revocable License is non-exclusive, and nothing herein shall be construed to grant Licensee exclusive access to the Premises or any portion thereof.

C. **No Tenancy Established.** The Parties acknowledge and agree that the Revocable License is not a lease, and nothing in this Agreement shall create a tenancy between Licensor and Licensee with regard to the Premises.

3. **Term.** The term of this Agreement (the "Term") shall commence as of May 22, 2017 (the "Commencement Date") and expire May 31, 2018 (the "Expiration Date") unless earlier revoked by Licensor. Notwithstanding the foregoing, in the event Licensee does not provide THIRTY (30) days written notice prior to the Expiration Date, the Term shall continue on a month-to-month basis. In the event Licensee shall fail to vacate the Premises by the Expiration Date without Licensor's prior written consent, Licensee acknowledges and agrees that it shall (i) lose its status as a licensee and become a trespasser subject to eviction, and (ii) defend, indemnify and hold harmless Licensor for any claim, loss, damage or other expense, including but not limited to loss of business revenue.

4. **License Fee.** Licensee shall pay Licensor the sum of THREE THOUSAND SEVEN HUNDRED DOLLARS (\$3,700) (the "License Fee") per month, plus Hawaii's General Excise Tax ("GET") for the Revocable License.

A. **Submission of Payments.** Licensee shall pay the License Fee to Licensor, without notice, on a monthly basis and pursuant to the below payee and location.

Checks are payable to:	S M Investment Partners
At following address:	680 Iwilei Road, Suite #700
	Honolulu, HI 96817

B. **Payment Due Date/Late Payment.** The License Fee shall be due and payable before the FIRST (1<sup>st</sup>) calendar day of each month during the Term. In the event any License Fee is received by Licensor after the FIFTH (5<sup>th</sup>) calendar day of any month during the Term, the License Fee shall be subject to a late charge of \$50.00 plus interest at the rate of ONE AND ONE HALF PERCENT (1.5%) per month, or the highest rate permitted by law in the State of Hawaii.

C. **First Month's License Fee/Security Deposit.** Upon execution of this Agreement, Licensee shall pay Licensor the sum of SEVEN THOUSAND SEVEN HUNDRED EIGHT AND 36/100 DOLLARS (\$7,708.36), which represents the first month's License Fee, a security deposit (the "Deposit") equal to ONE (1) month of the License Fee and applicable GET. The Deposit shall be given to Licensor as security for the performance of Licensee's obligations under this Agreement. The Deposit shall not be used as payment for any monthly License Fee, including the last month of the Term. The Deposit shall not earn interest and Licensor shall retain the right to commingle the Deposit with other funds. Licensor may deduct any sums necessary (collectively, the "Deposit Deductions") from the Deposit for the cost of (i) uncured damages, repairs and cleaning to the Premises, (ii) fees and fines incurred and unpaid as a result of Licensee's use of the Premises, and (iii) any other costs associated with Licensee's use of the Premises. The Parties acknowledge and agree that any Deposit Deductions shall be calculated and implemented in Licensor's sole discretion, and shall not be offset against any insurance proceeds that Licensor collects. Any balance of the Deposit not required to cover the Deposit



Deductions shall be returned to Licensee within THIRTY (30) days following the later of the Expiration Date or Licensee's vacation of the Premises. In the event the Deposit is insufficient to cover the Deposit Deductions, Licensor shall send Licensee an invoice that shall be due and payable within TEN (10) days of dispatch. The Deposit shall be adjusted from time to time to equal the current monthly License Fee

5. **Licensee's Representations and Warranties.** As a material term to this Agreement, Licensee hereby represents and warrants the following to Licensor (collectively, "Licensee's Reps and Warranties"):

A. Licensee shall comply with all applicable federal, state, county and local laws, statutes, ordinances, regulations, and Covenants, Conditions and Restrictions applicable to the Premises (collectively, "Laws").

B. Licensee shall comply with all rules, regulations and reasonable requests made by Licensor personnel of the Golf Course.

C. Licensee shall not store any property outside of the Premises.

D. Licensee shall not distribute any advertising, political or other handbills outside of the Premises.

E. Licensee shall provide prompt written notice to Licensor of any accident, injury or property damage occurring on or about the Premises.

F. Licensee shall prevent accumulation of refuse on or about the Premises, and ensure that refuse is placed in proper receptacles until collected.

G. Licensee shall maintain the Premises in a clean, orderly and sanitary condition at all times during the Term.

H. Licensee shall refrain from placing any signage on or about the Premises without Licensor's prior written consent.

I. Licensee shall be solely responsible for obtaining all necessary permits, licenses and authorizations required to undertake the Permitted Activities.

J. Licensee shall not undertake repair or maintenance activities on the Premises, but shall be under a continuing duty to: (i) immediately notify Licensor of any portion of the Premises which may require repair; and (ii) refrain from using any portion of the Premises which may require repair until Licensor has provided written consent. Notwithstanding, Licensee shall not be entitled to any offset or deduction of the License Fee, unless otherwise agreed by the Parties in writing.

Licensee's failure to comply with any of Licensee's Reps and Warranties shall be deemed an event of default, result in immediate revocation of the Revocable License, and Licensee shall forfeit all License Fees and the Deposit.

6. Limitation of Liability. LICENSEE EXPRESSLY ACCEPTS FULL RESPONSIBILITY FOR THE WELFARE OF ALL INDIVIDUALS AND PROPERTY, AND ALL CONSEQUENCES, FORESEEABLE OR UNFORESEEABLE, ASSOCIATED WITH ITS USE OF THE PREMISES, AND HEREBY ACCEPTS THE PREMISES IN IT'S "AS IS, WHERE IS, WITH ALL FAULTS" CONDITION. LICENSEE HEREBY RELEASES LICENSOR FROM ALL LIABILITY WHATSOEVER, AND UNDERSTANDS AND AGREES THAT LICENSOR SHALL NOT BE LIABLE FOR INJURY TO ANY PERSON OR FOR THE LOSS OF, OR DAMAGE TO, ANY PROPERTY OCCURRING ON OR ABOUT THE PREMISES FROM ANY CAUSE WHATSOEVER, EXCEPT LICENSOR'S WILLFUL MISCONDUCT.

LICENSEE HEREBY AGREES TO DEFEND, INDEMNIFY AND HOLD HARMLESS LICENSOR FROM ANY AND ALL CLAIMS, LOSSES, COSTS, KNOWN OR UNKNOWN HAZARDS, EXPENSES AND LIABILITY OF EVERY KIND OR NATURE WHATSOEVER, INCLUDING ATTORNEY'S FEES ARISING FROM ANY ACTIVITY PERMITTED OR SUFFERED ON OR ABOUT THE PREMISES.

LICENSOR MAKES NO REPRESENTATIONS OR WARRANTIES WITH REGARD TO THE SAFETY OF THE PREMISES OR SUITABILITY OF THE PREMISES FOR LICENSEE'S INTENDED USE, IT BEING UNDERSTOOD THAT LICENSEE SHALL BE UNDER A DUTY TO INSPECT AND MAKE SAFE THE PREMISES PRIOR TO PERFORMING THE PERMITTED ACTIVITIES. IF LICENSOR MAKES EQUIPMENT OR MACHINERY AVAILABLE FOR LICENSEE, INCLUDING BUT NOT LIMITED TO ANY DOCKS, LICENSEE SHALL INSPECT AND BE UNDER A DUTY TO MAKE SAFE ALL SAID DOCKS, EQUIPMENT AND MACHINERY PRIOR TO USE.

THIS SECTION 5 SHALL SURVIVE ANY TERMINATION, REVOCATION OR EXPIRATION OF THIS AGREEMENT.

6. Insurance. Licensee shall, during the entire Term and any extension thereof, keep in full force and effect the below policies of insurance (collectively, the "Insurance Policies") with an insurance company or companies qualified to do business in the state of Hawaii and in forms satisfactory to Licensor. All Insurance Policies shall contain a provision in the policy and certificate of insurance specifically naming Licensor and its affiliated companies as additional insureds, and include an endorsement providing that the policies shall not be canceled, allowed to expire by non-renewal or modified without THIRTY (30) days written notice to Licensor prior to the effective date of the proposed cancellation, non-renewal or modification. Prior to the Commencement Date, Licensee shall deposit with Licensor current certificates of all Insurance Policies in a form and content acceptable to Licensor.

A. Commercial General Liability with minimum coverage of TWO MILLION DOLLARS (\$2,000,000) per occurrence for bodily injury and property damage, insuring against

all claims, demands or actions arising out of or in connection with occurrences within the whole of the Premises and adjacent exterior walkways or driveways, covering the use, occupancy or maintenance of the Premises and all operations of Licensee, the condition of the Premises, the acts or omissions of Licensee and its agents in the Premises, and for liabilities assumed under this Agreement.

B. Business Automobile Liability insurance with minimum coverage of TWO MILLION DOLLARS (\$2,000,000) for each occurrence, including owned and hired automobile coverage.

C. Worker's Compensation insurance offering statutory coverage and limits as required in the State of Hawaii for all of Licensee's employees and independent contractors.

D. Umbrella Insurance with minimum coverage of TWO MILLION DOLLARS (\$2,000,000) in the aggregate, or such other minimum limit as Licensor reasonably requires.

7. **Indemnification.** Licensee hereby agrees that it shall defend, indemnify and hold harmless Licensor and Licensor's affiliated entities, directors, officers, attorneys, accountants, agents, representatives, employees and their respective heirs, successors and assigns from and against any claim, demand, loss, expense (including attorney's fees), damage and other cost whatsoever resulting from: (i) any damage to property or person occurring on or about the Premises; (ii) any breach of, or failure to perform, any of Licensee's Reps and Warranties; and (iii) any breach of, or failure to perform, any covenant or obligation of Licensee contained in this Agreement.

8. **Licensor's Access to the Premises.** The Parties acknowledge and agree that Licensor and Licensor's authorized agents shall be permitted to enter the Premises at all times during the Term to inspect the Premises and ensure that Licensee is in compliance with the terms of this Agreement.

9. **Default and Remedies.** The occurrence of any of the following events shall constitute an event of default on the part of Licensee (collectively, the "Events of Default"):

- A. Failure to timely pay any amount due under this Agreement;
- B. Using the Premises for any activity other than the Permitted Activities;
- C. Engaging in any activity on the Premises or allowing any activity to occur on the Premises that is illegal, distasteful, or disruptive;
- D. Violating any Law;
- E. Failing to comply with any requests pertaining to the Premises made by Licensor and its authorized agents;
- F. Failure to comply with any of Licensee's Reps and Warranties; and

G. Failure to comply with any of the terms, conditions and covenants of this Agreement.

If Licensee shall engage in any Event of Default, Licensor shall have the option to immediately revoke the Revocable License, evict Licensee, retain all License Fees and the Deposit, and pursue any and all claims available at law and in equity.

10. **Return of Premises and Property.** Upon the expiration or termination of this Agreement, Licensee shall surrender the Premises to Licensor in the same condition when received by Licensee, reasonable wear and tear incident to proper use of such property excepted.

11. **No Transfer or Assignment.** This Revocable License is personal to Licensee and shall not be assigned in whole or in part, nor shall any rights or privileges granted in this Agreement be sold, transferred or assigned without the prior, express, and written consent of Licensor. For purposes of this Agreement, any merger, sale of majority stock ownership or other reorganization shall be deemed an "assignment" on the part of Licensee. Otherwise this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, representatives, successors and permitted assigns.

12. **Governing Law.** It is agreed that this Agreement shall be governed by, construed, and enforced in accordance with the laws of the State of Hawaii.

13. **Notices.** Any notice provided for or concerning this Agreement shall be in writing and be deemed sufficiently given when sent by email, certified or registered mail if sent to the respective address of each party as set as follows:

**Licensor:**  
S M Investment Partners  
680 Iwilei Road, #700  
Honolulu, HI 96817  
Tel: 808-539-9471

**Licensee:**  
Hang Loose Boat Tours, LLC  
75-5707 Alii Drive  
Kailua-Kona, HI 96740  
Tel: 808-345-4262

14. **No Waiver.** The failure of either party to this Agreement to insist upon the performance of any of its terms and conditions, or the waiver of any breach of any of the terms and conditions of this Agreement, shall not be construed as thereafter waiving any such terms and conditions, but they shall continue and remain in full force and effect as if no forbearance or waiver had occurred.

15. **Entire Agreement.** This Agreement, together with any exhibits and the related written agreements specifically referred to herein, represents the only agreement among the Parties concerning the subject matter hereof and supersedes all prior agreements whether written or oral, relating thereto.

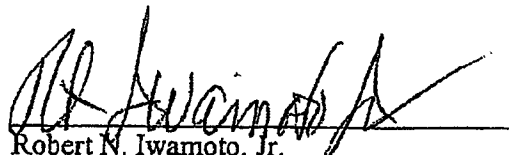
16. **Modification of Agreement.** Any modification of this Agreement or additional obligation assumed by either Party in connection with this Agreement shall be binding only if evidenced in a writing signed by each Party or an authorized representative of each Party.
17. **Counterparts.** This Agreement may be executed in counterparts and by different Parties on different counterparts with the same effect as if the signatures thereto were on the same instrument. This Agreement shall be effective and binding upon all Parties hereto when all Parties have executed a counterpart of this Agreement.
18. **Relationship of the Parties.** The execution and performance of this Agreement, and the exercise of any rights hereunder are not intended, and shall not be construed, to create a partnership or joint venture between the Parties.
19. **Construction.** Although this Agreement may have been drafted by counsel for one of the Parties hereto, this Agreement has been subject to negotiation and modification prior to final execution and, accordingly, is not to be construed for or against either Party but is to be construed as if mutually drawn according to the general tenor of the language. The Parties hereby acknowledge that each is represented by legal counsel in connection with the Agreement, or each has knowingly waived their right to do so.
20. **Severability.** If any provision of this Agreement is held to be illegal, invalid or unenforceable under present or future laws, such provision shall be fully severable and this Agreement shall be construed and enforced as if such illegal, invalid or unenforceable provision had never constituted a part hereof, and the remaining provisions shall remain in full force and effect and shall not be affected by the illegal, invalid or unenforceable provision or by its severance therefrom. Furthermore, in lieu of such illegal, invalid or unenforceable provision there shall be added automatically as part of this Agreement a legal, valid and enforceable provision as similar in terms to the illegal, invalid or unenforceable provision as may be possible.
21. **Singular/Plural.** Any words or terms used herein in the singular shall be deemed to include the plural when applicable and vice versa.

*[Signature page follows]*

IN WITNESS WHEREOF the parties to this Agreement have executed same as of the date first above written.

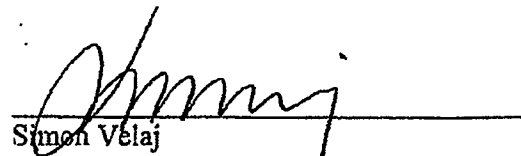
**Licensors:**

S M INVESTMENT PARTNERS  
Dba Sea Mountain Golf Course  
By S M Investment, Inc.  
Its General Partner

  
Robert N. Iwamoto, Jr.  
Its President

**Licensee:**

HANG LOOSE BOAT TOURS, LLC

  
Simon Velaj  
Its Member