

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Office of Conservation and Coastal Lands
Honolulu, Hawaii 96813

September 10, 2021

Board of Land and Natural Resources	(ENF) KA-14-58
State of Hawaii	Docket No. KA 15-4
Honolulu, Hawaii	KAUAI

Approve and Delegate to Chairperson Authority to Execute Settlement Agreement with Mr. Norman Caris Relating to Use of Conservation District Lands at ‘Aliomanu Estates, Kawaihau, Kaua‘i, Under Board Action February 27, 2015, Item #K-1, Conservation District Enforcement Case (ENF) KA-14-58; Finding of Violation for Unauthorized (1) Construction of Erosion Control Structures, (2) Landscaping including grubbing and grading, and (3) Drainage Improvements Located in the Conservation District *Limited* and *General* Subzones, ‘Aliomanu Estates, Kawaihau District, Kaua‘i, TMK (4) 4-9-005:027

APPLICANT Mr. Norman J. Caris, by and through his attorneys.
Collectively, Mr. Caris and the Office of Conservation and Coastal Lands (“OCCL” or the “State”) are referred to hereinafter as the “Parties.”

LEGAL REFERENCE Section 183C-7, Hawaii Revised Statutes (“HRS”), and
Section 13-5-6, Hawaii Administrative Rules (“HAR”).

LOCATION Lot #12, ‘Aliomanu Estates (Residence of Mr. Norman J. Caris),
Kawaihau District, Island of Kaua‘i, TMK (4) 4-9-005:027

AREA Parcel: 15.44 acres (approx.)
Area of Use: > 1.0 acre.

ZONING State Land Use District: Conservation District
Subzone: *Limited* and *General*

CURRENT USE STATUS Residential

CHARACTER OF USE Unauthorized construction of erosion control structures, landscaping, and drainage improvements.

BACKGROUND

This matter has a long history with the department, of which the relevant portions are discussed below.

At its meeting on February 27, 2015, the Board of Land and Natural Resources (“Board”) considered Item #K-1 for “Unauthorized, 1) Construction of Erosion Control Structures, 2) Landscaping including grubbing and grading, and 3) Drainage Improvements Located in the Conservation District *Limited* and *General* Subzones.”¹ During the meeting, Mr. Caris made an oral request for a contested case hearing. The decision regarding whether to allow such a hearing was unanimously deferred.²

On March 9, 2015, Mr. Caris submitted a written petition for a contested case hearing later assigned to Docket No. KA 15-4.³

At its meeting on March 27, 2015, the Board considered Mr. Caris’s written petition for a contested case hearing⁴ and unanimously approved delegation of authority to the Chairperson to appoint a hearings officer for adjudication of the enforcement action.⁵

In early 2016, the hearings-officer selection process was placed on “hold” while the Parties continued their on-going settlement communications. Eventually, settlement communications trailed off, and personnel changes among legal representatives for each side caused further delays, and a global pandemic began. No hearings officer was ever selected.

In September 2020, the Parties’ re-established settlement discussions to attempt to resolve the matter without the need for time consuming and expensive litigation. To this end, via a joint letter dated December 21, 2020, the Parties requested that the hearings-officer selection process remain paused during negotiations. See **Exhibit A** (Joint Letter to BLNR). The Parties devised a broad plan to satisfy several of OCCL’s requirements, including a report-or-schematic memorializing the precise, unpermitted work that was done on the Caris property, which led to

¹ See Staff Submittal for Item #K-1, Meeting of the Board of Land and Natural Resources (Feb. 27, 2015), *available at*: <https://files.hawaii.gov/dlnr/meeting/submittals/150227/K-1.pdf>.

² See Minutes for the Meeting of the Board of Land and Natural Resources, at 9–10 (Feb. 27, 2015) (discussion of Item #K-1 erroneously appears under the title for Item #K-2), *available at*: <https://files.hawaii.gov/dlnr/meeting/minutes/150227-minutes.pdf>.

³ See Exhibit 1 (Petition for a Contested Case Hearing, Docket No. KA 15-4) to Staff Submittal for Item #K-1, at 3–4, Meeting of the Board of Land and Natural Resources (Mar. 27, 2015), *available at*: <https://files.hawaii.gov/dlnr/meeting/submittals/150327/K-1.pdf>.

⁴ See Staff Submittal for Item #K-1, Meeting of the Board of Land and Natural Resources (Mar. 27, 2015), *available at*: <https://files.hawaii.gov/dlnr/meeting/submittals/150327/K-1.pdf>.

⁵ See Minutes for the Meeting of the Board of Land and Natural Resources, at 5 (Mar. 27, 2015), *available at*: <https://files.hawaii.gov/dlnr/meeting/minutes/150327-minutes.pdf>.

the underlying enforcement action.

The Parties have negotiated the following settlement with the understanding that Mr. Caris would need to complete several steps before the Parties would bring any proposed settlement terms to the Board. Based on the following considerations, OCCL staff recommends settlement of the dispute with Mr. Caris under the proposed terms and conditions that follow (see below).

LEGAL AUTHORITY FOR SETTLEMENT

Section 183C-7, HRS provides that:

(b) Any person violating this chapter or any rule adopted in accordance with this chapter shall be fined not more than \$15,000 per violation in addition to administrative costs, costs associated with land or habitat restoration, and damages to public land or natural resources, or any combination thereof. After written or verbal notification from the department, willful violation of this chapter or any rule adopted in accordance with this chapter may incur an additional fine of up to \$15,000 per day per violation for each day in which the violation persists. The board may set, charge, and collect the fine based on the value of the natural resource that is damaged, the market value of the natural resource damaged, and any other factor it deems appropriate, such as the loss of the natural resource to its natural habitat and environment and the cost of restoration or replacement. The remedies provided for in this subsection are cumulative and in addition to any other remedies allowed by law.

Section 13-5-6, HAR, provides, in relevant part:

(a) Any person, firm, government agency, or corporation violating any of the provisions of this chapter or permits issued pursuant thereto shall be punished as provided in chapter 183C, HRS.

....

(d) No land use(s) shall be conducted in the conservation district unless a permit or approval is first obtained from the department or board.

SETTLEMENT CONSIDERATIONS

A. Original Fines and Costs

Prior to Mr. Caris's oral request for a contested case hearing on November 13, 2020, OCCL staff submitted a report with recommendations for Mr. Caris's potential penalty. Specifically, staff recommended that pursuant to HRS Chapter 183C, "the Board fined the landowner in violation of § 183C-7, HRS and § 13-5-6 HAR, and is subject to the following":

1. The landowner is fined in one (1) instance for violating the provisions of § 183C- 7, HRS, and § 13-5-6, HAR, for the unauthorized construction of a major erosion control structure by failing to obtain the appropriate approvals within the Conservation District for \$15,000;
2. The landowner is fined in one (1) instance for violating the provisions of § 183C- 7, HRS, and §13-5-6, HAR, for unauthorized landscaping by failing to obtain the appropriate approvals within the Conservation District for \$15,000;
3. The landowner is fined in one (1) instance for violating the provisions of § 183C- 7, HRS, and § 13-5-6, HAR, for the unauthorized modification of on-site drainage improvements by failing to obtain the appropriate approvals within the Conservation District for \$10,000;
4. The landowner is fined an additional \$2,500 for administrative costs associated with the subject violations;
5. The landowner shall pay all designated fines and administrative costs (total \$42,500) within sixty (60) days of the date of the Board's action;
6. Within one-hundred and eighty (180) days of the Board's action the landowner shall either: A) conduct land restoration as prescribed by the Department of Land and Natural Resources, or B) submit to the Office of Conservation and Coastal Lands (OCCL) a Conservation District Use Application (CDUA) to apply for After-the-Fact authorization for the alleged unauthorized land uses and structures. As always the final decision to approve or deny the CDUA will be at the discretion of the BLNR;
7. The landowner shall complete an addendum archaeological inventory survey (AIS) of the subject parcel in accordance with SHPD guidelines and requirements listed in Exhibit 11 within one-hundred and eighty days (180) of the date of the Board's action. This should include an updated preservation plan to also be submitted to the SHPD for review and approval;
8. The landowner shall coordinate with OCCL regarding the applicants choice relating to condition #6 of this enforcement action, and shall allow OCCL staff to visit the site as needed to resolve this enforcement action; and
9. That in the event of failure of the landowner to comply with any order herein, the matter shall be turned over to the State of Hawaii - Office of the Attorney General for disposition, including all administrative costs.

Staff Submittal for Item #K-1, at 6–7 (Feb. 27, 2015),

available at: <https://files.hawaii.gov/dlnr/meeting/submittals/150227/K-1.pdf>.

B. Waiver of After-the-Fact CDUP Requirement

During settlement discussions, Mr. Caris expressed his willingness to obtain an after-the-fact Conservation District Use Permit (“CDUP”) regarding the unauthorized work that took place. A question arose regarding whether Mr. Caris might obtain an “exception” from any further archaeological survey requirement as part of that process. Staff has concluded that he may.

Under HRS chapter 6E, before an officer or agency approves any project involving a permit which *may affect historic property*, the agency or office is required to advise the State Historic Preservation Division (“SHPD”) and, prior to approval, allow SHPD an opportunity for review and comment. Haw. Rev. Stat. § 6E-42(a).

Historical reports in the case file, , indicate that no significant features were identified on the portion of the property where the violations leading to this action occurred.⁶ Mr. Caris has also verified that the historic properties previously located pursuant to the archaeological survey were not in the area of the violation. See **Exhibit B** (Decl. of Norman J. Caris) and **Exhibit C** (Decl. of Brian Hennessey), *attached*. It does not appear that the unauthorized activity affected historic property. *E.g.*, **Exhibit D** (Schematic with Archaeological Sites Noted) and **Exhibit E** (As-Built Drainage Plan). The after the fact issuance of the CDUP is not likely to affect historic property. Review and comment by SHPD is therefore not required.

The settlement agreement will note that any *future* project with the potential to include land alteration activities may require additional consultation with SHPD.

C. Considerations Favoring Settlement

The Parties, on their own initiative, have engaged in settlement discussions several times over the years, which culminated in the proposed settlement principles submitted herein for the Board’s approval. The Parties believe that the settlement terms agreed to provide a certain result in an expeditious and cost-effective manner that is fair, reasonable, and fiscally prudent, under the totality of circumstances.

PROPOSED SETTLEMENT OF CLAIMS

Based on the foregoing considerations, the Parties request that the Board delegate authority to the Chairperson to approve a Settlement Agreement with terms as follows:

1. Detailed Documentation of Work Performed (As Completed).

Mr. Caris will provide the State (via OCCL) with a formal record of the improvements/ work that are the subject of the violation. Such record will include documentation of subjects including (but not limited to) the following:

⁶ The case file includes a March 2000 Preservation & Monitoring Plan by Hammat & McDermott, and a Cultural Survey of the Caris Property by Bushnell et al.

- As-built Landscaping Plan (including the finished aesthetic improvements/ the plantings/ everything on top of the grading);
- As-built Terracing Plan;
- As-built Drainage Plan
- Identification of all terracing/landscaping walls on the as-built plans

Mr. Caris has retained the services of Brian Hennessy of Honua Engineering, Inc., who completed the drainage/terrace area work forming the basis of these violations. Mr. Hennessy shall report on what work was done on the property, including but not limited to the area of previously identified historical/archaeological sites.

2. Sworn Statement(s) and Work Report in Lieu of New Archaeological Survey.

The State will not require an archaeological survey in connection with the work previously performed upon two conditions being met:

- a. Mr. Caris (either alone, or together with Mr. Hennessy) will provide a sworn statement (or statements) confirming that the work did not impact any of the previously documented archaeological/historical sites on the property; and
- b. Mr. Caris will provide the State with a copy of Mr. Hennessy's report regarding the extent of the work done on the entire property (see Paragraph 1, *supra*) including its impact, if any, on the previously identified archaeological/historical sites.

3. After-the-Fact Conservation District Use Application Not Required.

Upon good faith completion of the above requirements, the State will not require Mr. Caris to submit an after-the-fact Conservation District Use Application or obtain a new Conservation District Use Permit for the work performed on the property which is the subject of the underlying violation. This will not apply to any *future* work in the conservation district.

4. Recommended Monetary Penalty (Fines + Admin. Costs) of \$39,500.00.

Because Mr. Caris has satisfied the foregoing prior to the instant Board Meeting, the State agrees to recommend a total fine of \$39,500.00 to the Board, in satisfaction of the original \$42,500.00 in fines and administrative costs requested by staff in its Board submittal (item K-1) dated February 27, 2015.

The OCCL will provide Mr. Caris with a copy of the fully executed Settlement Agreement once his payment has cleared.

5. Consideration for Settlement Satisfied by Paragraphs 1–4, above.

The four settlement terms summarized above, if agreed to, shall be executed:

- a. In full and complete satisfaction of the enforcement action; and
- b. As consideration for the settlement agreed to by the Parties.

6. Withdrawal of Pending Actions/ Proceedings.

- a. **Contested Case**—In order for staff to bring these proposed settlement terms to the Board, Mr. Caris has agreed to a limited withdrawal of his request for a contested case hearing for the purpose of allowing the Board to consider the proposed settlement.

If the Board (or the Chairperson, following a delegation of authority by the Board) rejects any settlement, or if the Board approves a modified settlement agreement with terms that are not agreeable to Mr. Caris, then Mr. Caris's withdrawal will be nullified, and his request for a contested case hearing will remain in full force and effect.

Upon the Board's approval of an acceptable settlement (or the Chairperson's approval, if the Board delegates its authority to her), Mr. Caris will be deemed to have fully withdrawn his request for a contested case hearing.

- b. **OCCL Enforcement Action**—Upon the Board's approval of an acceptable settlement that resolves the State's enforcement action against Mr. Caris, the State agrees not to bring further enforcement actions against Mr. Caris solely with regards to the actions that are the subject of the underlying violations.

The parties understand and agree that nothing associated with the resolution of this enforcement process may be interpreted as authorization for any further "material alteration of the land." Any *future* work contemplated on the property—whether within the existing grading/ landscaping footprint or beyond—would still require full compliance with the State's established approval processes. In light of Mr. Caris's previous violations, no leniency will be afforded for any future violations.

7. Final Authority Rests with the Board of Land and Natural Resources.

All parties fully understand and agree that the settlement agreement is subject to approval by the Board of Land and Natural Resources. The Board is not required to follow the staff's recommendation and, in fact, may alter them in any way permitted by law prior to execution of any settlement agreement.

Mr. Caris has provided the following documentation in satisfaction of the first two paragraphs set forth above, which are attached for the Board's consideration:

Exhibit B—Declaration of Norman Caris (dated June 3, 2021)

Exhibit C—Declaration of Brian Hennessey (dated June 15, 2021)

Exhibit D—Schematic with Archaeological Sites Noted (Exhibit 1 to Declarations)

Exhibit E—As-Built Drainage Plan (Exhibit 2 to Declarations)

The proposed Settlement Agreement will also release any/all claims, fines, or assessments of any kind or nature by the State against Mr. Caris arising out of the alleged violations occurring on or about December 2013 regarding lands located in the Conservation District *Limited* and *General* Subzones—'Aliomanu Estates, Kawaihau District, Island of Kaua'i, TMK (4) 4-9-005:027.

CHAPTER 343 – ENVIRONMENTAL ASSESSMENT

Not applicable.

REMARKS

The OCCL believes that allowing the parties to execute a Settlement Agreement that incorporates the points above will satisfactorily accomplish its main objectives of fully remediating the property and providing significant compensation to the State in light of historical and legal complexities.

RECOMMENDATION: That the Board:

Delegate authority to the Chairperson to execute a Settlement Agreement that incorporates the settlement principles outlined above, subject to such other terms and

conditions as may be prescribed by the Chairperson to best serve the interests of the State, and review and approval by the Department of the Attorney General.

Respectfully Submitted,

S Michael Cain

Michael Cain, Planner
Office of Conservation and Coastal Lands

APPROVED FOR SUBMITTAL

Suzanne D. Case

Suzanne D. Case, Chairperson

ATTACHMENTS

- Exhibit A—Joint Letter to BLNR re No Action (12.21.2020)
- Exhibit B—Declaration of Norman Caris (May 11, 2021)
- Exhibit C—Declaration of Brian Hennessey (June 15, 2021)
- Exhibit D—Schematic with Archaeological Sites Noted (Exhibit 1 to Hennessey Decl.)
- Exhibit E—As-Built Drainage Plan (Exhibit 2 to Hennessey Decl.)

Approve and Delegate to Chairperson Authority to Execute Settlement Agreement with Mr. Norman Caris Relating to Use of Conservation District Lands at ‘Aliomanu Estates, Kawaihau, Kaua‘i, Under Board Action February 27, 2015, Item #K-1, Conservation District Enforcement Case (ENF) KA-14-58; Finding of Violation for Unauthorized (1) Construction of Erosion Control Structures, (2) Landscaping including grubbing and grading, and (3) Drainage Improvements Located in the Conservation District *Limited* and *General* Subzones, ‘Aliomanu Estates, Kawaihau District, Kaua‘i, TMK (4) 4-9-005:027.

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A Law Corporation

Bronster Fujichaku Robbins

ATTORNEYS AT LAW

December 21, 2020

Via Email and U.S. Mail
suzanne.case@hawaii.gov

Suzanne D. Case, Chairperson
Board of Land and Natural Resources
1151 Punchbowl Street, Room 130
Honolulu, Hawai'i 96813

Re: *Conservation District Enforcement Case (ENF) KA-14-58*
Hearing Date: February 27, 2015

Dear Madam Chair:

Our office, on behalf of Mr. Norman Caris, and the State of Hawai'i, through Deputy Attorney General Melissa Goldman, jointly request that the tribunal stay the selection of a hearings officer as the parties are currently in settlement discussions.

This matter has a long history with the department as summarized below:

11/5/2013:	OCCL's Notice of Violation
2014:	OCCL/SHPD Investigation
02/27/2015:	BLNR Meeting (Item K-1) – unanimously deferred
03/09/2015:	Caris CCH Petition submitted & rec'd by DLNR
03/27/2015:	BLNR Meeting (Item K-1) –unanimously approved delegation of authority to appoint a HO
02/08/2016:	Settlement Communication from Mr. Caris to State

08/24/2016: Settlement Communication from State to Mr. Caris

2016 (remainder): HO selection pending while parties engaged in settlement discussions [No settlement was ever reached; no hearings officer was ever appointed.]

09/2020: Case re-assigned; all parties with new counsel; Parties re-start settlement discussions

10/2020: Deputy AG Kathleen Ho assigned to act as counsel for the tribunal

11/2020: Parties agree to pursue settlement in the case and devise broad plan regarding next steps.

Early 2021: Significantly, an after-the-fact CDUP will be required as part of any settlement, and both parties have agreed to target early 2021 for their submission of the application to the BLNR.

We will immediately advise you should we reach an impasse in our efforts to reach a resolution.

We appreciate your understanding and patience. Please let us know if you have any questions. Thank you.

Very truly yours,

/s/ Lanson K. Kupau

Margery S. Bronster
Lanson K. Kupau

Attorneys for
NORMAN CARIS

/s/ Melissa D. Goldman

Melissa D. Goldman
William J. Wynhoff

Attorneys for
STATE OF HAWAI'I

cc via email: Norman Caris (ncaris@brileyco.com)
Bin Li (Bin.C.Li@hawaii.gov)
Sara Levins (Sara.d.Levins@hawaii.gov)
Kathy Ho (Kathleen.S.Ho@hawaii.gov)

DECLARATION OF NORMAN CARIS

STATE OF HAWAII)	
)	Conservation District Enforcement
COUNTY OF KAUAI)	Case (ENF) KA-14-58

1. I am the owner of property located at 5336 Aliomanu Estate Drive #12, Anahola, Hawai'i 96703.

2. Prior to construction of my residence in the 1990's, an archeological survey was conducted that identified three (3) sites on the *northern* portion of my property containing artifacts and cultural materials. The locations of the three sites are noted on Figure 13 on the 1995 "Interim Preservation Plan" that was prepared for my property.

3. Attached for your convenience is an updated and enhanced version of this aerial figure highlighting the specific locations of the archeological sites. The figure will be included in the report completed by Brian Hennessy, my Professional Land Surveyor and Professional Engineer, and concerning the extent of the work completed on the southern portion of the property.

4. As demonstrated in the attached figure, Features "A" and "B" were thought to contain remains of a single person along with a "cultural layer" possibly related to the burial site. To protect them, the remains were removed and reinterred under the State's supervision to a location *north* of where they were discovered. Feature "C" was an "adz" located mauka and upslope from the burial site. The adz was also moved *northward* prior to construction. As such, all previously identified artifacts and cultural materials remain *north* of the location of the residence that was built on my property.

5. In 2013, I hired contractors to reenforce the *southern* portion of my property to improve drainage and erosion. All of the drainage/erosion measures occurred on the *southern* portion of the property and did not impact any previously identified archeological sites *north* of the residence. As shown in the attached aerial image, the scope of the drainage/erosion measures did not extend past the southern edge of the residence and, therefore, could not have impacted the previously identified sites north of the residence.

6. I do declare under penalty of law that the foregoing statements are true and correct.

DATED: Anahola, Hawai'i, June 3, 2021.



NORMAN CARIS

Honua Engineering, Inc.
Ching Young Center Ste. C7
P.O. Box 851, Hanalei, Kauai, Hawaii 96714
PH: (808) 826-7256

Via Email and U.S. Mail
mbronster@bfrhawaii.com
lkupau@bfrhawaii.com

Ms. Margery Bronster
Mr. Lanson Kupau
Bronster Fujichaku Robbins
1003 Bishop Street, Suite 2300
Honolulu, Hawai'i 96813

Re: **REPORT OF BRIAN HENNESSY CONCERNING EXTENT OF
WORK AT THE CARIS PROPERTY (TMK (4) 4-9-005:027)**

Dear Ms. Bronster and Mr. Kupau:

Mr. Norman Caris retained my company's services, Honua Engineering, Inc., to complete the drainage/terrace construction that forms the basis of the violations against Mr. Caris from the State of Hawai'i. Please accept the following summary and attachments as the report requested by the State and pursuant to the terms of the settlement agreement between the State and Mr. Caris.

On September 6, 2013, Mr. Caris retained Honua Engineering to prepare items in respond to Notice of Violation from County of Kauai on the subject property. As noted in Exhibit "1" attached to this report, the extent of the work completed was strictly limited to the southern portion of the property. The boundaries of the work completed are identified by the red-dashed lines that demonstrate all work completed, which only impacted the portion of the parcel that is directly south of the single family residence.

It is my understanding that the State is concerned that the work completed may have impacted historical/archeological sites. I can report that myself and my employees surveyed the property and reviewed the Preservation and Monitoring plan that identified the three previously identified archeological/historical sites. I can assure you that the work we completed did not extend past the southern portion of the property. Therefore, in consideration of the fact that the only three archeological/historical sites were either located or moved to the northern portion of the property well before the terrace and drainage work was initiated, none of the work completed by my team was in the vicinity of the previously identified archeological/historical sites.

I have also attached as Exhibit "2" an "As-Built Grading and Drainage Plan" that includes the limit of the work area that had already been substantially completed when we began our oversight and includes the work completed to finish the work halted by the Notice of Violation. As illustrated on Exhibit "2", the portion of the property where the grading and drainage improvements were made did not extend past Mr. Caris' property lines.

Please let me know if your office will require any additional information on behalf of myself or Honua Engineering.

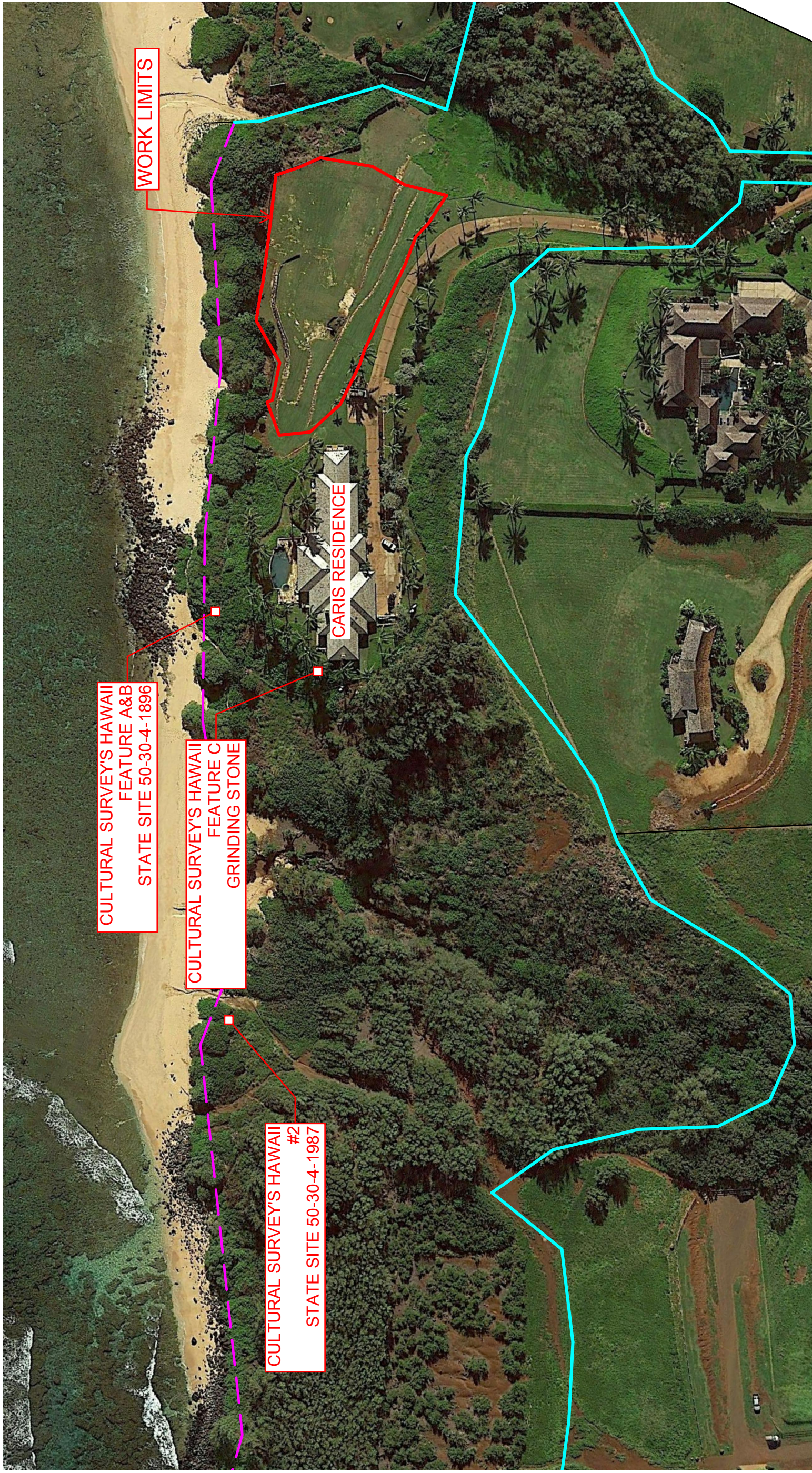
Thank you,

A handwritten signature in dark ink, appearing to read "B. Hennessey", written in a cursive style.

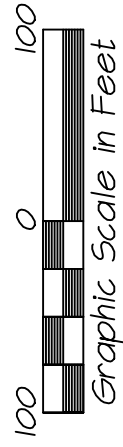
Brian Hennessey, PE, PLS

TRUE NORTH

Scale: 1 INCH = 100 FEET



Note:
Location's shown are approximate per
Cultural Survey's Hawaii, July 1992 AIS.



ARCHAEOLOGICAL SITES EXHIBIT
CARIS RESIDENCE
LOT 12
ALIOMANU ESTATES
(FILE PLAN 2023)
AT
PAPAA, KAWAIIHAU, KAUAI, HAWAII

PREPARED FOR:
NORMAN CARIS
P.O. BOX 542
ANAHOLA, HI.
MAY 11, 2021

Honua Engineering, Inc.
P.O. Box 851 Hanalei, HI 96714 (808) 826-7256

TMK:(4) 4-9-05:27

PROJECT NO. 0416-4

