

STATE OF HAWAI‘I
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS

Honolulu, Hawai‘i

December 7, 2023

Board of Land and Natural Resources
State of Hawai‘i
Honolulu, Hawai‘i

REGARDING: Request for Administrative Fines and Other Penalties Against Mr. Joshua H. VanEmmerik for Conservation District Enforcement Case OA 23-13 Regarding Construction of a Shoreline Erosion Control Device Located Makai of 59-147 A Ke Nui Road, Tax Map Key: (1) 5-9-002:002, and Makai of 59-147 Ke Nui Road, Tax Map Key: (1) 5-9-002:003

The Board may go into Executive Session pursuant to Section 92-5(a)(4), Hawai‘i Revised Statutes, in order to consult with its attorneys on questions and issues pertaining to the Board’s powers, duties, privileges, immunities, and liabilities.

AGAINST: Joshua H. VanEmmerik

LOCATION: Makai of 59-147 A Ke Nui Road; and Makai of 59-147 Ke Nui Road, Pūpūkea-Paumalū Beach Lots, Ko‘olauloa, O‘ahu, Tax Map Keys: (1) 5-9-002:002 and (1) 5-9-002:003 (Parcels 002 and 003)

LANDOWNER: State of Hawai‘i

SUBZONE: Resource

EXHIBITS:

1. Map
2. Emergency Permit OA-19-06 (August 13, 2018)
3. Notices of Alleged Noncompliance (October 28, 2021)
4. Enforcement OA 23-13 (September 30, 2022)
5. Settlement Agreement for Enforcement OA-23-13
6. Notice of Public Safety Concerns (October 20, 2023)
7. Notice of Alleged Unauthorized Work (November 6, 2023)
8. Photos
9. Rules and Statutes regarding the Conservation District

Summary

The Office of Conservation and Coastal Lands (OCCL) alleges that Mr. Joshua H. VanEmmerik, landowner of 59-147 A Ke Nui Road, Tax Map Key (TMK) parcel 5-9-002:002, and 59-147 Ke Nui Road, TMK parcel 5-9-002:003, conducted unauthorized land uses on State of Hawai'i land in the Resource Subzone of the State Land Use Conservation District fronting the subject parcels.

On September 30, 2022, the OCCL issued Mr. VanEmmerik a Notice of Alleged Violation letter (ref. ENF: OA 23-13) concerning the placement of small polypropylene sandbags over failed and expired temporary erosion control measures, the pouring of concrete over those bags and failed temporary erosion control measures, the construction of an unauthorized revetment in the shoreline area fronting Parcel 003, and the placement of rocks under the dwelling's foundation secured in place with rebar and cement.

OCCL entered into a Settlement Agreement with Mr. VanEmmerik, the terms of which included the removal of all alleged unauthorized structures. The materials were to be removed by September 30, 2023. On October 2, 2023, OCCL staff observed that most material had been removed from the shoreline area fronting Parcels 002 and 003, although debris, remnant cement pieces and geotextile materials were still found in the sand.

OCCL has evidence of unauthorized work being conducted in the shoreline area fronting Parcels 002 and 003 between October 28, 2023 and November 5, 2023. This unauthorized work included workers digging a trench fronting Parcels 002 and 003, laying geotextile tubes in the trench, mining sand from the beach to fill the tubes, and then covering the area with beach sand and a geotextile cloth (ENF: OA 23-13). On November 6, 2023, the OCCL issued an NOAV letter (ref. ENF: OA 23-13) to Mr. VanEmmerik regarding the unauthorized work. This more recent unauthorized activity is the subject of this enforcement action.

Description of Area

Sand and Swell Patterns

The subject area is on the North Shore of O'ahu. The beaches here are composed of carbonate coarse sand with occasional outcrops of limestone. The inland area is composed of fossiliferous limestone and unconsolidated sand. The beaches of the North Shore are highly dynamic. They are heavily influenced by a complex interplay of swells, wind, and tides transporting large amounts of sand both along the beach and on- and off-shore within a particular season (summer or winter) and over the course of the year. Even within a particular season or year, these coastal processes can more dramatically affect (by widening or narrowing/inflating or deflating) a particular area or stretch of beach along the North Shore.

Erosion hot spots in the region can vary from year to year, though over the long-term, the area fronting the subject parcels erodes at an average of 0.98 feet per year.

One significant coastal geological feature of the area is the large storm berm, which was built up during past high-wave events. Many single-family residences in this area have been built on top

of this berm, including at the subject parcel. This “high wave berm” has been degraded over the years by a combination of coastal erosion and coastal development.

Sunset Beach Park

In 1971, portions of the Government (Crown) Land of Pūpūkea were set aside as the Pūpūkea-Paumalū (Sunset) Park (Executive Order 02598). The EO placed Sunset Park, noted as TMK: (1) 5-9-001:038, under the control and management of the City and County of Honolulu, Department of Parks and Recreation. Based on numerous site visits to the area, the beach reserve and park fronting the subject parcels appears to have eroded.

Residential Development

Parcels 002 and 003 are residential lots with single-family residences. The parcels contain cesspools that the Department of Health has categorized as “priority level 1,” meaning that it has the greatest potential to impact human health and environmental quality. The Department of Health recommends that the cesspools be converted or decommissioned by 2030.¹ Previous cursory reviews of the website Airbnb.com indicates that Parcel 003, including the associated dwelling, has been used as transient vacation rentals.

Mitigation History

Sand Pushing

Between 2017-2019, two authorizations were given for sand pushing fronting Parcels 002 and 003.

Emergency Permit (Exhibit 2)

The erosion scarp eventually came within less than twenty feet from the residences on Parcels 002 and 003. On August 13, 2018, the previous landowner obtained Emergency Conservation District Use Permit (CDUP) OA 19-06 for the installation of a heavyweight geotextile fabric blanket that would overlie three sand filled tubes of the same geotextile fabric (also known as “burritos”). The Department authorized the structure for three years, during which time the permittee was to work on a long-term solution.

Alleged Unauthorized Land Uses in the Conservation District

Non-Compliance with Emergency CDUP OA 19-06 (Exhibit 3)

On August 13, 2021, Emergency CDUP OA 19-06 expired and the temporary erosion control structure and associated materials were to be removed from the shoreline area.

On October 28, 2021, the Chair of the Board issued the owners of Parcels 002 and 003 Notifications of Alleged Noncompliance regarding alleged noncompliance with the permit conditions of Emergency CDUP OA 19-06. The notifications noted that the structure was occupying State-owned lands without active authorization. The notifications requested a written

¹ See Hawai'i Cesspool Prioritization Tool, available at <https://seagrant.soest.Hawaii.edu/cesspools-tool/> (last visited Oct. 5, 2023)

report describing how the owners intended to correct the situation. The responses are included with Exhibit 3.

Enforcement OA 23-13 (Exhibit 4)

Ground and aerial surveys conducted on September 7 and September 20, 2022, revealed that the structures remained on State-owned and County managed land in a dilapidated condition, debris from torn geotextile bags were in the ocean, rocks appeared to have been placed at the base of the sandbags, and that the alleged unauthorized materials and structures were posing a nuisance in the shoreline as well as blocking lateral shoreline access.

On September 28, 2022, a site inspection revealed concrete, painted or adhesive-sprayed sand, rebar, unauthorized erosion control materials and debris in the shoreline area seaward of Parcels 002 and 003 on State land. Staff observed it appeared that small polypropylene bags had been placed over the failed and expired temporary erosion control measures. Staff also observed that concrete had been poured over the small polypropylene bags and failed and expired temporary erosion control measures. Additionally, it appeared rocks had been placed beneath the portion of the structure's foundation that had been previously exposed and undermined by erosion, and the rocks were secured in place with rebar and cement. Sand appeared to have been placed over the concrete, small polypropylene bags, failed erosion control measures, and Staff noted that it appeared that the sand had been sprayed with either paint or an adhesive.

On September 30, 2022, the Department issued an NOAV letter (ref. ENF: OA 23-13) for the above work.

On November 18, 2022, the OCCL entered into a Settlement Agreement with Mr. VanEmmerik, the terms of which included the removal of all alleged unauthorized structures as noted in the Notice of Alleged Violation (NOAV) letter. The materials were to be removed by September 30, 2023. On October 2, 2023, OCCL staff observed that most material had been removed from the shoreline area fronting Parcels 002 and 003, although remnant cement pieces and geotextile tubes were still found in the sand. This settlement agreement, and amendment, are included as **Exhibit 5**.

Public Safety Concerns (Exhibit 6)

On October 20, 2023, OCCL issued a letter (ref. CORR: OA 24-51) to Mr. VanEmmerik stating that it had recently been notified by the City and County Department of Planning and Permitting (DPP) that the residences located on Mr. VanEmmerik's two properties were at risk of failure. This appeared to be a dangerous situation to the safety of the public and to the coastal environment, given concerns that the structures were being undermined and at risk of falling onto the public beach. The OCCL encouraged Mr. VanEmmerik to work quickly with the DPP to relocate the two residences to a safe location. Mr. VanEmmerick's response is included with Exhibit 6.

Additional Unauthorized Work (Exhibit 7)

Between October 28, 2023 and November 5, 2023, OCCL received evidence that workers dug a trench fronting Parcels 002 and 003, laid what appeared to be geotextile tubes in the trench, mined sand from the beach to fill the tubes, and then covered the area with beach sand and a

geotextile cloth. Staff believes an unauthorized erosion control structure has been constructed in the shoreline area fronting Parcels 002 and 003.

On November 6, 2023, the Department issued an NOAV (ref. ENF: OA 23-13) for the above work.

Site Photos

Exhibit 8 contains a photo history of the subject area.

Conservation District Rules and Statutes

Exhibit 9 contains the relevant rules and statutes that will be cited in the discussion, findings, and recommendations.

Discussion

The beaches of Hawai'i are held in trust by the State for the benefit of present and future generations. The State should be consulted, and a land disposition obtained, when individuals seek to temporarily use beach areas for construction. There should be consequences when an individual unilaterally and willfully acts in such a way that endangers a public trust resource.

The beaches of O'ahu's north shore are some of the State's most valued natural resources. These beaches serve as an attraction which bring residents and visitors to the area who support community economic activities that are key for the north shore. The Paumalū to Pūpūkea stretch of beach is one of the more famous beaches in the area and is heavily utilized at all times of the year by the public, both residents and visitors alike.

Many of the shorefront homes in the area are built on the sand berm and are thus vulnerable to the effects of both chronic and seasonal coastal erosion. Coastal erosion occurs as a result of the following phenomena:

- (1) Seasonal changes in waves and currents that move sand alongshore or across the shore, adjusting the beach profile;
- (2) Long-term (chronic) deficiencies in natural sand supply and/or fluctuations in meteorological or oceanographic processes such as storms and sea level rise; and
- (3) Human impacts to sand availability through sand impoundment and supply disruption from development and coastal engineering.

During the last several years, beach erosion in this area appears to have intensified significantly. Although such erosion could be attributed to normal accretion and erosion cycles, it is more likely that the erosion has become a chronic and permanent result of acceleration in sea level rise this century. Over the past century, local tide gauges have measured approximately 0.5 ft of rise in sea levels among the islands such that it should be no surprise that resulting impacts are occurring.

Coastal armoring, such as seawalls and revetments, protect private land mauka of the armoring device while harming the public trust resources makai of the wall. Coastal armoring or shoreline hardening devices damage beaches by cutting the sand bank and impounding sand behind walls;

refracting waves and creating a high-energy environment that impedes sand accumulation; creating flanking that can increase adjacent erosion and damage neighboring properties; and impacting lateral transport thereby damaging downdrift beaches.

The Department has taken measures throughout the past two decades to address the progressively damaging chronic and seasonal erosion concerns in the greater Paumalū to Pūpūkea (Sunset) Beach area.

Sand pushing can be an effective but short-term measure to protect a property or infrastructure, provided that best management practices are followed and provided that there is a sufficient supply of dry sand in the area. The County Parks Department, for example, currently engages in seasonal sand pushing to shore up the sand around beach rights-of-way and lifeguard towers.

Due to unauthorized erosion control materials and debris in the shoreline area and continued long term trends of chronic and seasonal erosion limiting the amount of available sand, sand pushing is increasingly no longer a short-term option to mitigate the effects of continued coastal erosion and impacts of sea level rise in the subject area.

Conservation District rules allow the Chairperson to issue emergency permits when there is an imminent threat to public health, safety, or welfare. This has been an important tool for the Department when addressing emergencies from natural hazards. Between 2017 and 2020, the Department authorized approximately 35 temporary erosion control structures fronting approximately 50 properties in the Ko'olauloa and Waialua Districts on O'ahu.

The emergency authorizations that were issued by the Department were designed to allow landowners time to develop long-term plans to address the impacts of coastal erosion on their property. Few permit holders complied with permit conditions. With the absence of any long-range plan to address the impacts of coastal erosion and sea level rise, and with the most recent requests to reauthorize these structures, OCCL has concluded that these "temporary" structures appear to violate State policy and Coastal Zone Management rules against private shoreline hardening structures, as well as the Department's policy of not approving new private seawalls.

Staff admits that the situation is challenging for the homeowners, but the Department is also confronted by the lack of compliance and continued violations. Various OCCL staff site inspections of the subject area indicate the continued unauthorized installation of erosion control devices and the continued presence of the alleged unauthorized materials discussed in this report on State land.

Based on the present evidence, Mr. VanEmmerik did not obtain authorization for recent work in the shoreline area fronting Parcels 002 and 003. This alleged unauthorized work included the digging of a trench, laying geotextile tubes in the trench, mining sand from the beach to fill the tubes, and covering the area with beach sand and a geotextile cloth (ENF: OA 23-13). Based on previous correspondences with Mr. VanEmmerik, he is fully aware of the need to consult with the Department and obtain authorization(s) prior to conducting work in the shoreline area. He is also fully aware of the dangerous situation posed by the residences located on his two properties, and the need to work quickly with DPP to relocate the two residences to a safe location.

Staff is recommending that the Board issue the following fines and penalties allowed under its authority.

Findings and Conclusions

Based on the above-summarized information, OCCL staff have reached the following findings and conclusions regarding the alleged violation:

1. That Mr. VanEmmerik did in fact authorize, cause, or allow the digging of a trench, laying geotextile tubes in the trench, and covering the area with beach sand and a geotextile cloth within the State Land Use Conservation District, Resource Subzone;
2. The occupation of public land by the erosion control structure is without a land disposition;
3. That Mr. VanEmmerik performed unauthorized work after being given notification by the Department to stop all work on at least two (2) separate occasions: October 28, 2023 and November 5, 2023; and
4. That the unauthorized land uses, and unauthorized occupation of public land, occurred upon submerged public land that lies within the State Land Use Conservation District, Resource Subzone.

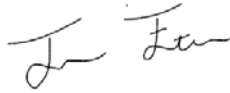
Staff Recommends

1. That the Board adopt the findings and conclusions set forth above and impose the following administrative fines:
 - a. Pursuant to Section 183C-7, HRS, Mr. VanEmmerik is fined \$15,000 for violating the provisions of Section 13-5-24, HAR, for digging a trench, laying geotextile tubes in the trench, mining sand from the beach to fill the tubes, and covering the area with beach sand and a geotextile cloth (ENF: OA 23-13) on land within the Conservation District Resource Subzone;
 - b. Pursuant to Section 183C-7, HRS, Mr. VanEmmerik is fined a total of \$30,000 for a total of two days (October 28, 2023, and November 5, 2023) of willful violation of this chapter after having received notification from the Department to stop all work;
 - c. Pursuant to Section 171-6(12), HRS, Mr. VanEmmerik may be fined up to \$1,000 per day for his failure to remove the encroachments upon public lands, accrual of such starting when he received notice on November 6, 2023, and therefore may total \$32,000;
 - d. Therefore, that the total fines and administrative costs that may be levied against Mr. VanEmmerik may be \$77,000, and that Mr. VanEmmerik shall pay all designated fines and administrative costs within ninety days from the date of the Board's action;
2. That the Board authorize the Department of the Attorney General to file a Notice of Pendency of Action with the deed or deed instrument of Parcel 005 at the Bureau of Conveyances pursuant to Sections 171-6.4(c), 501-151, and 634-51, HRS;

3. That Mr. VanEmmerik, or a future owner of Parcels 002 and 003, shall remove all unauthorized erosion control materials and encroachments by September 1, 2024;
4. That Mr. VanEmmerik shall restore the subject area to a more natural state and the Department's satisfaction by September 1, 2024;
5. That Mr. VanEmmerik, or a future owner of Parcels 002 and 003, shall remove or relocate the portions of the dwellings that are makai of the shoreline by September 1, 2024. That Mr. VanEmmerik, or a future owner of Parcels 002 and 003, shall ensure that removal or relocation of the dwellings or portions of the dwellings that are makai of the shoreline comply with applicable statutes, ordinances, rules, regulations, and conditions of the Federal, State, and County governments;
6. Regarding Recommendations 3-5, the Board authorizes the issuance of a right-of-entry permit to Mr. VanEmmerik, or a future owner of Parcels 002 and 003, covering the subject area for removal of the shoreline erosion control device under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
 - a. The standard terms and conditions of the most current right-of-entry permit form, as may be amended from time to time;
 - b. The right-of-entry shall expire on September 1, 2024, or upon completion of the project, whichever is sooner; and
 - c. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
7. That in the event Mr. VanEmmerik, or a future owner of Parcels 002 and 003, fails to restore the subject area to a more natural state and the Department's satisfaction by September 1, 2024, then Mr. VanEmmerik, or a future owner of Parcels 002 and 003, shall be liable for all costs of removal incurred by the State or local government(s);
8. That in the event of failure of Mr. VanEmmerik, or a future owner of Parcels 002 and 003, to comply with any order imposed in connection with this enforcement action, Mr. VanEmmerik shall be fined an additional \$16,000 per day, pursuant to Sections 171-6(12) and 183C-7, HRS, until the order is complied with;
9. That any extension of these deadlines will require the concurrence of the Board. Any request to extend these deadlines will require supportive information and documentation from Mr. VanEmmerik, or a future owner of Parcels 002 and 003, as to why an extension may be warranted. Any extension request regarding these deadlines must be submitted to the Department prior to the deadline or any authorized extension thereof;
10. That in the event of failure of Mr. VanEmmerik, or a future owner of Parcels 002 and 003, to comply with any order herein, this matter shall be turned over to the Attorney General for disposition, including all administrative costs;
11. That the Board delegate authority to the Chairperson to effectuate the above recommendations, subject to such conditions as may be prescribed by the Chairperson to best serve the interest of the State, without further consultation with the Board, and subject to review and approval by the Department of the Attorney General; and

12. The above noted conditions of Enforcement file OA 23-13 shall be recorded with the deed instrument by Mr. VanEmmerik at the Bureau of Conveyances pursuant to Section 13-5-6(e), HAR.

Respectfully submitted,



Trevor Fitzpatrick, Staff Planner
Office of Conservation and Coastal Lands

MC

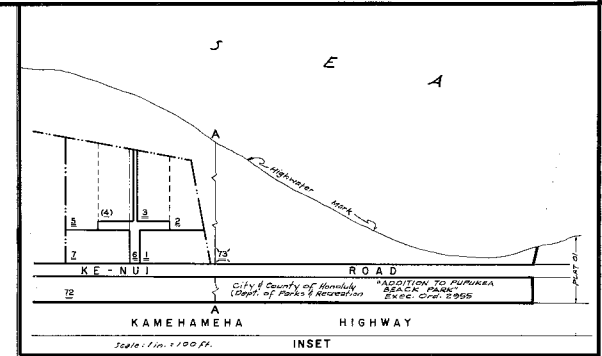
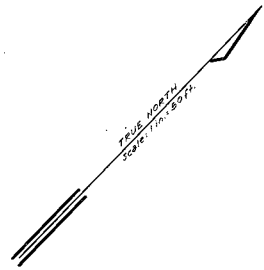
Approved for submittal:



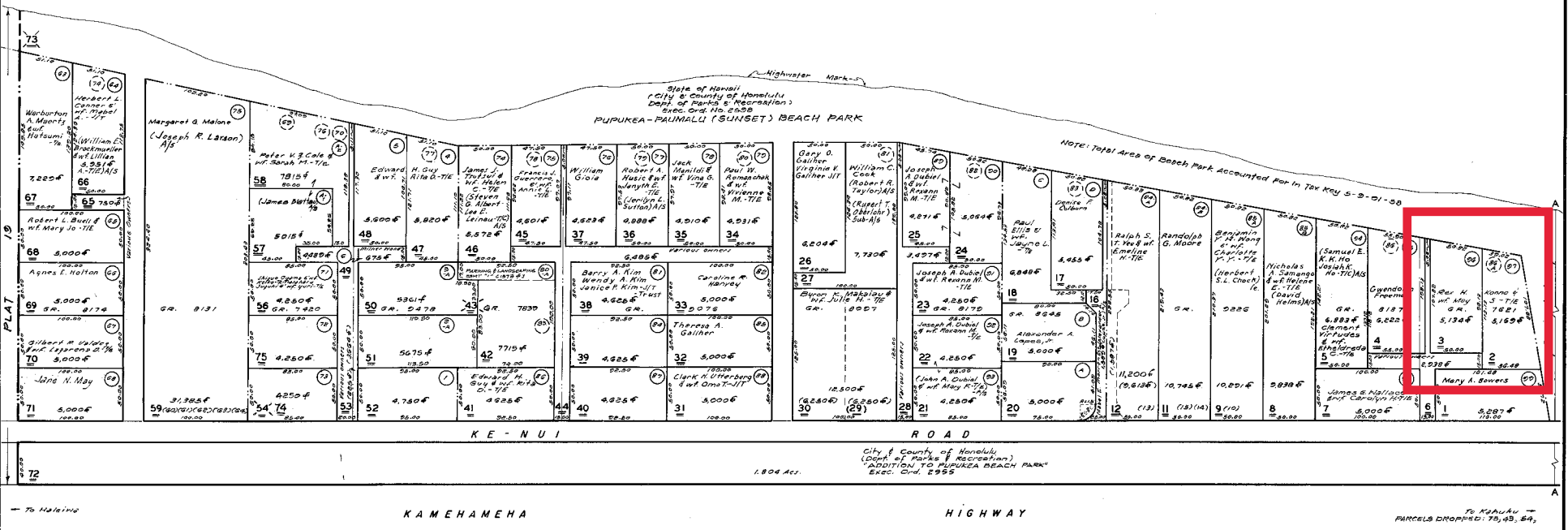
Dawn N. S. Chang, Chairperson
Board of Land and Natural Resources



Exhibit 1 - Location



DWG. NO. 1770 (Revised)
 SOURCE: Tax Maps Bureau
 BY: L.B. February 19, 1980



KAMEHAMEHA HIGHWAY

PLAT 13

To KAHUKU - PARCELS DROPPED: 78, 43, 84,

DEPARTMENT OF THE TAX COMMISSIONER
 TAXATION MAPS BUREAU
 STATE OF HAWAII
TAX MAP
 FIRS T DIVISION
 ZONE SEC. PLAT
5 9 02
 CONTAINING PARCELS
 SCALE: 1 IN. = 50 FT.

Por. PUPUKEA-PAUMALU BEACH LOTS, KOOLAULO, OAHU

SUBJECT TO CHANGE

Exhibit 1 - Location

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

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

ROBERT K. MASUDA
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

DLNR:OCCL:SH

Emergency CDUA OA-19-06

Mark Ticconi
Gundaker Works, LLC.
931 University Ave. Suite #304
Honolulu, HI 96826

AUG 13 2018

SUBJECT: Emergency Response to Shoreline Erosion Located at Sunset Beach, North Shore of Oahu Tax Map Key: (1) 5-9-002:003

Dear Mr. Ticconi,

The Department of Land and Natural Resources (DLNR) received your July 31, 2018 request to utilize temporary emergency erosion control measures (geotextile fabric erosion control blankets) along the beach at Sunset Beach, North Shore, Oahu.

Recent seasonal wave and current action has resulted in erosion of the shoreline fronting the subject property creating a safety hazard for a single family residence. The erosion appears to be within ten feet or less from the residence and appears to be advancing.

The DLNR understands that the proposed work will occur on State land, seaward of where the shoreline would likely be determined based on HAR §13-5-222, Shoreline Certifications. A heavyweight geotextile fabric blanket will be installed fronting the subject property in response to the erosion. The blanket overlies sand filled tubes constructed of the same geotextile fabric. The blanket and tubes are staked in place with three-foot long wooded spikes. Sand will be used from the beach fronting the properties to fill the fabric tubes and to create an even slope behind the material. The structure will be constructed by hand.

The DLNR authorizes the temporary emergency erosion control measures as described above for three (3) years along the shorefront of the subject property in an effort to protect public health, welfare, and safety on the subject property under Hawaii Administrative Rules (HAR) §13-5-35, *Emergency Permits (a)* "Notwithstanding any provision of this chapter, the chairperson or deputy director of the department in the absence of the chairperson may authorize through an emergency permit any land use deemed to be essential to alleviate any emergency that is a threat to public health, safety, and welfare, including natural resources, and for any land use that is imminently threatened by natural hazards, These actions shall be temporary in nature to the extent that the threat to public health, safety, and welfare, including natural resources, is alleviated (e.g., erosion control, rockfall mitigation). The emergency action

shall include contingencies for removal methods, estimates for duration of the activity, and future response plans if required by the department.”

In addition, the temporary structure may be considered an exempt action under State environmental laws under HAR §11-200-8 and as provided in the approved Exemption List for the DLNR, *Exemption Class 1: 1. Mitigation of any hazardous conditions that present imminent danger as determined by the Department Director and that are necessary to protect public health, safety, welfare, or public trust resources; and 2. Upon determination by the Department Director that an emergency exists, emergency mitigation and restoration work to prevent damage from continuing to occur and to restore the topographical features and biological resources.* The Office of Conservation and Coastal Lands consulted with the Land Division, who has concurred with the EA exemption for the proposed project.

The temporary erosion control structure is intended to provide temporary mitigation of the erosion problem and reduce hazards to the subject property. If the subject structure results in adverse flanking of adjacent properties, the DLNR may require you to remove the structure immediately. Any materials that become liberated from the structure must be immediately removed from the beach or ocean. Further it is critical that the property owners maintain lateral shoreline access through the area if the proposed work in any way interferes with lateral public shoreline access. Please review the following Terms and Conditions carefully.

The DLNR is aware of plant material and cement and rock wall structures that have fallen from the property and are now strewn along the beach and nearshore. This authorization is contingent upon the landowner removing and properly disposing of this debris, in addition to any other derelict material that is emanating from the property.

Terms and Conditions

The DLNR authorizes the Emergency Temporary Shoreline Protection as described above fronting the subject property, at TMK (1) 5-9-002:003 provided that you adhere to the following Terms and Conditions:

1. It is understood that the Emergency Temporary Shoreline Protection is a temporary response to address a safety hazard to the existing residence on the subject property, which is threatened by both chronic and seasonal beach erosion. **The material is authorized as a temporary erosion control measure for three (3) years** from the date of issuance of this letter. Subsequent erosion control efforts that call for modification, other than maintenance of the proposed structure will require a new application. At the end of the authorization period, the materials shall be removed;
2. If the subject structure results in adverse flanking of adjacent properties, the DLNR may require you to remove the structure immediately. Any materials that become liberated from the structure must be immediately removed from the beach or ocean;
3. The permittee shall remove debris that has been strewn along the beach and nearshore, and any other derelict structures or materials emanating from the property, and dispose of them immediately;
4. The permittee shall comply with all applicable statutes, ordinances, rules, and regulations of the federal, state, and county governments, and applicable parts of this chapter;

5. The permittee shall contact the City and County of Honolulu, Department of Parks and Recreation to secure their authorization to work on the beach;
6. The permittee will submit a completion report for the project to the OCCL within ninety (90) days of completion of construction of the temporary structure. It will summarize the construction and detail any deviation from the proposed plans and provide a summary of the beach conditions since installation. The report will also include a photo summary of the temporary structure and beach conditions with documentation of any alterations or repairs;
7. The permittee, its successors and assigns, shall indemnify and hold the State of Hawaii harmless from and against any loss, liability, claim, or demand for property damage, personal injury, and death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors, and agents under this permit or relating to or connected with the granting of this permit;
8. Unless otherwise authorized, any work or construction to be done on the land shall be completed within 180 days of the approval of such use. The permittee shall notify the department in writing at least 24 hours prior to initiating construction and when it is completed, except that the permittee shall call the OCCL (587-0377) and arrange for a site inspection when work is initiated;
9. Work shall be conducted at low tide to the most practical extent possible and no work shall occur during high surf or ocean conditions that will create unsafe work or beach conditions;
10. Authorization of the sand use and placement is contingent upon review and approval of the sand by the Department. The sand shall meet the following State quality standards:
 - a. The proposed fill sand shall not contain more than six (6) percent fines, defined as the #200 sieve (0.074 mm);
 - b. The proposed beach fill sand shall not contain more than ten (10) percent coarse sediment, defined as the #4 sieve (4.76 mm) and shall be screened to remove any non-beach compatible material and rubble;
 - c. No more than 50 (fifty) percent of the fill sand shall have a grain diameter less than 0.125 mm as measured by #120 Standard Sieve Mesh;
 - d. Beach fill shall be dominantly composed of naturally occurring carbonate beach or dune sand. Crushed limestone or other man made or non-carbonate sands are unacceptable;
11. Appropriate safety and notification procedures shall be carried out. This shall include high visibility safety fencing, tape or barriers to keep people away from the active construction site and a notification to the public informing them of the project. All barriers shall be removed once the project is complete to allow full public access laterally along the beach and alongshore walkway;
12. The applicant shall implement standard Best Management Practices (BMPs), including the ability to contain and minimize silt in nearshore waters and clean up fuel; fluid or oil spills immediately for projects authorized by this letter. Equipment must not be refueled in the shoreline area. If visible petroleum, persistent turbidity or other unusual substances are observed in the water as a result of the proposed operation, all work must cease immediately to ascertain the source of the substance;
13. All placed material shall be free of contaminants of any kind including: excessive silt, sludge, anoxic or decaying organic matter, turbidity, temperature or abnormal water

- chemistry, clay, dirt, organic material, oil, floating debris, grease or foam or any other pollutant that would produce an undesirable condition to the beach or water quality;
14. The permittee understands and agrees that the permit does not convey any vested right(s) or exclusive privilege;
 15. Transfer of ownership of the subject property includes the responsibility of the new owner to adhere to the terms and conditions of this authorization;
 16. In issuing the permit, the Department and the Chairperson have relied on the information and data that the permittee has provided in connection with the permit application. If, subsequent to the issuance of the permit such information and data prove to be false, incomplete, or inaccurate, this permit may be modified, suspended, or revoked, in whole or in part, and the department may, in addition, institute appropriate legal proceedings;
 17. Where any interference, nuisance, or harm may be caused, or hazard established by the use, the permittee shall be required to take measures to minimize or eliminate the interference, nuisance, harm, or hazard;
 18. Obstruction of public roads, trails, lateral shoreline access, and pathways shall be avoided or minimized. If obstruction is unavoidable, the permittee shall provide alternative roads, trails, lateral beach access, or pathways acceptable to the Department;
 19. For all landscaped areas, landscaping and irrigation shall be contained and maintained within the property, and shall under no circumstances extend seaward of the shoreline as defined in Hawaii Revised Statutes (HRS) §205A-1;
 20. The activity shall not adversely affect a federally listed threatened or endangered species or a species proposed for such designation, or destroy or adversely modify its designated critical habitat;
 21. The activity shall not substantially disrupt the movement of those species of aquatic life indigenous to the area, including those species, which normally migrate through the area;
 22. No contamination of the marine or coastal environment (trash or debris) shall result from project-related activities authorized under this letter;
 23. Artificial light from exterior lighting fixtures, including but not limited to floodlights, uplights, or spotlights used for decorative or aesthetic purposes, shall be prohibited if the light directly illuminates or is directed to project across property boundaries toward the shoreline and ocean waters, except as may be permitted pursuant to HRS §205A-71. All exterior lighting shall be shielded to protect the night sky;
 24. The permittee acknowledges that the approved work shall not hamper, impede, or otherwise limit the exercise of traditional, customary, or religious practices are provided for by the Constitution of the State of Hawaii, and by Hawaii statutory and case law;
 25. Should historic remains such as artifacts, burials or concentration of charcoal be encountered during construction activities, work shall cease immediately in the vicinity of the find, and the find shall be protected from further damage. The contractor shall immediately contact the State Historic Preservation Division (692-8015), which will assess the significance of the find and recommend an appropriate mitigation measure, if necessary;
 26. The DLNR reserves the right to impose additional terms and conditions on projects authorized under this letter, if it deems them necessary;
 27. Failure to comply with any of these conditions shall render a permit void under the chapter, as determined by the Chairperson or BLNR.

Should you have any questions pertaining to this letter, please contact the Office of Conservation and Coastal Lands at (808) 587-0377.

Sincerely,



SUZANNE D. CASE, CHAIRPERSON
DEPARTMENT OF LAND AND NATURAL RESOURCES

CC: City and County of Honolulu
Department of Planning and Permitting
Parks and Recreation
DOCARE (Oahu)

I concur with the conditions of this letter:

Applicant

Date _____

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

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

ROBERT K. MASUDA
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

DLNR:OCCL:SH

RE: Emergency CDUA OA-19-06

Mark Ticconi
Gundaker Works, LLC.
931 University Ave. Suite #304
Honolulu, HI 96826

AUG 29 2018

SUBJECT: Correction Regarding Emergency Response to Shoreline Erosion Located at
Sunset Beach, North Shore of Oahu Tax Map Key: (1) 5-9-002:003

Dear Mr. Ticconi,

The Department of Land and Natural Resources (DLNR) is in receipt of your August 7, 2018 request to utilize temporary emergency erosion control measures (geotextile fabric erosion control blankets) along the beach at Sunset Beach, North Shore, Oahu fronting TMKs (1) 5-9-002:002 and 003.

We understand that your August 7, 2018 request serves as a correction to the original request received by DLNR on July 31, 2018 regarding erosion control measures for a single property located at TMK (1) 5-9-002:003. We understand that you had intended to request erosion control measures for an additional property located at TMK (1) 5-9-002:002, which is owned by the same party (Sunset Beach Lot 97 Land Trust & Residuary Trust). This letter serves as a correction to the response by DLNR sent August 13, 2018 (DLNR Ref: Emergency CDUA OA-19-06) such that the original authorization pertains to properties located at TMKs (1) 5-9-002:002 and 003. This authorization is subject to all the terms and conditions of the original authorization (OA-19-06).

Should you have any questions pertaining to this letter, please contact the Office of Conservation and Coastal Lands at (808) 587-0377.

Sincerely,

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

SAMUEL J. LEMMO, ADMINISTRATOR
OFFICE OF CONSERVATION AND COASTAL LANDS

RE: Emergency CDUA OA-19-06

CC: City and County of Honolulu
Department of Planning and Permitting
Parks and Recreation
DOCARE (Oahu)
Sunset Beach Lot 97 Land Trust & Residuary Trust

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

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AQUATIC RESOURCES
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LAND
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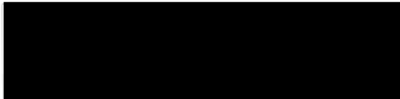
VIA CERTIFIED MAIL/RETURN RECEIPT REQUESTED
7020 2450 0000 0357 8214

Ref: Emergency CDUP OA 19-06

NOTIFICATION OF ALLEGED NONCOMPLIANCE

OCT 29 2021

Sunset Beach Lot 97 Land Trust, Residuary Trust



SUBJECT: Alleged noncompliance with permit conditions
Emergency Conservation District Use Permit (CDUP) OA 19-06
59-147A Ke Nui Road, Sunset Beach, Hale'iwa, O'ahu;
Makai of Tax Map Key parcel: (1) 5-9-002:002

Dear Landowner:

NOTICE IS HEREBY GIVEN that your Emergency Conservation District Use Permit (CDUP) OA 19-06 no longer complies with its original terms and conditions.

1. On August 13, 2018 the Chair of the Board of Land and Natural Resources approved Emergency CDUP OA 19-06 for the parcel for a temporary erosion control measure fronting the subject property. The permit allowed for the placement of geotextile fabric erosion control tubes that would be filled with sand from the beach area fronting the subject property, and subsequently covered with another layer of geotextile fabric erosion control blankets;
2. The structure extends seaward of the erosion scarp fronting the subject property, and was determined to be on State-owned submerged land;
3. Condition 1 of the permit reads: *It is understood that the Emergency Temporary Shoreline Protection is a temporary response to address a safety hazard to the existing residence on the subject property, which is threatened by both chronic and seasonal beach erosion. The material is authorized as a temporary erosion control measure for **three (3) years** from the date of issuance of this letter. Subsequent erosion control efforts that call for modification, other than maintenance of the proposed structure will require a new application. At the end of the authorization period, the materials shall be removed;*
4. The authorizations granted under Emergency CDUP OA 19-06 expired on August 13, 2021;

5. Condition 5 of the permit reads: *The permittee shall contact the City & County of Honolulu, Department of Parks and Recreation to secure their authorization to work on the beach;*
6. Our office has no record of a Right of Entry Permit or land disposition being obtained to perform the work on State land that was authorized under Emergency CDUP OA 19-6;
7. OCCL staff conducted a site visit on August 15, 2021, and observed that the temporary erosion control structure remained in place despite a lack of authorization to exist on State Land pursuant to the Terms and Conditions of Emergency CDUP OA 19-6 (**Figure 1, below**);
8. Condition 6 of the permit reads: *The permittee will submit a completion report for the project to the OCCL within ninety (90) days of the completion of construction of the temporary structure. It will summarize the construction and detail any deviation from the proposed plans and provide a summary of the beach conditions since installation. The report will also include a photo summary of the temporary structure and beach conditions with documentation of any alterations or repairs;*
9. Our records indicate that no completion report was received for the work performed on State land that was approved in Emergency CDUP OA 19-6;
10. Condition 15 of the permit reads: *Transfer of ownership of the subject property includes the responsibility of the new owner to adhere to the terms and conditions of this authorization;*
11. Condition 27 of the permit reads: *Failure to comply with any of these conditions shall render a permit void under the chapter, as determined by the Chairperson or BLNR.*

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Figure 1: Aerial Image of Subject Property, Taken August 15, 2021

DISCUSSION

Based upon the above, it appears that the subject erosion control structure no longer complies with the terms and conditions of Emergency CDUP OA 19-06, namely expiration of the permit on August 13, 2021 and the lack of proof of authorization to utilize State-owned lands. Upon expiration the structure was to have been removed per Condition 1 of the permit.

Further, the emergency situation for which the structure was originally authorized has existed over an extended period of time and appears likely to continue over an indefinite timeframe such that we now consider the situation an unmanaged hazardous condition. If you apply for a new emergency authorization, you will be required to demonstrate that a concerted effort is being undertaken to develop and implement a long-term solution which will enable removal of the temporary erosion control measures.

For the purposes of such a requirement, "concerted effort" shall mean a bona fide planning effort involving the employment of professional planners, engineers, or consultants to develop and implement a long-term solution whether it involves relocation or abandonment, beach restoration, or some other form of shoreline management. A surety bond or other legal or financial assurance may also be required as part of any potential authorizations for a time extension to guarantee removal of temporary uses at the expiration of any permitted time extension that may be authorized.

To summarize, Emergency CDUP OA 19-6 was contingent on the permittee abiding by all facets of its Terms and Conditions, which included obtaining proper authorization to work in and place the structure within State-owned lands in the shoreline area. Our office has no evidence of a Right of Entry Permit or land disposition being obtained for the subject erosion control structure despite its continued existence, rendering the

authorization in Emergency CDUP OA 19-6 void pursuant to Condition 27, as stated above.

Please provide this office with a written report which describes how you intend to correct the situation. The report should be submitted to DLNR's Office of Conservation and Coastal Lands (OCCL) within thirty (30) days of the date of this letter. The report shall describe the steps that will be taken moving forward to bring the subject structure into compliance.

Failure to act promptly on these matters may result in this matter being forwarded to the Board of Land and Natural Resources for formal enforcement action.

Please submit all responses and reports in writing to Salvatore Saluga at salvatore.j.saluga@hawaii.gov. Please note that any information provided may be used in civil proceedings.

Sincerely,



SUZANNE D. CASE Chair
Board of Land and Natural Resources

Copy: DLNR Land Division, O'ahu Office
C&C Honolulu: Dept. Planning & Permitting
Dept. Parks & Recreation
DOCARE
Gundaker Works, LLC, c/o Mark Ticconi

attachment: Emergency CDUP OA 19-6
Correction Letter re: Emerg. CDUP OA 19-6

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
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FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

VIA CERTIFIED MAIL/RETURN RECEIPT REQUESTED

Ref: Emergency CDUP OA 19-06

NOTIFICATION OF ALLEGED NONCOMPLIANCE

OCT 28 2021

Sunset Beach Lot 96 Land Trust

SUBJECT: Alleged noncompliance with permit conditions
Emergency Conservation District Use Permit (CDUP) OA 19-06
59-147 Ke Nui Road, Sunset Beach, Hale'iwa, O'ahu;
Makai of Tax Map Key parcel: (1) 5-9-002:003

Dear Landowner:

NOTICE IS HEREBY GIVEN that your Emergency Conservation District Use Permit (CDUP) OA 19-06 no longer complies with its original terms and conditions.

1. On August 13, 2018 the Chair of the Board of Land and Natural Resources approved Emergency CDUP OA 19-06 for the parcel for a temporary erosion control measure fronting the subject property. The permit allowed for the placement of geotextile fabric erosion control tubes that would be filled with sand from the beach area fronting the subject property, and subsequently covered with another layer of geotextile fabric erosion control blankets;
2. The structure extends seaward of the erosion scarp fronting the subject property, and was determined to be on State-owned submerged land;
3. Condition 1 of the permit reads: *It is understood that the Emergency Temporary Shoreline Protection is a temporary response to address a safety hazard to the existing residence on the subject property, which is threatened by both chronic and seasonal beach erosion. The material is authorized as a temporary erosion control measure for **three (3) years** from the date of issuance of this letter. Subsequent erosion control efforts that call for modification, other than maintenance of the proposed structure will require a new application. At the end of the authorization period, the materials shall be removed;*
4. The authorizations granted under Emergency CDUP OA 19-06 expired on August 13, 2021;

5. Condition 5 of the permit reads: *The permittee shall contact the City & County of Honolulu, Department of Parks and Recreation to secure their authorization to work on the beach;*
6. Our office has no record of a Right of Entry Permit or land disposition being obtained to perform the work on State land that was authorized under Emergency CDUP OA 19-6;
7. OCCL staff conducted a site visit on August 15, 2021, and observed that the temporary erosion control structure remained in place despite a lack of authorization to exist on State Land pursuant to the Terms and Conditions of Emergency CDUP OA 19-6 (**Figure 1, below**);
8. Condition 6 of the permit reads: *The permittee will submit a completion report for the project to the OCCL within ninety (90) days of the completion of construction of the temporary structure. It will summarize the construction and detail any deviation from the proposed plans and provide a summary of the beach conditions since installation. The report will also include a photo summary of the temporary structure and beach conditions with documentation of any alterations or repairs;*
9. Our records indicate that no completion report was received for the work performed on State land that was approved in Emergency CDUP OA 19-6;
10. Condition 15 of the permit reads: *Transfer of ownership of the subject property includes the responsibility of the new owner to adhere to the terms and conditions of this authorization;*
11. Condition 27 of the permit reads: *Failure to comply with any of these conditions shall render a permit void under the chapter, as determined by the Chairperson or BLNR.*

[the rest of this page intentionally left blank]



Figure 1: Aerial Image of Subject Property, Taken August 15, 2021

DISCUSSION

Based upon the above, it appears that the subject erosion control structure no longer complies with the terms and conditions of Emergency CDUP OA 19-06, namely expiration of the permit on August 13, 2021 and the lack of proof of authorization to utilize State-owned lands. Upon expiration the structure was to have been removed per Condition 1 of the permit.

Further, the emergency situation for which the structure was originally authorized has existed over an extended period of time and appears likely to continue over an indefinite timeframe such that we now consider the situation an unmanaged hazardous condition. If you apply for a new emergency authorization, you will be required to demonstrate that a concerted effort is being undertaken to develop and implement a long-term solution which will enable removal of the temporary erosion control measures.

For the purposes of such a requirement, "concerted effort" shall mean a bona fide planning effort involving the employment of professional planners, engineers, or consultants to develop and implement a long-term solution whether it involves relocation or abandonment, beach restoration, or some other form of shoreline management. A surety bond or other legal or financial assurance may also be required as part of any potential authorizations for a time extension to guarantee removal of temporary uses at the expiration of any permitted time extension that may be authorized.

To summarize, Emergency CDUP OA 19-6 was contingent on the permittee abiding by all facets of its Terms and Conditions, which included obtaining proper authorization to work in and place the structure within State-owned lands in the shoreline area. Our office has no evidence of a Right of Entry Permit or land disposition being obtained for the subject erosion control structure despite its continued existence, rendering the

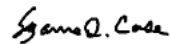
authorization in Emergency CDUP OA 19-6 void pursuant to Condition 27, as stated above.

Please provide this office with a written report which describes how you intend to correct the situation. The report should be submitted to DLNR's Office of Conservation and Coastal Lands (OCCL) within thirty (30) days of the date of this letter. The report shall describe the steps that will be taken moving forward to bring the subject structure into compliance.

Failure to act promptly on these matters may result in this matter being forwarded to the Board of Land and Natural Resources for formal enforcement action.

Please submit all responses and reports in writing to Salvatore Saluga at salvatore.j.saluga@hawaii.gov. Please note that any information provided may be used in civil proceedings.

Sincerely,



SUZANNE D. CASE Chair
Board of Land and Natural Resources

Copy: DLNR Land Division, O'ahu Office
C&C Honolulu: Dept. Planning & Permitting
Dept. Parks & Recreation

DOCARE
Gundaker Works, LLC, c/o Mark Ticconi
Residuary Trust, [REDACTED]

attachment: Emergency CDUP OA 19-6
Correction Letter re: Emerg. CDUP OA 19-6

Mālama ‘Āina Consulting

7130 Kukii St • Honolulu, HI 96825
malamaainaconsulting@gmail.com
Phone: (808) 348-7192
Oahu, Maui, Kauai, & Hawaii

November 26, 2021

Salvatore Saluga
Department of Land and Natural Resources
DLNR Office of Conservation and Coastal Lands (OCCL)

Sunset Beach Lot 96 & 97

59-147, 147A Ke Nui Rd
Haleiwa, HI 96712

Subject: Notification of Alleged Noncompliance

Address: 59-147, 147A Ke Nui Rd, Haleiwa, HI 96712
TMK: (1) 5-9-002:002, 003

Aloha,

This letter is a response to the notification of the alleged non-compliance with the temporary erosion control permit issued: Emergency CDUP OA 19-06.

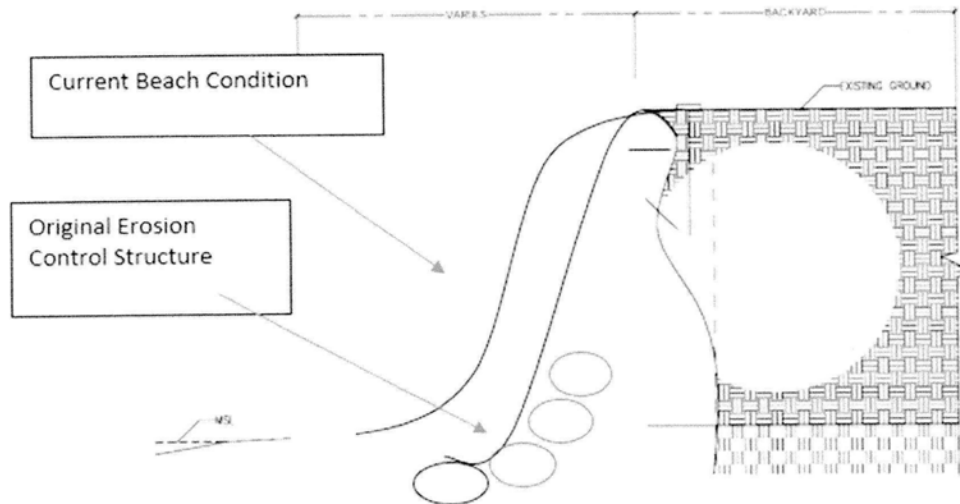
This letter is to inform the Department of Planning and Permitting, Land Use Approval Branch (LUAB), of the state of emergency for the properties from 59-161 Ke Nui Road. On October 16th, 2021 the erosion scarp was less than one foot from the home and needs to remain in place to prevent further loss of land and create immediate flanking issues to neighboring properties. The erosion has removed earth to where the scarp is dangerously close to impacting the structural integrity of the property dwelling. [REDACTED] is worried about losing his home on North Shore.

[REDACTED] has engaged a team of coastal engineers and consultants to work with himself and the neighbors to develop a long-term solution to the erosion fronting his property.

Erosion Control – 59-147, 147A Ke Nui Rd.

1

The Image below is a depiction of the current structure installed in front of 59-147, 147A Ke Nui Rd



The Structure is entirely composed of non-woven geotextile materials that have been approved by the DLNR for temporary erosion control measures at various installations around the island in public and private projects.

Please note, as this is a temporary solution, we have suggested that the homeowners file for a Shoreline Setback Variance to construct a Reinforced Concrete Seawall. This would prevent any loss of property or the endangerment of lives due structural erosion, thereby providing a long-term solution to the problem at hand.

If there is anything else we need to provide, please let us know.

Sincerely,

Mark Ticconi, Director of Operations

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
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M. KALEO MANUEL
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ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

REF: OCCL: TF

ENF: OA 23-13

NOTICE OF ALLEGED VIOLATION

Sep 30, 2022

CERTIFIED MAIL / RETURN RECEIPT

7020 2450 0000 0357 8467

Joshua H. VanEmmerik



SUBJECT: Alleged Unauthorized Land Use Within the Conservation District
Located at 59-147 & 59-147 A Ke Nui Road
Por. Pupukea-Paumalu Beach Lots, Koolauloa, Oahu
Tax Map Keys (TMKs): (1) 5-9-002:002 & (1) 5-9-002:003 (seaward)

Dear Mr. VanEmmerik:

It has come to the attention of the Department of Land and Natural Resources (DLNR) Office of Conservation and Coastal Lands' (OCCL) attention that there appears to be unauthorized materials within the Conservation District fronting the locations listed above.

On August 13, 2018, the Chair of the Board of Land and Natural Resources (BLNR) approved Emergency CDUP OA 19-06 for the placement of temporary erosion control measures fronting the subject properties. The permit allowed for the placement of geotextile fabric erosion control tubes that would be filled with sand from the beach area fronting the subject properties, and subsequently covered with another layer of geotextile fabric erosion control blankets. The material was authorized as a temporary erosion control measure for three (3) years from the date of issuance of the letter. The authorizations granted under Emergency CDUP OA 19-06 expired on August 13, 2021.

On October 28, 2021, the Chair of the BLNR issued the landowner(s) of the subject parcels a NOTIFICATION OF ALLEGED NONCOMPLIANCE regarding alleged noncompliance with the permit conditions of Emergency CDUP OA 19-06. The notification noted that the structure was occupying State-owned lands without active authorization. The notification requested a written report describing how the landowner(s) intended to correct the situation. To date, it appears that the OCCL has not received a response or report. See *Exhibit 1*.

Ground and aerial surveys conducted on September 7 and September 20, 2022, revealed that the structures remained on State-owned and County managed land in a dilapidated condition, debris from torn geotextile bags were in the ocean, rocks appeared to have been placed at the base of the sandbags, and that the alleged unauthorized materials and structures were posing a nuisance as well as blocking lateral shoreline access. Photos from the survey are attached as *Exhibit 2*.

September 28, 2022 – Alleged Unauthorized Activity

A site inspection on September 28, 2022, revealed concrete, painted or adhesive-sprayed sand, rebar, unauthorized erosion control materials and debris in the shoreline area seaward of TMKs: (1) 5-9-002:002 & (1) 5-9-002:003 on State land. Staff observed it appeared that small polypropylene bags had been placed over the failed temporary erosion control measures. Staff also observed that concrete had been poured over the small polypropylene bags and failed temporary erosion control measures. Additionally, it appeared rocks had been placed beneath the portion of the structure's foundation that had been previously exposed and undermined by erosion, and the rocks were secured in place with rebar and cement. Sand appears to have been placed over the concrete, small polypropylene bags, failed erosion control measures, and Staff notes that it appears that the sand had been sprayed with either paint or an adhesive. Photos of the alleged unauthorized materials and encroachments on State-owned and County-managed lands are attached. See ***Exhibit 3***.

According to OCCL files, there are no authorizations for these land uses. Pursuant to Hawaii Administrative Rules (HAR) §13-5-2, "land use" is defined as (1) the placement or erection of any solid material on land if that material remains on the land more than thirty days, or which causes a permanent change in the land area on which it occurs; (2) the grading, removing, harvesting, dredging, mining, or extraction of any material or natural resource on land; (3) the subdivision of land; or (4) the construction, reconstruction, demolition, or alteration of any structure, building, or facility on land. Additionally, pursuant to HAR §13-5-2, the "Shoreline" is defined as 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 wash of the waves, or as otherwise defined in section 205A-1, Hawaii Revised Statutes (HRS)". Lands makai of the shoreline are under the jurisdiction of the State of Hawaii DLNR.

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

The Department of Land and Natural Resources (DLNR) has reason to believe that:

1. The concrete, painted or adhesive-sprayed sand, rebar, unauthorized erosion control materials and debris has been placed seaward of TMKs: (1) 5-9-002:002 and 003 and located within the State Land Use Conservation District, Resource Subzone;
2. Pursuant to §13-5-22 P-15 (D-1), HAR, "Shoreline Erosion Control " is a regulated land use as stated below:
 - a. *Seawall, revetment, groin, or other coastal erosion control structure or device, including sand placement, to control erosion of land or inland area by coastal waters, provided that the applicant shows that (1) the applicant would be deprived of all reasonable use of the land or building without the permit; (2) the use would not adversely affect beach processes or lateral public access along the shoreline, without adequately compensating the State for its loss; or (3) public facilities (e.g., public roads) critical to public health, safety, and welfare would be severely damaged or destroyed without a shoreline erosion control structure, and there are no reasonable alternatives (e.g., relocation). Requires a shoreline certification;*

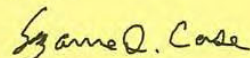
3. These land uses were not authorized by the Department of Land and Natural Resources under Chapter 13-5, HAR; and
4. The land uses have occurred on public land owned by the State without authorization or permission from the State as landowner.

We recommend that you remove the erosion control structures and unauthorized materials located within the shoreline area within 30 days of receipt of this notice. Pursuant to HRS, 171-6, the Board of Land and Natural Resources may bring such actions as may be necessary to remove or remedy encroachments upon public lands. Any person causing an encroachment upon public land shall: (a) Be fined not more than \$1,000 a day for the first offense; (b) Be fined not less than \$1,000 nor more than \$4,000 per day upon the second offense and thereafter; (c) If required by the board, restore the land to its original condition if altered and assume the costs thereof; (d) Assume such costs as may result from adverse effects from such restoration; and (e) Be liable for administrative costs incurred by the Department and for payment of damages.

Additionally, with regards to alleged unauthorized land use(s) in the State Land Use Conservation District, pursuant to 183C-7(b), HRS, the Board of Land and Natural Resources (Board) may subject you to fines of up to \$15,000.00 per violation in addition to administrative costs and costs associated with land or habitat restoration, or both, if required, and damages to state land. 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. In addition, criminal penalties may also be assessed. Failure to comply with any part of the letter mentioned above will result in the matter being forwarded to the Board for formal action.

Please respond to this Notice in writing within thirty (30) days. Please note any information provided may be used in civil proceedings. If we do not receive a response within thirty (30) days, we will proceed with enforcement actions. Should you have any questions regarding this matter, contact Trevor Fitzpatrick of our Office of Conservation and Coastal Lands at trevor.j.fitzpatrick@hawaii.gov.

Sincerely,



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

MC

CC: Oahu Board Member
DOCARE (Oahu)
Oahu District Land Office
DCCA - Regulated Industries Complaints Office
City & County of Honolulu, Department of Planning and Permitting
City & County of Honolulu, Department of Parks and Recreation

Settlement Terms and Agreement

The Department of Land and Natural Resources (DLNR), Office of Conservation and Coastal Lands (OCCL), through its Administrator, Michael Cain, and through Chairperson Suzanne D. Case of the Board of Land and Natural Resources, hereby agree to close the enforcement file against JOSHUA H. VANEMMERIK ("Mr. VanEmmerik") for the alleged violation of unauthorized land use within a conservation district, ENF: OA 23-13 subject to completion of the following conditions:

- (1) Mr. VanEmmerik will obtain a contractor carrying a valid contractor's license for the State of Hawaii and his attorney will provide proof, by way of email, of such to OCCL by November 18, 2022;
- (2) Mr. VanEmmerik will remove all alleged unauthorized structures as noted in the Notice of Alleged Violation under "September 30, 2022-Alleged Unauthorized Activity", attached as **Exhibit 1**, to the extent that weather conditions and sand migration do not obstruct the alleged unauthorized structures and prevent removal, by December 31, 2022;
- (3) OCCL will conduct an inspection of 59-147 & 59-147 A Ke Nui Road Por. Pupukea-Paumalu Beach Lots, Koolauloa, Oahu, Tax Map Keys: (1) 5-9-002:002 & (1) 5-9-002:003 (seaward) during the second week of January 2023 to ensure Mr. VanEmmerik has completed condition 2, to the extent possible considering weather conditions and sand migration;
- (4) If Mr. VanEmmerik has not removed all other alleged unauthorized structures as noted in the Notice of Alleged Violation, dated Sep 30, 2022, attached as **Exhibit 1**, by December 31, 2022, he, through his attorney, will provide a weekly email status update on progress made toward removal;
- (5) If all alleged unauthorized structures as noted in the Notice of Alleged Violation, dated Sep 30, 2022, attached as **Exhibit 1**, have not been removed by March 1, 2023, then Mr. VanEmmerik will meet with OCCL staff to discuss further remediation plans; and
- (6) If Mr. VanEmmerik fails to remove all alleged unauthorized structures as noted in the Notice of Alleged Violation, dated Sep 30, 2022, attached as **Exhibit 1**, by March 1, 2023, and fails to reach an agreement with OCCL staff as to further remediation plans, by March 15, 2023, this agreement will be considered null and void.

IT IS UNDERSTOOD AND AGREED that the State of Hawaii is not responsible for the costs incurred by Mr. VanEmmerik to remove the alleged unauthorized structures as alleged in **Exhibit 1**.

IT IS UNDERSTOOD AND AGREED that this Agreement shall not exempt Mr. VanEmmerik from future fines or enforcement actions for any future violations.

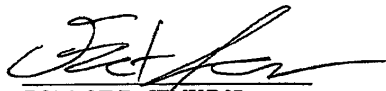
IT IS UNDERSTOOD AND AGREED that failure to comply with this agreement will result in an OCCL staff recommendation to the Board of Land and Natural Resources to impose fines for ENF: OA 23-13.


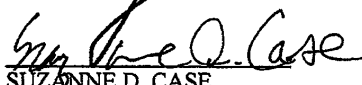
IT IS UNDERSTOOD AND AGREED that Mr. VanEmmerik's compliance with this agreement will result in OCCL closing the enforcement file against Mr. VanEmmerik and that any and all matters noted in the Notice of Alleged Violation, dated Sep 30, 2022, attached as **Exhibit 1**, will not go before the Board of Land and Natural Resources for any enforcement related action.

IT IS UNDERSTOOD AND AGREED that the final decision of whether to impose fines rests with the Board of Land and Natural Resources and must be decided during a meeting subject the Haw. Rev. Stat. chapter 92.

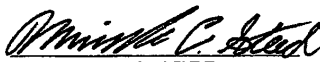
Dated: Honolulu, Hawaii, ~~November 18~~, 2022


APPROVED AS TO FORM:


FOREST B. JENKINS
Attorney for Mr. VanEmmerik


JOSHUA H. VANEMMERIK

SUZANNE D. CASE
Chairperson
Board of Land and Natural
Resources

APPROVED AS TO FORM:


MIRANDA C. STEED
Deputy Attorney General


MICHAEL CAIN
Administrator
Department of Land and Natural
Resources, Office of Conservation
and Coastal Lands

RECEIVED
CONSERVATION
LANDS
2023 AUG 25 11:49
NATURAL RESOURCES

Addendum to Settlement Terms and Agreement

The Department of Land and Natural Resources (DLNR), Office of Conservation and Coastal Lands (OCCL), through its Administrator, Michael Cain, and through Chairperson Dawn N.S. Chang of the Board of Land and Natural Resources, hereby agree to the following addendum to the settlement agreement (dated November 18, 2022) regarding alleged violation(s) for unauthorized land uses within the Conservation District against JOSHUA H. VANEMMERIK (“Mr. VanEmmerik”), OCCL enforcement file ENF: OA 23-13, subject to completion of the following conditions:

- (1) Mr. VanEmmerik will remove all alleged unauthorized structures as noted in the Notice of Alleged Violation under “September 30, 2022-Alleged Unauthorized Activity”, attached as **Exhibit 1**, by September 30, 2023 notwithstanding force majeure, defined herein to mean an unforeseen and unanticipated natural disaster, which does not include anticipated seasonal coastal and/or tidal changes;
- (2) Mr. VanEmmerik will provide an update on work done to remove the alleged unauthorized structures twice a week in writing via email to the Department of the Attorney General and in writing via email and postal mail to OCCL;
- (3) The reports in condition (2) must include: (1) a summary of what work was conducted, or if no work was conducted, an explanation of why conditions rendered work unfeasible; and (2) photos of the area where unauthorized structures exist with date and time stamps;
- (4) OCCL will conduct an inspection of 59-147 & 59-147 A Ke Nui Road Por. Pupukea-Paumalu Beach Lots, Koolauloa, Oahu, Tax Map Keys: (1) 5-9-002:002 & (1) 5-9-002:003 (seaward) by October 31, 2023 to ensure all unauthorized structures as alleged in condition (1) have been removed; and
- (5) If Mr. VanEmmerik fails to remove all alleged unauthorized structures as noted in the Notice of Alleged Violation, dated Sep 30, 2022, attached as **Exhibit 1**, by September 30, 2023 notwithstanding force majeure, this addendum and underlying agreement attached as **Exhibit 2** will be considered null and void.

IT IS UNDERSTOOD AND AGREED that the State of Hawaii is not responsible for the costs incurred by Mr. VanEmmerik to remove the alleged unauthorized structures as alleged in **Exhibit 1**.

IT IS UNDERSTOOD AND AGREED that this Agreement shall not exempt Mr. VanEmmerik from future fines or enforcement actions for his failure to remove the

alleged unauthorized structures and encroachments by September 30, 2023, or any future violations.

IT IS UNDERSTOOD AND AGREED that failure to remove all of the alleged unauthorized structures and encroachments by September 30, 2023 and/or comply with this agreement will result in an OCCL staff recommendation to the Board of Land and Natural Resources to impose fines for ENF: OA 23-13 and mandate removal of any remaining alleged unauthorized structures and encroachments.

IT IS UNDERSTOOD AND AGREED that Mr. VanEmmerik's compliance with this agreement will result in OCCL closing the enforcement file for ENF: OA-23-13 against Mr. VanEmmerik and will not go before the Board of Land and Natural Resources for any enforcement related action on the above referenced case.

IT IS UNDERSTOOD AND AGREED that the final decision of whether to impose fines rests with the Board of Land and Natural Resources and must be decided during a meeting subject the Haw. Rev. Stat. chapter 92.

Dated: Honolulu, Hawaii, August 24, 2023.

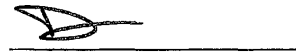
APPROVED AS TO FORM:



FOREST B. JENKINS
Attorney for Mr. VanEmmerik



JOSHUA H. VANEMMERIK



DAWN N.S. CHANG
Chairperson
Board of Land and Natural
Resources

APPROVED AS TO FORM:

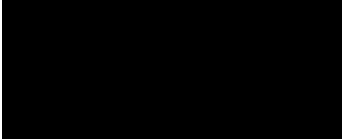
Michael Cain
MICHAEL CAIN
Administrator
Department of Land and Natural

Miranda Steed
MIRANDA C. STEED
Deputy Attorney General

Resources, Office of Conservation
and Coastal Lands

Oct 20, 2023

Joshua H. VanEmmerik



SUBJECT: PUBLIC SAFETY CONCERNS
Properties at 59-147 & 59-147 A Ke Nui Road
Por. Pūpūkea-Paumalū Beach Lots, Koʻolauloa, Oʻahu
Makai of Tax Map Key (TMK) parcels (1) 5-9-002:002 & (1) 5-9-002:003

Dear Mr. VanEmmerik:

The Office of Conservation and Coastal Lands (OCCL) has recently been notified by the City and County Department of Planning and Permitting that the residences on the above two properties are at risk of failure. There are concerns that the structures will fall onto the public beach, as up to 30% of the foundations have been undermined by the on-going surf.

This appears to be a dangerous situation to the safety of the public and to the coastal environment. We note that at the Board of Land and Natural Resources' meeting of September 22, 2023 you asked that the Board members defer taking action on OCCL Enforcement Case OA-22-13, promising that you in turn would take no action that puts the public safety or the State's resources at risk.

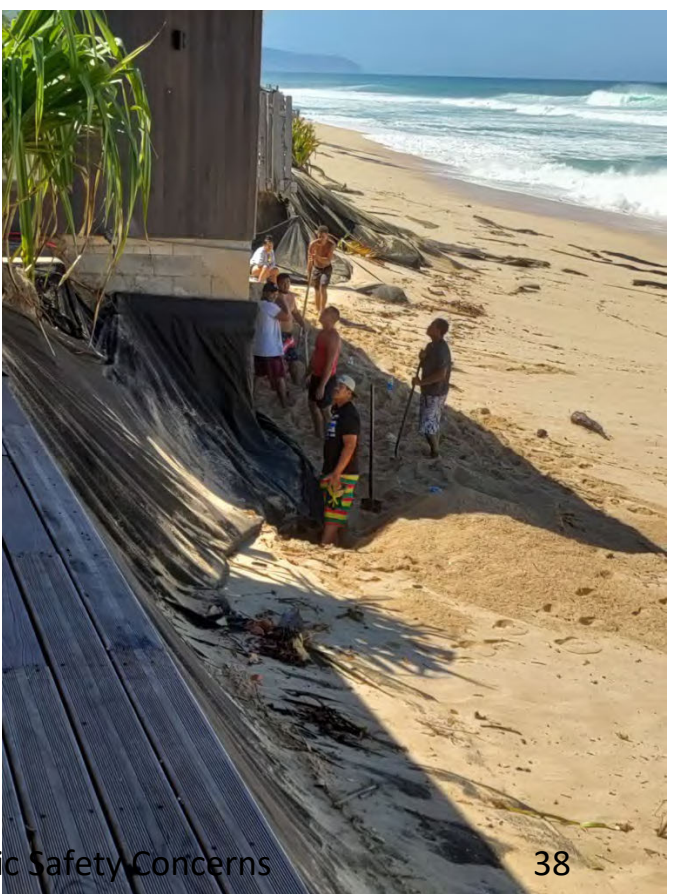
We thus strongly encourage you to work quickly with County Department of Planning and Permitting to relocate the two residences to a safe location.

Should you have any questions regarding this notice please write to Michael Cain at michael.cain@hawaii.gov.

Sincerely,

S Michael Cain

Michael Cain, Administrator
Office of Conservation and Coastal Lands



Joshua H. VanEmmerik



State of Hawai‘i | Ka Moku‘āina‘o Hawai‘i
Department Of Land And Natural Resources
Ka ‘Oihana Kumuwaiwai ‘āina
Office Of Conservation And Coastal Lands
P.O. Box 621
Honolulu, Hawaii 96809

October 23, 2023

**RE: PUBLIC SAFETY CONCERNS; Properties at 59-147 and 59-147A Ke Nui Road
Por. Pūpūkea-Paumalū Beach Lots, Ko‘olauloa, O‘ahu**

Aloha Mr. Cain,

This letter is in response to your October 20, 2023 Letter regarding Public Safety Concerns at the Properties located at 59-147 and 59-147A Ke Nui Road, Ko‘olauloa, Hawai‘i.

I respectfully acknowledge that the City and County Department of Planning and Permitting has deemed the above properties at risk of failure and that urgency in preventing future harm caused by this risk is critical. I assure you that finding a solution for this sensitive and highly nuanced situation is my utmost priority and that, among all factors involved, public safety is my main concern.

In fact, it was this concern that led me to request an emergency permit to place temporary reinforcement on the beach side of the above properties, as such a permit would give me an opportunity to alleviate any imminent risk to public safety while I find, plan, and carry out a permanent solution. A permanent solution, including potential relocation, requires time due to the numerous, complex factors involved and thoughtful planning required to ensure any solution implemented is done right. I recognize you also feel there is little room to move inland. This is true even when, as here, a permanent solution is actively considered on a daily basis. Indeed, not a day goes by that I do not work to remedy this situation, including through ongoing, collaborative efforts with an experienced structural engineering team.

For this reason, I request that the Department of Land and Natural Resources reconsider its decision not to authorize the temporary use of sand burritos at the above properties. I make this request in acknowledgement of the fact that the Thirty-First Legislature for the State of Hawai‘i amended Hawaii Revised Statute sections 183C-7 and 205A-30, in view of its 2021 position that “shoreline hardening structures accelerate coastal erosion in the areas they are meant to protect.” See A Bill for an Act, S.B. No. 1310, Section 1. However, I also make this request in

acknowledgement of the fact that the same Legislature recognized during its 2022 Regular Legislative Session that the impact of particular shoreline hardening structures, like sand burritos, is uncertain and, therefore, further research is needed to better understand such impact and decision make with respect to specific mitigation efforts. *See* House Bill No. 2229 HD 1.

I genuinely believe all affected parties, namely, the People of the State of Hawai'i, its general public, its state government, and its private and commercial beachfront property owners, have a united interest in the preservation of our state's natural beauty, including its unparalleled beaches, clean waters, and surrounding infrastructure. I also earnestly believe that there exists a mutually favorable solution amongst the seemingly competing interests of preservation and maintenance of beachfront properties affected by erosion, occupied by some for many generations.

Though that is not my case, I share sentiments with those in which is, because, at bottom, we are all not only affected by any unintentional collateral impacts of our homes on our environment, but also, by imminent, overwhelming threat to our homes—one of the most valuable things to us, at an innate, financial, and fundamental human level. Indeed, I, along with so many others, are at risk of losing the very things that provide us shelter and the very things that we have invested everything into. This is the context in which beachfront property owners like me approach this issue: with regard for our beautiful community and land, but also, with crippling concern for what any human can agree is an essential to life—our homes.

I am open to all mutually beneficial solutions that fall under the umbrella of your suggestion to “relocate,” including a potential adaptation of the above properties from private land to state land, through private negotiation settlement and sale.

These properties' disposition are the closest to the public beach while also neighboring a park located behind TMK 1-5-9-002:003. Per the last Land Board meeting, the state's efforts as you have said are indeed about ‘continuously trying to work settlements and find solutions,’ I believe a tax assessed value sale on both homes would be very close to suffice for the State of Hawaii to obtain and continue to protect that section of our coastline from the possibility of two cesspools, electrical, glass, metal, and other catastrophically destructive material infests our ocean. In essence, I would be open to demolition and removal of the homes at my expense, at fair market value, for the continued conservation of this beach. This option, along with others, have the potential of serving all interests in our state and assuaging all concerns for myself as a homeowner.

As mentioned, I am actively working with multiple specialists to find alternative solutions, as well, and will continue to work expeditiously to adhere to your advice. Respectively, I also recognize and can empathize with your and the States' constant efforts to tackle these issues to keep our beaches safe and thriving. That said, at this stage, a temporary permit of any duration would help immensely to the public and to myself, and I thank you for your consideration.

Sincerely,

Joshua H. VanEmmerik

DAVID Y. IGE
GOVERNOR OF HAWAII



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

ROBERT K. MASUDA
FIRST DEPUTY

M. KALEO MANUEL
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



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

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

REF: OCCL: TF

ENF: OA 23-13

Nov 6, 2023

NOTICE OF ALLEGED VIOLATION

CERTIFIED MAIL / RETURN RECEIPT

Joshua H. VanEmmerik



SUBJECT: Alleged Unauthorized Land Use Within the Conservation District
Located makai of 59-147 & 59-147 A Ke Nui Road
Por. Pūpūkea-Paumalū Beach Lots, Koʻolauloa, Oʻahu
Tax Map Keys (TMKs): (1) 5-9-002:002 & (1) 5-9-002:003 (seaward)

Dear Mr. VanEmmerik:

It has come to the attention of the Department of Land and Natural Resources (DLNR) Office of Conservation and Coastal Lands' (OCCL) attention that there appears to be unauthorized materials within the Conservation District fronting the locations listed above.

OCCL has evidence that between October 28, 2023 and November 5, 2023 workers dug a trench fronting the two properties, laid what appeared to geotextile tubes in the trench, mined sand from the beach to fill the tubes, and then covered the area with beach sand and a geotextile cloth. Photos of the alleged unauthorized materials and encroachments are attached.

According to OCCL files, there are no authorizations for these land uses. Pursuant to Hawai'i Administrative Rules (HAR) §13-5-2, "land use" is defined as (1) the placement or erection of any solid material on land if that material remains on the land more than thirty days, or which causes a permanent change in the land area on which it occurs; (2) the grading, removing, harvesting, dredging, mining, or extraction of any material or natural resource on land; (3) the subdivision of land; or (4) the construction, reconstruction, demolition, or alteration of any structure, building, or facility on land. Additionally, pursuant to HAR §13-5-2, the "Shoreline" is defined as 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 wash of the waves, or as otherwise defined in section 205A-1, Hawaii Revised Statutes (HRS)". Lands makai of the shoreline are under the jurisdiction of the State of Hawai'i DLNR.

NOTICE IS HEREBY GIVEN that you may be in violation of Hawai'i Administrative Rules (HAR) Title 13, Chapter 5, entitled Conservation District providing for land uses within the Conservation District, enacted pursuant to the Hawai'i Revised Statutes (HRS), Chapter 183C.

The Department of Land and Natural Resources (DLNR) has reason to believe that:

1. The geotextile materials have been placed seaward of TMKs: (1) 5-9-002:002 and 003 and located within the State Land Use Conservation District, Resource Subzone;
2. Pursuant to §13-5-22 P-15 (D-1), HAR, "Shoreline Erosion Control " is a regulated land use as stated below:
 - a. *Seawall, revetment, groin, or other coastal erosion control structure or device, including sand placement, to control erosion of land or inland area by coastal waters, provided that the applicant shows that (1) the applicant would be deprived of all reasonable use of the land or building without the permit; (2) the use would not adversely affect beach processes or lateral public access along the shoreline, without adequately compensating the State for its loss; or (3) public facilities (e.g., public roads) critical to public health, safety, and welfare would be severely damaged or destroyed without a shoreline erosion control structure, and there are no reasonable alternatives (e.g., relocation). Requires a shoreline certification;*
3. These land uses were not authorized by the Department of Land and Natural Resources under Chapter 13-5, HAR; and
4. The land uses have occurred on public land owned by the State without authorization or permission from the State as landowner.

Pursuant to HRS, 171-6, the Board of Land and Natural Resources may bring such actions as may be necessary to remove or remedy encroachments upon public lands. Any person causing an encroachment upon public land shall: (a) Be fined not more than \$1,000 a day for the first offense; (b) Be fined not less than \$1,000 nor more than \$4,000 per day upon the second offense and thereafter; (c) If required by the board, restore the land to its original condition if altered and assume the costs thereof; (d) Assume such costs as may result from adverse effects from such restoration; and (e) Be liable for administrative costs incurred by the Department and for payment of damages.

Additionally, with regards to alleged unauthorized land use(s) in the State Land Use Conservation District, pursuant to 183C-7(b), HRS, the Board of Land and Natural Resources (Board) may subject you to fines of up to \$15,000.00 per violation in addition to administrative costs and costs associated with land or habitat restoration, or both, if required, and damages to state land. 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. In addition, criminal penalties may also be assessed.

OCCL intends to bring this enforcement action to the Board of Land and Natural Resources for disposition. We will notify you when the hearing is scheduled.

Written responses to this notice can be submitted to the Office of Conservation and Coastal Lands, 1151 Punchbowl, Room 131, Honolulu, Hawai'i, 96813 .

Sincerely,



Dawn N. S. Chang, Chairperson
Board of Land and Natural Resources

Admin Review: Michael Cain, Administrator, Office of Conservation and Coastal Lands

S Michael Cain

copy: O'ahu Board Member
DOCARE (O'ahu)
O'ahu District Land Office
DCCA – Regulated Industries Complaints Office
City & County of Honolulu, Department of Planning and Permitting
City & County of Honolulu, Department of Parks and Recreation



Figure 1 Conditions on October 3, 2023



Figure 2 Work crews on October 28, 2023



Figure 3 Work crews on November 4, 2023



Figure 4 Conditions on November 5, 2023



September 28, 2022 OCCL Photo of Shoreline Area Fronting Subject Parcel



Exhibit 8 - Photos

September 28, 2022 OCCL Photo of Shoreline Area Fronting Subject Parcel



October 2, 2023 OCCL Photo of Shoreline Area Fronting Subject Parcel



October 2, 2023 Remnant material from geotextile tubes found in sand



October 2, 2023 Remnant material from geotextile tubes found in sand



November 5, 2023 Additional Unauthorized Work in the Form of a Trench, Geotextile Tubes, and Geotextile Cloth

Conservation District Rules and Statutes

Shorelines and Public Lands

In Hawai'i, the shoreline is defined, pursuant to HRS §205A-1, as *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 wash of the waves.* Most lands in the State of Hawai'i that are seaward of the shoreline are in the Resource Subzone of the State Land Use Conservation District, and are owned by the State.

It is the uniform law of every coastal state that land below, or makai, of the shoreline is owned by the State and is held in public trust for the people of the State.¹ In Hawai'i County v. Sotomura, 55 Haw. 176, 517 P.2d 57 (1973), the Court made clear that the dividing line between public and private property with respect to oceanfront property is fluid and, specifically, that it changes with erosion.²

The Court based its ruling on the common law principle that loss of land by erosion is an inherent aspect of littoral property:

*The loss of lands by the permanent encroachment of waters is one of the hazards incident to littoral or riparian ownership... (W)hen the sea, lake or navigable stream gradually and imperceptibly encroaches upon the land, the loss falls upon the owner, and the land thus lost by erosion returns to the ownership of the state.*³

In determining that the dividing line between public and private property with respect to oceanfront property may change with erosion, the Court also based its ruling on the public trust doctrine, citing to King v. O'ahu Ry. And Land Co., 11 Haw. 717, 723-24 (1899), for the proposition that:

*The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.*⁴

Therefore, public policy “favors extending to public use and ownership as much of Hawai'i's shoreline as is reasonably possible.”⁵

¹ See Margaret E. Peloso and Margaret R. Caldwell, Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate, 30 Stan. Envtl. L.J. 52, 57 (2011) (“In nearly all cases, the lines for defining the limits of private title and public access are the mean high water and mean low water marks.”).

² 55 Haw. At 180, 517 P.2d at 61.

³ In re City of Buffalo, 206 N.Y. 319, 325, 99 N.E. 850, 852 (1912).

⁴ Hawai'i County v. Sotomura, 55 Haw. At 184, 517 P.2d at 63.

⁵ Hawai'i County v. Sotomura, 55 Haw. At 182, 517 P.2d 61-62; see Application of Banning, 73 Haw. 297, 309-10, 832 P.2d 724, 731 (1992); Diamond v. Dobbin, 132 Haw. 9, 26, 319 P.3d 1017, 1034 (2014); Gold Coast Neighborhood Ass'n. v. State, 140 Haw. 437, 458, 403 P.3d 214, 235 (2017).

Hawai'i Administrative Rules (HAR) Chapter 13-5: Conservation District

Land uses in the Conservation District are regulated under HAR Chapter 13-5, which identifies land uses that may be applied for within the Conservation. Chapter 13-5 also contains the administrative rules relating to penalties, collection of administrative costs, and monetary damages that may be sought against persons responsible for unauthorized land uses within the Conservation District.

HAR § 13-5-2, defines "land use" as follows:

- (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.

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

HAR § 13-5-6(d) provides that "no land use(s) shall be conducted in the conservation district unless a permit or approval is first obtained from the department or board."

One of the allowed uses is for shoreline erosion control. HAR § 13-5-22 P-15(D-1) allows for a:

Seawall, revetment, groin, or other coastal erosion control structure or device, including sand placement, to control erosion of land or inland area by coastal waters, provided that the applicant shows that (1) the applicant would be deprived of all reasonable use of the land or building without the permit;(2) the use would not adversely affect beach processes or lateral public access along the shoreline, without adequately compensating the State for its loss; or (3) public facilities (e.g., public roads) critical to public health, safety, and welfare would be severely damaged or destroyed without a shoreline erosion control structure, and there are no reasonable alternatives (e.g., relocation). Requires a shoreline certification.

HAR § 13-5-35 Emergency permits (d) provides that "Repair and reconstruction of any structure or land use being investigated for possible violation of this chapter, or in situations in which fines for a violation have not been collected, shall not be processed until the violation is resolved."

Hawai'i Revised Statutes Chapter 183C Conservation District

HRS §183C-7 (Penalty for violation) provides the statutory penalty for violations of Chapter 13-5, HAR, and provides, in relevant part:

- (a) The department shall prescribe administrative procedures as it deems necessary for the enforcement of this chapter.
- (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.
- (c) 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.

Hawai'i Revised Statutes Chapter 171: Management and Disposition of Public Lands

Pursuant to HRS §171-6 the Board may:

- (12) Bring actions as may be necessary to remove or remedy encroachments upon public lands. Any person causing an encroachment upon public land shall:
 - (A) Be fined not more than \$1,000 a day for the first offense;
 - (B) Be fined not less than \$1,000 nor more than \$4,000 per day upon the second offense and thereafter;
 - (C) If required by the board, restore the land to its original condition if altered and assume the costs thereof;
 - (D) Assume such costs as may result from adverse effects from such restoration; and
 - (E) Be liable for administrative costs incurred by the department and for payment of damages..."

HRS §171-6 further allows the Board to assess the following fines for a violation on Chapter 171 or any rule adopted thereunder:

- (15) Set, charge, and collect reasonable fines for violation of this chapter or any rule adopted thereunder. Any person engaging in any prohibited use of public lands or conducting any prohibited activity on public lands, or violating any of the other provisions of this chapter or any rule adopted thereunder, for which violation a penalty is not otherwise provided, shall be:

- (A) Fined no more than \$5,000 per violation for a first violation or a violation beyond five years of the last violation; provided that, after written or verbal notification from the department, an additional \$1,000 per day per violation may be assessed for each day in which the violation persists;
- (B) Fined no more than \$10,000 per violation for a second violation within five years of the last violation; provided that, after written or verbal notification from the department, an additional \$2,000 per day per violation may be assessed for each day in which the violation persists;
- (C) Fined no more than \$20,000 per violation for a third or subsequent violation within five years of the last violation; provided that, after written or verbal notification from the department, an additional \$4,000 per day per violation may be assessed for each day in which the violation persists; and
- (D) Liable for administrative costs and expenses incurred by the department and for payment for damages, including but not limited to natural resource damages.

In addition to the fines, administrative costs, and damages provided for hereinabove, for damage to or theft of natural resources, the board may also set, charge, and collect a fine that, in its discretion, is appropriate considering the value of the natural resource that is damaged or the subject of the theft. In arriving at an appropriate fine, the board may consider the market value of the natural resource damaged or taken 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 paragraph are cumulative and in addition to any other remedies allowed by law.

No person shall be sanctioned pursuant to this section for the exercise of native Hawaiian gathering rights and traditional cultural practices as authorized by law or as permitted by the department pursuant to article XII, section 7, of the Hawai'i state constitution.

HRS § 171-6.4 states, in relevant part:

- (c) Noncompliance with administrative enforcement against a landowner for a land use, as defined in section 183C-2, that violates the law or for a currently unauthorized structure encroaching on public lands, including but not limited to submerged lands or lands within the shoreline, that falls, slides, or comes onto public land, or arises from or benefits an adjoining or abutting private land shall affect title pursuant to section 501-151 and result in a lien attaching to the adjoining or abutting private land.

Hawai'i Revised Statutes Chapter 205A: Coastal Zone Management

Pursuant to Chapter 205A-2 Coastal Zone Management Program, (c) (9) Beaches Protection, it is State policy to (A) *Locate new structures inland from the shoreline setback to conserve open space, minimize interference with natural shoreline processes, and minimize loss of improvements due to erosion*, and (B) *Prohibit construction of private shoreline hardening structures, including seawalls and revetments, at sites having sand beaches and at sites where shoreline hardening structures interfere with existing recreational and waterline activities.*