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A LIMITED LIABILITY LAW PARTNERSHIP

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COMMUNICATION SUBJECT TO HAWAI'I RULE OF EVIDENCE 408 PLANNING COMMISSION RULE § 12-201-68

December 20, 2021

BY EMAIL AND CERTIFIED MAIL

Jordan E. Hart
Deputy Director
Department of Planning
County of Maui
2200 Main Street, Suite 315
Wailuku, Maui, Hawai'i 96793
Email: planning@mauicounty.gov

Re: File No. NOV 2021/0058; Notice of Violation: Special Management Area - Maui dated September 8, 2021; Confidential Settlement Offer

Dear Deputy Director Hart:

I represent Iwa 'Ike LLC ("**Iwa 'Ike**") with respect to the above-referenced Notice of Violation ("**NOV**"), which imposed a fine of $65,000. I write to propose a resolution of the NOV. This communication is made subject to Hawai'i Rule of Evidence 408 and Maui Planning Commission Rules of Practice and Procedure § 12-201-68.

1. Background. To assist the Department of Planning (the "**Department**") in reviewing this offer and the SMA Initial and daily Fine Calculator Worksheet (the "**SMA Worksheet**"), we provide the following background.

By letter dated December 31, 2020, the Department issued an amended SMA Minor Permit approval for the Iwa 'Ike Subdivision on Makena-Keoneoio Road, which is identified by Tax Map Key No. (2) 2-1-005:118 (the "**Project**"). The approval was made on the condition that "a qualified archaeological monitor shall be present during all ground-altering activities in order to document any historic properties which may be encountered during the proposed undertaking and to preserve those known significant sites."

Prior to obtaining the SMA approval, Iwa ʻIke retained the services of an archeological consultant, Erik Fredericksen, Ph. D., of Xamanek Researches, LLC. Xamanek is listed by the State of Hawaiʻi Department of Land and Natural Resources Historic Preservation Division ("**SHPD**") as a permitted archeological firm.[1] He prepared an Archaeological Monitoring Plan dated July 16, 2019, for the Project. The plan contemplated monitoring for "subsurface earthmoving activities." The plan was accepted by SHPD by letter dated July 29, 2019.

During work on the Project on August 24, 2021, drilling and digging work was performed in the rocky road shoulder area that had a previously disturbed rock base. Prior to conducting this work, Mr. Newbro discussed with Dr. Fredericksen whether an archeological monitor would be required. Dr. Fredericksen indicated that an archaeological monitor was not necessarily required because the work was occurring on the road shoulder. Based on its licensed archaeological consultant's assessment, Iwa ʻIke began the work without an archaeological monitor. To the extent that an archaeological monitor should have been present for the work, Iwa ʻIke proceeded under the good faith belief that it was acting in compliance with its permit obligations.

After receiving notice from the Department regarding the August 24 issues, Iwa ʻIke changed archaeological consultant firms to Scientific Consultant Services, Inc. ("**SCS**"), for which Michael F. Dega, Ph. D. is the principal investigator. SCS is also listed by SHPD as a permitted archeological firm.

On August 27, 2021, SCS representatives conducted monitoring as well as a field inspection of the Project area, including the area where the work had occurred on August 24.[2] During the field assessment of that area, SCS assessed whether any historic or possibly pre-contact sites were impacted. SCS Archaeologist Derek Butler concluded that no sites of any kind were impacted. He noted that sediments consisted of extremely rocky, dark yellowish brown to brown clay/sandy loam and bedrock matrix. He noted that there was evidence of prior disturbance, as would be expected in an area of prior utility and road work. We hope that the Department

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[1] *See* SHPD's Archeological Consultants in the State of Hawaiʻi for Calendar Year 2021, *available at* https://dlnr.hawaii.gov/shpd/files/2021/04/2021_Permit-List_6-1.pdf.

[2] SCS representatives also conducted further monitoring on August 30 and September 4, 17, and 20-23, 2021.

considers the efforts to assess the area where the work occurred on August 24 and the findings of the assessment as mitigating circumstances in this matter.

On September 3, 2021, Iwa ʻIke's contractor drilled into an existing concrete electrical jacket. This jacket had been poured by Iwa ʻIke's contractor. Prior to performing this work, Iwa ʻIke consulted with SCS and was advised that a monitor was not required for the work performed on the concrete jacket because the work did not qualify as ground-altering or subsurface earthmoving activity.

Although Iwa ʻIke consulted with and followed the advice of its archaeological consultants at every stage, it received the NOV from the Department based on the August 24 work. Iwa ʻIke has disputed the NOV and timely requested a hearing with the Director.

2. SMA Worksheet. We offer our assessment under the SMA Worksheet.

As to criterion 1, we agree that there was no prior violation and the ranking score of 0 is appropriate.

As to criterion 2, any "damage to the environment" in the context of the NOV would be the risk of encountering archeological items. The comments in the SMA Worksheet do not address archaeological issues. Instead, the focus is on water issues. The NOV was not issued for water issues. Accordingly, a ranking score of 0 is appropriate.

To the extent the archaeological issues are considered, there is no evidence of any damage to a historical property. Moreover, Iwa ʻIke's acted in accordance with the advice of its archaeological consultants. Since there was no damage to the environment, a ranking score of 0 is appropriate.

As to criterion 3, we understand that our contractor was cooperative with the Department. The Department gave a stop work order on August 26, 2021, until a monitor was obtained, and the contractor complied. As noted above, at that point, Iwa ʻIke retained a new archaeological consultant. Given the cooperation and the decision to retain a new consultant, the ranking score of 4 should be reduced to 0.

As to criterion 4, the "amount necessary to deter future violations" is modest. As noted, we retained an archeological consultant at the outset, acted in reliance on the consultant's advice and promptly changed consultants once the Department raised an issue with the August 24 work. Iwa ʻIke will continue to follow the monitoring

requirements with expert guidance from SCS. The ranking score of 10 should be reduced to 1.

As to criterion 5, "circumstances beyond the control of the violator," Iwa ʻIke relied on the expert advice of permitted archeological firms. While we accept responsibility for their advice, the fact remains that Iwa ʻIke acted in good faith. Accordingly, the ranking score of 10 should be reduced to 1.

As to criterion 6, "[w]hether the violator knew or should have known that permits, approvals, or assessments were needed," Iwa ʻIke believed that monitoring was not required for the August 24 work because it involved the rocky road shoulder area. Monitoring was not required for the September 3 work because it involved drilling into concrete and the road. Iwa ʻIke was guided by its archeological experts. Accordingly, the ranking score of 10 should be reduced to 1.

3. Proposal. Based on these considerations and mitigating circumstances and subject to Hawaiʻi Rule of Evidence 408 and Maui Planning Commission Rules of Practice and Procedure § 12-201-68, we respectfully propose the following terms to resolve this matter:

a. The Department withdraws the NOV;

b. The Department issue a new NOV to Iwa ʻIke setting a fine of $5,000; and

c. Iwa ʻIke will pay the fine of $5,000.

We would welcome an opportunity to discuss this matter with you. Thank you very much for your consideration.

Very truly yours,

Calvert G. Chipchase
Christopher T. Goodin
for
CADES SCHUTTE
A Limited Liability Law Partnership

Jordan Hart - FW: Iwa'ike NOV Update

From: Mike <mike@scshawaii.com>
To: Cal Chipchase <cchipchase@cades.com>
Date: 1/26/2022 6:03 PM
Subject: FW: Iwa'ike NOV Update

To: County of Maui and Mr. Newbro
I have read over the NOV and your letter is correct.

Per September 3, 2021, SCS did not conduct archaeological monitoring as the work crew broke concrete jackets in the project area. We did not monitor because this is not ground altering disturbance and no soil was impacted during the activity. SCS only monitors when ground altering work occurs and this did not occur on that date.

Thank you,
Mike

Michael Dega, Ph.D.
Senior Archaeologist
Scientific Consultant Services, Inc. (SCS)
1357 Kapiolani Blvd., Suite 850
Honolulu, HI 96814
(808) 597-1182 tel
(808) 597-1193 fax
mike@scshawaii.com

From: Mike <mike@scshawaii.com>
To: Cal Chipchase <cchipchase@cades.com>
Date: 2/5/2022 1:52 PM
Subject: Iwa'Ike, concrete

Mr Chipchase

SCS and other archaeological forms in Hawaii are not required to monitor when construction crews are only breaking up concrete. The only instance would be if monitoring is required on a project and concrete breaking proceeded into soil layers below the concrete. In this instance, only concrete was being broken with no intrusion into soil contexts.

Mahalo,

Mike

Michael Dega, PhD
Senior archaeologist
SCS, Inc

Sent from my iPhone

XAMANEK RESEARCHES, LLC
P.O. BOX 880131
PUKALANI, MAUI, HI 96788
Phone/Fax: 808-572-8900
E-mail: xamanekresearchesllc@gmail.com

Jordan Hart, Deputy Director
County of Maui
Department of Planning
200 South High Street
Wailuku, Maui
Phone: 808-270-7735

Attn: Jordan Hart, Deputy Director **1 May 2022**

Subject: Working Draft document for on-site portion of the 'Iwa'ike Subdivision archaeological monitoring project, Makena, Maui.

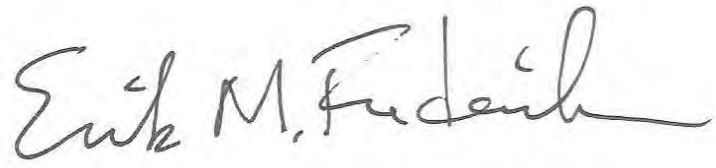
Aloha Jordan,

Per the request of Michael Newbro, Makai Properties, I am providing you with information regarding the on-site portion of the 'Iwa'ike Subdivision archaeological monitoring project. Xamanek Researches LLC monitored all on-site earthmoving activities associated with the proposed subdivision. Monitored activities included initial and overall grubbing, as well as excavation of post holes for the dust fence sections, grading for the access road, pads, and excavation for buried on-site electrical and water lines, and the retention basin.

During the on-site portion of the monitoring project, no significant material culture remains were identified. Initial on-site monitoring occurred in August 2019 - general vegetation clearing (handheld tools only). The remainder of the on-site monitoring program was carried out over the months of January, February and early March 2021. As noted above, a monitor was present for all on-site disturbance activities. A working Draft document of the on-site monitoring program is included on the following pages.

Please contact me if you have any questions regarding the following Draft document.

Sincerely,



Erik M. Fredericksen

Created by Universal Document Converter

Jordan Hart - Fwd: RE: File No. NOV 2021/0058

From: Jordan Hart
To: Jacky Takakura
Date: 8/17/2022 9:32 AM
Subject: Fwd: RE: File No. NOV 2021/0058

I support that option.

We identified errors in our calculation upon further review which would be more appropriately resole by rescinding the NOV that was improperly issued.

>>> Christopher Goodin <cgoodin@cades.com> 8/16/2022 1:32 PM >>>
Jacky, Jordan, I wanted to follow up to see if we can resolve this along the lines of what Jacky described: rescind the NOV and reissue in the amount of $15,000, which we will pay. Please let us know. Thanks.

-----Original Message-----
From: Jacky Takakura <Jacky.Takakura@co.maui.hi.us>
Sent: Wednesday, July 27, 2022 3:51 PM
To: Jordan Hart <Jordan.Hart@co.maui.hi.us>
Cc: Cal Chipchase <cchipchase@cades.com>; Christopher Goodin <cgoodin@cades.com>
Subject: RE: File No. NOV 2021/0058

sorry about that!

>>> Jordan Hart 7/27/2022 3:45 PM >>>
Sorry Jacky, point of clarification, the only agreement in concept that was expressed was that it was reasonable for the Department not to reduce the deterrence score in the calculator down to zero (it is now 1).

There was not final agreement on a specific dollar amount.

Jordan E. Hart
Department of Planning, ZAED Chief
County of Maui
Jordan.Hart@co.maui.hi.us
(808) 270-7821

>>> Jacky Takakura 7/27/2022 2:35 PM >>>
Hello Cal and Chris

I believe you have already been in discussion on this subject, and have agreed to a reduced fine of $15,000.
Do you want us to rescind the NOV and reissue a new one with this amount?
Or do you prefer a settlement which must be approved by the Maui

Planning Commission?
Please advise at your convenience and we'll work on next steps.

Thank you

Jacky

Jacky Takakura
Deputy Director
Maui County Department of Planning
2200 Main Street, Suite 315
Wailuku, HI 96793
phone (808) 270-7743

>>> Cal Chipchase <cchipchase@cades.com> 7/25/2022 12:20 PM >>>

Hi Jacky - Checking in. Is it possible to bring this one to conclusion?

From: Cal Chipchase <cchipchase@cades.com>

Sent: Wednesday, July 06, 2022 1:41 PM
To: Jacky Takakura <Jacky.Takakura@co.maui.hi.us>

Cc: Jordan Hart <Jordan.Hart@co.maui.hi.us>; Shaina Hipolito <Shaina.M.Hipolito@co.maui.hi.us>; Michele Chouteau McLean <Michele.McLean@co.maui.hi.us>; Christopher Goodin <cgoodin@cades.com>

Subject: Re: File No. NOV 2021/0058

Hi Jacky - Hope all is well with you.

Before Jordan jumped with ZAED, we were close to wrapping up this notice of violation. The last item is the level for factor 4. Could we bring this one to closure soon.

Best,

Cal

On Jun 6, 2022, at 12:34 PM, Christopher Goodin <cgoodin@cades.com<cgoodin@cades.com>> wrote:

Jordan, just following up on this one. Please let us know. Thanks.
From: Christopher Goodin
Sent: Tuesday, May 10, 2022 10:29 AM

To: 'Jordan Hart'
Cc: Cal Chipchase ; Lori Chong Kee ; Jacky Takakura ; Shaina Hipolito
Subject: RE: File No. NOV 2021/0058
Jordan, here's a memo from the archaeologist stating on the first page that he performed monitoring in August 2019 and January through March 2021. We appreciate your consideration of our request regarding factor 4.
Thanks,
Chris Goodin
Christopher T. Goodin
Partner

Cades Schutte LLP
Cades Schutte Building
1000 Bishop Street, Suite 1200
Honolulu, HI 96813
(t) 808.521.9296 | (f) 808.540.5090
cgoodin@cades.com<mlee@cades.com> |
https://protect2.fireeye.com/v1/url?k=31323334-50bba2bf-31360632-4544474f5631-3383cc900dab1f11&q=1&e=b232e6e1-2849-4db9-94e2-3b36bde31309&u=http%3A%2F%2Fwww.cades.com%2F<https://protect2.fireeye.com/v1/url?k=31323334-50bba2bf-31360632-4544474f5631-3383cc900dab1f11&q=1&e=b232e6e1-2849-4db9-94e2-3b36bde31309&u=http%3A%2F%2Fwww.cades.com%2F>

From: Jordan Hart
<Jordan.Hart@co.maui.hi.us<Jordan.Hart@co.maui.hi.us>>

Sent: Monday, May 2, 2022 10:56 AM
To: Christopher Goodin <cgoodin@cades.com<cgoodin@cades.com>>

Cc: Cal Chipchase <cchipchase@cades.com<cchipchase@cades.com>>;
Lori Chong Kee <lchongkee@cades.com<lchongkee@cades.com>>; Jacky Takakura
<Jacky.Takakura@co.maui.hi.us<Jacky.Takakura@co.maui.hi.us>>;
Shaina Hipolito
<Shaina.M.Hipolito@co.maui.hi.us<Shaina.M.Hipolito@co.maui.hi.us>>

Subject: RE: File No. NOV 2021/0058
Chris,
Please forward or reforward a statement from the project archaeologist that was engaged at the time stating that they were on site on and monitoring the days mentioned below.
I am open to reducing this item, but not to zero. Some level of deterrence is appropriator in this situation.
Thank you
Jordan E. Hart, Deputy Director
Department of Planning
County of Maui
Jordan.Hart@co.maui.hi.us<Jordan.Hart@co.maui.hi.us>

(808) 270-7821
>>> Christopher Goodin <cgoodin@cades.com<cgoodin@cades.com>>
5/2/2022 10:40 AM >>>

Jordan,
We appreciate the Department's cooperation and willingness to work with us. Respectfully, we ask the Department to look at factor 4, which states, "Amount necessary to deter future violations." The Department's analysis on this factor states,
Violations created by Alpha Inc., on behalf of owner. It is under the assumption from SHPD that no monitor was ever there prior to the site visit on 08/24/21. This TMK also has lots on it to construct, which means that there is a high potential that they could possibly continue to ground alter without any type of archeological monitor there as stipulated in the SMA.
I have confirmed with our former archaeologist that we had a monitor prior to the site visit on August 24, 2021. Specifically, we had a monitor on site in August 2019 and January through March 2021. Between March 2021 and August 24, 2021, we did not engage in ground disturbing activities.
The incident on August 24, 2021, was an honest misunderstanding. We retained a new archaeological consultant once we received notice from the Department. And we have worked with the Department to comply since that time. Accordingly, the "[a]mount necessary to deter future violations" is not significant in this case. Therefore, with respect to factor 4, we would respectfully ask for a reduction to zero points.
Thanks,
Chris Goodin
Christopher T. Goodin
Partner

Cades Schutte LLP
Cades Schutte Building
1000 Bishop Street, Suite 1200
Honolulu, HI 96813
(t) 808.521.9296 | (f) 808.540.5090
cgoodin@cades.com<https://protect2.fireeye.com/v1/url?k=fcc0e462-a35bdd6e-fcc4d164-0cc47a335c28-3696fa1661497c56&q=1&e=1ba8c71b-ad00-492b-9497-4e25f2e9e61b&u=http%3A%2F%2Fmlee%40cades.com%2F>

|
https://protect2.fireeye.com/v1/url?k=31323334-50bba2bf-31360632-4544474f5631-3383cc900dab1f11&q=1&e=b232e6e1-2849-4db9-94e2-3b36bde31309&u=http%3A%2F%2Fwww.cades.com%2F<https://protect2.fireeye.com/v1/url?k=31323334-50bba2bf-31360632-4544474f5631-3383cc900dab1f11&q=1&e=89e8acc7-d3bd-4301-9101-80f80defc7aa&u=http%3A%2F%2Fwww.cades.com%2F>

From: Cal Chipchase
<cchipchase@cades.com<cchipchase@cades.com>>

Sent: Wednesday, April 27, 2022 12:16 PM
To: Jordan Hart
<Jordan.Hart@co.maui.hi.us<Jordan.Hart@co.maui.hi.us>>

Cc: Christopher Goodin <cgoodin@cades.com<cgoodin@cades.com>>;
Lori Chong Kee <lchongkee@cades.com<lchongkee@cades.com>>; Jacky
Takakura
<Jacky.Takakura@co.maui.hi.us<Jacky.Takakura@co.maui.hi.us>>;
Shaina Hipolito
<Shaina.M.Hipolito@co.maui.hi.us<Shaina.M.Hipolito@co.maui.hi.us>>

Subject: Re: File No. NOV 2021/0058
No worries, Jordan. Thanks much. I appreciate the second look. We'll
review and get back to you soon.
Best,
Cal

On Apr 27, 2022, at 12:04 PM, Jordan Hart
<Jordan.Hart@co.maui.hi.us<Jordan.Hart@co.maui.hi.us>>
wrote:

Hi Cal,

I apologize for the delay. Shaina completed this a while ago but I
didn't have an opportunity to engage it.

See attached revised fine calculation for the amount due reflecting a
single occurrence.

Jordan E. Hart, Deputy Director
Department of Planning
County of Maui
Jordan.Hart@co.maui.hi.us<Jordan.Hart@co.maui.hi.us>

(808) 270-7821

>>> Cal Chipchase <cchipchase@cades.com<cchipchase@cades.com>>
4/20/2022 10:55 PM >>>

Hey - Checking in.
From: Cal Chipchase
Sent: Sunday, March 13, 2022 9:40 PM
To: 'Jordan Hart'
<Jordan.Hart@co.maui.hi.us<Jordan.Hart@co.maui.hi.us>>

Cc: Christopher Goodin <cgoodin@cades.com<cgoodin@cades.com>>;
Lori Chong Kee <lchongkee@cades.com<lchongkee@cades.com>>; 'Jacky Takakura'
<Jacky.Takakura@co.maui.hi.us<Jacky.Takakura@co.maui.hi.us>>;
'Shaina Hipolito'
<Shaina.M.Hipolito@co.maui.hi.us<Shaina.M.Hipolito@co.maui.hi.us>>

Subject: RE: File No. NOV 2021/0058
Hi Jordan - Just checking in.
From: Cal Chipchase
Sent: Sunday, March 6, 2022 6:39 PM
To: 'Jordan Hart'
<Jordan.Hart@co.maui.hi.us<Jordan.Hart@co.maui.hi.us>>

Cc: Christopher Goodin <cgoodin@cades.com<cgoodin@cades.com>>;
Lori Chong Kee <lchongkee@cades.com<lchongkee@cades.com>>; Jacky Takakura
<Jacky.Takakura@co.maui.hi.us<Jacky.Takakura@co.maui.hi.us>>;
Shaina Hipolito
<Shaina.M.Hipolito@co.maui.hi.us<Shaina.M.Hipolito@co.maui.hi.us>>

Subject: RE: File No. NOV 2021/0058
Not at all, Jordan. We're all trying to keep above water.
I appreciate the department's willingness to revisit the application of repeat behavior in the calculation.
I agree that the work on August 24 did not involve breaking concrete.
The failure to have a monitor present on August 24 was the result of an honest mistake. We accept responsibility for the mistake. We only ask the department to consider that the violation was not intentional and that we tried to confirm the correct course before we proceeded with the work.
In an earlier letter, I proposed a fine for the department's consideration. I think the fine accounts for the fact of the violation while recognizing that the violation was not intentional and was not repeated. Indeed, we immediately changed archaeological consultants after learning that we had committed a violation. Under the circumstances, would the department consider the resolution that I proposed?
Best,
Cal
From: Jordan Hart
<Jordan.Hart@co.maui.hi.us<Jordan.Hart@co.maui.hi.us>>

Sent: Friday, February 25, 2022 12:53 PM
To: Cal Chipchase <cchipchase@cades.com<cchipchase@cades.com>>

Cc: Christopher Goodin <cgoodin@cades.com<cgoodin@cades.com>>;
Lori Chong Kee <lchongkee@cades.com<lchongkee@cades.com>>; Jacky Takakura
<Jacky.Takakura@co.maui.hi.us<Jacky.Takakura@co.maui.hi.us>>;

Shaina Hipolito
<Shaina.M.Hipolito@co.maui.hi.us<Shaina.M.Hipolito@co.maui.hi.us>>

Subject: RE: File No. NOV 2021/0058
Hi Cal,

I apologize for the delay in replying.

The date of the violation was August 24th. Active excavation (not concrete breaking) was observed and photographed by our inspectors, with no archaeological monitor present.
Our inspectors were also on the site on September 3rd to observe additional subsurface work without a monitor. We did use September 3rd as an indication of repeat behavior in the SMA calculation. However, per the information provided on the nature of that work and the consultation done to determine if monitoring would be needed, we are open to reconsidering that as a relevant factor to the fine calculation.
If you have any further information that would explain why the work observed and documented on August 24th was not in violation we are open to discussing and reviewing.

Thank you,
Jordan E. Hart, Deputy Director
Department of Planning
County of Maui
Jordan.Hart@co.maui.hi.us<Jordan.Hart@co.maui.hi.us>

(808) 270-7821
>>> Cal Chipchase <cchipchase@cades.com<cchipchase@cades.com>>
2/5/2022 4:47 PM >>>

Hi Jordan - Attached is an email from Dr. Dega and a picture of the concrete work.
From: Cal Chipchase
Sent: Friday, February 4, 2022 10:51 PM
To: 'Jordan Hart'
<Jordan.Hart@co.maui.hi.us<Jordan.Hart@co.maui.hi.us>>

Cc: Christopher Goodin <cgoodin@cades.com<cgoodin@cades.com>>;
Lori Chong Kee <lchongkee@cades.com<lchongkee@cades.com>>; Jacky Takakura
<Jacky.Takakura@co.maui.hi.us<Jacky.Takakura@co.maui.hi.us>>;
Shaina Hipolito
<Shaina.M.Hipolito@co.maui.hi.us<Shaina.M.Hipolito@co.maui.hi.us>>

Subject: RE: File No. NOV 2021/0058
Thanks, Jordan.
Mr. Fredrickson's statements were to Mike, and he relied on them. Mr. Fredrickson will not be providing a statement. The point is that even if reasonable people can differ about what was required, the actions were taken in good faith and without the intent to violate the conditions.

Regarding the second day, the work was not merely in a previously disturbed area; it was breaking concrete. I'm not aware that breaking concrete ever requires monitoring. But I'll inquire with SCS all the same.
Best,
Cal
From: Jordan Hart
<Jordan.Hart@co.maui.hi.us<Jordan.Hart@co.maui.hi.us>>

Sent: Friday, February 4, 2022 3:26 PM
To: Cal Chipchase <cchipchase@cades.com<cchipchase@cades.com>>

Cc: cgoodin@cades; Lori Chong Kee
<lchongkee@cades.com<lchongkee@cades.com>>; Jacky
Takakura
<Jacky.Takakura@co.maui.hi.us<Jacky.Takakura@co.maui.hi.us>>;
Shaina Hipolito
<Shaina.M.Hipolito@co.maui.hi.us<Shaina.M.Hipolito@co.maui.hi.us>>

Subject: RE: File No. NOV 2021/0058
Hi Cal,

Sorry for the delay.
We will review the letter and reply further.
My initial questions:
The statements of Mr. Fredrickson are being referenced second hand. Is he providing a statement?
Regarding the statement from SCS, is there any record of communication and coordination of the work being done and monitoring needs with one of the archaeologists in the time period that the work was occurring?
I have heard that SHPD can call for monitoring of previously disturbed areas. Can there be more specific information or reference provided on that subject with regard to this situation?
Thank you
>>> Cal Chipchase <cchipchase@cades.com<cchipchase@cades.com>>
2/3/2022 10:28 PM >>>

Hi Jordan - Checking in.
From: Cal Chipchase
Sent: Wednesday, January 26, 2022 7:59 PM
To: 'Jordan Hart'
<Jordan.Hart@co.maui.hi.us<Jordan.Hart@co.maui.hi.us>>;
'cgoodin@cades' ; Lori Chong Kee
<lchongkee@cades.com<lchongkee@cades.com>>

Cc: 'Jacky Takakura'
<Jacky.Takakura@co.maui.hi.us<Jacky.Takakura@co.maui.hi.us>>;
'Shaina Hipolito'
<Shaina.M.Hipolito@co.maui.hi.us<Shaina.M.Hipolito@co.maui.hi.us>>

Subject: RE: File No. NOV 2021/0058

Hi Jordan - See the attached email from SCS and the attached letter from Mike Newbro summarizing his understanding.
From: Cal Chipchase
Sent: Tuesday, December 28, 2021 4:41 PM
To: 'Jordan Hart' <Jordan.Hart@co.maui.hi.us<Jordan.Hart@co.maui.hi.us>>; cgoodin@cades; Lori Chong Kee <lchongkee@cades.com<lchongkee@cades.com>>

Cc: Jacky Takakura <Jacky.Takakura@co.maui.hi.us<Jacky.Takakura@co.maui.hi.us>>; Shaina Hipolito <Shaina.M.Hipolito@co.maui.hi.us<Shaina.M.Hipolito@co.maui.hi.us>>

Subject: RE: File No. NOV 2021/0058
Thanks, Jordan. I'll reach out to SCS.
Happy New Year!
From: Jordan Hart <Jordan.Hart@co.maui.hi.us<Jordan.Hart@co.maui.hi.us>>

Sent: Tuesday, December 28, 2021 4:23 PM
To: cgoodin@cades; Cal Chipchase <cchipchase@cades.com<cchipchase@cades.com>>; Lori Chong Kee <lchongkee@cades.com<lchongkee@cades.com>>

Cc: Jacky Takakura <Jacky.Takakura@co.maui.hi.us<Jacky.Takakura@co.maui.hi.us>>; Shaina Hipolito <Shaina.M.Hipolito@co.maui.hi.us<Shaina.M.Hipolito@co.maui.hi.us>>

Subject: Fwd: File No. NOV 2021/0058
Hi All,
Per attached there is a position that monitoring was not required when it was not occurring.
Pleases clearly outline the specific work scope being referring to. Photos and or diagrams would be ideal. Once that is established, please provide a written statement from your archaeologist that the monitoring was not required for that work scope, per SHPD criteria. Please reference the scope and the relevant dates. It may be most efficient to confirm the work scope with Shaina before proceeding.
We may need to reconcile the specific language of the condition, but if your archaeologist's official position is that monitoring was not warranted, and or was properly carried out, that would be a significantly different conversation.
Mahalo,
Jordan E. Hart, Deputy Director
Department of Planning
County of Maui
Jordan.Hart@co.maui.hi.us<Jordan.Hart@co.maui.hi.us>

(808) 270-7821

>>> planning 12/23/2021 10:02 AM >>>
>>>
From:

Lori Chong Kee <lchongkee@cades.com<lchongkee@cades.com>>

To:

"'planning@mauicounty.gov'"
<planning@mauicounty.gov<planning@mauicounty.gov>>

CC:

Cal Chipchase <cchipchase@cades.com<cchipchase@cades.com>>,
Christopher Goodin <cgoodin@cades.com<cgoodin@cades.com>>

Date:

12/20/2021 11:36 AM

Subject:

File No. NOV 2021/0058

Dear Deputy Director Hart,
I am attaching a letter to you from Cal Chipchase and Christopher Goodin, dated December 20, 2021, relating to the above-referenced matter. A hard copy will also be mailed to you.
Please let me know if you have any issues opening the attachment. Thank you.
Lori
Lori A.K. Chong Kee
Legal Assistant to Kelly G. LaPorte, Esq.
and Christopher T. Goodin, Esq.

Cades Schutte LLP
Cades Schutte Building
1000 Bishop Street, Suite 1200
Honolulu, HI 96813
(t) 808.521.9200 | (d) 808.521.9285 | (f) 808.521.9210
lchongkee@cades.com<lchongkee@cades.com> |
https://protect2.fireeye.com/v1/url?k=31323334-50bba2bf-31360632-4544474f5631-3383cc900dab1f11&q=1&e=b232e6e1-2849-4db9-94e2-3b36bde31309&u=http%3A%2F%2Fwww.cades.com%2F<https://protect2.fireeye.com/v1/url?k=99912154-c60a184b-99951452-8630ffab37ab-e05716859195accf&q=1&e=ac9acc3d-3932-498f-a5af-923efb47bee1&u=http%3A%2F%2Fwww.cades.com%2F>

Original:

	SMA INITIAL AND DAILY FINE CALCULATOR
Date:	3-Sep-21
Prepared by:	INSPECTOR: Shaina Hipolito
TMK:	2-2-1-005:118-0000
RFS:	21-0001311
Purpose:	Analysis of potential initial fines for 'Iwa 'Ike Subdivision, Makena-Keoneoio Rd., Kihei, HI 96753
Violation:	SM2 2019/0005 was granted for a four-lot rural residential subdivision to include a roadway, water distribution, fire protection system and underground utilities. Numerous complaints came in about this project and they broke condition #3 which stated that a qualified archeological monitor shall be present during all ground-altering activities in order to document any historic properties which may be encountered during the proposed undertaking and to preserve those known significant sites. No monitor was present on 08/24/21 during a spot check and drilling/ground work was being done. There is potential violation of condition #4, as water was viewed in the hole that was dug, and water had filled the hole 2 days later on 08/26/21, in which some kind of utility box is going to be dropped into that hole.
CODE:	HRS 205A

Criteria used to determine severity of violation and calculate applicable fines:		Rank on a scale of 0 through 10
(1) Previous violations by the same person;	Comments: *No prior violation by current owner for property*	0
(2) The risk or severity of damage to the environment, including the damage to the shoreline and marine resources;	Comments: *Drilling into the ground showed water filling the hole, and a painted utility box to be lowered and buried into the water filled hole. Somewhat high potential for environmental impact.*	5
(3) The degree of cooperation provided by the violator during the enforcement process; 1=Very Cooperative 10=Very Uncooperative	Comments: *Alpha Inc. somewhat cooperative, they saw it as no violations as they had an SMA permit. Workers on site were compliant and helpful during the site visits.*	4
(4) Amount necessary to deter future violations;	Comments: *Violations created by Alpha Inc., on behalf of owner. Alpha Inc. is a large company with many jobs across the island, and it is under the assumption from SHPD that no monitor was ever there prior to the site visit on 08/24/21. This TMK also has lots on it to construct, which means that there is a high potential that they could possibly continue to ground alter without any type of archeological monitor there as stipulated in the SMA.*	10
(5) Evidence, if any, of circumstances beyond the control of the violator;	Comments: *None*	10
(6) Whether the violator knew or should have known that permits, approvals, or assessments were needed.	Comments: *Approved SMA with conditions, owner and Alpha Inc. knew. On 08/26/21, verbal stop work order was given for any ground altering work without an archeological monitor on site. Then on 09/03/21, viewed Alpha Inc. digging/drilling into the ground without any archeological montior on site. 2nd time viewing work without monitor.*	10
	Total Ranking	39

USE	**Initial Fine**	$ 65,000.01
	Other mitigating factors not considered above	100%
	Note:	
	FINAL INITIAL FINE	$ 65,000.01
DO NOT USE	**Daily Fine**	
	Other mitigating factors not considered above	
	Note:	
	FINAL DAILY FINE	$ -

Notes regarding expectations and/or responsibilities of the violator that are consistent to all enforcement cases:

SMA/SSA Application is required to come into compliance.

Costs incurred to reverse negative impacts are the sole responsibility of owner.

Maximum Initial Fine allowable is $100,000 / Maximum Daily Fine allowable is $10,000.

NOTES: Water was viewed in the hole, no monitor was seen on the site at the time of digging on 08/24/21. Digging extended from subject TMK and extended down the roadway to the adjacent TMKs 00-1-005:141, 2-1-005:117, and 2-1-005:116. Concerete was seen in the trenches as well, and digging went under 2 established driveways.

Revised:

	SMA INITIAL AND DAILY FINE CALCULATOR
Date:	3-Sep-21
Prepared by:	INSPECTOR: Shaina Hipolito
TMK:	2-2-1-005:118-0000
RFS:	21-0001311
Purpose:	Analysis of potential initial fines for 'Iwa 'Ike Subdivision, Makena-Keoneoio Rd., Kihei, HI 96753
Violation:	SM2 2019/0005 was granted for a four-lot rural residential subdivision to include a roadway, water distribution, fire protection system and underground utilities. Numerous complaints came in about this project and they broke condition #3 which stated that a qualified archeological monitor shall be present during all ground-altering activities in order to document any historic properties which may be encountered during the proposed undertaking and to preserve those known significant sites. No monitor was present on 08/24/21 during a spot check and drilling/ground work was being done. There is potential violation of condition #4, as water was viewed in the hole that was dug, and water had filled the hole 2 days later on 08/26/21, in which some kind of utility box is going to be dropped into that hole.
CODE:	HRS 205A

Criteria used to determine severity of violation and calculate applicable fines:		Rank on a scale of 0 through 10
(1) Previous violations by the same person;	Comments: *No prior violation by current owner for property*	0
(2) The risk or severity of damage to the environment, including the damage to the shoreline and marine resources;	Comments: *Drilling/excavation into the ground showed water filling the hole, and a painted utility box to be lowered and buried into the water filled hole. Somewhat high potential for environmental impact.*	2
(3) The degree of cooperation provided by the violator during the enforcement process; 1=Very Cooperative 10=Very Uncooperative	Comments: *Alpha Inc. somewhat cooperative, they saw it as no violations as they had an SMA permit. Workers on site were compliant and helpful during the site visits.*	1
(4) Amount necessary to deter future violations;	Comments: *Violations created by Alpha Inc., on behalf of owner. It is under the assumption from SHPD that no monitor was ever there prior to the site visit on 08/24/21. This TMK also has lots on it to construct, which means that there is a high potential that they could possibly continue to ground alter without any type of archeological monitor there as stipulated in the SMA.*	3
(5) Evidence, if any, of circumstances beyond the control of the violator;	Comments: *None*	0
(6) Whether the violator knew or should have known that permits, approvals, or assessments were needed.	Comments: *Approved SMA with conditions, owner and Alpha Inc. knew. On 08/26/21, verbal stop work order was given for any ground altering work without an archeological monitor on site.*	5
	Total Ranking	11

USE	**Initial Fine**	$ 18,333.34
	Other mitigating factors not considered above	100%
	Note:	
	FINAL INITIAL FINE	$ 18,333.34
DO NOT USE	**Daily Fine**	
	Other mitigating factors not considered above	
	Note:	
	FINAL DAILY FINE	$ -

Notes regarding expectations and/or responsibilities of the violator that are consistent to all enforcement cases:

SMA/SSA Application is required to come into compliance.

Costs incurred to reverse negative impacts are the sole responsibility of owner.

Maximum Initial Fine allowable is $100,000 / Maximum Daily Fine allowable is $10,000.

NOTES: Water was viewed in the hole, no monitor was seen on the site at the time of digging on 08/24/21. Digging extended from subject TMK and extended down the roadway to the adjacent TMKs 00-1-005:141, 2-1-005:117, and 2-1-005:116. Concerete was seen in the trenches as well, and digging went under 2 established driveways.

COUNTY OF MAUI
DEPARTMENT OF PLANNING
ZONING ADMINISTRATION AND
ENFORCEMENT DIVISION
ONE MAIN PLAZA
2200 MAIN STREET, SUITE 315
WAILUKU, MAUI, HAWAII 96793
Telephone: (808) 270-7253
Facsimile: (808) 270-7634
Email:planning@mauicounty.gov

FILE NO	NOV 2021/0058
RFS NO	21-0001311
DATE OF NOTICE	September 8, 2021
DATE OF VIOLATION	August 24, 2021
CONTINUING VIOLATION	[ ] YES [X] NO
COLLECTED FINE	NONE
CERTIFIED RECEIPT NO	*MULTIPLE ADDRESSES

NOTICE OF VIOLATION: SPECIAL MANAGEMENT AREA - MAUI

TO:			
	*7021 1970 0001 0541 7122 Iwa 'Ike LLC P.O. Box 1518 Kihei, Hawaii 96753	*7021 1970 0001 0541 7139 Michael Newbro Paia, Hawaii 96779	*7021 1970 0001 0541 7146 Alpha Inc. P.O. Box 330449 Kahului, Hawaii 96733

RE:			
	TMK	(2) 2-1-005:118-0000	PERMIT NO: SMX 2018/0407, SM2 2019/0005, EAE 2020/0080
	ADDRESS	Iwa 'Ike Subdivision – Makena Road, Kihei, Hawaii 96753	

I have inspected the above described structure(s) and/or premises and have found the following violation(s) of §12-202-12(a) Special Management Area Rules for the Maui Planning Commission ("SMA Rules"), as amended, and Hawaii Revised Statutes §205A-28:

NATURE AND EVIDENCE OF THE VIOLATION(S)	Failure to comply with the conditions set forth in the approved amended Special Management Area (SMA) approval dated December 31, 2020

Evidence of the aforementioned violation(s) include(s): Photographs of drilling/digging without an archeological monitor on site, site visit, and verbal testimony from State Historic Preservation Department Archeologist – Andrew McCalister

ORDER

Pursuant to §12-202-23 and §12-202-25, SMA Rules, and §205A-32 Hawaii Revised Statutes (HRS), as amended, you are hereby ordered as follows:

X	Cease and desist all activity immediately.		
X	Stop any activity that is in violation, and submit an SMA Assessment, obtain an exemption or approval, and remove or retain any work that is in violation.		
X	Pay an initial civil fine in the amount of:	**$65,000.00**	To the Department of Planning ("Planning") by **October 8, 2021**
X	Pay a daily civil fine in the amount of:	**$0.00**	Per day beginning on **September 15, 2021** to Planning if the corrective action described above is completed by **December 8, 2021**
X	Pay a daily civil fine in the amount of:	**$0.00**	Per day beginning on **December 9, 2021** to Planning if the corrective action described above is not completed by **December 8, 2021**

Pursuant to §205A-32 and Chapter 91, Hawaii Revised Statutes, as amended, these fines are not imposed until you have had an opportunity for a hearing. If you wish to contest any provision of this Notice of Violation and Order (NOV), then within thirty days of the certified mailing of this NOV, you must submit a request for hearing with the director as required by Title MC-12, Chapter 202, §12-202-23(d)(4), Maui Planning Commission ("MPC") Special Management Area Rules ("SMA Rules"); or submit an appeal to the MPC as required by Title MC-12, Chapter 201, Subchapter 8 of the MPC Rules of practice and Procedure. Pursuant to §91.95, Hawaii Revised Statutes, as amended, if you submit a timely request for hearing or a timely appeal, we will notify you of the hearing date and time. If you do not submit a timely request for hearing or appeal, this Order will become final pursuant to §12-202-23(d)(2), MPC SMA Rules. Submitting a timely request for a hearing or appeal does not stay any provision of this Order. If the director has held a requested hearing, then within 10 days after receiving the director's written decision, you may submit an appeal for the director's decision to the MPC, pursuant to §12-202-26, MPC SMA rules. Pursuant to §12-202-31, MPC SMA rules, an appeal hearing by the MPC is governed by Subchapter 8 of the MPC Rules of Practice and Procedure.

FOR THE PLANNING DIRECTOR

Print Administrator's Name	JOHN S. RAPACZ	Administrator's Signature	
Print Supervisor's Name	JAY ARAKAWA	Supervisor's Signature	
Print Inspector's Name	SHAINA HIPOLITO	Inspector's Signature	

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COUNTY OF MAUI
DEPARTMENT OF PLANNING
ZONING ADMINISTRATION AND
ENFORCEMENT DIVISION
ONE MAIN PLAZA
2200 MAIN STREET, SUITE 315
WAILUKU, MAUI, HAWAII 96793
Telephone: (808) 270-7253
Facsimile: (808) 270-7634
Email:planning@mauicounty.gov

FILE NO	NOV 21-00001311(SMA)
RFS NO	21-0001311
DATE OF NOTICE	September 5, 2022
DATE OF VIOLATION	August 24, 2021
CONTINUING VIOLATION	[ ] YES [X] NO
COLLECTED FINE	NONE
CERTIFIED RECEIPT NO	*MULTIPLE ADDRESSES

NOTICE OF VIOLATION: SPECIAL MANAGEMENT AREA - MAUI

TO:			
	Certified Receipt No. 7017 3380 0000 8999 6730 Iwa 'Ike LLC P.O. Box 1518 Kihei, Hawaii 96753	Certified Receipt No. 7018 2290 0001 0723 6633 Michael Newbro Paia, Hawaii 96779	Certified Receipt No. 7019 2970 0000 5318 0903 Alpha Inc. P.O. Box 330449 Kahului, Hawaii 96733

RE:			
	TMK	(2) 2-1-005:118-0000	PERMIT NO: SMX 2018/0407, SM2 2019/0005, EAE 2020/0080
	ADDRESS	Iwa 'Ike Subdivision – Makena Road, Kihei, Hawaii 96753	

I have inspected the above described structure(s) and/or premises and have found the following violation(s) of §12-202-12(a) Special Management Area Rules for the Maui Planning Commission ("SMA Rules"), as amended, and Hawaii Revised Statutes §205A-28:

NATURE AND EVIDENCE OF THE VIOLATION(S)	Failure to comply with the conditions set forth in the approved amended Special Management Area (SMA) approval dated December 31, 2020

Evidence of the aforementioned violation(s) include(s): Photographs of drilling/digging without an archeological monitor on site, site visit, and verbal testimony from State Historic Preservation Department Archeologist – Andrew McCalister.

ORDER

Pursuant to §12-202-23 and §12-202-25, SMA Rules, and §205A-32 Hawaii Revised Statutes (HRS), as amended, you are hereby ordered as follows:

X	Cease and desist all activity immediately.		
X	Stop any activity that is in violation, and submit an SMA Assessment, obtain an exemption or approval, and remove or retain any work that is in violation.		
X	Pay an initial civil fine in the amount of:	**$15, 000.00**	To the Department of Planning ("Planning") by **October 5, 2022**
X	Pay a daily civil fine in the amount of:	**N/A**	Per day beginning on **September 12, 2022** to Planning if the corrective action described above is completed by **October 5, 2022**
X	Pay a daily civil fine in the amount of:	**N/A**	Per day beginning on **October 6, 2022** to Planning if the corrective action described above is not completed by **October 5, 2022 (SAME AS ABOVE)**

Pursuant to §205A-32 and Chapter 91, Hawaii Revised Statutes, as amended, these fines are not imposed until you have had an opportunity for a hearing. If you wish to contest any provision of this Notice of Violation and Order (NOV), then within thirty days of the certified mailing of this NOV, you must submit a request for hearing with the director as required by Title MC-12, Chapter 202, §12-202-23(d)(4), Maui Planning Commission ("MPC") Special Management Area Rules ("SMA Rules"); or submit an appeal to the MPC as required by Title MC-12, Chapter 201, Subchapter 8 of the MPC Rules of practice and Procedure.

Pursuant to §91.95, Hawaii Revised Statutes, as amended, if you submit a timely request for hearing or a timely appeal, we will notify you of the hearing date and time. If you do not submit a timely request for hearing or appeal, this Order will become final pursuant to §12-202-23(d)(2), MPC SMA Rules. Submitting a timely request for a hearing or appeal does not stay any provision of this Order. If the director has held a requested hearing, then within 10 days after receiving the director's written decision, you may submit an appeal for the director's decision to the MPC, pursuant to §12-202-26, MPC SMA rules.

Pursuant to §12-202-31, MPC SMA rules, an appeal hearing by the MPC is governed by Subchapter 8 of the MPC Rules of Practice and Procedure.

FOR THE PLANNING DIRECTOR

Print Administrator's Name	JORDAN E HART	Administrator's Signature	
Print Supervisor's Name	GAIL DAVIS	Supervisor's Signature	
Print Inspector's Name	SHAINA HIPOLITO	Inspector's Signature	

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