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

Ref. File No.: Violation MA-08-22

May 9, 2008

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

REGARDING:	Alleged Unauthorized Construction of a Shoreline Structure at Makena, Maui
BY:	Ms. Sara Dodge, Rancho Santa Fe, CA
LOCATION/ TMK:	6950 Makena Road, Makena, Maui TMK: 2-1-6:90
SUBZONE:	Resource

DESCRIPTION OF AREA:

The location of the alleged unauthorized land use is a shoreline area at Makena, Maui **(Exhibits 1-3).** The alleged unauthorized improvements (wall and planter) are constructed on a sandy beach **(Exhibit 4, Photos).**

ALLEGED UNAUTHORIZED LAND USE:

On October 26, 2008 the Department of Land and Natural Resources (DLNR), Office of Conservation and Coastal Lands (OCCL) received complaints that several unauthorized improvements were in existence beyond the certified shoreline boundary. The complaint alleges that a newly constructed rock wall is situated on the upper portion of the beach directly seaward of the residence **(See Exhibit 4, Photos)**, and a section of a rock wall on an elevated rock outcropping **(Exhibit 5)**, as well as a portion of a deck **(Exhibit 6)**, are located seaward of the shoreline[1].

1 Staff has been working on this case in concert with the Maui County Planning Department (MCPD). MCPD will be investigating issues related to the deck. In addition, MCPD will be assuming a lead role in its investigation of alleged unauthorized improvements on a small-elevated rock outcropping where some walls and chains were recently constructed. These improvements may lie within the County shoreline setback area. OCCL is pursuing the wall and planter attached to the main residence.

On January 25, 2008, OCCL send a letter to Ms. Dodge informing her that an enforcement action would be scheduled before the Board of Land and Natural Resources (BLNR) to resolve the matter **(Exhibit 7)**.

RESOLUTION OF UNAUTHORIZED LAND USES:

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

As evidenced by the wave run up, and prior shoreline certifications, Staff believes that the wall/planter is located within the Conservation District **(See copy of 1995 Shoreline Certification, Exhibit 8[2])**. Based on the evidence available, the OCCL has sufficient cause to bring this matter to the Board since it is evident that portions of the structure is placed within the Conservation District pursuant to the Hawaii Administrative Rules (HAR), §15-15-20 Standards for determining "C" conservation district boundaries:

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

<u>Conservation District</u>

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

2. The 1995 shoreline certification clearly indicates the presence of a "deck" with the shoreline certification running just seaward of and underneath the deck. The wall/planter are clearly seaward and underneath the deck, based of the photographs in this report. Thus, based on this shoreline certification as evidence, historical photos, and recent site inspections, staff has determined that these improvements are within the Conservation District.

Hawaii Coastal Erosion Management Plan

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

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

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

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

DISCUSSION

Based on site inspections, Staff believes that the improvements are relatively new and postdate the Board's no tolerance policy **(See photos dated 1992, Exhibit 9[3])**. The mortar and rockwork appear to be relatively fresh and there is no evidence of these structures in 1992 (first shoreline certification), and in 1995, based on documents located in the 1995 shoreline certification file. Because the Department has a "no tolerance" policy in regards to shoreline structures constructed after 1999, OCCL Staff recommends that the subject rock wall (and the contained fill material and plants) should be removed[4].

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

3. These photographs were retrieved from a CDUA file dated around 1992, and were titled "CDUA Project Files."
4. Even if this action was not subject to the no tolerance policy, staff would recommend the removal of wall and planter as they were constructed seaward of a 1995 shoreline in the public right-of-way, without any government authorization.

[Note: The Department has been working closely with the County of Maui Planning Department on this matter since there may be unauthorized work that occurred within the County's jurisdiction within the shoreline area. For instance, there is an elevated rock outcropping on the eastern extent of the property along the shoreline that was constructed after 1992. The photographs in Exhibit 9 clearly depict this section of the shoreline in a relatively natural state, without any walls. These improvements appear to have been made recently based on an inspection of the mortar. The County has agreed to bring an enforcement action against the property owner to have these alleged unauthorized improvements removed. In addition, OCCL has deferred the matter of the deck to the County authorities. Should it be determined by the County that these improvements are not within their jurisdiction, OCCL may conduct a shoreline determination to verify if the improvements are in the Conservation District.]

AS SUCH, STAFF RECOMMENDS AS FOLLOWS:

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

1. Ms. Dodge is in violation of the provisions of Chapter 183C, Hawaii Revised Statutes (HRS), and Chapter 13-5, Hawaii Administrative Rules (HAR), for the unauthorized shoreline structure (wall with planter) with the Conservation District;

2. Ms. Dodge is fined $1,000.00 for administrative costs associated with the subject violation;

3. Ms. Dodge shall pay all fines (total $1,000.00) within sixty (60) days of the date of the Board's action;

4. Ms. Dodge shall remove the wall and planter within the Conservation District within thirty (30) days of the Board's action on this matter (all dirt/fill material will be removed from the shoreline area using best management practices);

5. Within 60 days, a Departmental representative shall inspect the shoreline for compliance;

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

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

5. Counsel for Ms. Dodge claims that she did not make the improvements, and that the improvements were made by her predecessor. Thus, staff will not be recommending a fine, just removal of the offending uses. If Ms. Dodge purchased the property with the improvements in place, this does not absolve her of responsibility. If it is discovered through these proceedings that she authorized or was somehow responsible for the subject improvements, she should be assessed a $2,000 fine.

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

Respectfully submitted,

Samuel Lemmo, Administrator
Office of Conservation and Coastal Lands

Approved for submittal:

LAURA H. THIELEN, Chairperson
Board of Land and Natural Resources

MAUI

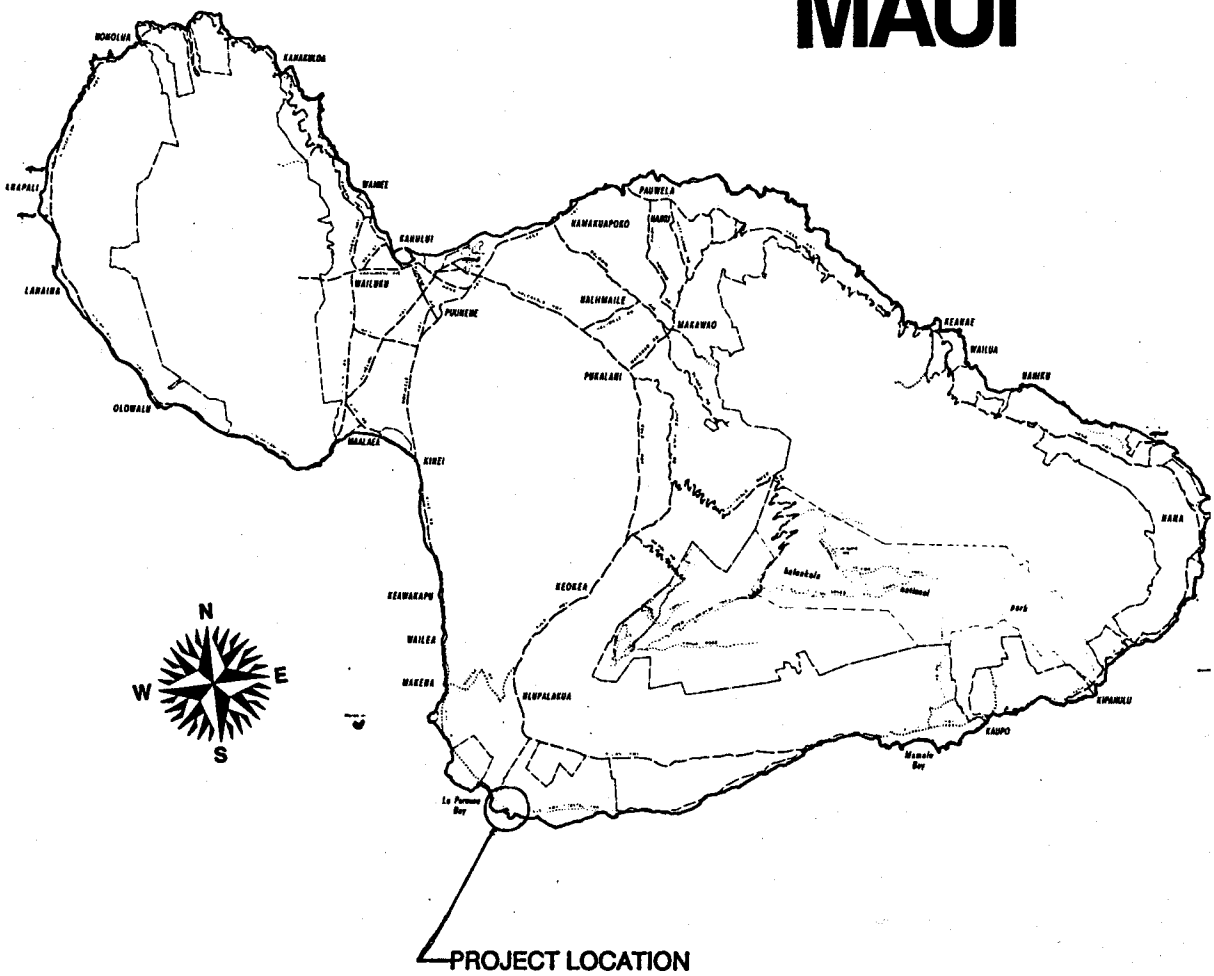
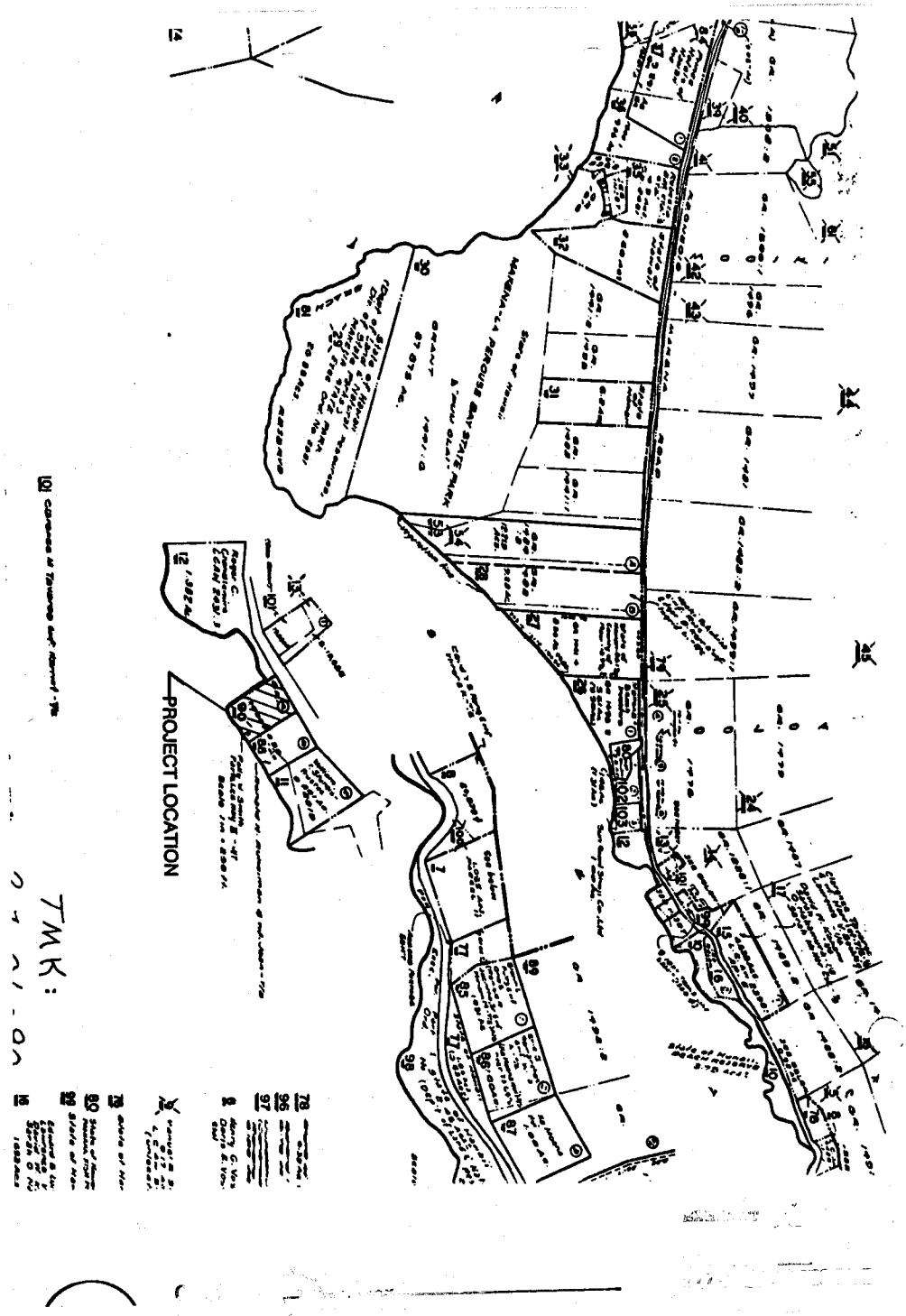


EXHIBIT 1



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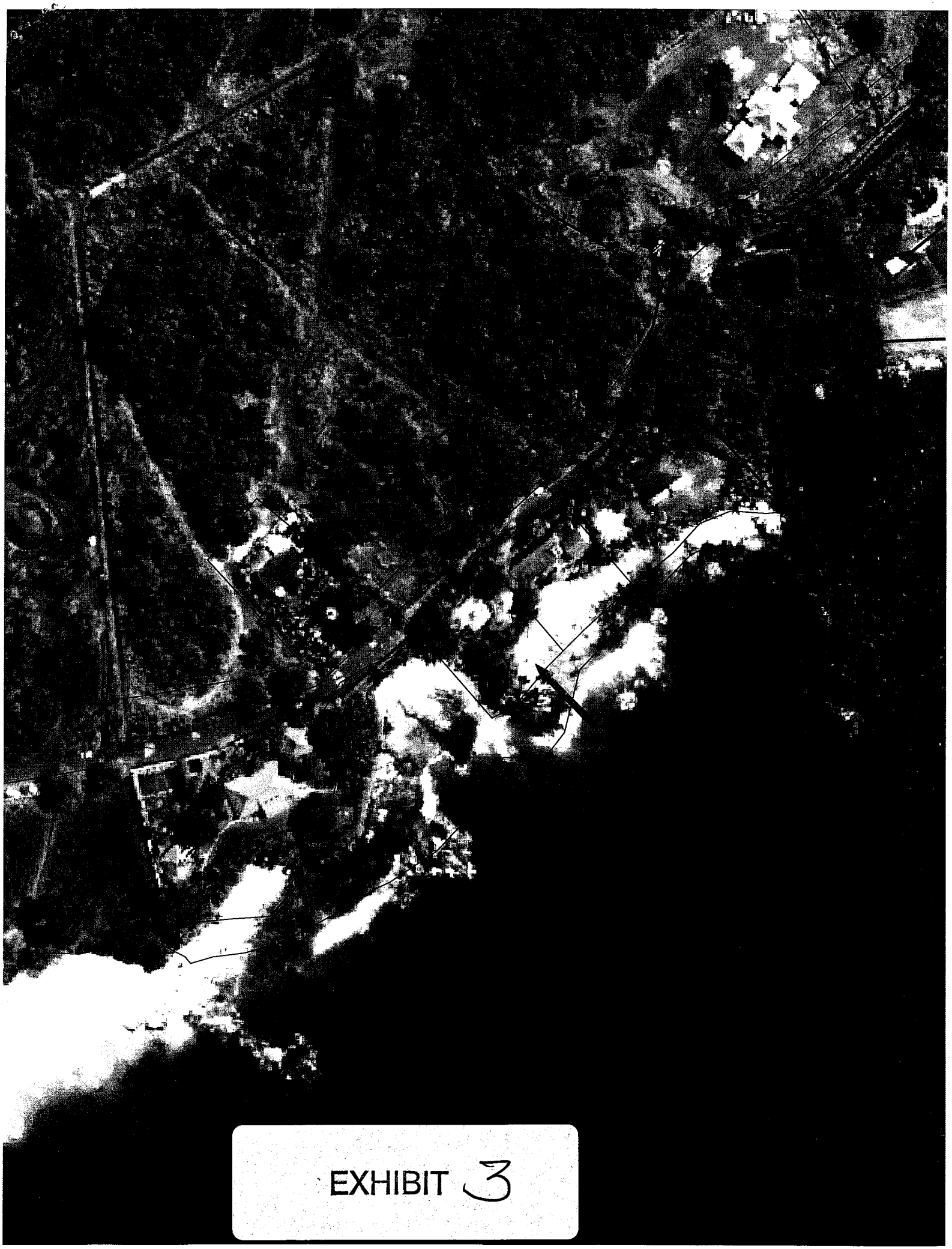

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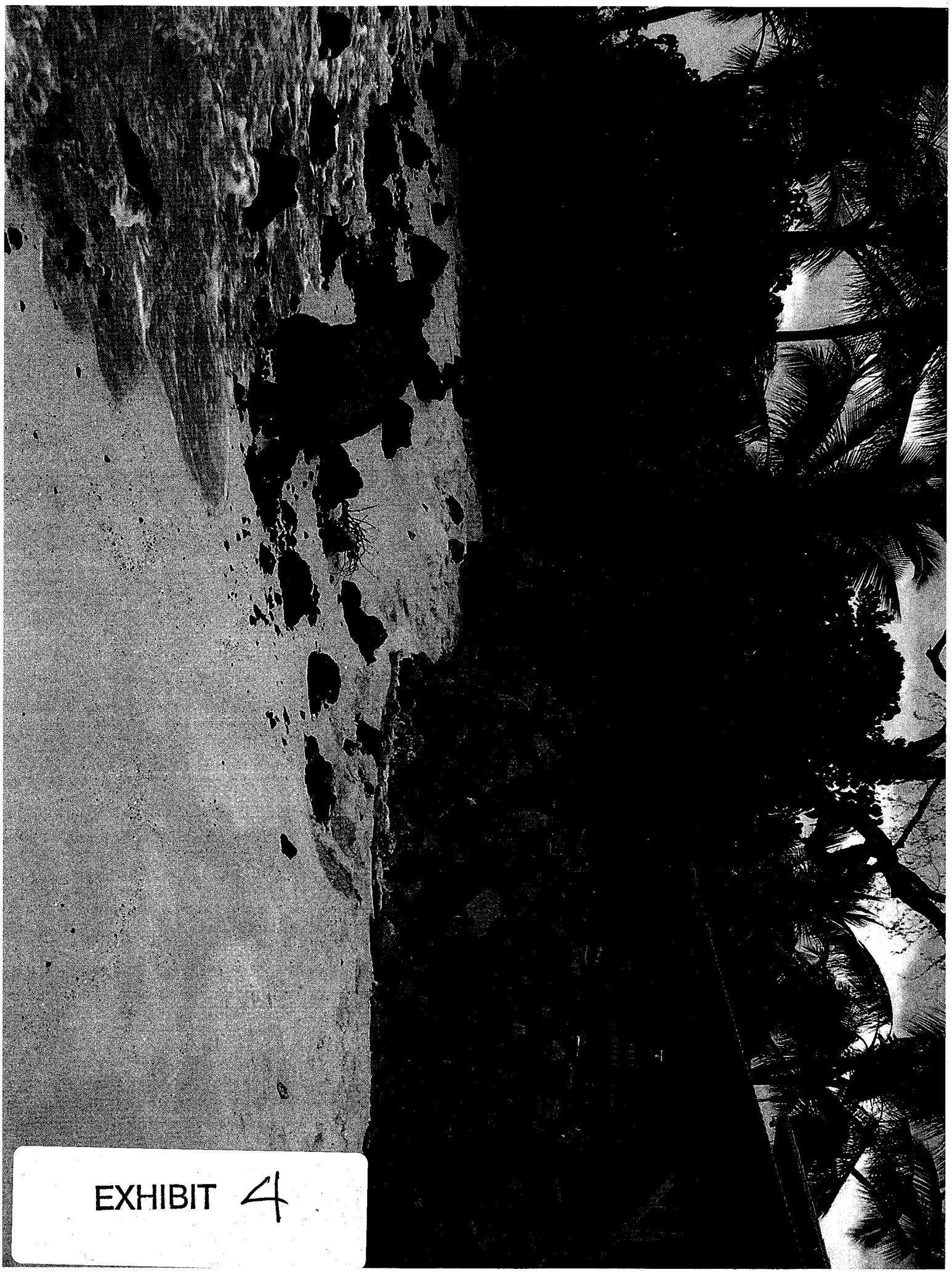

EXHIBIT 4

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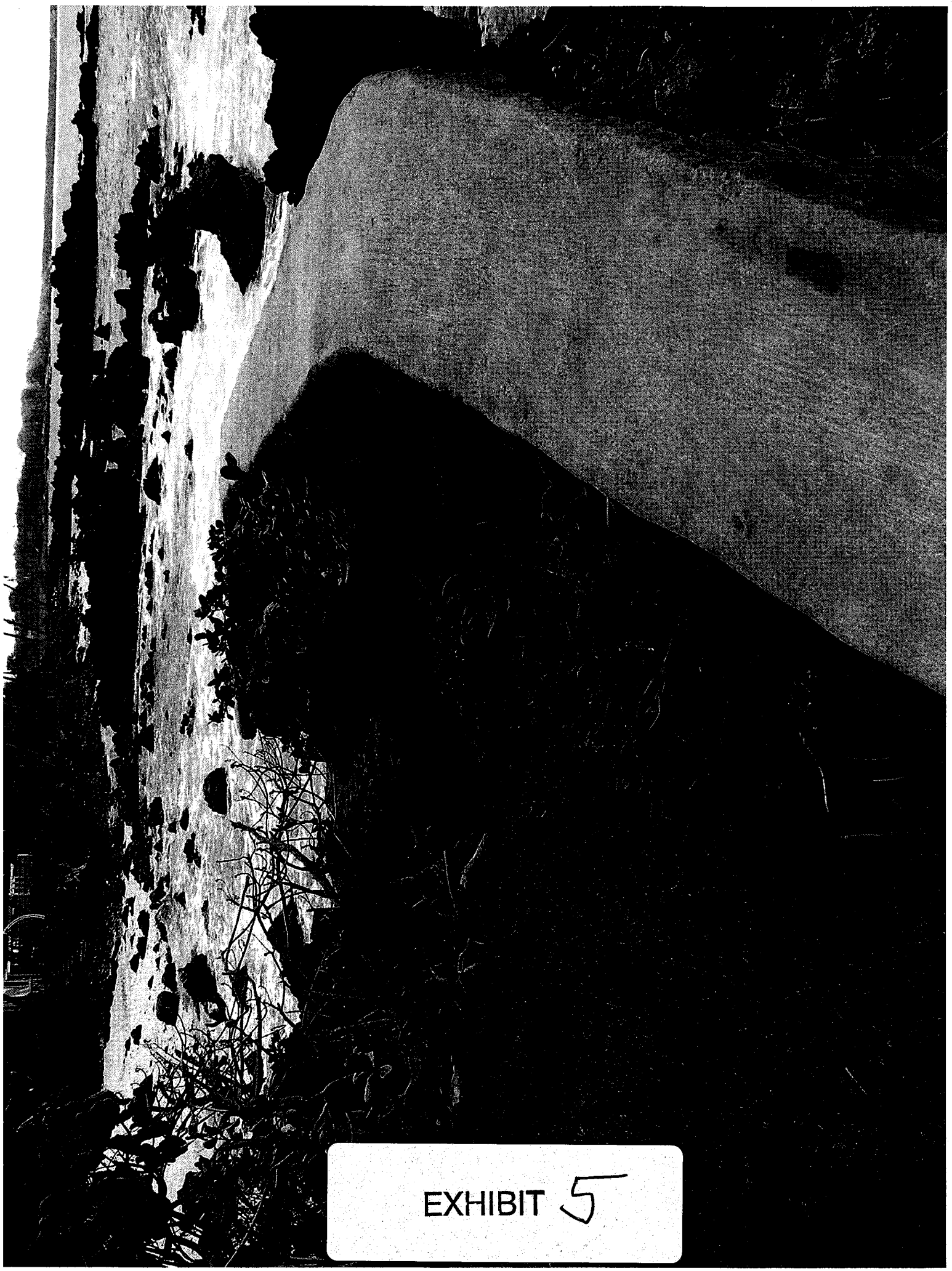
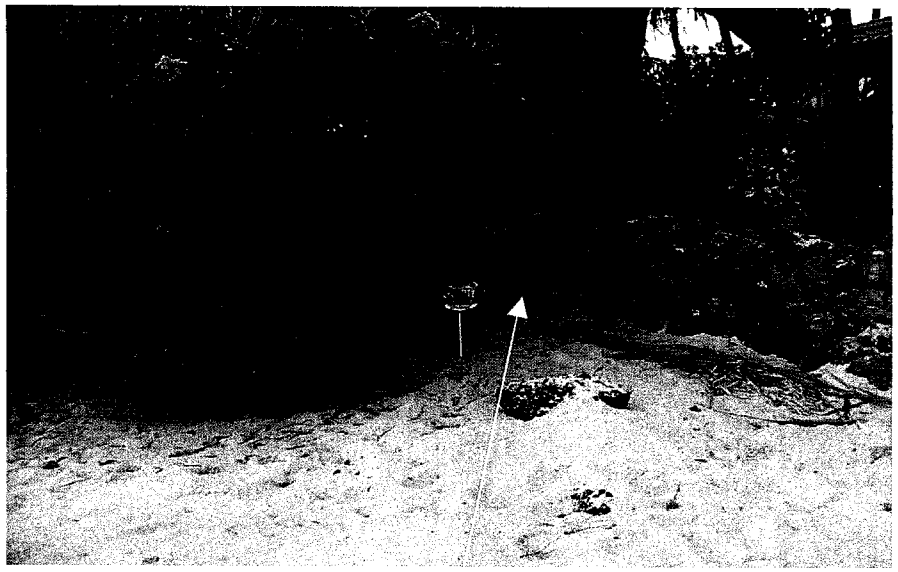


EXHIBIT 5

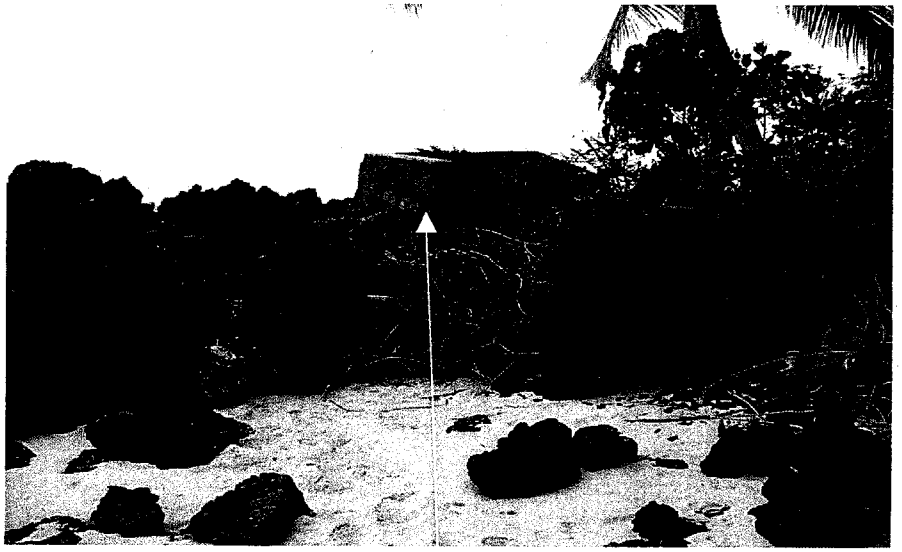
EXHIBIT 5

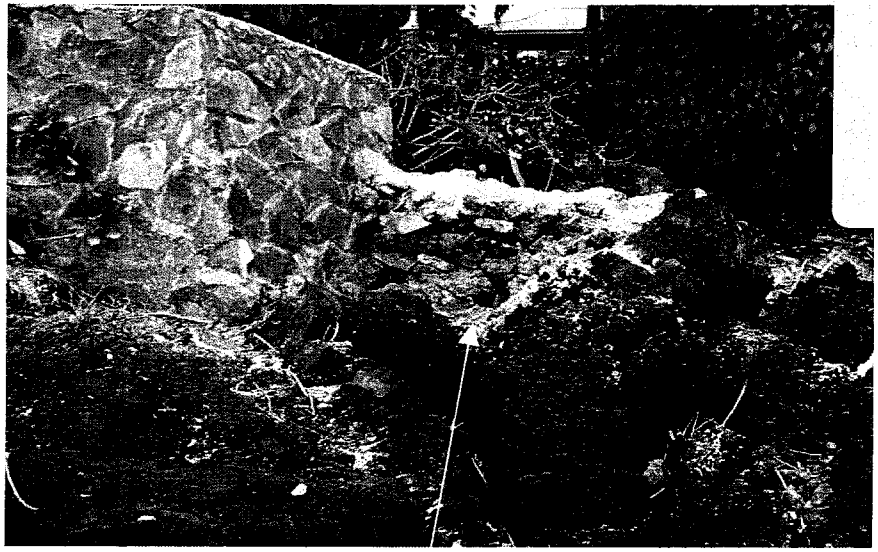
Photos taken: 10/19/07

6950 Makena Road.



Encroaching stairway at north end of the seawall.





Roack wall on an outcropping fronting the property.

Newly constructed addition to the rock wall on the rock outcropping.

EXHIBIT 5

Photos taken: 10/19/07

6950 Makena Road, TMK: (2) 2-1-006:090

Photos depict newly erected rock wall fronting residence. The seawall has been constructed beyond the certified shoreline boundary.

False corner pin at the base of the the rock wall

EXHIBIT G

LINDA LINGLE
GOVERNOR OF HAWAII

LAURA H. THIELEN
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

RUSSELL Y. TSUJI
FIRST DEPUTY

KEN C. KAWAHARA
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

Violation No. OA-08-22

JAN 2 5 2008

Ms. Sara Dodge
P.O. Box 2029
Rancho Santa Fe, CA 92067

Dear Ms. Dodge:

Subject: Unauthorized Land Use at Makena, Maui TMK: (2) 2-1-006:090

The Department of Land and Natural Resources (DLNR), Office of Conservation Lands (OCCL) is responsible for the enforcement of land use regulations within the State Land Use Conservation District. One of OCCL's responsibilities is to ensure that lands and natural resources under its jurisdiction are not degraded or inappropriately used. I have attached a recently published brochure that explains our mission and some of our administrative functions, for your information and use. We have also attached a copy of a booklet we recently published concerning the purchasing of coastal property.

It has come to our attention that the Maui Land Division Office sent you a notice alleging that unauthorized uses or activities were conducted on state land seaward of your property. The letter alleges that a seawall was constructed (copy attached).

The OCCL is following up on that notice and is assuming jurisdiction of the matter so you will be dealing directly with the OCCL office in Honolulu Hawaii. The OCCL has been designated as the lead agency on this enforcement action. In addition to the management of state-owned lands, the DLNR regulates all land uses within the Conservation District. The Conservation District is defined as the area seaward of the shoreline as defined under Chapter 205A, Hawaii Revised Statutes (see attached). The unauthorized work described by the Maui Land Division Office is punishable under Chapter 183C, HRS and Title 13-5, Hawaii Administrative Rules (HAR). We have attached these documents for you perusal.

Chapter 183C, HRS states "Any person violating this chapter or any rule adopted in accordance with this chapter shall be fined not more than $2,000 per violation, in addition to administrative costs, and costs associated with land or habitat restoration, or both, if required, and damages to state land. After written or verbal notification from the department, willful violation of this section may incur an additional fine of up to $2,000 per day per violation for each day in which the violation persists".

EXHIBIT 7

The OCCL has conducted some research on this matter and it has become clear that the wall (planter) was constructed below the shoreline as defined under Chapter 183C, HRS and is therefore in violation of Chapter 183C, HRS. In addition, there were other improvements made in the vicinity of the conservation district (stone wall and landscaping), which we continue to investigate for possible violations.

The OCCL intends to pursue this matter until the alleged violations are resolved. With this letter we are informing you of our intent to schedule this matter before the BLNR for action within the next few months. In addition, please consider this letter a formal notice that you are in violation of Chapter 183C and may be subject to fines of up to $2,000 per day until this matter is resolved.

Prior to taking action, the Board, pursuant to Chapter 91-90, Hawaii Revised Statutes, informs you of the following:

1. Date, time, place and nature of meeting.

   This matter will be included on the Land Board's agenda at time and place to be announced.

2. Legal authority under which the hearing is to be held

   The Board derives its authority from Article XI, Section 1 of the Hawaii State Constitution, and in this specific case, Chapters 183C, Hawaii Revised Statutes, and Title 13-5 of the Administrative Rules.

3. The particular sections of the statutes and rules involved.

   a. Section 183C-7, Hawaii Revised Statutes.
   b. Section 13-5-6 of the Administrative Rules.

4. Issues involved.

   Unauthorized work within Conservation lands.

5. Counsel.

   You are entitled under the law to retain counsel if you so desire in this matter. Further, you or your counsel will be afforded an opportunity to present evidence and argument on all issues involved.

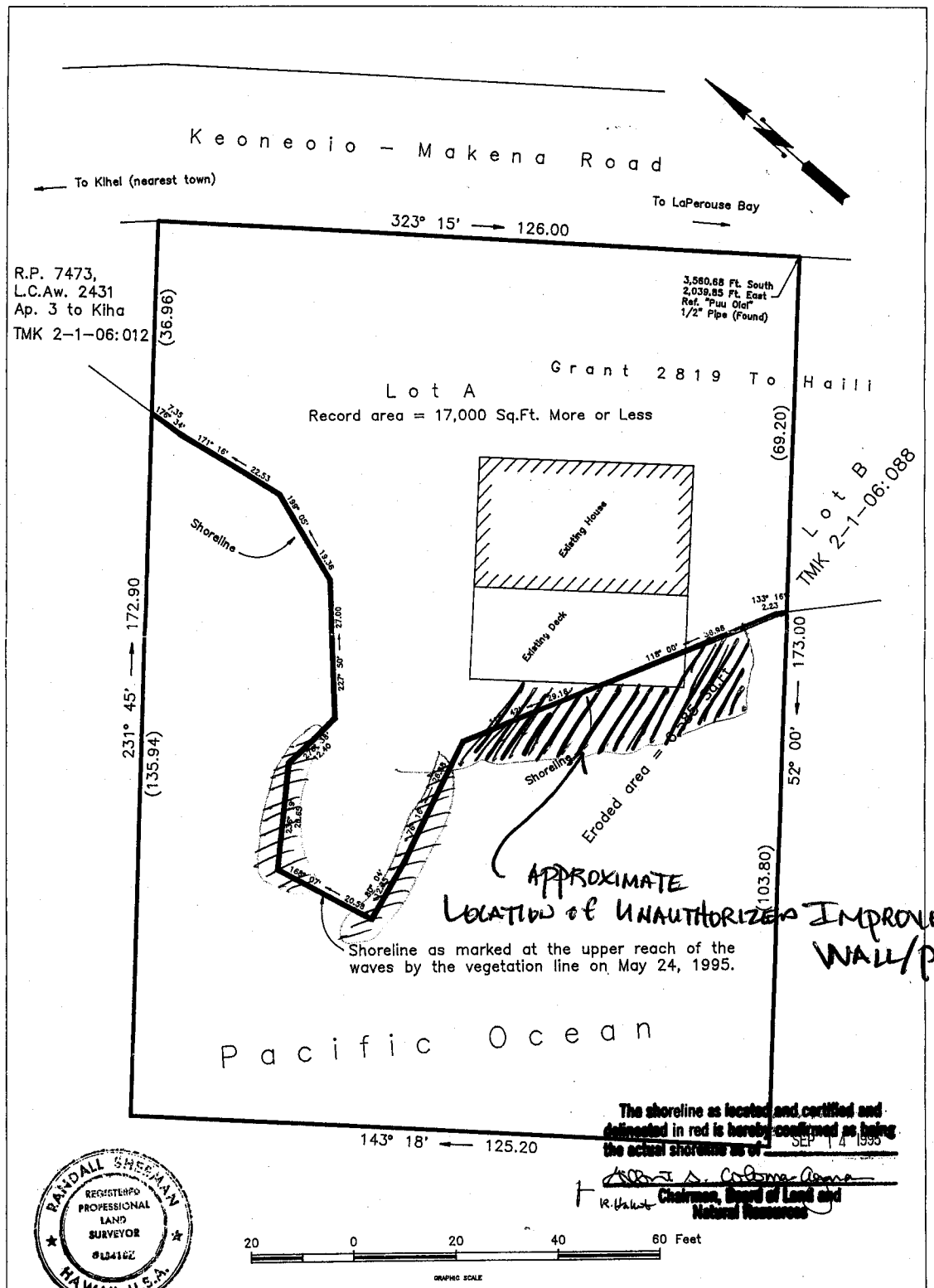
A staff report with recommendations will be forwarded to you prior to the meeting. Please call me at 587-0377, should you have any questions on this matter.

Very truly yours,

Samuel Lemmo, Administrator

cc: Chairperson's Office
Maui Board Member
Maui Land Agent
DOCARE (Maui)
County of Maui Planning Department
Paul Mancini

Attachments



The shoreline as located and certified and delineated in red is hereby confirmed as being the actual shoreline as of SEP 14 1995

R. Hakoi

Chairman, Board of Land and Natural Resources

Prepared For:
P. L. Hay III
16 Honour Ave. NW
Atlanta, GA 30305

NOTES:
1. This map is based on an actual field survey performed May 12, 1995.
2. Shoreline shown is the highwater mark at the upper reach of the waves as evidenced by the vegetation line on May 24, 1995.
3. Property address is 6950 Keoneoio-Makena Road

This map was prepared by me or under my direct supervision.

Randall Sherman
Registered Professional Land Surveyor
State of Hawaii Certificate Number LS4187

Land Surveyors, Inc.

Kihei Gateway Plaza
362 Huku Li'i Place, Suite 202
Kihei, Maui, HI 96753
Bus (808) 874-8848
Fax (808) 874-1136

Shoreline Verification Map
Showing
Lot A
Being also a portion of
Grant 2819 to Haili
Situated at
Honuaula, Makawao, Maui, Hawaii

REVISIONS By Date
FB No: 505 Date: 24 May 1995
Job: SANDS - Shoreline
No: 95057 TMK: 2-1-06:090

EXHIBIT 8

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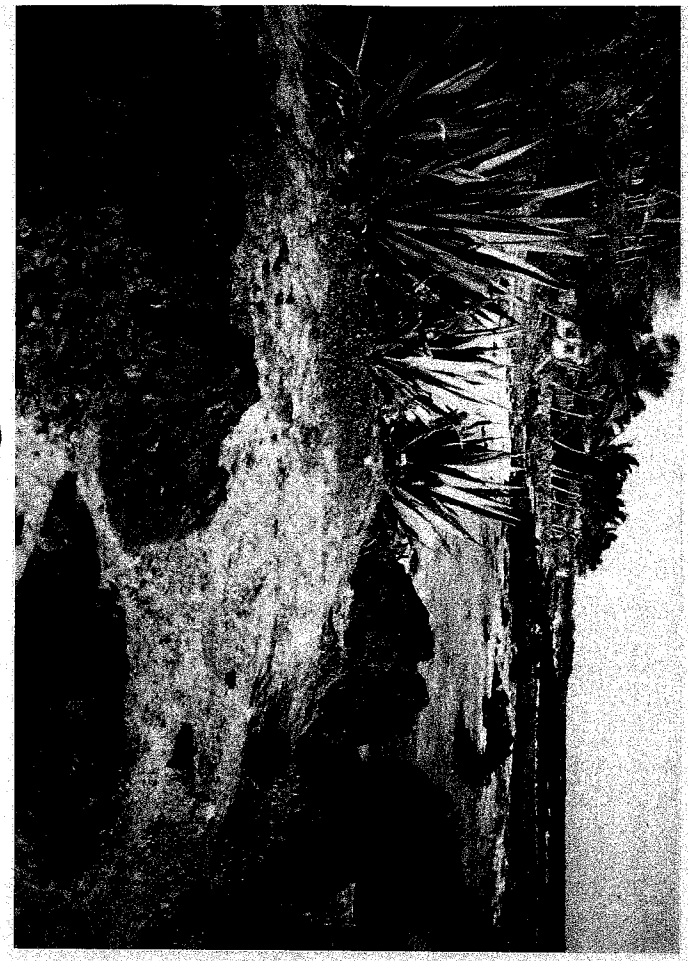

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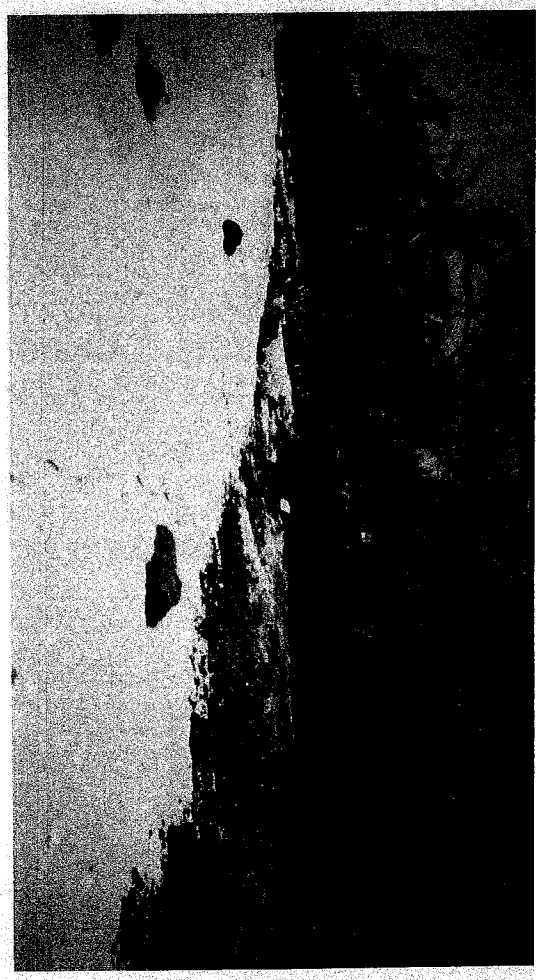

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EXHIBIT 9