

## **GET Committee**

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**From:** Samuel Small <info@mauicauses.org>  
**Sent:** Monday, February 4, 2019 1:55 PM  
**To:** GET Committee  
**Subject:** Director Criminal Violations (GET-1(9))(GET-1(6))(GET-1(2))  
**Attachments:** ss\_affidavit\_notarized.pdf

Maui County Council

I feel it is paramount that the members of the Maui County Council are provided with information on the proposed Directors that Mayor Victorino's Selection Committee most likely didn't have when they made their recommendations.

The evidence detailed in my attached affidavit I believe clearly shows that under the Direction of Corporation Counsel Patrick Wong, Planning Director William Spence and Public Works Director David Goode have willfully withheld public documents and have manufactured false government records to serve the financial interests of private developers and former clients.

These violations appear to be criminal in nature, under the Hawaii Revised Statutes, Title 37 710. HAWAII PENAL CODE.

Not only are their actions grounds for denial of continued employment, but under the Charter, the Council has the Power and Duty to conduct a thorough investigation of these acts and impose penalties for conduct which is detrimental to the citizen's trust in our county government

The evidence and exhibits are clearly established in the attached affidavit. Here's just a few;

### **Circumventing Environmental and Zoning Laws Through Fraud and Abuse of Power:**

Public records and testimony reveal that with the Director's assistance, private developers and their licensed consultants are actively circumventing environmental laws adopted by Maui County under the Planning Commission rules and procedures, through fraudulent SMA permit applications and selective non-enforcement of permit and subdivision conditions in direct violation of the Federal Coastal Zone Management Act.

### **DIRECTOR GOODE - VIOLATION:**

Director of Public Works David Goode signed off on a massive subdivision at Olowalu, overlooking the fact the developer's infrastructure and environmental mitigation conditions were left unfulfilled. It was only through the actions of a concerned citizen, almost ten years after Director Goode signed off on the

project, that the developers of Olowalu were found to be in violation of their SMA Major Permit. (13) See Olowalu Notice of Non Compliance PDF PG 30 - 44

#### **DIRECTOR SPENCE - VIOLATION:**

On another oceanfront subdivision in West Maui, Director Will Spence made a recent legal determination on the status of SMA Permit #SM2 2000/0042 as follows: "It is my belief that SM2 2000/0042 was closed when the approval was issued on June 6, 2000 via letter to Hugh Farrington."

Director Spence's Declaration is flawed in two ways:

First, the unique role of a Director is to make legally binding determinations of fact, not to express his personal "beliefs" on matters of County permit compliance records.

Second, it is impossible for a development permit, which as a condition requires construction that has not yet been performed, to be signed off and "closed" on the same day that *the application* for that permit was approved. (15) See Declaration of Planning Director Spence PDF PG 150 - 154

Spence's declaration hides the fact that this permit is still open, and now expired, and is part of what appears to be an ongoing attempt by County officials to cover up administrative failures or specific abuses in the SMA permitting process and the lack of inspections on SMA Permits applied to this project and probably many others in Maui County.

#### **DIRECTOR WONG - VIOLATION**

All of my research leads me to the conclusion that when the County Council goes into executive sessions, Corporation Counsel misleads the members of the Council in order to obtain taxpayer funds to continue their long-standing pattern of vigorously defending the unlawful acts of politically appointed public officials.

Corp Counsel obstructs the County Council from investigating the acts of County Departments and their Directors by asserting that the Council Members are Corp Counsel's clients too and must abide by their directives and advice. The Dept. of the Corporation Counsel will even authorize their administrative clients not to answer questions from Council Members, their other purported client(s) during litigation.

The supporting documents will be sent in a separate email as the attachment is too large to included here:

**Thank you for your consideration in these important matters**

**Respectfully,  
Sam Small  
Director, Maui Causes**



Affidavit of Samuel A. Small Oct 1, 2018

I, Samuel A. Small, state as follows;

1. I have been a full-time resident of the County of Maui, State of Hawaii since 2005.
2. My involvement with media technology began in the early 1970's. I have BA in Speech Communication (with a minor in Broadcasting) from Penn State and ran a Media Production Company in NYC for nearly 30 years, producing commercials and documentaries.
3. As both a Creative and Technical Director, I served for 8 years as Vice President of Broadcast Production Services for Prudential Financial.
4. Here on Maui, I chaired the Media Content & Production Committee for the SHAKA Movement's 2014 electoral win of the GM Moratorium with opposition from a \$12 Million media blitz waged by Monsanto.
5. I am currently principally engaged in the design and implementation of complex online marketing and media delivery platforms for a variety of advanced educational products.
6. I am the independent producer and host of Maui Causes, a weekly, local issues driven interview TV show that airs both online and on Akaku's Ch 55 (Mondays & Sundays at 7PM and 7AM)
7. For the past three years I have been doing research for a documentary film on the contributing factors of Maui's shoreline degradation and have documented the unethical mismanagement of Maui County's administration of subdivision deferral agreements that allow private developers to shift their financial burdens for roadway infrastructure improvements onto the public, as well as SMA Permit application fraud that allow many of the same private developers to circumvent environmental protections and public oversight mandated by the Federal Coastal Zone Management Act.
8. I was recently invited to make a presentation of some of my research to the Maui County Council's Infrastructure and Environment Committee by Committee Chair Elle Cochran, whose staff fact-checked it. The video of the presentation can be viewed at

<https://mauicauses.org/maui-causes-show-64/>. (1) See Infrastructure Presentation PDF PG 1 - 46

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### Unaccounted for and Uncollected Upon 3-Lot-or-Less Infrastructure Deferral Agreements

9. From the 2013 *Maui Time Weekly* cover story I learned about the County of Maui Department of Public Works mismanagement of thousands of untracked, unaccounted for, and uncollected upon developer agreements, authored by the Department of Corporation Counsel since 1974.. (2) See Maui

Time Weekly PDF PG 47 - 51

10. Christopher Salem, who is widely quoted in Maui Time Weekly's reporting, has an extensive resume in land planning, residential and commercial development, and general contracting of multifamily, entry-level residential housing. In 2011, Mr. Salem's expertise in the permit and planning process earned him a position with Maui County as Executive Assistant to County Council Member Sol Kaho'ohalahala, the Chair of Planning Committee, specifically to advise the County on how to effectively resolve these mismanaged developer deferral agreements.

11. Previously, former County Council Member JoAnne Johnson-Winer worked alongside Mr. Salem for over a decade and recounted her discoveries in an affidavit she submitted in public hearings, which included a scathing account of procedural abuse by public officials and county attorneys. Johnson-Winer testified: "I can see how the "three parcel or less" County subdivision ordinance, originally intended to assist local families wanting to divide relatively small, family land parcels by "deferring" the expensive cost of frontage roadway improvements, drainage infrastructure, and utility relocation, has been exploited by public officials for decades."

(3) See Affidavit of JoAnne Johnson-Winer PDF PG 52 - 64

### Good Intentions. Intentionally Abused:

12. By County ordinance, the "onetime deferral" of roadway infrastructure cost was limited to small subdivisions, containing "3 lots or less". The subdivision agreements, drafted by County attorneys, required landowners to pay the County their "fair share" of infrastructure costs, at a future date, when the

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County of Maui initiated a roadway Capital Improvement Project along the subdivision's frontage. (4) See Sample Deferral Agreement PDF PG 65 - 70

13. Council testimony, newspaper articles, and public records reveal how County attorneys never tracked these developer agreements and literally let them pile up in storage closets and warehouses. Now uncovered and cataloged, these public records show how extensively this ordinance has been manipulated by select private developers, apparently assisted by certain well-placed licensed professionals, public officials, and County attorneys.

The lack of any tracking mechanism for these "one time" deferrals allowed it to go unnoticed, and the records now show for decades that two or three layers of additional deferrals have been re-applied inappropriately to the same parent properties and developments, in clear violation of the adopted County Ordinance. The increased, and unlawful additional burden on taxpayers, has yet to be assessed or calculated. (5) See Maui Time Weekly "Deferral Article" PDF PG 71

14. Because the agreements were not monitored, developers were never assessed their fair share, even when the County did initiate and complete roadway Capital Improvement Project along their frontage. On CIPs performed, with State, County, and Federal funds, the taxpayers ended up paying for 100% of the developer's infrastructure financial obligations.

(6) See List of Deferral Agreements PDF PG 72 - 79

15. Even after this was all made public in 2001, County officials continued to write the potentially defective agreements, facilitating private developers intentional shifting of their financial burdens onto the backs of Maui taxpayers to an amount totaling, perhaps, hundreds of millions of dollars.

16. In her affidavit, Council Member Johnson-Winer expresses concern that the County's budget process is compromised because it has never included any accounting of the deferred development infrastructure costs that are owed to the County. It is a clear violation of the Maui County Charter by

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public officials and the Department of Finance to not include an accounting of the monies owed which are categorized as anticipated revenues to offset County expenditures.

17. In her affidavit Council Member Johnson-Winer also expresses concern that ordinances, like #3731, which she introduced and saw legally enacted into law, are being actively circumvented by the Department of Public Works and the attorneys within the Department of Corporation Counsel.

**Attempts to remediate stonewalled:**

18. I have reviewed a series of letters between Councilmember Ellie Cochran and Public Works Director David Goode starting in January of 2012. Councilmember Cochran increasingly presses Public Works for details on the number of deferral agreements that exist and their potential value to the County if collected because, "These deferral agreements represent a major revenue that is continuously overlooked each year".

(7) See Councilmember Cochran Letters to Public Works Director Goode PDF PG 80

19. The interchange ends with a response on June 4, 2012, not from Public Works but rather directly from the Mayor's office, signed by the Mayor Arakawa, with Director Goode stating that "After our meeting with our Corporation Counsel on this issue, we are unable to respond at this time on the matter as we are 1) researching the applicability of certain agreements on the ability to seek compensation, and 2) working out a formula for compensation on certain agreements. Rest assured we (Departments of Public Works and Corporation Counsel) are actively working on this issue..." It is now six years later and still Public Works and Corporation Counsel have not disclosed to the Maui County Council or the public which "certain agreements" they were researching on the ability to seek compensation and which "certain agreements" they were working out a formula for compensation. (8) See Director Goode Letter to

Cochran signed by Mayor Arakawa PDF PG 81 - 82

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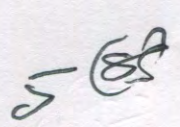


### Avoidance and Unsupported Claims:

20. On March 22, 2014 David Goode publically set the stage for the County's inaction by writing a Viewpoint for the Maui News. Director Goode expresses what County Ordinance 18.20.040, in effect from the 1970's up to 2007, **REQUIRES** of subdividers: "If the subdivider elected to defer the improvements, he/she would be **required** to compensate the County of Maui for the cost of the improvements when performed by the County. To ensure that this was done, the subdivider was **required** to enter into an agreement to compensate the County for the improvements when performed"

Later in the same editorial, Director Goode completely misrepresents the same ordinance and casts uncertainty upon the "requirements" of the subdividers when he ignores the consistent use in the language of the ordinance of the word "shall" by stating "As explained, the agreements state that if and when the County of Maui does a Capital Improvement Project along a roadway fronting a property that has one of these agreements recorded against it, the County **may** recover the costs of doing those improvements that were specifically deferred." The actual ordinance never once includes the word "may", only the word "shall" is used. (9) See Maui News Viewpoint Article PDF PG 83 - 84

21. The Subdivision ordinance clearly states that deferrals are to be a one time event: "The land so subdivided shall not thereafter qualify for this exception with respect to any subsequent subdivision of any of the resulting parcels." However in public testimony to the Budget and Finance Committee on April 19, 2012, Director Goode admits that the ordinance has been violated repeatedly, "some deferral agreements, three lots, had another future three lot and a future three lot, so it got subdivided again and again, had different deferrals." It is questionable as to whether the County could ever collect on a "one time" deferral agreement that was applied over and over again to the same original parcel by developers and County officials, in violation of the adopted ordinance. Anyone purchasing a property with one of these overlapping encumbrances on its title, would be wise to retain legal counsel to dispute any attempt by the county to collect upon the original developer's outstanding subdivision obligations which transfer with the title. (10) See Council Minutes – Director Goode Admission PDF PG 85 - 86





22. In his 2014 "Viewpoint" printed in the Maui News, Director Goode made an official statement on behalf of the County of Maui that: "The Department of Public Works is currently enforcing the agreements per their express terms." And, "They are agreements, plain and simple, and the County is abiding by them." Factually, in violation of the adopted County ordinance, the Department of Public Works has never collected on any of these thousands of deferral agreements, even when infrastructure projects were completed that clearly should have triggered a collection.

**Circumventing Environmental and Zoning Laws Through Fraud and Abuse of Power:**

23. Unfortunately, uncovered breaches of public trust do not end with the unaccounted for developer agreements. Public records and testimony also reveal that private developers and their licensed consultants are actively circumventing environmental laws adopted by Maui County under the Planning Commission rules and procedures, involving the preservation of Shoreline Management Areas.

24. The 2010 study of the State of Hawaii Coastal Zone Management Program conducted by the National Oceanic and Atmospheric Administration (NOAA) shows that compliance with and enforcement of SMA Permits has been, and remains, an issue. [\(11\) See NOAA Study PDF PG 87 - 133](#)

25. The lack of action on the part of the County to remediate the existing ordinances and Planning Department procedures to stop this known exploitation makes the County vulnerable to the same kind of federal prosecution that we suffered over the County's persistent and illegal use of injection wells.

**Current Example of Circumvention and Manipulation of Shoreline Management Rules and Laws**

26. This long-standing systemic pattern of manipulation raises questions on the veracity of recent statements and filings made by the attorneys of the Department of Corporation Counsel and Planning Director William Spence.

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27. I have reviewed the Freedom of Information Act RFS request for public records for 16-0001392 received 11/28/16 by the Maui County Department of Planning where Mr. Salem requests, not for the first time, the "public record of the date of final acceptance and closure of SMA Permit #SM2 2000/0042" for a developer's oceanfront subdivision in West Maui. (12) See Public Records RFS Request – SMA Permit Final Acceptance PDF PG 134 - 135

28. The public records provide conclusive evidence that the developer's SMA Permit was never closed, is indeed currently expired, and that the developer's infrastructure and environmental mitigation conditions remain unfulfilled.

29. Through actions triggered by a concerned citizen, the developers of Olowalu were found to be in violation of their SMA Major Permit, almost ten years after the permit was issued by the Department of Planning. Despite the fact the developer's infrastructure and environmental mitigation conditions were left unfulfilled, the Director of Public Works signed off on that massive subdivision.

30. It is noteworthy that many of the licensed professional consultants and public officials at Olowalu are the same as in the SMA Permit #SM2 2000/0042.

(13) See Olowalu Notice of Non Compliance PDF PG 136 - 148

**The Foundational Role of a Municipality's Administration and Recordkeeping of Permits:**

31. Tracking and keeping records of all types of issued permits is a foundational duty for all municipalities to insure that commercial and residential developments, roadway infrastructure, environmental protection, and public facilities have passed the necessary steps to ensure both public safety and the underwriting of real property mortgages and insurance coverage. Just as a Birth Certificate substantiates an individual's existence, rights and credit worthiness, so does a Certificate of Occupancy substantiate a structure.

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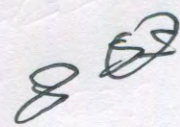


32. Given the importance of such record keeping, the response from the Corporation Counsel attorneys to Mr. Salem's public record request, that no "SMA Permit tracking record exists" and that the County has "no affirmative obligation to maintain records", would leave any citizen with no choice but to file a complaint for access to public records in the Second Circuit Court for the State of Hawaii.

33. In response to Mr. Salem's FOIA request for RFS 16-0001392 dated 1/9/17, attorney Brian Bilberry, Maui County Deputy Corporation Counsel, states "the Department of Planning has advised that there are no documents which would constitute "public records of the date of final acceptance and closure of SMA permit #SM2 2000/(0)042". (14) See Corporation Counsel Attorney Bilberry "No Records" exist response. PDF PG 149

34. In the declaration that Planning Director Will Spence made in response to Salem's request for a determination on the status of permit #SM2 2000/0042, Spence echos Bilberry's assertion that there are no "public records of the date of final acceptance and closure of SMA permit #SM2 2000/042" but then goes on to state that "It is my belief that SM2 2000/0042 was closed when the approval was issued on June 6, 2000 via letter to Hugh Farrington." Spence's declaration is flawed in two ways: First, the unique role of a Director is to make legally binding determinations of fact, not to express his personal "beliefs" on matters of County permit compliance records. Second, it is impossible for a development permit, which as a condition requires construction that has not yet been performed, to be signed off and "closed" on the same day that *the application* for that permit was approved. (15) See Declaration of Planning Director Spence PDF PG 150 - 154

35. The 6/23/200 preliminary subdivision acceptance letter to Farrington clearly states "**Condition 15. Of Preliminary Subdivision Approval:** Comply with the conditions of the SMA Minor Permit (SM22000/0042) granted on June 6, 2000. Note: Upon approval of Construction Plans, the sub divider should verify if a SMA Major Permit is required." That forward looking statement also precludes the





Director's "same day" declaration. (16) See Farrington SMA Permit acceptance 6/6/2000 And Preliminary Subdivision letter 6/23/2000 PDF PG 155 - 162

36. Clearly, when a SMA permit requires plans to be approved for the construction of roadway infrastructure and drainage mitigations, a permit cannot be closed on the same day it is issued. For a SMA permit to be closed someone with sufficient authority had to sign off on it and for the County to persist in its business there must exist a record of who had that authority and when they signed. If Bilberry's contention is true, that no public records of the sign off exist, it could only be because, as Mr. Salem contends, the developer SMA permit was indeed never satisfied and never closed. Spence's absurd "belief" draws questions of what the Director is trying to cover up.

37. Mr. Salem shared with me a copy of the Permit Summary for SMA Permit SM2 2000/0042, which I understand was recently provided to him by an executive assistant to Council Member Kelly King, the Chair of Planning for the Maui County Council. (17) County Records – SMA Permit Summary sm2 2000 0042 PDF PG 163

38. Although the SMA Permit Summary does not include all of the underlying permit application documents, such as the engineer's stamped Order of Magnitude estimate, it is a public document that is clearly responsive to Mr. Salem's repeated requests for all documents related to SMA Permit SM2 2000/0042t. Why didn't Public Works or Bilberry ever deliver to Mr. Salem at least the permit summary?

39. Mr. Salem also shared the Permit Summary copy with the State of Hawaii Office of Information Practices and they apparently agreed. I read in a letter dated August 17, 2017 from the staff attorney of the OIP to the effect that the County attorneys should have provided that Permit Summary in their response to Mr. Salem's RFS request made in 2016. Instead, the County attorneys repeatedly claimed the record "simply does not exist".

(18) See Letter from OIP Staff Attorney 8/16/17 & 10/3/17 PDF PG 164

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40. Being computer savvy, a requirement of my profession, I figured I was a good candidate to dive into the County's online information systems, Kiva-net and Accel GIS, to try to obtain a clean copy of the Permit Summary for SMA Permit SM2 2000/0042 and see what else might be there that Corporation Counsel claims does not exist.

41. I found that the online databases of Permit tracking records maintained by the County of Maui are quite extensive. At the same time, the records are very difficult to access. Some functions work only on certain web browsers. Most of the search parameters don't work at all. The system requires you to enter information in just the right way to get anywhere. Mostly it's about 0s and dashes. Sometimes it wants them, sometime not. But then, once you figure out the right way to enter a query, it responds.

42. It took me a solid day and a half to back into the system using a third party map utility to identify TMK's and three different browsers to find the different expressions of the same SMA and subdivision permit tracking public records that are indeed actively maintained in the County's systems.

43. It didn't help that they changed the physical addresses of several of the properties I was researching. Overall I found that once you are able to access at least one piece of the information you are looking for, the system does contain a wide variety of interconnected Permit tracking cross-links to an extraordinary amount of related, detailed and useful permit data.

44. Ultimately, I did discover even more maintained public records that should have been delivered to Mr. Salem by the Planning Department, in the form of the two attached separate SMA Permit Summaries for #SM2 2000/0042. (19) See County Records – SMA Permit Summaries PDF PG 165

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45. On Kivanet at;

<http://kivanet10g.co.maui.hi.us/kivanet/2/permit/summary/index.cfm?pid=281293&jur=MAUI> and on ACCELA GIS, at <http://agis10g.co.maui.hi.us:8080/agis/map/PermitData.jsp?CAP=CAP3>

46. (ACCELA GIS is difficult to access via the hotlink above. However it can be reached by clicking on the blue "GIS Parcel" link on the Kivanet page and clicking on the small "Permit Info" tab on the bottom left)

47. Searching through the other permits listed for TMK 2430150040000 contained in ACCELA GIS, I was able to locate the summary of the associated Subdivision Permit, #SUBD-20000045. (20) See **County Records – Subdivision Summary PDF PG 166**

48. I then was able to call up #SUBD-20000045 on Kivanet.

Note the empty boxes for "Construction Plan Approval" in the detail of "Inspections".

<http://kivanet10g.co.maui.hi.us/kivanet/2/permit/summary/index.cfm?pid=279237&jur=MAUI> (21) See

**County Records - SMA Permit Open Construction Plan Approval PDF PG 167**

and 21a Detail: **County Records Open Inspection OPEN detail. PDF PG 168**

49. Kivanet's permit record offers a link to "CONSTRUCTION PLAN APPROVAL" which leads to this page: (22 See **County Records – Const Plan Approval OPEN Subdivision Summary #5) PDF PG 169**

<http://kivanet10g.co.maui.hi.us/kivanet/2/permit/activities/index.cfm?fa=3&pid=279237&id=175345&jur=M>  
AI where **the Activity Status of the Construction Plan Approval is still listed as "OPEN".**

#### **What These Documents Reveal:**

50. The County of Maui does in fact have an extensive capability to create and maintain public records. Though the system could be more user friendly, they do have the ability, and the duty, to retain

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control over private developer's and property owner's compliance with SMA Permits, Subdivision conditions, and all the residential and commercial permits they issue, including underlying permit application documents.

51. The records clearly show that the SMA Permit was a condition of the oceanfront subdivision's final acceptance and approval. The condition is delineated on the June 27<sup>th</sup>, 2000 Preliminary Subdivision approval issued by the Department of Public Works. The public records also clearly show that the Developer Lot 48A, LLC's SMA Permit was extended twice, until December 31, 2001, to allow for the completion of the subdivision infrastructure and environmental mitigations.

52. Public records maintained and tracked by the County of Maui **clearly contradict** Planning Director Spence's declaration that the SMA permit was "closed" on June 6<sup>th</sup>, 2000. The SMA permit could not possibly have been "closed" on the very same day the permit *application* was approved.

**The Cover Up - More Intentional Abuse of Authority and Power:**

53. Spence's declaration hides the fact that this Developer Lot 48A, LLC's SMA permit is still open, and now expired, and is part of what appears to be an ongoing attempt by County officials to cover up administrative failures or specific abuses in the SMA permitting process and the lack of inspections on SMA Permits applied to this project and probably many others in Maui County.

On Oct 12, 2009 in testimony to the County Council, Director of Public Works, Milton Arakawa points the finger of responsibility to track compliance with issued SMA Permits towards the Department of Planning.

"Mr. Chair, the second three-lot subdivision was the subject of an SMA Minor Permit, if I'm correct. But the conditions of the SMA Minor Permit, I mean would, it would still apply. From, from our standpoint, we, we would look to the Planning Department to basically enforce those SMA Minor Permit conditions. If there are any violations regarding the actual subdivision regulations and it's brought to our

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attention then of course we would go out and investigate. But the, the SMA Minor Permit conditions should be enforced by, by Planning.” 23. Milton Arakawa testimony 10.12.09 PDF PG 170

54. Through selective mismanagement and manipulation of the system, certain private developers have been allowed to dodge all obligations and oversight. With the County refusing to enforce nether deferral agreements nor SMA Permit violations, it has fallen to citizens' complaints and costly litigation to protect the public and our environment. And as "Maui-Gate", it is taxpayer's dollars that are being used to defend in court the Mayor and the Directors that are involved.

**Other Projects - Same Licensed Professionals, Same Manipulations:**

55. The Ukumehame development, which is directly adjacent to Olowalu, is another development project initiated at the same time as Olowalu, Montana Beach and Hui Rd E, by mostly the same group of licensed professionals and administered by the same County officials. The records now reveal a pattern of intentional circumvention and manipulation of the County's SMA Permit Rules. The June 4<sup>th</sup> 1999 letter to attorney Tom Welch of Mancini, Rowland and Welch from the project coordinator for Pacific Rim land, Inc clearly states, "Our goal is to come up with the best lot configuration possible and avoid an SMA requirement". (24) See Attorney Welch Letters – Ukumehame PDF PG 171 - 177

56. The shoreline proximity of these rather large parcels should make it impossible to bypass environmental mitigations. This is the vast stretch of land directly mauka of where so much recent flooding and shoreline erosion is taking place. The damage done to marine life in that area is incalculable. In conclusion, the discretionary authority of the Planning Director to waive or exempt large lot developments or subdivisions of 4 parcels or less, allows developers and their consultants to manipulate the SMA Permit application process and dodge their environmental mitigation obligations.

**Typical behaviors of a corrupt administration:**

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57 History documents that when private citizens raise questions or challenge the decisions of politically appointed Directors, County attorneys immediately circumvents and terminates the Council member's communication and investigation process. As a recent example, Robert Sinnott MD, COL USA Rtd, of Kihei, in his 2014 response to a letter of intimidation sent to him by Deputy Corp Counsel Moana Lutey, reiterates that he is NOT interested in suing the County though, "The County seems to be making every effort to encourage me to do that." and that "Unless you have some information that would preclude my speaking to them, I suggest strongly that your office stop interfering with my Constitutional rights." (25)

See Letter from Kihei Resident Colonel Sinnott PDF PG 178 - 180

58. The Department of Corporation Counsel continues to overstep its authority through unjustified intimidation designed to deny Maui citizens and taxpayers of their rights. One example was recently characterized by Second Circuit Judge Peter Cahill in his ruling that the County must refund \$10.7 million to a time-share owners association. Cahill wrote that the Department of Corporation Counsel, not the County's Real Property Assessment Division, orchestrated the County's official decision to "create a weapon — a new \$10-plus million tax obligation — against taxpayers with whom it was in litigation." (26)

See Maui News Article — Judge Cahill PDF PG 181

### The Documents Discovered!

59. On August 3rd 2009 Joseph Prutch, Staff Planner of the Planning Dept responded to one of Salem's many requests for the supporting documents for SM2 2000.0042, writing, "As you know, the SM2 file cannot be found at the County. Without the file I could only locate documents on the computer and was only able to find the following: 1) SMA Minor Permit 2) Scope of SMA Permit 3) Condition of Approval for permit 4) Extension approval letter dated Nov 6, 2000 (not signed) 5) Extension approval letter dated May 10, 2001 (not signed). Sorry, I was not able to find a compliance report or any shoreline certification maps." (27) See Prutch 8/3/09 fax cover sheet PDF PG 182

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60. It was not until 2015 that it was discovered that just three months after claiming the files "cannot be found", the complete "missing" file, including the application packet that Mr. Salem first requested in 2001, was transmitted in a letter from Planning Program Administrator Clayton Yoshita to Mr. Shichao Li of the State of Hawaii Office of Planning, Mr Prutch was cc'd.

(28) See 10/3/09 letter from Yoshita PDF PG 183

61. The complete application packet, secured through a FOIA request to the State of Hawaii Office of Planning in 2015, included the 'missing' 40 Page Special Management Area (SMA) Report authored by Munikiyo, Arakawa, and Hiraga, Inc, from May of 2000, just prior to Milton Arakawa's employment with the County of Maui. 29) See Signed SMA Permit Application by Developer Hugh Farrington, May 11, 2000. PDF PG 184 - 193

62. The documents reveal that when Milton Arakawa was hired as Deputy Director of Public Works in 2001, he was immediately allowed by Public Works Director Goode to **sign off on his own client's oceanfront subdivision with an incomplete conditioned SMA Permit** (#SM2 2000/0042). Deputy Arakawa's land planning firm was the authorized agent for the entire SMA permit application process. Deputy Director Arakawa engaged in unethical conduct incompatible his official duties as established in the Maui County Charter to serve the financial interest of a private developer and his client. (30) See 30. Final Sub Approval Arakawa; PDF PG 194

63. The SMA Permit application authored by Deputy Arakawa's firm also included an Order of Magnitude statement generated by the civil engineering firm Unemori Engineering, Inc. The exact same SMA Permit infrastructure and drainage improvements were given to Sullivan, Inc., a licensed engineering contractor, who calculated the **costs to be ten times more** than the valuation that was submitted by Unemori. (31) See Sullivan, Inc. Project Estimate PDF PG 195

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64. The cover letter of the fax transmission of the conditioned Order of Magnitude valuation from Unemori Engineering to developer Farrington includes a comment from Warren S. Unemori: **"Hope you're successful in convincing Planning that improvements will cost less than \$125,000."**

**Signed "Good Luck, Warren S. Unemori".** (32) See Unemori fax 3/3/2000 PDF PG 196

65. In January of 2008, Warren Unemori was served with a Request for Production of that Order of Magnitude Estimate and falsely denied ever having been employed "to perform any services in connection with the SMA Minor permit process." (33) See Ito letter 1/18/08 PDF PG 197 - 200

66. On March 15th, 2016 attorney Matson Kelly made a declaration detailing the SMA Permit County records and environmental studies that the law firm for developer Lot 48A, LLC / Hugh Farrington, concealed during legal arbitration proceedings. The attorney representing the developer, Margery Bronster, had represented to the Arbitrator that the SMA Permit records "are not relevant, and therefore they will not be produced". Kelley states in his declaration that he has reviewed the documents that have been recently uncovered and that they are, in fact, relevant to the arbitration that took place, and further show that the developer, **"lied to me. Lied to the arbitrator." And that "they lied to this Court."** (34) See Declaration of Matson Kelley PDF PG 201 - 206

67. On June 6, 2017 Attorney Randall Schmitt wrote a letter to the ODC appraising them of apparent professional misconduct by certain attorneys of The Corporation Council of the County of Maui. Schmitt writes: "subsequent events seem to indicate that **the records that we requested so many years ago did and do exist.**" Schmitt paints a picture of misdeeds and malfeasance that are worthy of an investigation by the Hawaii State and US Attorneys General for racketeering. (35) See Attorney Schmitt Letter to Office of Disciplinary Counsel PDF PG 207 - 210

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68. Such an investigation is also called for regarding a Complaint for Access to Public Records filed in the Circuit Court for the Second Circuit. (Civil No. 17-1-0208(1) where Deputy Corporation Counsel Moana Lutey responded; ***"The declaration provided by (attorney) Matson Kelley is in reference to a matter where the documents were eventually produced."***

(36) See Civil No. 17-1-0208(1) PG 211 - 213

It took an intervention by the State Office of Information Practices asking for substantiation that the documents were indeed "eventually produced" by Corporation Counsel, to get Lutey to admit that proof of the delivery of the documents ***"does not exist in any County record"***. (37) See Exhibit "B" - False Representations of Eventually Produced Public Records PDF PG 214 - 215

69. Deputy Lutey cannot prove that Corporation Counsel ever delivered the requested documents for #SM2 2000/0042 because they are documents that Corporation Counsel has been actively withholding from Christopher Salem since his original request for them in 2001, saying that they don't exist. At one point Corporation Counsel claimed that the County has no responsibility to maintain records of the SMA permits they issue, when, in truth, the documents are the foundation under which all real estate mortgages and property insurance policies are written. **Corporation Counsel is caught in a Catch 22, claiming that they "eventually produced" documents that don't exist. Which is it?**

**How we know all this:**

70. Almost two decades ago, Christopher Salem purchased a parcel of land in a "3 Lots or Less" subdivision in West Maui. Mr. Salem's research of County ordinances and recorded County subdivision agreements had shown that the "one time" SMA Permit exemptions for 4 lots or less and the "one time" deferral of the subdivision roadway frontage improvements were exhausted by the developer who sold Mr. Salem his property. Mr. Salem says he was convinced that no further development of the "3 Lots or Less" subdivision could occur without public review, an SMA Major Permit including environmental impact

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studies, and full roadway improvements and environmental mitigations along the roadway frontages of the underlying subdivision.

71. Believing the desirable open space and limited density of his "3 Lots or Less" subdivision was protected, Mr. Salem designed and built his family home. Mr. Salem says he understood that once a County roadway infrastructure project was built along his subdivision frontage he would be required to pay his pro rata fair share of the deferred cost of the roadway improvements. During the purchase of the property, Mr. Salem felt the benefits of a low density lifestyle far outweighed the future expense on the "3 Lots or Less" subdivision infrastructure deferral agreement which clouded his property title.

72. To his surprise, and detriment, Mr. Salem had no idea the stated conditions of the "3 Lot or Less" developer deferral agreements were not being enforced and that developers island-wide were indeed being allowed to re-subdivide their subdivisions over and over without completing their infrastructure obligations, shifting the financial burdens to the taxpayers while leaving the open-ended County cloud on property owner's titles.

73. A well-connected developer, armed with private consultants and legal counsel who were current or previous public officials with the County of Maui, applied for a re-subdivision of one of the oceanfront parent parcels of Salem's "3 Lots or Less" subdivision. Salem disputed the re-subdivision application on the grounds that a SMA Major Permit was required on the oceanfront development and the "one time" deferred infrastructure improvements must be completed by the developer in accordance with the adopted laws and ordinances. At the very least, Mr. Salem asserted, the "3 Lots or Less" cloud on his property title was to be removed.

74. The low density lifestyle Mr. Salem thought he had secured was ultimately obliterated and years of costly legal disputes with the developer ensued. During the critical years of legal disputes and government record discovery, Corporation Counsel retained, as special counsel, the Developer Lot 48A,

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LLC's legal counsel, Margery Bronster. As the record shows, Bronster failed to disclose to the Maui Procurement Committee her active representation of Developer Lot 48A, LLC in legal disputes centering on the County SMA permit records.

The decades of legal disputes caused by the **conspired concealment of government records** by County officials including Public Work Director Milton Arakawa and attorney Margery Bronster on behalf of Developer Lot 48A, LLC led to Mr. Salem's complete financial ruin and the loss of his family home. (38 See Attorney Margery Bronster Special Counsel Procurement Report PDF PG 216 - 234

**Ongoing harm:**

75. Harm came to Mr. Salem in 2010 when Director Arakawa sent Mr. Salem a formal Notice of Intent to Collect on the County's "3 Lots or Less" roadway infrastructure encumbrance that was attached to Salem's real property deed. By doing so, the County's "encumbrance" was converted into a "lien". However, to this very day, the County Council has not adopted any process or formula to allow any property owner to remove an open-ended lien on their title.

Furthermore, prior to the notice being sent to Mr. Salem, the County had never issued a Notice of Intent to collect on any of the thousands of subdivision deferral agreements and they have not done so since. (39 See Department of Public Works – Notice of Intent to Collect PDF PG 235 - 319

76. Not only is the County negligent having not established any formula and process to collect on any of the deferred amounts, there's never been established a fund to receive nor disburse the funds should any ever be collected. In May 2018 Council Member Guzman proposed the creation of a fund specifically for this purpose. Item BF-145 is on the Master List for the Budget and Finance committee but has not been scheduled. (40 See CC 18-177 Infrastructure Development Fund) PDF PG 320 - 322

77. In 2014, despite believing that the financial obligations for the roadway improvements were actually the responsibility of Milton Arakawa's client, Mr. Salem attempted to pay off the "3 Lots or Less" subdivision lien on his property title to satisfy the terms established by his mortgage lender. The

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Department of Corporation Counsel refused to establish a dollar amount for the lien and wouldn't accept payment from Mr. Salem to remove it. Unable to satisfy the demands of his lender and their legal counsel, the lender foreclosed, 41. See Prudential Listing Cancel PDF PG 323

78. The documents that attorney Bronster, Public Works and Corporation Counsel withheld, which finally have been secured, show the following:

a. That the application for SMA Permit SM2 2000/0042 contained fraudulent engineering estimates that allowed the developer to avoid public hearings, SMA Major environmental studies, public parking for shoreline access, and public view preservation.

b. That attorney Bronster and her client falsely denied having obligations to fulfill roadway infrastructure and drainage mitigations that her client's professional consultants incorporated into the subdivision SMA Permit.

c. That attorney Tom Welch of Mancini, Welch & Geiger, entered into a settlement agreement in 2001 knowing his client was concealing relevant County of Maui government records.

d. That upon his employment, Deputy Director Milton Arakawa issued final subdivision approval to his own client in spite of the SMA Permit being unfulfilled, in violation of the Maui County Charter.

e. That Deputy Director Milton Arakawa sent a Notice of Intent to collect to Mr. Salem, and fellow "3 Lot or Less" owners, for roadway infrastructure and drainage improvements that were his own client's financial obligations.

79. The affidavit of former Council Member and Department of Transportation Director JoAnne Johnson Winer affirms that executive assistants to Maui Council Members are direct witnesses to many of the facts presented in this affidavit including the concealment of County records spanning a time period of almost 20 years. It is cause for investigation to find out if those executive assistants are being intimidated to remain silent.

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80. The Department of Planning's refusal to enforce the terms of the developer's subdivision and SMA Permit, and Corporation Counsel's concealment of the SMA Permit records, in apparent conspiracy with private developers and their legal counsel, gave Mr. Salem no choice but to engage in costly, protracted, and ongoing litigation.

81. In repeating violation of the State Procurement Code, Corporation Counsel now employs, without going through the legislated Procurement Committed and conflict disclosure process, the very same KSG law firm as special counsel to defend former Public Works Director Arakawa and the County Defendants. Is it coincidence or conspiracy that KSG, the same law firm that represented the Federal Savings Bank that drove Salem into bankruptcy, is now defending Deputy Director Arakawa, Directors Spence and Goode and Corporation Counsel Pat Wong?

82. All of my research leads me to the conclusion that when they go into executive sessions, Corporation Counsel misleads the members of the Maui County Council in order to obtain taxpayer funds to continue their long-standing pattern of vigorously defending the unlawful acts of politically appointed public officials. Corp Counsel obstructs the County Council from investigating the acts of County Departments and their Directors by asserting that the Council Members are Corp Counsel's clients too and must abide by their directives and advice. The Dept. of the Corporation Counsel will even authorize their administrative clients not to answer questions from Council Members, their other purported client(s) during litigation.


83. In sum, my findings conclude and I believe that Attorney Margery Bronster, Tom Welch, Deputy Public Works Director Milton Arakawa, Planning Director William Spence, Public Works Director David Goode, Corporation Counsel Pat Wong, Deputy Corp Counsel Brian Bilberry and Moana Lutey, and Mayor Alan Arakawa, and probably other public officials within the County Departments who assisted in the concealment of County records, should all be investigated for conspiracy, collusion, fraud, and racketeering.

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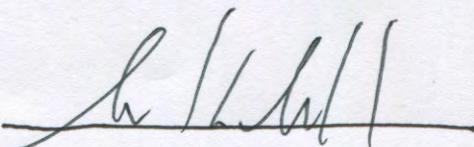
## **Exhibit Summary**

- 1) **Presentation script w Powerpoint PDF PG 1 - 46**
- 2) **Mauitime Weekly - PDF PG 47 - 51**
- 3) **Affidavit of JoAnne Johnson Winer PDF PG 52 - 64**
- 4) **Sample Deferral Agreement - PDF PG 65 - 70**
- 5) **Maui News "Deferral Article" PDF PG 71**
- 6) **Public Works List of 602 Deferral Agreements PDF PG 72 - 79**
- 7) **Councilmember Cochran Letters to Public Works Director Goode PDF PG 80**
- 8) **Director Goode Letter to Cochran signed by Mayor Arakawa - PDF PG 81 - 82**
- 9) **Maui News Viewpoint Article - PDF PG 83 - 84**
- 10) **Council Minutes – Director Goode Admission PDF PG 85 - 86**
- 11) **NOAA Study - PDF PG 87 - 133**
- 12) **Public Records RFS Request – SMA Permit Final Acceptance PDF PG 134 - 135**
- 13) **Olowalu SMA Permit Notice of Non Compliance - PDF PG 136 - 148**
- 14) **Corporation Counsel Attorney Bilberry "No Records" exist response. PDF PG 149**
- 15) **Declaration of Planning Director William Spence - PDF PG 150 - 154**
- 16) **Farrington SMA Permit acceptance 6/6/2000 And Prelim SubD 6/23/00 - PDF PG 155 - 162**
- 17) **County Records – SMA Permit Summary sm2 2000 0042 - PDF PG 163**
- 18) **Letter from OIP Staff Attorney 8/16/17 & 10/3/17 - PDF PG 164**
- 19) **County Records – SMA Permit Summaries - PDF PG 165**
20. **County Records – SMA Permit Summaries 2000/0042 - PDF PG 166**
21. **County Records Open Inspection OPEN - PDF PG 167**
- 21a. **Detail: County Records Open Inspection OPEN - PDF PG 168**
- 22) **County Records - SMA Permit Open Construction Plan Approval - PDF PG 169**
- 23) **Milton Arakawa testimony 10.12.09 - PDF PG 170**
- 24) **Attorney Welch Letters – Ukumeheme - PDF PG 171 - 177**
- 25) **Letter from Kihei Resident Colonel Sinnot - - PDF PG 178 - 180**

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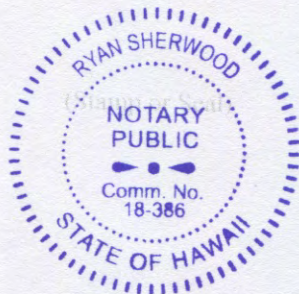


- 26) Maui News Article – Judge Cahill - PDF PG 181
- 27) Prutch 8/3/09 fax cover sheet - PDF PG 182
- 28) 10/3/09 letter from Yoshita - PDF PG 183
- 29) SMA Permit Application - PDF PG 184 - 193
- 30) Arakawa's sign off - - PDF PG 194
- 31) Sullivan order of magnitudes. - PDF PG 195
- 32) Unemori fax 3/3/2000 - PDF PG 196
- (33) Ito letter 1/18/08 - PDF PG 197 - 200
- 34) Declaration of Matson Kelley - PDF PG 201 - 206
- 35) Attorney Schmitt Letter to Office of Disciplinary Counsel - PDF PG 207 - 210
- 36) Civil No. 17-1-0208(1) - PDF PG 211 - 213
- 37) False Representations of Eventually Produced Public Records - PDF PG 214 - 215
- 38) Attorney Margery Bronster Special Counsel Procurement Report - PDF PG 216 - 234
- 39) Department of Public Works – Notices of Intent to Collect - PDF PG 235 - 319
- 40) See CC 18-177 Infrastructure Development Fund) - PDF PG 320 - 322
- 41) Prudential Maui Realty Letter – Agent Lawrence Carnicelli - - PDF PG 323

x   
SAMUEL SMALL



This 23 page document titled, AFFIDAVIT OF SAMUEL SMALL,  
dated OCTOBER 1ST, 2018, was subscribed and sworn to  
before me this 1ST day of OCTOBER, 2018, in the 2ND Circuit of  
the State of Hawaii, by SAMUEL SMALL.



Signature: [Signature]

Name: RYAN SHERWOOD

Notary Public, State of Hawaii

My commission expires: 7-15-2022