

Introduced By: JOANN A. YUKIMURA

1. Amend Section 2 of Bill No. 2461, Draft 1, by amending Section 8-27.1 to read as follows:

“Sec. 8-27.1 Applicability.

[(a) Except in either of the following two cases, this Article applies to all lands abutting the shoreline, on which a structure is proposed to be located within five hundred (500) feet of the shoreline, and to lands not abutting the shoreline where the Planning Director finds that the structure as proposed will be located within approximately 550 feet of the shoreline and may affect or be affected by coastal processes based on the factors in Sec. 8-27.1(a)(2):

(1) In cases where the site of the proposed structure satisfies the following three criteria:

(i) The site is located outside of the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Map (FIRM) V or VE flood zones;

(ii) The site is located at an elevation which is twenty (20) feet above mean sea level or greater; and

(iii) The applicant can demonstrate to the satisfaction of the Planning Director that the property is adjacent to a rocky shoreline.

(2) In cases where the applicant’s proposed structure or subdivision will not adversely affect beach processes, impact public beach access, or be affected by or contribute to coastal erosion or hazards, excluding natural disasters. Factors to be considered shall include, but not be limited to, proximity to the shoreline, topography, properties between the shoreline and applicant’s property, elevation, and the history of coastal hazards in the area.

(b) Notwithstanding the above, unless permitted pursuant to Sections 8-27.7 and 8-27.10, no structure shall be placed within forty (40) feet of the shoreline.]

This Article shall be applicable to all lands within the County of Kauaʻi, that are:

(a) Abutting the shoreline where structures and/or prohibited activities are proposed within five hundred (500) feet of the shoreline, or

(b) Not abutting the shoreline where structures and/or prohibited activities are proposed within approximately five hundred fifty (550) feet of the shoreline.

2. Amend Section 2 of Bill No. 2461, Draft 1, by adding the definition of “Prohibited Activities” to Section 8-27.2 to read as follows:

“Prohibited Activities” means those prohibited in the shoreline setback area as provided in Section 8-27.6 of this Article. All other activities shall be regulated by the Special Management Area Rules and Regulations of the County of Kauai.”

3. Amend Section 2 of Bill No. 2461, Draft 1, by amending the definition of “Qualified consultant” in Section 8-27.2 to read as follows:

“Qualified consultant” means a coastal scientist with a masters master of science degree or doctorate in geology, geography, or other appropriate physical science relating to coastal processes, or an engineer licensed in the State of Hawai‘i that has experience in coastal processes. For purposes of Sections 8-27.6(b), the qualified consultant shall have expertise in Hawaiian native and non-native salt and wind tolerant plants and their growth patterns. If a dune restoration project is proposed, the qualified consultant shall have experience and expertise with dune restoration.”

3. Amend Section 2 of Bill No. 2461, Draft 1, by amending the definition of “Repair” in Section 8-27.2 to read as follows:

“Repair” means the fixing or regular maintenance of a lawfully existing structure that does not result in an addition to, or enlargement or expansion of, the lawfully existing structure. The replacement of fifty percent (50%) or more of a lawfully existing structure is not a repair. A “substantial improvement” as defined herein shall not be considered a repair.”

4. Amend Section 2 of Bill No. 2461, Draft 1, by amending Section 8-27.3 to read as follows:

“Sec. 8-27.3 Shoreline Setback Determination: Establishment of the Shoreline Setback Line.

Shoreline setback determinations shall be issued based on the following procedures:

(a) Except in either of the following two cases or as permitted in Section 8-27.7, a shoreline setback determination shall be required for all structures and subdivisions proposed on lands covered by this Article.

(1) In cases where the proposed structure or subdivision satisfies the following three criteria:

(A) In cases where the proposed structure or subdivision is located outside of the Federal Emergency Management Agency (FEMA) Flood Insurance Rate Map (FIRM) V or VE flood zones:

(B) The proposed structure or subdivision is located at an elevation which is thirty (30) feet above mean sea level or greater; and

(C) The applicant can demonstrate to the satisfaction of the Planning Director that the property is clearly adjacent to a rocky shoreline such that it will not affect or be affected by coastal erosion or hazards.

(2) In cases where the applicant can demonstrate to the satisfaction of the Planning Director that the applicant's proposed structure or subdivision will not affect beach processes, impact public beach access, or be affected by or contribute to coastal erosion or hazards, excluding natural disasters. Factors to be considered shall include, but not be limited to, proximity to the shoreline, topography, properties between the shoreline and applicant's property, elevation, and the history of coastal hazards in the area.

[(a)] (b) Unless otherwise provided in [the Article] subsection (a) above, no shoreline setback line shall be established for any lot subject to this Article unless the application for a shoreline setback line includes a certified shoreline issued [no later than] within twelve (12) months prior to submission of the application.

[(b)] (c) Lots Included in the Kaua'i Coastal Erosion Study. For all structures on lots subject to the Kaua'i Coastal Erosion Study, the setback shall be calculated as follows:

(1) For lots with an average lot depth of less than one hundred forty (140) feet, the setback line shall be forty (40) feet plus seventy (70) times the annual coastal erosion rate as measured from the certified shoreline. In addition to the shoreline setback calculations above, for all applicable lots subject to the Kaua'i Coastal Erosion Study a mandatory twenty (20) foot additional safety buffer shall be added to the setback area for episodic coastal events, sea level rise and other hazards.

(2) For lots with an average lot depth of one hundred forty (140) feet to two hundred twenty (220) feet, the greater setback of the following shall apply:

(A) Forty (40) feet plus seventy (70) times the annual coastal erosion rate as measured from the certified shoreline. In addition to the shoreline setback calculations above, for all applicable lots subject to the Kaua'i Coastal Erosion Study a mandatory twenty (20) foot additional safety buffer shall be added to the setback area for episodic coastal events, sea level rise and other hazards; or

(B) A shoreline setback determined by taking the average lot depth, subtracting one hundred (100) feet, dividing by two and adding forty (40) feet.

(3) For all lots with an average lot depth of over two hundred twenty (220) feet, the greater setback of the following shall apply:

(A) Forty feet (40) plus seventy (70) times the annual coastal erosion rate as measured from the certified shoreline. In addition to the shoreline setback calculations above, for all applicable lots subject to the Kaua'i Coastal Erosion Study a mandatory twenty (20) foot additional safety buffer shall be added to the setback area for episodic coastal events, sea level rise and other hazards; or

(B) A shoreline setback line of one hundred (100) feet from the certified shoreline.

Table 1. (This table is included for illustrative purposes only.) **Lots Included in the Kaua'i Coastal Erosion Study.** The distance in feet of the shoreline setback line as measured from the certified shoreline based on the average lot depth in feet.

Average Lot Depth	Setback Line
Less than 140 feet	40 feet plus (70 [feet] X annual coastal erosion rate) plus 20 feet
140 feet to 220 feet	Greater of: 40 feet plus (70 [feet] X annual coastal erosion rate) plus 20 feet -or- (Average Lot Depth minus 100 feet) ÷ by 2 plus 40 feet
Greater than 220 feet	Greater of: 40 feet plus (70 [feet] X annual coastal erosion rate) plus 20 feet -or- [A minimum of] 100 feet from the certified shoreline

(c) (d) Lots Not Included in the Kaua'i Coastal Erosion Study. For all structures on lots that were not included in the Kaua'i Coastal Erosion Study, the setback shall be calculated [as follows] **by the following formula, (Average Lot Depth -100)/2 +40, subject to the following:**

(1) For lots with naturally occurring rocky shorelines, the setback is a minimum of forty (40) feet.

(2) For all other lots, the setback is a minimum of sixty (60) feet.]

(1) For lots with naturally occurring rocky shorelines, the shoreline setback line shall be no less than 40 feet.

(2) For all other lots, the shoreline setback line shall be no less than 60 feet.

(3) For all lots, the maximum setback that can be required [shoreline setback line] shall be 100 feet.

[(d)] (e) Non-abutting Lots. If an applicant is unable to secure permission from the abutting owner to complete a certified shoreline for a non-abutting lot within approximately five hundred fifty (550) feet of the shoreline, the Planning Director may, pursuant to Sec. 8-4.3, impose conditions to zoning permits to increase setbacks where evidence exists that a proposed structure may be affected by coastal hazards or erosion.

[(e)] (f) No subdivision[, any of] which [involve a lot(s)] involves a lot, or any portion of a [lot(s)] lot that would be subject to this Article, shall be approved without a coastal erosion study, a certified shoreline, and a shoreline setback line established in accordance with this Article, unless the subdivision is initiated by the County.

[(f)] (g) Any subdivision with lots abutting the shoreline approved pursuant to Chapter 9 of the Kaua'i County Code, 1987, as amended, after the adoption of this Ordinance shall have a shoreline setback line of forty (40) feet plus seventy (70) times the annual coastal erosion rate as measured from the certified shoreline. In addition to the shoreline setback calculations above, a mandatory twenty (20) foot additional safety buffer shall be added to the setback area for episodic coastal events, sea level rise and other hazards.

[(g)] (h) Each lot abutting the shoreline in a subdivision approved after the effective date of this ordinance shall be designed to achieve a building footprint of five thousand (5,000) square feet of buildable area *mauka* of the shoreline setback line established in accordance with subsections [(e) and] (f) and (g), above.

[(h)] When an application for a Shoreline Setback Determination has been deemed complete by the Director on a form prescribed by the Director, the Director shall, within one hundred twenty (120) days of the completed application, issue a Shoreline Setback Determination which shall conform to the delineation of the shoreline setback line on a site plan pursuant to Section 8-27.3.

(i) The Director shall notify the Commission at the Commission's next regularly scheduled meeting of any new shoreline setback determinations made by the Director including, but not limited to, the name of the applicant, the average lot depth calculations, the location of any proposed structures depicted on a plan drawn to scale, the purpose of the proposed structures, the current certified shoreline, the setback calculations and setback line drawn on the plan, and copies of the coastal erosion study, if applicable. The Director's determinations shall include, but not be limited to, any exemptions or determinations regarding the inapplicability of this Article. All applications for a shoreline setback determination deemed

complete by the Director shall be posted within ten (10) working days to a publicized website maintained by the Department.

(j) The Director's shoreline setback determination shall not be final until posted on the Commission's agenda. Notwithstanding the posting of the determination, if there is an appeal, the shoreline setback determination shall not be final until the Commission completes its decision-making on the appeal.]

[(k)] (i) Prior to commencement of grubbing, grading, or construction activities, the shoreline and shoreline setback line shall be identified on the ground and posted with markers, posts, or other appropriate reference marks by a surveyor licensed in the State of Hawai'i.

[(l)] (i) The application of Section 8-27.3 by itself shall not make a dwelling unit nonconforming."

5. Amend Section 2 of Bill No. 2461, Draft 1, by amending Section 8-27.5 to read as follows:

"Sec. 8-27.5 [Structures subject to this Article.] Applicable Laws.

[All structures located or proposed to be located within the shoreline setback area shall conform to the requirements of this Article.] The requirements of this Article shall not abrogate the requirements of Hawai'i Revised Statutes Chapter 205A, the Special Management Area Rules and Regulations of the County of Kaua'i, or any other applicable statutes, codes, ordinances, rules and regulations, or other law."

6. Amend Section 2 of Bill No. 2461, Draft 1, by amending Section 8-27.6 to read as follows:

Sec. 8-27.6 Prohibited Activities in the Shoreline Setback Area.

(a) Pursuant to HRS 205A-44, as amended, the mining or taking of sand, dead coral or coral rubble, rocks, soils, or other beach or marine deposits from the shoreline setback area is prohibited with the following exceptions:

(1) The inadvertent taking from the shoreline setback area of the materials, such as those inadvertently carried away on the body, and on clothes, toys, recreational equipment, and bags;

(2) Where the mining or taking is authorized by a variance pursuant to Section 205A-46 of the Hawai'i Revised Statutes;

(3) The clearing of these materials from existing drainage pipes and canals and from the mouths of streams, including clearing for the purposes under HRS section 46-11.5; provided that, the sand removed shall be placed on adjacent areas unless such placement would result in significant turbidity;

(4) The cleaning of the shoreline setback area for state or county maintenance purposes, including the clearing of seaweed, limu, and debris under HRS section 46-12; provided that, the sand removed shall be placed on adjacent areas unless the placement would result in significant turbidity;

(5) The taking of driftwood, shells, beach glass, glass floats, or seaweed;

(6) The exercise of traditional cultural practices as authorized by law or as permitted by the department pursuant to article XII, section 7, of the Hawaii State Constitution; or

(7) For the response to a public emergency or a state or local disaster.

(b) Any primary coastal dune, which lies wholly or partially in the setback area, shall not be altered, graded, or filled in any way except for the addition of sand of compatible quality and character unless the application of this section renders the build-out of allowable density unfeasible. In such case, modifications, alterations, grading, or filling may be allowed through a variance, but only for that portion of the primary dune located mauka (landward) of the shoreline setback area, and only to the extent necessary to construct on a minimum building footprint. This exception shall apply only to lots in existence on the date of enactment of this ordinance. Non-native vegetation may be removed only if done in conjunction with a dune restoration and re-vegetation program approved by the Director that uses naturally occurring historical endemic plant species.

(c) The following are prohibited in the shoreline setback area:

(1) Individual wastewater system or subsurface improvement unless the applicant demonstrates to the satisfaction of the Director that no feasible alternative exists, including a redesign of the improvement or structure to accommodate the system outside of the setback line, and the system or improvement complies with all statutory and Department of Health requirements.

(2) Landscaping that artificially fixes the shoreline.

(3) Shoreline hardening unless it is approved by the State of Hawai'i's Office of Conservation and Coastal Lands.

(4) Expansion of the footprint of a non-conforming structure, unless otherwise provided by law.

6. Amend Section 2 of Bill No. 2461, Draft 1, by amending Section 8-27.7 to read as follows:

“Sec 8-27.7 Permitted structures within the shoreline setback area.

(a) The following structures are permitted in the shoreline setback area. All structures and/or landscaping not specifically permitted in this section are prohibited without a variance.

(1) Existing conforming and nonconforming structures/activities.

(2) Structure or activity that received a shoreline variance or administrative approval prior to February 26, 2008.

(3) A structure or activity that is necessary for, or ancillary to, continuation of agriculture or aquaculture existing in the shoreline setback area on June 16, 1989.

(4) “Temporary structures” as defined in Section 8-27.2. To ensure that there will be no irreversible or long-term adverse affects, the Director shall require as a condition of a permit the restoration of the site to its original condition or better, and the Director may require a bond to ensure such restoration.

(5) A structure [or activity] that consists of maintenance, repair, reconstruction, and minor additions or alterations of legal boating, maritime, or water sports recreational facilities, which are publicly owned, and which result in no interference with natural beach processes; provided that permitted structures may be repaired, but shall not be enlarged within the shoreline setback area without a variance.

(6) Repairs to a lawfully existing structure, including nonconforming structures, provided that:

(A) The repairs do not enlarge, add to or expand the structure; increase the size or degree of non-conformity; or intensify the use of the structure or its impact on coastal processes;

(B) The repairs do not constitute a substantial improvement of the structure; and

(C) The repairs are permitted by the Comprehensive Zoning Ordinance, Development Plans, building code, [flood hazard] floodplain management regulations, special management area requirements under HRS Chapter 205A and any other applicable rule or law.

(7) Beach nourishment or dune restoration projects approved by all applicable governmental agencies.

(8) A structure approved by the Director as a minor structure [or activity].

(9) Qualified demolition of existing structures.

(10) Unmanned civil defense facilities installed for the primary purposes of: (i) warning the public of emergencies and

disasters; or (ii) measuring and/or monitoring geological, meteorological and other events.

(11) Scientific studies and surveys, including archaeological surveys.

(12) Structures built by a governmental agency to address an emergency as declared by the Governor of the State of Hawai'i, the Mayor of the County of Kaua'i or any other public official authorized by law to declare an emergency.

(13) Structures relating to film productions that have received a County Revocable Film Permit. Structures undertaken for film productions must be removed within thirty (30) days following the completion of the film production.

(14) Structures required for remedial and removal actions undertaken pursuant to Chapter 128D of the Hawaii Revised Statutes.

(b) The following conditions shall apply to any new structure permitted in the shoreline setback area:

(1) All new structures shall be constructed in accordance with the standards for development in Chapter 15, Article 1, Flood Plain Management, Kaua'i County Code 1987, as amended, relating to coastal high hazard districts and FEMA guidelines regarding construction in areas mapped on Flood Insurance Rate Maps as flood hazard areas.

(2) The applicant shall agree in writing that the applicant, its successors, and permitted assigns shall defend, indemnify, and hold the County of Kaua'i harmless from and against any and all loss, liability, claim or demand arising out of damages to said structures [and/or landscaping] from any coastal natural hazard and coastal erosion.

(3) The applicant shall agree in writing for itself, its successors and assigns that the construction of any erosion-control or shoreline hardening structure and/or landscaping shall not be allowed to protect the permitted structure during its life, with the exception of approved beach or dune nourishment fill activities, and landscape planting and irrigation located more than forty feet (40') from the shoreline.

(4) Unless otherwise provided, all new structures and/or landscaping shall not (i) adversely affect beach processes, (ii) artificially fix the shoreline, (iii) interfere with public access or public views to and along the shoreline, (iv) impede the natural processes and/or movement of the shoreline and/or sand dunes, or (v) alter the grade of the shoreline setback area.

(5) All new structures shall be consistent with the purposes of this article and HRS Chapter 205A, as amended.

(6) The requirements of this Subsection (b) shall run with the land and shall be set forth in a unilateral agreement recorded by the applicant with the bureau of conveyances or land court, whichever is applicable, no later than thirty (30) days after the date of final shoreline approval of the structure under Section 8-27.8. A copy of the recorded unilateral agreement shall be filed with the Director and the County Engineer no later than forty-five (45) days after the date of the final shoreline determination and approval of the structure and the filing of such with the Director shall be a prerequisite to the issuance of any related building permit.”

7. Amend Section 2 of Bill No. 2461, Draft 1, by amending Section 8-27.8 to read as follows:

“Sec. 8-27.8 Procedures For Obtaining Determinations.

“(a) [Any] Unless as otherwise provided in this Article, any structure proposed in the shoreline setback area shall first obtain a determination from the Director in accordance with this Article.

(b) A proposed structure in the shoreline setback area or within five hundred feet (500’) of the shoreline shall not be allowed by the Director unless it is consistent with this Article and HRS Chapter 205A, as amended.

(c) Procedure.

(1) A request for determination for a proposed structure [or activity] within the shoreline setback area or within five hundred (500) feet of the shoreline shall be submitted to the Department on a form prescribed by the Director.

(2) For public structures whose valuation does not exceed \$125,000.00 and repairs to lawfully existing private structures as delineated in Section 8-27.7(a), the request shall include construction and site plans, and written text addressing compliance with the criteria set forth in this Article.

The Director may also require additional information, including, but not limited to a current shoreline setback determination or a current certified shoreline survey or shoreline survey stamped by a licensed surveyor, registered in the State of Hawai’i and coastal erosion information, a list of proposed plants and their growth, existing and final contours, photographs, and an environmental assessment.

(3) For public structures whose valuation exceeds one hundred twenty-five thousand dollars (\$125,000.00) and private structures unless delineated in Sec. 8-27.7(a), the request shall include relevant information, which shall include, but is not limited to, a current shoreline setback determination as set forth in Sec. 8-27.3 or a

current certified shoreline survey and coastal erosion information, construction and site plans, existing and final contours, photographs, and a written text addressing compliance with the criteria set forth in this Article. The Director may also require a hazard assessment.

(4) Within sixty (60) days from the day the application is deemed complete by the Director, the Director shall make a [determination] decision in accordance with the criteria set forth in this Article that the proposed structure is:

- (A) Permitted under Section 8-27.7;
- (B) Permitted under Section 8-27.7 and subject to conditions;
- (C) Not permitted under Section 8-27.7;
- (D) Outside of the shoreline setback area; or
- (E) Not subject to [this Article pursuant to] Section [8-27.1(a)(1) and (2).] 8-27.3.

(5) All applications for a shoreline setback determination or determination of exemption deemed complete by the Director shall be posted within ten (10) working days to a publicized website maintained by the Department.

[(5)](6) The Director shall notify the Commission at the Commission's next regularly scheduled meeting of the following:

- (A) any shoreline setback determinations for approval [for] of a structure proposed within the shoreline setback area or within five hundred (500) feet of the shoreline [unless deemed inapplicable pursuant to Section 8-27.1];
- (B) any approvals or denials by the Director of structures and the reasons therefore, including, but not limited to, the name of the applicant, the location and purpose of the structure, and a discussion of the factors considered in making the decisions; and
- (C) any decision by the Director to not require a shoreline setback determination pursuant to Section 8-27.3, except with regard to repairs to structures permitted pursuant to Section 8-27.7(a)(6).

[(6)](7) All shoreline setback determinations made by the Director shall include, but are not limited to, the name of the applicant, the average lot depth calculations, the location of any proposed structures depicted on a plan drawn to scale, the purpose of the proposed structures, the current certified shoreline (if required), the setback calculations and setback line drawn on the plan, and copies of [the] a coastal erosion study, if applicable. If the Director, pursuant to Section 8-27.3, make a determination of exemption, the Director shall state the justification in writing.

~~[(7)](8)~~ Except with regard to repairs to structures permitted pursuant to Section 8-27.7(a)(6), the [The] Director's ~~[determinations]~~ decisions pursuant to Section 8-27.8(c)(4) shall not be final until posted on the Commission's agenda. Notwithstanding the posting of the ~~[determination] decision~~, if there is an appeal from the Director's decision, the [determination] decision shall not be final until the Commission completes its decision-making on the appeal.

~~[(8)](9)~~ Minor structures shall be completed within one year from the final shoreline approval or within one year from the date of approval of the last discretionary permit, whichever comes later.

~~[(9)](10)~~ For any non-minor structures allowed within the shoreline setback area and any structures outside the shoreline setback area based on the shoreline setback line, substantial construction of the structure shall be achieved within three (3) years from the date of final shoreline setback determination and approval, and construction thereof shall be completed (as evidenced by a certificate of occupancy in the case of buildings for habitation) within four (4) years from said date.

(A) An extension of no more than one year may be granted by the Director to the deadline for substantial construction only for properties with a stable shoreline such as rocky or accreting shorelines or shorelines exhibiting no coastal erosion per shoreline change rates as provided in the Kaua'i Coastal Erosion Study. In all other cases where substantial construction has not occurred by the deadline, a new certified shoreline and setback determination shall be required.

(B) In case of failure to complete construction by the four-year deadline, the Planning Commission shall determine a remedy based on a review of the specific circumstances, including but not limited to, the stability of the shoreline, the extent of the completion and the reason for delay.

(C) These requirements for substantial construction and completion shall run with the land and shall be written in a unilateral agreement that is recorded in the Bureau of Conveyances or Land Court, as applicable, prior to application for a building permit. A copy of the recorded unilateral agreement shall be submitted to the Planning Department prior to application for a building permit.

(d) Nothing in this section shall be deemed to amend, modify or supersede any provision of the Special Management Area Rules and Regulations of the County of Kaua'i and HRS Chapter 205A, as amended.

(e) Fees. A nonrefundable processing fee of one hundred dollars (\$100.00) shall accompany a request for determination.”

8. Amend Section 2 of Bill No. 2461, Draft 1, by amending Section 8-27.10 to read as follows:

“Sec. 8-27.10 Criteria for approval of a variance.

(a) A shoreline setback area variance may be considered for a structure [or activity] otherwise prohibited by this Article, if the Commission finds in writing, based on the record presented, that the proposed structure [or activity] meets those standards established under Section 8-3.3 and is necessary for or ancillary to:

(1) Cultivation of crops;

(2) Aquaculture;

(3) [Major landscaping;] Landscaping; provided that, the commission finds that the proposed structure [or activity] will not adversely affect beach processes, public access or public views and will not artificially fix the shoreline and is in compliance with HRS Section 115-5;

(4) Drainage;

(5) Boating, maritime, or water sports recreational facilities;

(6) [Facilities or improvements] Structures by public agencies or public utilities regulated under HRS chapter 269;

(7) Private and public [facilities or improvements] structures that are clearly in the public interest;

(8) Private and public [facilities or improvements] structures which will neither adversely affect beach processes nor artificially fix the shoreline; provided that, the [c]Commission also finds that hardship will result to the applicant if the facilities or improvements are not allowed within the shoreline setback area;

(9) Private and public [facilities or improvements] structures that may artificially fix the shoreline but not adversely affect beach processes; provided that, the Commission also finds that shoreline erosion is likely to cause severe hardship to the applicant if the facilities or improvements are not allowed within the shoreline setback

area and all alternative erosion control measures, including retreat, have been considered;

(10) The Commission may consider granting a variance for the protection of a dwelling unit or public infrastructure

e; provided that, the structure is at imminent risk of damage from coastal erosion, such damage poses a danger to the health, safety, and welfare of the public, and the proposed protection is the best shoreline management option in accordance with relevant state policy on shoreline hardening.

(11) Construction of a new dwelling unit. In the case where the minimum buildable footprint does not allow for a setback in accordance with this Article, the Commission may consider granting a variance under the following guidelines:

(A) The front yard setback may be reduced where feasible to allow for the minimum buildable footprint;

(B) The side yard setback may be reduced where feasible to allow for the minimum buildable footprint;

(C) If the foregoing approaches are done to the maximum extent practicable and a dwelling cannot be sited mauka of the shoreline setback, the [The] minimum buildable footprint shall be reduced to no less than one thousand (1000) square feet.

(D) If the foregoing approaches in subsections (A), (B) and (C) are done to the maximum extent practicable, the calculated shoreline setback may be reduced to the minimum extent required to permit the construction of a house within the reduced footprint, provided that a qualified consultant must certify that the property is not subject to undue risk from erosion, high wave action, or flooding. Under no circumstance shall the shoreline setback line be less than:

(i) forty (40) feet from the certified shoreline for lots with shorelines that are either (i) non-rocky shorelines or (ii) low-lying ledges subject to wave overtopping, regardless of material; or

(ii) thirty (30) feet from the certified shoreline for lots with rocky shorelines. forty (40) feet.

(12) Rebuilding of an existing dwelling unit.

(A) Rebuilding of a lawfully existing dwelling unit under this section shall only be allowed if the rebuilding is not prohibited by Article 13, Chapter 8, Kaua'i County Code 1987, as amended and does not:

(i) enlarge the structure beyond its previous building footprint, and

(ii) intensify the use of the structure or its impacts on coastal processes.

(B) In the case where the minimum buildable footprint does not allow for a setback of forty (40) feet, the Commission may consider granting a variance under the following guidelines only:

(i) The front yard setback may be reduced where feasible to allow for the minimum buildable footprint;

(ii) The side yard setback may be reduced where feasible to allow for the minimum buildable footprint;

(iii) If the foregoing approaches are done to the maximum extent practicable and a dwelling cannot be sited mauka of the shoreline setback, the [The] minimum buildable footprint may be reduced to the lesser of one thousand (1000) square feet or the actual footprint of the house.

[(iv) If the foregoing approaches in Sec. 8-27.11(a) (12)(B)(i), (ii) and (iii) are done to the maximum extent practicable, the shoreline setback may be reduced to the minimum extent required to permit the construction of a house within the reduced footprint, provided that a qualified consultant must certify that the property is not subject to undue risk from erosion, high wave action, or flooding. Under no circumstance shall the shoreline setback line be less than forty (40) feet.]

(b) A structure [or activity] may be considered for a variance upon grounds of hardship if:

(1) The applicant would be deprived of all reasonable use of the land if required to fully comply with the provisions of the [shoreline setback rules] provisions of this Article;

(2) The applicant's proposal is due to unique circumstances and does not draw into question the reasonableness of the [shoreline setback rules] provisions of this Article; and

(3) The proposal is the best practicable alternative which best conforms to the purpose of the [shoreline setback rules] provisions of this Article.

(c) Before granting a hardship variance, the Commission [must determine] shall find that the applicant's proposal is a reasonable use of the land. Because of the dynamic nature of the shoreline environment, inappropriate development may easily pose a risk to individuals or to the public health and safety or to the coastal zone management and resources. [For this reason, the determination of the reasonableness of the use of land should properly] The Commission shall consider factors such as coastal hazards, shoreline conditions, erosion, surf inundation, [and] flood conditions

and the geography of the lot in determining whether the proposal is a reasonable use of the applicant's land. The Commission shall give due consideration to the long-term average annual rate of coastal erosion calculated by following the methodology outlined in the National Assessment of Shoreline Change: Historical Shoreline Changes in the Hawaiian Islands (Fletcher, et al., 2012) and any amendments thereto, or Section 4.1 of the Hawai'i Coastal Hazard Mitigation Guidebook (Hwang, 2005) and any subsequent amendments thereto.

(d) For purposes of this section, hardship shall not include economic hardship to the applicant resulting from: (1) county zoning or setback changes, planned development permits, cluster permits, or subdivision approvals after June 16, 1989; (2) any other permit or approval which may have been issued by the commission, or (3) actions by the applicant.

(e) No variance shall be granted unless appropriate conditions are imposed:

(1) To maintain and require safe lateral access to and along the shoreline for public use or adequately compensate for its loss;

(2) To minimize and mitigate risk of adverse impacts on beach processes;

(3) To minimize and mitigate risk of structures failing and becoming loose rocks or rubble on public property; and

(4) To minimize adverse impacts on public views to, from, and along the shoreline; and

(5) To comply with County Code provisions relating to flood plain management, Chapter 15, Article 1, Kaua'i County Code 1987, as amended, and Drainage, Chapter 22, Article 16, Kaua'i County Code 1987, as amended, respectively.

(f) Any structure approved within the shoreline setback area by variance shall not be eligible for protection by shoreline hardening during the life of the structure, and this limitation and the fact that the structure does not meet setback requirements under Section 8-27.3 and could be subject to coastal erosion and high wave action shall be written into a unilateral agreement that is recorded by the Bureau of Conveyances of Land Court, as the case may be. A copy of the unilateral agreement shall be submitted to the Planning Department prior to the issuance of the required zoning and/or shoreline setback variance. Failure of the grantor to record these deed restrictions shall constitute a violation of this section and the grantor shall be subject to the penalties set forth in this article.

(g) For any structure approved within the shoreline setback area by variance, the applicant shall agree in writing that the applicant, its successors, and permitted assigns shall defend, indemnify and hold the County of Kaua'i harmless from and against any and all loss, liability, claim, or demand arising out of damages to said structure and this indemnification shall be included in the unilateral agreement required above.

(h) The applicant may apply to the department for an amendment to the variance in a manner consistent with the procedures of the special management area rules of the Kaua'i Planning Commission.

(i) No variance shall be granted for structures within the shoreline setback area that are unpermitted, unless the Commission determines that a structure is necessary to protect public health and safety, and/or that removal of the structure would cause a greater public harm.

(i) In no case shall the Commission grant a shoreline setback variance for structures constructed without valid permits."

(Material to be deleted is bracketed. New material is underscored.)