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DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS

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Honorable Mason K. Chock, Sr.
Kauai County Council Vice Chair
4396 Rice Street, Suite 209
Lihue, HI 96766

NOV 0 3 2014

Dear Council Member Chock,

SUBJECT: Bill for an Ordinance to Amend Chapter 8, Kauai County Code 1987, Relating to the Comprehensive Zoning Ordinance ("Shoreline Setback Bill," Bill No. 2461, Draft 3)

The Department of Land and Natural Resources (DLNR), Office of Conservation and Coastal Lands (OCCL) received your request via Peter Morimoto, Council Services, for our review and comment on the Bill for an Ordinance to Amend Chapter 8, Kauai County Code 1987, Relating to the Comprehensive Zoning Ordinance ("Shoreline Setback Bill," Bill No. 2461, Draft 3). We are taking this opportunity to communicate our comments and suggestions to the entire council and have copied the Councilmembers and Council Services Staff by email.

The OCCL strongly supports Bill No. 2461. As you know, part of the DLNR's mission is to manage coastal areas and ocean resources through the OCCL. A recent study by University of Hawaii and US Geological Survey researchers[1] finds the 71% of beaches on Kauai are undergoing a long-term trend of beach erosion (shoreline retreat). The threat of seasonal erosion and inundation during large waves may be an even greater hazard along many beaches. The OCCL has been especially busy with beach management efforts over the last year with a series of highly publicized coastal erosion events. Frequency and severity of coastal erosion and coastal flooding events will only increase with increasing rates of sea level rise in the coming decades. The Shoreline Setback Bill will help to move development away from hazard-prone shorelines, improving public safety and helping to conserve our coastal ecosystems.

Through the Shoreline Setback Bill, the County endeavors to improve protection of life and property and ensure integrity of Kauai's coastal and beach resources, strengthen County shoreline setback requirements of by incorporating science-based erosion rates, align the setback ordinance with the County Flood Ordinance, protect against episodic shoreline erosion, and create consistency with HRS 205A.

[1] Fletcher, C.H., *et al.*., 2012, National assessment of shoreline change: Historical shoreline change in the Hawaiian Islands: U.S. Geological Survey Open-File Report 2011–1051, 55 p.

While the OCCL strongly supports the overall intent of Bill 2461, Draft 3, we provide the following overall comments and recommendations for amendments for clarification of the proposed legislation, in addition to written comments on the attached copy of the Bill:

1. *Sec. 8-27.1Applicability (a) and (b).* Please provide justification and description for applicability of this Article to within 500 (a) or 550 (b) feet of the shoreline. Without further description, these distances appear arbitrary and do not follow coastal erosion rates or FEMA flood zones, for example.

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

    a. For clarity, *Sec. 8-27.3 (a)(1)* should be revised as: *In cases where the proposed structure or subdivision satisfies all the following criteria:*

    b. *Sec. 8-27.3(a) (1)* and *(2)* Overall, it is unclear how a structure would be cited on a property if the application meets criteria in (1) and (2). This may not provide safe setback for other serious hazards such as failure of rocky bluffs.

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

    a. (c)(2) *Landscaping that artificially fixes the shoreline.* This is a complicated subject matter. It appears that the sections on landscaping remain somewhat vague. In some cases, such as dune restoration, re-vegetation (landscaping) with native species may be desirable.

    b. (c)(3) *Shoreline hardening unless it is approved by the State of Hawai'i's Office of Conservation and Coastal Lands.* While the OCCL appreciates the County's efforts to keep our department involved in this process, this may be a subject matter that deserves more discussion pertaining to jurisdiction.

Thank you for the opportunity to provide testimony on this measure.

Sincerely,

Samuel J. Lemmo, ADMINISTRATOR
Office of Conservation and Coastal Lands

cc: Councilmembers and Council Services Staff via email: counciltestimony@kauai.gov

ORDINANCE NO. _____ BILL NO. **2461, Draft 3**

A BILL FOR AN ORDINANCE TO AMEND CHAPTER 8, KAUA'I COUNTY CODE 1987, AS AMENDED, RELATING TO THE COMPREHENSIVE ZONING ORDINANCE

BE IT ORDAINED BY THE COUNCIL OF THE COUNTY OF KAUA'I, STATE OF HAWAI'I:

SECTION 1. The Council finds that Kaua'i's coastline is subject to a wide variety of natural hazards, such as tsunamis, high surf, sea level rise, hurricanes, coastal flooding, and coastal erosion that pose dangers to people and property located near the shoreline. Proper siting of structures based on hazard recognition and long term planning principles is critical to the protection of life and property, the mitigation of coastal hazards, and the preservation of coastal resources.

Until recently, development and other improvements on coastal lands occurred without regard to erosion hazards. In some cases, chronically retreating shorelines eventually threatened these improvements causing strong pressure to build shore protection structures such as seawalls and revetments. These structures distorted the natural shoreline environment, often leading to accelerated erosion on adjoining properties, beach loss, and reduced public access. This pattern of coastal zone development has seriously degraded the natural attributes of the Kaua'i coast as documented in the Kauai Shoreline Erosion Management Study (September, 1990).

On January 25, 2008, the first shoreline setback ordinance (Ordinance No. 863) was signed into law. The purpose of the ordinance was to properly site structures to protect life, property, and resources along Kauai's shorelines from a wide variety of natural hazards, including high surf, hurricanes, flooding, and erosion. The Council envisioned Ordinance No. 863 as an initial effort to establish shoreline setbacks while science-based coastal erosion hazards maps were being completed. On December 2, 2009, Ordinance No. 887 became effective, amending the original shoreline setback ordinance. The purpose of Ordinance No. 887 was to streamline permit procedures by removing unnecessary requirements for structures and activities permitted within the shoreline setback area.

In 2010, the University of Hawai'i Coastal Geology Group completed the Kaua'i Coastal Erosion Study that mapped historical shoreline positions to calculate shoreline change data along most of Kaua'i's sandy shorelines, thus making available documented rates of shoreline erosion.

The Council finds that the shoreline environment is one of Kaua'i's most important economic and natural resources. Kaua'i's beaches provide scenic beauty and recreational opportunities for residents and visitors. They are culturally important to the people of Hawai'i. Beaches, dunes, and offshore topographic features also help to minimize risks from coastal hazards by dissipating wave energy, which could otherwise cause significant damage to coastal property. Beaches provide important habitat for seabirds, turtles, monk seals, and other animals and plants. In all of the abovementioned ways, beaches and coastal areas are part of the public trust, and it is government's fiduciary responsibility to protect beaches and coastal areas.

The Council also finds that it is important that information regarding natural hazards such as coastal erosion data be incorporated into the planning process at the early stage of development, i.e., at the time of subdivision before lot sizes and shapes are established, so as to give landowners more environmentally sound options and to save decision makers from the agonizing dilemma of choosing between protection of one owner to the detriment of another owner and/or the public.

The purpose of this bill is to:

(1) To protect life and property and to ensure the longevity and integrity of Kaua'i's coastal and beach resources along Kaua'i's shoreline.

(2) To strengthen shoreline setback requirements in Chapter 8, Article 27 of the Kaua'i County Code, 1987, as amended, by incorporating science-based erosion rates established in the Kaua'i Coastal Erosion Study and current coastal hazard mitigation best practices and strategies.

(3) To align the Shoreline Setback Ordinance with the County Flood Ordinance to improve coordination between the Departments of Planning and Public Works.

(4) To protect against episodic shoreline erosion that is not accounted for in the Kauai Coastal Erosion Study until such time as studies providing additional guidance and information are completed.

(5) To create consistency with recent amendments to Hawai'i Revised Statutes, Chapter 205A, as prescribed in Act 120 of the 2013 State Legislature.

(6) To give the Planning Director flexibility in applying this law to large parcels that abut the shoreline where the proposed improvement is sited in a location that will not increase erosion or impact natural shoreline processes.

The County is authorized to protect the coastal area pursuant to Public Law No. 92-583, as amended, ("Coastal Zone Management Act"), Chapter 205A, Hawai'i Revised Statutes, as amended, ("Shoreline Protection Act"), Article XI Section 1 of the Hawai'i State Constitution, Public Law 92-583, and the County's police powers to protect public health and safety. This ordinance shall be known as the "Shoreline Setback and Coastal Protection Ordinance."

SECTION 2. Chapter 8, Article 27 of the Kaua'i County Code 1987, as amended, is hereby amended as follows:

"**Sec. 8-27.0 Purpose.** The purpose of this Article is to protect life and property, ensure the longevity and integrity of Kaua'i's coastal and beach resources along Kaua'i's shoreline and to strengthen shoreline setback requirements in this Article by incorporating science-based erosion rates established in the Kaua'i Coastal Erosion Study and current coastal hazard mitigation best practices and strategies.

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 Kaua'i, that are:

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(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.

Sec. 8-27.2 Definitions.

For purposes of this [article] Article unless it is plainly evident from the context that a different meaning is intended, certain words and phrases used herein shall be defined as follows:

"Adversely affect beach processes" means to pose a potential immediate or future adverse effect on beach processes as a result of a structure and/or [activity] landscaping located within the coastal erosion hazard zone, or to create an immediate or future need to artificially fix the shoreline.

~~["Annual coastal erosion rate" means the annual rate of coastal erosion calculated by following a procedure established in the Hawai'i Coastal Hazard Mitigation Guidebook, (January 2005), which was prepared for the State of Hawai'i, Department of Land and Natural Resources, Coastal Zone Management Program, University of Hawai'i Sea Grant College Program and the Pacific Services Center and Coastal Services Center of the National Oceanic and Atmospheric Administration at section 4.1.]~~

"Annual coastal erosion rate" means 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). Annual coastal erosion rates are available for all lots on Kaua'i fronted by a sandy beach from the Kaua'i Planning Department. These rates were calculated by the University of Hawaii's Coastal Geology Group for the Kaua'i Coastal Erosion Study (2010). The Planning Director may designate a qualified professional to review and, subject to the Planning Director's approval, update annual coastal erosion rates."

"Average lot depth" means the measurement obtained by adding the lengths of the two sides of a lot which are at or near right angles with the shoreline, or the seaward boundary of the lot that runs roughly parallel to the shoreline if the property is not abutting the shoreline, to the length of a line obtained by drawing a line from a point in the center of the makai side of the lot to a point in the center of the mauka side of the lot and dividing the resulting sum by three. For irregularly shaped lots including flag lots, triangular parcels, lots on peninsulas, and/or lots having ocean on two or more sides of the lot, the average lot depth will be determined by the Director.

"Board" shall mean the Board of Land and Natural Resources, State of Hawai'i.

"Building footprint" shall mean all parts of a main building (excluding roof overhangs) that rest, directly or indirectly, on the ground, including those portions of the building that are supported by posts, piers, or columns. Building footprint also includes attached garages, covered carports, bay windows with floor space, lanais, decks, cantilevered decks, spas, and in-ground swimming pools.

"Certified Shoreline" means the shoreline established by Board pursuant to HRS 205A-42, as amended.

"Coastal Dune" means one of possibly several continuous or nearly continuous mounds or ridges of unconsolidated sand contiguous and parallel to the beach, situated so that it may be accessible to storm waves and seasonal high waves for release to the beach or offshore waters.

"Coastal erosion" means the natural loss of coastal lands, usually by wave attack, tidal or littoral currents, or wind. Coastal erosion is synonymous with shoreline retreat.

"Coastal erosion hazard zone" shall include all of the land between the shoreline and the shoreline setback line.

["Coastal erosion study" means a quantitative study of historical shoreline behavior utilizing orthorectified aerial photographs or other imagery to carry out high-resolution mapping of historical shoreline positions to obtain a statistically valid annual erosion rate of the Shoreline Change Reference Feature (SCRF) and vegetation line. The coastal erosion study shall be carried out by a qualified professional consultant as defined in this article following procedures described in Section 4.1 of the Hawai'i Coastal Hazard Mitigation Guidebook, (January 2005). The coastal erosion study shall include but not be limited to:

(1) Mapping of the historical shoreline positions including both the SCRF and the vegetation line for the subject parcel, as well as the local and regional littoral cell;

(2) The method resulting in the larger erosion rate (SCRF/toe of beach vs. vegetation line) shall be used to establish the erosion rate unless there is clear evidence to indicate another method is a more accurate representation of historic shoreline change.

(3) Uncertainty or error calculation of the data and the annual erosion rate;

(4) Additional information relevant to the erosion study shall include: a current certified shoreline survey, construction plans, if any, existing and finished contours; photographs of the shoreline setback area, analysis of the coastal erosion rates and shoreline processes.

(5) Where a coastal erosion study is required to be done or is done voluntarily by an applicant, an application for a shoreline setback determination shall not be deemed complete unless the coastal erosion study has been accepted by the Director.

(6) Any non-governmental study shall be valid for no longer than a period of five (5) years from the date of its acceptance by the Director which shall be by certified letter issued by the Planning Department.

(7) The coastal erosion study shall consider the purpose of the study—to safely site structures away from hazards such as erosion so that shoreline hardening will not be required to protect the property during its useful life.]

"Coastal hazard" means natural processes in the coastal zone that are generated by geologic, oceanographic, and/or meteorological processes that place people and/or improvements at risk for injury and/or damage.

"Commission" means the Planning Commission of the County of Kaua'i.

"Department" means the Planning Department of the County of Kaua'i.

"Director" means the Planning Director of the Planning Department of the County of Kaua'i.

"Dwelling Unit" means any building or any portion thereof which is designed or intended for occupancy by one (1) family or persons living together or by a person living alone, and provides complete living facilities

within the unit for sleeping, recreation, eating and sanitary facilities, including installed equipment for only one (1) kitchen.

"FEMA" means the Federal Emergency Management Agency.

"FIRM" means the Flood Insurance Rate Map.

"Hazard Assessment" means assessment for erosion, wave, flood, and inland zone following the standards in Section 4.3 of the Hawai'i Coastal Mitigation Guidebook, (January 2005), which was prepared for the State of Hawai'i, Department of Land and Natural Resources, Coastal Zone Management Program, University of Hawai'i Sea Grant College Program and the Pacific Services Center and Coastal Services Center of the National Oceanic and Atmospheric Administration.

"Kaua'i Coastal Erosion Study" means a quantitative study of Kaua'i and Ni'ihau's historical shoreline behavior utilizing orthorectified aerial photographs or other imagery to carry out high-resolution mapping of historical shoreline positions to obtain a statistically valid annual erosion rate of the Shoreline Change Reference Feature (SCRF). The study was conducted by the University of Hawai'i's Coastal Geology Group for the County of Kaua'i. The shoreline change data and shoreline change posters produced by this study are on file with the Kaua'i Planning Department. The study followed procedures described in the 'National Assessment of Shoreline Change: Historic Shoreline Changes in the Hawaiian Islands (Fletcher, et al., 2010) available from the Kaua'i Planning Department.

"Landscaping" means the modification of landscape for an aesthetic or functional purpose that includes the planting of vegetation; the installation of irrigation, rock or water features; grading or grubbing.

["~~Lot" means~~ a portion of land shown as a unit on an approved and recorded subdivision map.]

"Makai" means seaward or in a seaward direction.

"Mauka" means landward or in a landward direction.

"Minimum buildable footprint" [means the building footprint of 2,100 square feet or as allowed in Section 8-27.10(a).] means a building footprint of one thousand five hundred (1,500) square feet.

[~~"Minor activity" means an activity that:~~

~~(1) costs less than $125,000; and~~

~~(2) does not adversely affect beach processes, does not artificially fix the shoreline, does not interfere significantly with public access or public views to and along the shoreline; and~~

(3) does not impede the natural processes and/or movement of the shoreline or sand dunes, and does not alter the grade of the shoreline setback area, except for landscaping, clearing (grubbing) of vegetation, and grading, which are exempt from HRS Chapter 343; and

(4) is consistent with the purposes of this article and HRS Chapter 205A, as amended.]

"Minor structure" means:

(1) a structure that costs less than $125,000 and provides temporary emergency protective measures for a legally habitable structure that is imminently threatened by coastal hazards provided that the protective measure has received approval in accordance with the Special Management Area Rules of the Kaua'i Planning Commission and/or the State Department of Land and Natural Resources (as may be the case), relocation of the endangered structure has been considered and is not reasonable given the nature of the emergency, the protective measure is removed within one hundred eighty (180) days of its installation, and given the significance of the emergency, the protection is the best management alternative with respect to beach, shoreline, and/or coastal resource conservation, or

(2) a structure that:

(A) costs less than $125,000; and

(B) does not adversely affect beach processes, does not artificially fix the shoreline, and does not interfere with public access or public views to and along the shoreline; and

(C) does not impede the natural processes and/or movement of the shoreline and/or sand dunes, and does not alter the grade of the shoreline setback area; and

(D) is consistent with the purposes of this article and HRS Chapter 205A, as amended; and

(E) includes, but is not limited to, lighting in conformance with HRS Chapter 205A, landscape features, barbeques, picnic tables, benches, chairs, borders, wooden trellis, bird feeders, signs, safety improvements, lifesaving devices, movable lifeguard stands, walkways for access, outdoor showers and water faucets, public utility lines, utility poles and accessory structures along existing corridors, temporary tents for special events not exceeding fourteen (14) consecutive days in duration during any three-month period, walls and fences that are located more than forty (40) feet from the shoreline, landscape planting and irrigation systems provided that they are [directed] located more than forty (40) feet away from [a valid certified] the shoreline and do not artificially extend the shoreline or shoreline setback area seaward; and

(F) excludes, but is not limited to, any in-ground swimming pools or spas, garages, carports, concrete walkways that are reinforced, concrete walkways that are not saw-cut at a minimum of three (3) foot intervals, and concrete steps.

"Natural catastrophe" is a natural disaster qualifying for a governor's declaration of emergency pursuant to Hawai'i Revised Statutes Chapter 128, or a presidential declaration of emergency of a major disaster pursuant to 42 USC 5170, including those caused by episodic coastal hazards such as tsunamis and hurricanes, and not the result of other coastal hazards or processes such as erosion or sea level rise.

"Nonconforming structure or activity" means a structure or activity which is lawfully existing within the shoreline setback area because it:

(1) Was completely built, in its present form, prior to June 22, 1970; or

(2) Received either a building permit, board approval, or shoreline setback area variance prior to June 16, 1989; or

(3) Was outside the shoreline setback area when it received either a building permit or board approval; or

"Plan" or "site plan" means a detailed construction plan drawn to scale of 1" = 20' 0" that shows the design of a structure proposed to be built within the shoreline setback area. The plan shall be based on an accurate instrument by a surveyor licensed in the State of Hawaii and shall consist of data including but not limited to:

(1) Property boundaries;

(2) Natural features such as large trees, rock outcroppings, and any primary or secondary coastal dunes;

(3) Topography in and around the proposed construction;

(4) Any and all shoreline hardening;

(5) Flood zones, where applicable;

(6) Existing and proposed structures and their proximity to the shoreline and shoreline setback area;

(7) Fences, walls, and any other structures in the shoreline setback area and any potential hindrances to lateral access along the shoreline;

(8) A geo-referenced survey of the site; and

(9) Any other information which identifies the existing condition of the subject parcel of land."

"Primary Coastal Dune" means the first dune encountered mauka of the beach.

"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 Kaua'i.

"Qualified [professional] consultant" means a coastal scientist with a 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. If a dune restoration project is proposed, the qualified consultant shall have experience and expertise with dune restoration."

IS THIS REALLY NECESSARY?

"Qualified Demolition" means the demolition of a structure or structures where such demolition:

(1) Will not adversely affect beach processes;

(2) Will not artificially fix the shoreline;

(3) Will not interfere with public access, except for public safety reasons during demolition operations;

(4) Will not interfere with public views to and along the shoreline, except during demolition operations;

(5) Will be consistent with the intent of open space enhancement as reflected in these rules and HRS 205A; and

(6) Will comply with applicable County Codes.

"Rebuilding" means reconstruction of a lawfully existing dwelling unit when the reconstruction is valued by a licensed professional engineer, or architect at fifty percent (50%) or more of the current replacement cost of the structure.

~~["Repair" means the fixing of damages to a structure where the cost thereof is valued by a licensed professional, engineer, or architect at less than fifty percent (50%) of the current replacement cost of the structure.]~~

"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. A "substantial improvement" as defined herein shall not be considered a repair.

"Revetment" shall mean a facing of stone, concrete, blocks, or other similar materials built to protect a scarp, embankment, or shore structure against erosion by wave action or currents.

"Rocky Shoreline" means a shoreline segment acting as the primary interface between marine dominated processes and terrestrial dominated processes that is composed of hard, non-dynamic, non-erodible material such as basalt, fossil limestone, beach rock, or other natural non-dynamic material, not to include cobble or gravel beaches that are dynamic in nature, or erodible cliffed shorelines composed dominantly of dirt or clay.

"Shoreline" is as defined in Section 205A-1, Hawai'i Revised Statutes, as amended, and as established pursuant to Section 205A-42, Hawai'i Revised Statutes, as amended.

"Shoreline Hardening" means the process of fortifying the shoreline or shoreline setback area with hard structures including, but not limited to, seawall and revetments."

SEAWALL(S)

"Shoreline Change Reference Feature (SCRF)" means a morphologic feature commonly referred to as the "toe" of the beach, which represents the base of the foreshore or approximating the Mean Lower Low Water (MLLW).

"Shoreline setback area" means "shoreline area" as defined in Section 205A-41, Hawai'i Revised Statutes, as amended.

"Shoreline setback line" is as defined in Section 205A-41, Hawai'i Revised Statutes, as amended.

"Storm buffer zone" is the first forty feet (40') of the shoreline setback area as measured from the shoreline.

"Structure" is as defined in Section 205A-41, Hawai'i Revised Statutes, as amended.

"Substantial construction" means that one hundred percent (100%) of the foundation has been laid, or that one hundred percent (100%) of the foundation of the active phase of a project has been laid where the project is being done in phases.

"Substantial improvement" means any cumulative series of repairs, reconstruction, improvements, or additions to a structure over a ten (10) year period, where the cumulative cost equals or exceeds fifty percent (50%) of the market value of the structure before the start of construction of the first improvement during that ten (10) year period. For the purposes of this definition, substantial improvement is considered to occur when the first alteration of any wall, ceiling, floor, or other structural part of the building commences, whether or not that alteration affects the external dimensions of the structure. The value of any substantial improvement shall be determined by the County Engineer or his/her authorized representative. The term does not, however, include either: (1) any project for improvement of a structure to correct existing violations of a State or local health, sanitary, or safety code

specifications which have been identified by the local code enforcement official and which are the minimum necessary to assure safe living conditions, or (2) any alteration of a "historic structure," provided that the alteration will not preclude the structure's continued designation as a "historic structure."

"Temporary structures [or activities]" means structures [or activities] that will exist for no longer than six (6) months and will not irreversibly and adversely affect beach processes, public access, or public views nor artificially fix the shoreline in an irreversible way, and from which there will be a public benefit.

"Use" means the purpose for which land or building is arranged, designed, or intended, or for which either land or building is or may be occupied or maintained.

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

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

I UNDERSTAND WHAT THIS LEANS, BUT THE ANGUAGE IS RISKY!

(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 ALL the following three criteria:

I ASSUME ALL AREAS ARE MAPPED THAT HAVE POTENTIAL EXPOSURE

(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;

I HAVE A PROBLEM W/THIS EXCLUSION BLUFF FAILURE!

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

THE DEFINITION OF ROCKY SHORELINE IS TOO GENEROUS.

(C) The applicant can demonstrate to the satisfaction of the Planning Director that the property is clearly adjacent to a rocky shoreline and 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.]~~

DOES THIS IGNORE LOOSING/FIRM?

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

Sec. 8-27.4 Minimum Shoreline Setback Requirements.

Except as provided for in this article, no lot shall have a shoreline setback line of less than forty (40) feet.

Sec. 8-27.5 [Structures and activities subject to these rules.] Applicable Laws.

[All structures and activities located or proposed to be located within the shoreline setback area shall conform to the requirements of this article.] The requirements of this [article] 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. [Construction immediately mauka of the shoreline setback area shall also be subject to these rules unless a certified and confirmed survey map, prepared in accordance with the provisions of section 8-27.3, is filed with the department showing that the construction is mauka of the shoreline setback area.]

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, [not in excess of one gallon per person per day, for reasonable, personal noncommercial use; or] 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 [these rules;] 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; [or]

(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 [beach] 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 Hawai'i 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.

Well intentioned, poorly defined, falls on DLNR?

→ (2) Landscaping that artificially fixes the shoreline.

[redacted] NOW. THIS IS INTERESTING. NOT SURE IT'S TOTALLY LEGAL - MAYBE SOMETHING THAT [redacted] DESERVES MORE DISCUSSION.

(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.

Sec. 8-27.7 Permitted structures [and activities] within the shoreline setback area.

(a) The following structures [and activities] are permitted in the shoreline setback area. All structures and/or [activities] 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 [January 1, 2010] 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 [or activities]" 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; [nor] increase the size or degree of non-conformity; or intensify the use of the structure or its impact on coastal processes;

(B) The repairs [are valued by a licensed professional engineer or architect at less than fifty percent (50%) of the current replacement cost of the structure;] 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, [and] 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 [or activity] 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 Hawai'i Revised Statutes.

(b) The following conditions shall apply to any new structure [or activity] 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 [or activity] during its life, with the exception of approved beach or dune nourishment fill activities, and landscape planting and irrigation <u>located more than forty feet (40') from the shoreline.</u>

(4) [All] <u>Unless otherwise provided, all</u> 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.] <u>amended, and shall be designed and located to minimize the alteration of natural landforms and existing public views to and along the shoreline.</u>

(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 [or activity] 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 [or activity] and the filing of such with the Director shall be a prerequisite to the issuance of any related building permit.

Sec. 8-27.8 [Structure and Activity] <u>Procedures For Obtaining</u> Determinations.

(a) [Any] <u>Unless as otherwise provided in this Article, any</u> structure [or activity] proposed in the shoreline setback area shall first obtain a determination from the Director in accordance with this [article.] <u>Article.</u>

(b) A proposed structure [and activity] 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 [improvements and facilities] structures whose valuation does not exceed $125,000.00[,] and repairs to lawfully existing private structures as delineated in Section 8-27.7(a)[(6)], the request shall include construction and site plans, and [a] written text addressing compliance with the criteria set forth in this [article] 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 [improvements and facilities] structures whose valuation exceeds one hundred twenty-five thousand dollars ($125,000.00)[,] and private [improvements and facilities] structures [that are not repairs to lawfully existing structures as] unless delineated in Sec. 8-27.7(a)[(6)], 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, [a list of proposed plants and their growth,] existing and final contours, photographs, [an environmental assessment,] 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; [or]

(D) Outside of the shoreline setback [area.] area; or

(E) Not subject to Section 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; and] ;

(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).

(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 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.

[(6)] (8) [The] Except with regard to repairs to structures permitted pursuant to Section 8-27.7(a)(6), the Director's [structure or activity determinations] decisions pursuant to Section 8-27.8(c)(4) shall not be final until [accepted by the Commission] posted on the Commission's agenda. Notwithstanding [Commission acceptance] the

posting of the decision, if there is an appeal from the Director's decision, the [determinations] decision shall not be final until the Commission completes its decision-making on the appeal.

[(7)] (9) Minor structures [or activities] shall be completed [or in operation respectively] 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.

[(8)] (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 [a coastal erosion study] shoreline change rates as provided in the Kaua'i Coastal Erosion Study. In all other cases where substantial construction has not occurred by tlhe 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.

Sec. 8-27.9 Variance application.

(a) A written application for variance shall be made in a form prescribed by the Director and shall be filed with the Director. The application shall include plans, site plans, photographs, and any other plans, drawings, maps, or data determined by the Director to be necessary to evaluate the application. The application shall also include:

(1) [An] A non-refundable administrative application fee of three hundred dollars ($300.00). [There shall also be an administrative fee shall be seventy-five seven thousand five hundred dollars ($7,500.00) if the application is made after the structure is partially or fully built without the required approvals.]

(2) Certification from the owner or lessee of the lot which authorizes the application for variance;

(3) An environmental assessment prepared in accordance with HRS [c]Chapter 343, and the environmental impact statement rules and applicable guidelines of the State of Hawai'i;

(4) The names, addresses, and the tax map key identification of owners of real property situated adjacent to and abutting the boundaries of the land on which the proposed [use, activity, or operation is to occur;] structure and/or landscaping is to be located;

(5) A site plan of the shoreline setback area, drawn to scale, showing:

(A) Existing natural and man-made features and conditions within;

(B) Existing natural and man-made features and conditions along properties immediately adjacent to the shoreline setback area and proposed improvements;

(C) The certified shoreline and the shoreline setback line;

(D) Contours at a minimum interval of two (2) feet unless waived by the director; and

(E) Proposed development and improvements showing new conditions with a typical section (if a structure).

(6) A copy of the certified shoreline survey map of the property;

(7) Detailed justification of the proposed project, which addresses the purpose and intent of these rules and the criteria for approval of a variance;

(8) Analysis and report of coastal erosion rates and coastal processes; and

(9) Any other information required by the [d]Director.

(b) Upon a determination by the [d]Director that the application is complete and in compliance with HRS Chapter 205A, part II and this article, the Director shall submit the application to the [c]Commission. If the application is determined to be incomplete by the Director, the Director shall return the application to the applicant with a written description identifying the portions of the application determined to be incomplete. The Director shall submit a written report, a copy of the application, and all other documents submitted on the application to the [c]Commission prior to the matter appearing on an agenda of the [c]Commission.

(c) Except as otherwise provided in this section, all applications for variances shall be heard, noticed, and processed as public hearing matters. Not less than thirty (30) calendar days before the public hearing date, the applicant for a variance shall mail notices of public hearing by certified or registered mail, postage prepaid, to owners of real property which abut the parcel that is the subject of the application. Not less than thirty (30) days prior to the public hearing date, the Director shall publish a notice of hearing once in a newspaper that is printed and issued at least twice weekly in the County and which is generally circulated throughout the County. The notice shall state the nature of the proposed development, the date, time, and place of the hearing, and all other matters required by law.

(d) Exceptions. Prior to action on a variance application, the [c]Commission may waive a public hearing on the application for:

(1) Stabilization of shoreline erosion by the moving of sand entirely on public lands;

(2) Protection of a legal structure costing more than $20,000; provided that, the structure is at risk of immediate damage from shoreline erosion;

(3) Other structures or activities; provided that, no person or agency has requested a public hearing within twenty-five (25) calendar days after public notice of the application. For the purposes of this section "public notice of the application" shall be publication of a notice

of the application in a newspaper which is printed and issued at least twice weekly in the County of Kaua'i, which informs the public of the subject matter of the application and which identifies the date and time by which a written request for a public hearing must be received by the [commission;] Commission; or

(4) Maintenance, repair, reconstruction, and minor additions or alterations of legal boating, maritime or watersports recreational facilities, which result in little or no interference with natural shoreline processes.

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

THIS IS TOUGH! KIND OF SAYING WE CAN "FIX" SHORELINE BUT ALSO SAYING "CAN FIX" SHORELINE IN CAN'T RETREAT.

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; 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.

SAME AS COMMENT ABOVE →

(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;

LITTLE HARD FOR ME TO UNDERSTAND, BUT I THINK I GET IT.

(C) [The] <u>If the foregoing approaches are done to the maximum extent practicable and a dwelling cannot be sited mauka of the shoreline setback, the</u> minimum buildable footprint shall be reduced <u>to no less than one thousand (1,000) square feet</u>.

(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[:

DILEMMA. MAYBE IF YOU ARE GOING TO GRANT A VARIANCE W/ REDUCED SETBACK, SHOULD REQUIRE A HAZARD ASSESSMENT

(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.] <u>forty (40) feet.</u>

~~no setbacks <40ft~~

(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) [The] <u>If the foregoing approaches are done to the maximum extent practicable and a dwelling cannot be sited mauka of the shoreline setback, the</u> minimum buildable footprint may be reduced[.] <u>to the lesser of one thousand (1,000) square feet or the actual footprint of the house.</u>

[(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:

(aa) 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

(bb) thirty (30) feet from the certified shoreline for lots with rocky shorelines.]

(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.

DLNR?

(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.

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

Sec. 8-27.11 Enforcement.

(a) The Director shall enforce this article in accordance with Article 24 of the County of Kaua'i Comprehensive zoning Ordinance. HRS Chapter 205A, and the rules of Practice and Procedure of the County of Kaua'i Planning Commission.

(b) Removal of an unpermitted structure.

(1) In determining the disposition of a unpermitted structure, the Director shall follow the procedures outlined in Chapter 12 of the Rules of Practice and Procedure of the County of Kaua'i Planning Commission based on the nature of the unpermitted structure. If the structure would have required Class I, II, or III permits as well as shoreline setback determination and approval or variance, the procedure shall be that required under Section 1-12-4 of said rules. If a Class IV permit would have been required, the procedure would be that outlined in Sections 1-12-5 through 1-12-8 of said rules.

(2) Following the relevant procedures described in Sec. 8-27.11(b)(1), the Director or the Commission, as the case may be, shall order the removal of an unpermitted structure unless it is determined that removal shall cause a greater harm to the ecosystem and/or public improvements than allowing the structure to remain.

(3) If the Director or Commission determines that removal would be inappropriate, the property owner or perpetrator shall obtain a variance under Sec. 8-27.10 and shall pay penalties as specified in Section 8-27.12.

(c) Judicial Enforcement of Order. The Director may institute a civil action in any court of competent jurisdiction for the enforcement of any order issued pursuant to this section.

Where the civil action has been instituted to enforce the civil fine imposed by such order, the Director need only show that a notice of violation and order was served, a hearing was held or the time allowed for requesting a hearing had expired without such a request, that a civil fine was imposed and that the fine imposed has not been paid.

The Director may institute a civil action in any court of competent jurisdiction for injunctive relief to prevent violation of any provision of this Chapter, any rule adopted there under, any permit issued pursuant thereto or any condition of any shoreline setback approval in addition to any other remedy provided for under this chapter.

(d) Nonexclusiveness of Remedies. The remedies provided in this chapter for enforcement of the provisions of this chapter, or any rule adopted thereunder, shall be in addition any other remedy as may be provided by law.

(e) Appeal in Accordance with Statute. If any person is aggrieved by the order issued by the director pursuant to this section, the person may appeal the order in the manner provided in HRS Chapter 91, provided that no provision of such order shall be stayed on appeal unless specifically ordered by a court of competent jurisdiction

(f) The Director shall enforce this article in accordance with Article 24 of the County of Kaua'i Comprehensive Zoning Ordinance and HRS Chapter 205A.

[Sec. 8-27.12 Civil fines.

(a) Any person who violates any provision of this Article shall be subject to the penalties provided for in HRS Section 205A-32. Where a structure is built without permits and the Director, in following the procedures outlined in Section 8-27.11(a), determines that removal of the structure would cause a greater harm to the ecosystem and/or public improvements, a mandatory penalty of one thousand dollars ($1,000) shall be imposed, plus, in the discretion of the Director, between ten percent (10%) to one hundred percent (100%) of the estimated construction cost of the unpermitted structure shall be imposed as a penalty, considering factors such as percentage of completion, scope of work, and number of offenses.

(b) Any penalty paid pursuant to this section shall be deposited by the Director of Finance into the Planning Department's budget and shall be used for the enforcement and/or education relating to this ordinance.]

Sec. 8-27.12 Civil fines.

Any person who violates any provision of this Article shall be subject to the penalties provided for in HRS Section 205A-32 and Section 8-3.5 of this Chapter.

Sec. 8-27.13 Appeal of the Director's [decision] Determination.

Any person who can show that a direct probable harm to his or her person or his or her property interest, or probable public harm could occur from the decision may appeal any Shoreline Setback Determination, Approval, [or] Denial or Determination of Inapplicability by the Director to the Commission in accordance with the Commission's Rules of Practice and Procedure [The potential appellant shall file a notice of appeal with the Director and the Commission within fifteen (15) days after the adverse decision. Within twenty (20) days of said filing, the commission shall determine the potential appellant's standing to appeal. If the commission grants standing to appeal, the commission shall follow the procedure outlined in Chapter 9 of The Rules of Practice and Procedure of the County of Kaua'i

Planning Commission. The Planning Commission's decision may be appealed to the Circuit Court pursuant to HRS Chapter 91 and the aforementioned rules.]

Sec. 8-27.14 Promulgation of Rules and Regulations.

Pursuant to HRS Chapter 91, as amended, the Planning Commission may promulgate rules and regulations consistent with this Article as may be necessary to implement any of the provisions of this Article."

SECTION 3. If any provision of this ordinance or application thereof to any person, persons, or circumstances is held invalid, the invalidity does not affect the other provisions or applications of this ordinance which can be given effect without the invalid provision or application, and to this end, the provisions of this ordinance are severable.

SECTION 4. Ordinance material to be repealed is bracketed. New ordinance material is underscored. When revising, compiling or printing this ordinance for inclusion in the Kaua'i County Code 1987, as amended, the brackets, bracketed material, and underscoring shall not be included.

SECTION 5. This ordinance shall take effect upon approval. The requirements of this ordinance shall not affect any application which has been approved by the Commission prior to the effective date of this ordinance, unless there is a subsequent approval required prior to a building permit, in which case, that subsequent application shall be subject to the relevant requirements of this ordinance, excluding subdivisions which have received tentative approval prior to the approval date of this ordinance.

Introduced by: /s/ NADINE K. NAKAMURA
(By Request)

DATE OF INTRODUCTION:

December 19, 2012

Līhu'e, Kaua'i, Hawai'i
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