

## MINUTES

### PLANNING COMMITTEE

August 1, 2007

A meeting of the Planning Committee of the Council of the County of Kaua'i, State of Hawai'i, was called to order by Councilmember JoAnn A. Yukimura, Chair, at the Historic County Building, Room 201, Lihu'e, Kaua'i, on Wednesday, August 1, 2007, at 11:30 a.m., after which the following members answered the call of the roll:

Honorable JoAnn A. Yukimura  
Honorable Jay Furfaro  
Honorable Shaylene Iseri-Carvalho  
Honorable Ron Kouchi  
Honorable Mel Rapozo  
Honorable Bill "Kaipo" Asing, Ex-Officio Member  
Honorable Tim Bynum, Ex-Officio Member

The Committee proceeded on its agenda items as shown out of order in the following:

**Bill No. 2204**      A BILL FOR AN ORDINANCE TO AMEND CHAPTER 8 OF THE KAUA'I COUNTY CODE 1987, AS AMENDED, RELATING TO THE COMPREHENSIVE ZONING ORDINANCE (Transient Vacation Rental and Bed and Breakfast operations)  
[This item was deferred.]

JOANN A. YUKIMURA, PLANNING COMMITTEE CHAIR: We have some amendments to circulate and I think they are still being printed. We have it and if our Deputy Clerk can pass them around and also make them available to the public and I will try to explain them and then I would like to ask that we recess and go into the Committee of the Whole for discussions with the Deputy County Attorney and then we will come back to further discuss the amendments. We will be recessing at lunch at 12:30 p.m. and then when we come back, we have promised the citizens interested in the Hanapēpē Adolescent Drug Treatment Center that we will take that, then we will go back to vacation rentals to hopefully float any amendments that have to... need to be made or need to be prepared and then we will go back to our regular business, so that can be done (regular business in the other Committees). We are just trying to do our work as efficiently as possible and to accommodate citizens who turn out for these various issues. Let's see, we will also try to take public testimony hopefully before 12:30 p.m. No, I think we will try it after lunch, so that members can have a chance to look at the amendments.

Does everyone have a copy of the new amendments dated August 1, 2007? Most of the underlining and deletions were in prior amendments, but I want to

point out on page 3... I can't remember if this is brand new, but it is an issue which I would like to get Council and public input on. At the bottom in the definition of transient vacation rentals means a single family or multi-family dwelling which... you will note that over the course of 60 days or more is still in there and you will note that right above in the definition that we are taking out, the old definition, it was over the course of one or more years and that came from actually statutory language in State statutes. I am just using that to say that there needs to be some kind of show of ongoing use rather than a one day, one instant use. So, therefore, in terms of developing proof or evidence of a nonconforming use on page 12 under Section 8-17.10 which covers nonconforming use certificates. You will see on page 12 under C that we are giving guidance to the Planning Director that the vacation rental was... in order for people to qualify for a nonconforming use, there needs to be a show that the dwelling unit was being used at least over a course of 60 days or more. Now, this is not usually done in terms of (change side of tape)... establishing a nonconforming use. My reason for putting it in is it limits the discretion of the Planning Director, it gives a clear measurement of time. If the Council or the public... and/or the public feels that that is not a good thing to do, not a good policy, we can eliminate it. So I am pointing this out to you to invite input on it. If we eliminate it, then the criteria will be as identified under 1, 2, 3 and 4 and it will be in the judgment of the Planning Director that there has been an ongoing use and he will get that impression or... from the four (4) or... and more types of evidence that we are asking people to present.

Now you will also see in "D" below that I have tried to address the issue of agricultural land and I allow for the application of a special use permit for a vacation rental that is part of a real farm and there is guidance for the Planning Commission to determine what that would be. At the bottom of page 12, the applicant can apply for a special use permit, the Planning Commission shall issue a permit only if single family vacation rental... oh, let's see, either... more than half of the applicant's household income comes from farming operations on the subject property or more than 75% of the subject property is being used for farming purposes and A, B, C, D, E and F which includes the requirements up above 1, 2... C, 1, 2, 3, 4, so it is pretty stringent. That is an effort... we heard testimony from people who are clearly doing real farming and it is an effort to try to define what real farming is. We will have to do that when we begin to address ag lands of importance to the State and I scanned other jurisdictions in terms of how they define real agriculture and took some of that information and incorporated here, but it is open for discussion and I pointed it out to you. Other than that, in each section of the CZO that allows particular use like residential use, resort use, we have put in as permitted uses, transient vacation rentals, provided that they are located within visitor destination areas, but I have not done that in open zone or in industrial zone because I didn't think that the purposes of those CZO sections really matched vacation rental use. Let's see, we still have the registration requirement on page 11. The registration of existing or newly created transient vacation rentals in visitor destination areas will be through a new Class I zoning permit and then the registration of single family vacation rentals that are nonconforming will be through a nonconforming use certificate. I believe those are the major

amendments, so if there are any other questions or testimony, that is invited. Okay, I am open for questions or comments or we can go into Executive Session and let me people try to digest this.

MEL RAPOZO: I just have real quick, JoAnn, I know the staff is working on some amendments. I do have some concerns on the B&B definition, so as soon as that gets prepared, we will circulate that.

Ms. Yukimura: Okay, thank you. And I think your intention is mainly to add in the wording for breakfast in bed and breakfast.

Mr. Rapozo: The meal and also that it is... that the operator has to be in that residence as well.

Ms. Yukimura: Well, that is in there right now.

Mr. Rapozo: It looks like, but it doesn't really specify though.

Ms. Yukimura: Within the same dwelling unit in which the owner or lessee resides?

Mr. Rapozo: Okay, okay, and then the 180 days too, I am still debating whether or not... I think 180...

Ms. Yukimura: They can't hear you.

Mr. Rapozo: And the 180 days number because I know it used to be 30 and that is one that I am battling with right now.

Ms. Yukimura: Okay.

Mr. Rapozo: Thanks.

Ms. Yukimura: Any other comments or questions? Council Chair?

BILL "KAIPO" ASING, EX-OFFICIO MEMBER: On page 11 and we probably discussed this before, but starting with... in the middle of the page Section 8-17.9, just below that, item A. All single and multi-family transient vacation rentals lawfully existing. Where are we... who is going to make that determination? Lawfully existing, that is the first question and then if you take that down and go to the bottom of the page, again, go to "A". The purpose of this section is to provide a process to identify and register those single family transient vacation rentals as nonconforming uses which have been, again, lawful use prior to effective date of this ordinance. I think the question is, who's going to determine lawful use?

Ms. Yukimura: Okay, the importance of that wording is to make sure that we are not validating something, for example, that a vacation rental in a VDA area that is violating a shoreline setback law.

Chair Asing: I think I understand the intent and the rationale, but anytime you use, you know, words like this... unless there is a clear definition for, you know, the phrase, then it just throws everything up in the air again on what you think is lawful and what I think is lawful is different.

Ms. Yukimura: Well, that is true.

Chair Asing: So who is going to make that determination on, oh, yes, this is lawful?

Ms. Yukimura: Okay, I am thinking it is evident from the plain language that it has to be lawful use and that could be... we can't address every law, but it is basically and I think we have been told that, you know, that payment of taxes is not related, but planning and zoning laws are legitimately exercised in terms of nonconforming use or in terms of what is lawful from a land use bill and that is what the intention is. I would be afraid of not putting that word in because then we are saying... I mean, I think it opens us up to say, any vacation rental in a visitor destination area even though it may be illegal, you know, needs to be registered and that is what I am... and then once it is registered, they will argue that there was a government sanction on them and that starts to get really complicated.

Chair Asing: And I know the intent and I understand the intent, but, you know, is there... should we ask the County Attorney for help in trying to clarify lawful.

Ms. Yukimura: We can do that.

Chair Asing: Because, you know, if we just leave it as is, there is no question that anyone can challenge that on anything, almost anything and probably get away with it.

Ms. Yukimura: Uh huh.

Chair Asing: So maybe we need some help from the County Attorney's Office to try to take care of the intent and I understand the intent and, you know, you are making an effort to try to clear that and I appreciate that.

Ms. Yukimura: And I appreciate the question too. It is something we could maybe take up in Executive Session.

Chair Asing: Okay.

Ms. Yukimura: Questions?

SHAYLENE ISERI-CARVALHO: Again, just to follow up on what Council Chair mentioned about the definition of lawful use. I think it is vague and ambiguous. You also have that same language on page 2 in the purpose of the bill as allowing nonconforming uses (inaudible) single family vacation rentals have been operating lawfully prior to approval of this bill.

Ms. Yukimura: That is correct. We don't want to give nonconforming use status to a vacation rental that has not...

Ms. Iseri-Carvalho: Well, I think that is clear though, but...

Ms. Yukimura: I am open to suggestions for any other wording that might accomplish the goal.

Ms. Iseri-Carvalho: And we will consult, hopefully, with the County Attorney's Office to see if that can be clarified.

Ms. Yukimura: Yes, other questions?

Chair Asing: I don't have a... well, let me just try. So is it your intent to allow vacation rentals in ag zoned lands?

Ms. Yukimura: Only where there is a real farm and it is... and I don't know if the provisions I put in there achieve that, so I am asking... I mean, I think we had some testimony from people on ag land and we said, wow, they really are farming. I mean, they are supplying 40 families a week with fresh organic greens and, you know, their vacation rental is actually 500 square feet in a small and not the tail wagging the dog. I mean, they are not really a vacation rental operation, so if it is allowed under the law and it might be under a use permit and that is something that we all have to make a judgment about. I am trying to make it so that it is only for real agriculture and I may not be succeeding here, so I am open to...

Chair Asing: I think it is a question on philosophy I guess Councilmember Yukimura. In my mind, ag lands were not designed or planned to be used for visitor type operations... any type of visitor type operations as far as I am concerned. I just feel strongly that ag lands were designed for ag purposes and not for visitors. You know, those areas were the reasons we have resort areas and that is the visitor areas, so it is just my feel and my interpretation. I have some difficulty in having visitors in ag areas and even more, it appears as though it is even more discriminatory in the sense that if you are a true farmer, then you can have a visitor use and it is (inaudible).

Ms. Yukimura: Well, because the purpose of ag land is being fulfilled, but I understand what you are saying. It is a very difficult...

Chair Asing: And I just have some difficulty and, you know, for me, this is not unusual because I made... I am the only one that voted years ago on the ag lands bill. It is the same thing. You know, my philosophy is just the same. Ag lands were designed and to be used for ag purposes and we have this General Plan that we have resort and we have industrial and we have commercial and these lands are set aside for those purposes and that is the creation of the General Plan and we needed to stay as close as we can to that because that is the reasoning and, you know, I have come out many times to say, you know, I can remember the resort district on this island is Princeville and the Kapa'a/Wailua area and then down at Nāwiliwili and, you know, and Po'ipū, so we have these areas all set aside and it is part of the General Plan and we have to stick as close as we can to the General Plan as possible and that is basically where I am coming from.

Ms. Yukimura: Thank you. Any other discussion? If not, I would recommend that the Planning Committee be recessed and if Committee Chair of the Whole, Mr. Kouchi, could convene that Committee, we might have a chance to discuss with the County Attorney some of the legal issues.

RON KOUCHI: I don't have an objection to it. Are we anticipating that that would take less than the 40 minutes before we break for lunch, otherwise I might suggest that we recess the Planning Committee and then go through... if there are some other agenda items that could be concluded and then come back with the Executive Session, but it doesn't matter to me though.

Ms. Yukimura: We have told the Hanapēpē Adolescent Drug Treatment Center people at 1:30 p.m.

Mr. Kouchi: Well, let's go do the Executive Session and see how far we go.

Ms. Yukimura: It would help because then if we settle the legal issues and discussions, then we can prepare final amendments hopefully.

Mr. Kouchi: Begin with the end in mind, I like that anyway.

Ms. Yukimura: Thank you.

Mr. Rapozo: I guess the public testimony for this item will occur when?

Ms. Yukimura: Right after the drug adolescent treatment center if the other Committees would...

Mr. Rapozo: That is fine. I don't know how many people are going to testify on this matter. (Inaudible) I would guess that the adolescent treatment center would take probably an hour or maybe an hour and a half. I don't want to be held to that because I am not sure how many people will be here to testify. I know that there will be a few people here to testify because we did get the calls yesterday,

so it is really difficult unless you want to take... you want to do the Executive Session before public testimony on this issue?

Ms. Yukimura: Well, do people... I think people want to still want to look at these amendments.

Mr. Rapozo: Well, it is their choice. I mean, if we can get the public testimony out of the way...

Ms. Yukimura: Well, we can say, is there anyone who wishes to testify now, no, not now, okay. So with that, the Planning Committee stands in recess. Thank you everyone.

There being no objections, the Committee recessed at 11:52 a.m.

The meeting was called back to order at 5:40 p.m., and proceeded as follows:

Ms. Yukimura: I think there is some question that we need to settle in terms of the intention of the Chair and this Committee with respect to the vacation rental bill. It is my intention to pass this bill out of Committee today, but I understand that there were at least two (2) amendments pending that haven't actually been drafted and, in fact, one of the reasons I asked to have the vacation rental bill up on the agenda was that we could work on drafting amendments while we did other business. So we will work on those amendments and see if, you know, at the... we will actually take public testimony now and, then recess on the Planning Committee, so that we can draft any amendments that need to be drafted and we will come back into session after we do all the other Council business, Committee businesses because we need to go back to Public Works and then we will come back and look at the amendments. If the Council feels ready to pass the bill, we will pass it out, excuse me, if the Committee feels ready to pass the bill out of Committee, we will do so and if not, we will defer. At this time, I will suspend the rules.

There being no objections, the rules were suspended.

Ms. Yukimura: Any testimony? Mr. Pleas?

BRUCE PLEAS: I will go directly to the August 1, 2007 floor amendment. Page 3, Section 2 on the 180 days, I would prefer 30 days on that because 31 to 180 days are short term rentals be month to month or short term leases. Off we go to page 10 on the top of the page. Now, this is a continuation from page 9. I would like to see a change in wording to the following and this would be where "B" starts, but "B" is omitted. In commercial, resort and residential districts located within the visitor destination areas designated on Kua'i County visitor destination area maps, the rest would be deleted.

Ms. Yukimura: Yes. You want to delete the specific references to various regions of the island?

Mr. Pleas: Delete, yes.

Ms. Yukimura: Yes, I actually did that in one place because right now we know there's actually a VDA in Waimea and it is not necessary... and we may add or subtract on the areas, hopefully not... I mean, hopefully we won't add more areas of our island to be visitor destination areas, but you never know.

Mr. Pleas: As in Po'ipū, there may be places that need to be added because it is so hodge podge.

Ms. Yukimura: Right.

Mr. Pleas: This, I think, would clean it up, so that it is basically VDA areas.

Chair Asing: What page are you on now again?

Ms. Yukimura: 10 at the top.

Mr. Pleas: 10 on the top and what I will read is what I would like to stay in.

Ms. Yukimura: Go ahead.

Mr. Pleas: In Commercial, Resort and Residential Districts located within the visitor destination areas... designated on County of Kaua'i visitor destination area maps.

Ms. Yukimura: We are going to put in "and as designated on County of Kaua'i..." actually, it should be zoning maps, right?

Ms. Iseri-Carvalho: So take out visitor destination area zoning maps?

Mr. Pleas: No, leave that in.

Ms. Iseri-Carvalho: But are you adding the word zoning there?

Mr. Pleas: Well, yes, you can add zoning.

Ms. Iseri-Carvalho: Is that what you said?

Ms. Yukimura: Actually, within the visitor destination areas (capitalized) as designated on County of Kaua'i zoning maps.

Mr. Pleas: That would work, yes, because I believe that is about the same wording as (inaudible).

Ms. Yukimura: In the definition I think. Thank you.

Mr. Pleas: On page 12 and this is in the agriculture areas. The lot is no greater than 15 acres in size. My question is, why?

Ms. Yukimura: Because the Planning Commission has jurisdiction only up to...

Mr. Pleas: That is fine. If I may continue. Page 13 and this is section (e) at the top of the page. The owner, operator, or proprietor shall have the burden of proof in establishing that the use is properly nonconforming. The following documentation may be provided to the Planning Director as evidence of the forthcoming issue and so on. I would like to change "may" to "shall," so that (inaudible) documentation is required. As you have written here, may be provided. It says, well, they may be able, they may not, it is up to somebody's discretion. I would like to see the documentation required to be provided for the burden of proof and that is what I have on this bill as it is written now. I have a few points that I would like to see that are not in this. Existing vacation rentals continues with owner and family is not tied to the land. I have testified on this before and I don't see it in here. I know that there is a legal issue on it, but that is my feeling as I would like to see it continue with the person. If they sell the property and it is not in a VDA area, it goes out of vacation rental. That has been my intent for long because I want to see our residential areas or commercial areas come back to what they originally planned for. Also...

Mr. Furfaro: So Bruce, you would like to see that in there because you hope that there would be some attrition.

Mr. Pleas: I want to see attrition and I want to see vacation rentals in VDA areas only, new ones and that is it. That is where we are heading for, I would like to see. Also, all vacation rentals pay same County tax rates and County use rates as for water and sewage as resorts. These are basically mini resorts and they should pay the same as resorts do. We have heard testimony that (inaudible) can drive us out of business. Now what it will do will bring the rate of a daily cost for a vacation rental closer to a resort rate. Resorts on the westside are \$300 per day... the one that is there, vacation rentals are \$175 (inaudible) depending on what they are. If they have to pay this, the same County commercial tax that a resort is paying, I believe it is fair and it would bring just the price range into a closer deal. It would be passed onto the consumer. Another issue I have is to include agriculture, open and industrial zoned areas in the bill to avoid a blank area of legislation and this is the wording that is in resort... condition 22, neighborhood commercial, condition number 13 and general commercial number 22 and residential 8-3.3(e) which reads as follows: transient vacation rentals provided that they are located within designated visitor destination areas established pursuant to Article 17 of this

Chapter. These uses are prohibited in non-VDA areas. This needs to be in our agriculture, open, and industrial zoned areas because if you do not put that wording in those sections, you have a blank space and we run into the same problem because it is not addressed. We have to address all zoning areas and one more which is... I don't... it is not mandatory, but what I still want to put out is what I said before (inaudible). The definition of a TVR. Change single family, multi-family to shall mean the rental of any structure or any portion of any structure for occupancy for dwelling, lodging or sleeping and so on. That is what you got a copy the last time from Encinitas because we have single family, multi-family... any structure for dwelling is a broader scope and addresses what I consider a broader area and we don't have a hole in it. Besides that, this is looking better every time I see a new draft, so thank you.

Ms. Yukimura: Thank you. Any questions of Mr. Pleas? Councilmember Furfaro?

Mr. Furfaro: Bruce, thank you. Tell me on your 30 day piece why you feel so strongly about that and could you tie it to anything specifically?

Mr. Pleas: As it is written, say like transient vacation rentals be single family or multi-family dwelling units which over the course of 60 or more days is providing transient occupants for compensation or fees including (inaudible)... with the duration of occupancy less than 180 days. That means that they can rent it for 179 days in a row, the same person. So, to me, that is what is covered under a short term rental or a month to month lease. I believe we are talking about transient vacation rentals which is under 30 days. You are beginning to get fuzzy on how long this is. A transient by definition was 30 days, should be 30 days...

Mr. Furfaro: I want to clarify something for you. I am not getting fuzzy. I want to know why you can tell us how you can support 30 days because there are others that can support 60, there are others that can reference fractional ownership, so I am not fuzzy. I wanted to know, you know, what you could justify the 30 days.

Mr. Pleas: Well, my justification is that 30 days is a transient is a time for a transient vacation rental and everything over 30 days is covered by other legislation.

Mr. Furfaro: Thank you very much.

Ms. Yukimura: Other questions of Mr. Pleas? Councilmember Bynum?

Mr. Bynum: Bruce, thanks for your testimony and reading this carefully and I have been advocating that this be 60 days because I believe there are people who may want to rent their homes for three (3) or four (4) months while they are with their grandchildren on the mainland and I don't see that as a transient accommodation (inaudible) the same impact and typically 30 days is what most

jurisdictions use, but 60... make some logic to me (inaudible).

Mr. Pleas: What hasn't been addressed and what I have presented before on addressing the problem... not the problem, but the situation where people want to live here for six (6) months and do TVR's for six (6) months is to have them come in and state to the Planning Department that this is the open block that I would like to do TVR's and the rest of the time my family is there and make... (inaudible) because these... the people that come in usually just like a resort have certain blocks when things are blocked off or different uses and they could come forward and state for their next year that this is when we plan on doing this and they can go ahead and, you know, for the 180 days have it done.

Mr. Bynum: Obviously, some people... transient vacation rental now, seasonally, they live here half of the year and under this bill, if they have been doing that, they'll be grandfathered in, yes, so I am thinking more about a person who retires in a few years and wants to spend summers with their kids and they would be gone three (3) or four (4) months and they might want to arrange a rental, right? Not TVR during that time, but, you know, have a three (3) month rental or a six (6) months rental and I think we could continue to allow that without significant impact on a community, that would be my point.

Ms. Yukimura: Okay, other questions? First on that point, you know, we may be able to take care of it under the definition of transient or (inaudible)... you will see that we have... that is on page 3. We have a lot of exclusions which include non-paying guests of the family occupying..., patients, full-time students and I forget where we got this, but, I mean, we could try to include people that aren't really using or renting on a... to visitors, but there are people who rent to people for one or two (2) or three (3) months for transients. I mean, they are here and they are very wealthy and they want to just stay for a long time. Are you saying that should not be including as a transient vacation rental?

Mr. Pleas: I think it should be included as a short term because like I know friends who come over for four (4) months, five (5) months every winter and they want to rent a place and that could be considered a short term and the owner should have the ability to pull out of TVR and not pay a transient tax if the person is staying for three (3) months.

Ms. Yukimura: Or not violate the law because they would be in violation of law if they didn't have a nonconforming use permit and they weren't in a VDA area theoretically.

Mr. Pleas: But it is legal to rent month to month in a residential area.

Ms. Yukimura: I mean, you know, the State TAT law says, no matter what your situation, if you are up to 180 days and a transient... this might... you have to pay a transient accommodations tax and we were paralleling, you know, our definition with that. What you are saying is that there are circumstances and I

think what Councilmember Bynum is saying, where people are not using it like a hotel room or a vacation rental that is in a different category and we would not want to classify it as a TVR that (inaudible).

Mr. Pleas: During that (inaudible) time period because when it is used as TVR, you have to classify that. It just gets complicated at that point I can see.

Ms. Yukimura: Well, I am just asking if we make it only 30 days, are we missing people who are actually using... we probably are not because they are going to... amongst their various ways of renting will have 30 day rentals or less than 30 day rentals.

Mr. Pleas: (Inaudible).

Ms. Yukimura: Okay, thank you for that input. Let me tell you that your point about putting the language in every classification is... I tried to address that on... Excuse me here, page 11 and it actually starts on page 10. It says, notwithstanding any underlying zoning designation and with the exception of properties on the National and State register, historic places, single family transient vacation rentals are prohibited in all areas not designated as visitor destination areas, and single family vacation rentals are permitted uses within visitor destination areas only where explicitly permitted, and there is no permission in industrial or open or ag.

Mr. Pleas: But it is not explicitly not permitted.

Ms. Yukimura: They are prohibited.

Mr. Pleas: Are they explicitly not permitted because then you run into the same Blaine Kobayashi decision where if it is not...

Ms. Yukimura: Well, I am taking only where explicitly permitted as being explicitly prohibited in the other places, but, okay.

Mr. Pleas: We have been into that black hole before.

Ms. Yukimura: No, no.

Mr. Pleas: Personally, I think it is safer to put that same wording into all zoning areas.

Ms. Yukimura: Okay, we will look at that.

Mr. Pleas: Then we are (inaudible) a little bit better covered.

Ms. Yukimura: Okay, they are prohibited in all areas not designated as visitor destination areas and we are not explicitly permitted.

Mr. Pleas: And remember this is written as single family only... only it doesn't address multi-family

Ms. Yukimura: And it is not our intention to do that. Actually, multi-families are addressed in...

Mr. Pleas: In the multi-family section.

Ms. Yukimura: That is correct.

Mr. Pleas: I still feel safer with the wording in each zoning.

Ms. Yukimura: I noticed that we were kind of overreacting because we had this experience (change tape).

Mr. Furfaro: Just a point of order. Mr. Rapozo, you are on the Planning Committee?

Mr. Rapozo: Yes.

Mr. Furfaro: Okay, we have three (3). I just wanted to make sure we have a quorum.

Ms. Yukimura: Go ahead Ms. Robeson.

BARBARA ROBESON: Barbara Robeson for the record. On page 14 at the top of the page, item (c), you talk about the applicant can request a hearing before the Planning Director and I am wondering if hearing is the right word. Maybe it is a reconsideration. Hearing has a connotation to me of, it is a public forum, etc., so I am not sure about using that word. Anyway, that was just a comment there. And then...

Ms. Yukimura: I think we may have meant Planning Commission.

Ms. Robeson: Well, I think under (c), the applicant request a reconsideration from the Planning Director and then it goes to the Planning Commission if the applicant disagrees under that item (c) (inaudible). But I am just...

Ms. Yukimura: Actually, you know, the Planning Director could act as a hearings officer.

Ms. Robeson: But the applicant is appealing the decision, the revocation... notice that he got from or that they got from the Planning Director. So then, that applicant would appeal that to the Planning Director in a hearing that it kind of doesn't...

Ms Yukimura: Right. Actually, in order to show cause why a certificate not be revoked is the previous section and...

Ms. Robeson: But that would go to the Planning Commission then, right?

Ms. Yukimura: Yes, thank you for catching that.

Ms. Robeson: I mean, my preference would be, the applicant gets a notice from the Planning Director appealing the Planning Director's revocation notice. The applicant then files a request that is heard by the Planning Commission. That is the way that the structure would be I think.

Ms. Yukimura: But then it would be the Planning Commission that actually makes the decision.

Ms. Robeson: Well, generally, I think in the way that the Planning Commission rules are written now is that any action by the Planning Director, you appeal to the Planning Commission, so it is kind of the same scenario except... well, it is not on the scale of that, but it is just a question, so I think...

Ms. Yukimura: But it is a very good question. Thank you.

Ms. Robeson: And the word hearing. I am not sure if that is the correct... because that implies to me that it is public, that the public has input, that it is an open process and it doesn't sound like it is an open process at this point in that first 30 days.

Ms. Yukimura: Okay, thank you.

Ms. Robeson: So then on page 12 (in the center of the page), there is item number 4 that says that on the effective date of this ordinance, there are no outstanding violations. To me, outstanding implies that I have received an official notice of violation, so I think that word... I mean, I could be in violation, but not have received a notice, so I think you want to cover all aspects whether I have received official notice of a violation or whether I am in violation and nobody knows about it yet. So I would take out outstanding or say existing violations.

UNKNOWN: (Inaudible).

Ms. Robeson: Something like that. The outstanding is the word that kind of makes me think I am on notice already that I am violating something.

Ms. Yukimura: Uh huh. Another good catch, thank you.

Ms. Robeson: And then last is what I am assuming you talked about in Executive Session, you don't need to answer that. On page 12, as the Chair mentioned on the center of the page, there is that word lawful and...

Ms. Yukimura: On the center of the page...

Ms. Robeson: On page 12 in number (3), the word lawful enterprise at the end of the... and let's see... and then in other sections, for example, on page 13, under (f) that failure to obtain... it goes on to say, it shall be treated as an illegal use, so, you know, just to clarify that not lawful means illegal or lawful means legal because you are using words... you are not using the same word throughout the document, so I think for consistency, maybe you want to take a look at that.

Ms. Yukimura: Okay.

Mr. Furfaro: We have had some discussion on those items.

Ms. Robeson: Yes. On page 14 on (e) there right above Section 8-17.12... right above, you have another illegally... operating illegally, so that was another place that I say that word.

Ms. Yukimura: Okay, thank you.

Ms. Robeson: That is all that I have.

Ms. Yukimura: Thank you. Any questions of Ms. Robeson? Anyone else wishes to testify? Excuse me, Ms. Elmore, I am sorry, I can hardly see you.

BARBARA ELMORE: Thank you. My name is Barbara Elmore. I have some comments about the amendment too, but I have some general questions that may sound really simple, but to evaluate these amendments is the bracketed material from a previous versions of your law or from the law as it stands now?

Ms. Yukimura: It is from the bill that was...

Ms. Elmore: How many versions have there been, so I can compare all of them?

Mr. Bynum: There is only one version of the bill.

Ms. Yukimura: Well, there was one... yes, I guess something that is very... there was a bill that went to the Planning Committee that was introduced by myself and Councilmember... no, let's see. This bill came up... I am sorry, I am getting it mixed up with the shoreline setback. This bill came from the Planning Department to us and then we are amending that bill, that is basically it. So it is the Bill No. 2204 as introduced and we are amending that.

Ms. Elmore: So I need to get all the copies. So the amendment is not the whole bill, it is just parts of it? The one dated today.

Ms. Yukimura: But pretty much the bill is...

Ms. Elmore: That is the whole bill or is that just...

Mr. Furfaro: Excuse me, just so we know what you are holding up. Does yours say August 1 and it has a (10) next to it?

Ms. Elmore: Yes.

Mr. Furfaro: That is the one Barbara. That is the correct one.

Ms. Yukimura: That is the proposed amendments to Bill No. 2204.

Ms. Elmore: But I don't need to go back and look at nine (9) others?

Mr. Furfaro: No.

Ms. Yukimura: No.

Mr. Furfaro: No, that is the one.

Ms. Elmore: Okay, I just want to make sure.

Ms. Yukimura: Good question.

Ms. Elmore: Section 1, as I read it, just everything up to Section 2 is not really the law, it is just your explanation of the...

Ms. Yukimura: It shows intention and justification.

Ms. Elmore: I just think a lot of that language in the first paragraph is very favorable to vacation rentals. Could be compatible? Has certain positive advantages? Is desirable and those kinds of words and I don't think you need a law saying, this is good, this is desirable. I think you need a law saying, this is the law, so I would just take out that whole (inaudible). And it refers to the County General Plan which makes it sound like the General Plan is a law and it is not really the law. On page 2 (in the middle, the short paragraph) says that the Council also finds... there is no reference in there to the IRS income tax or the State income tax and I know that this is not the meat of the law... it is the bill itself, but to me, and I have said this in the past... the only way to prove somebody has been operating a vacation rental is an income tax not their GET license or their TAT license.

The next paragraph. I would delete restore a balance. All this language about setting standards for all the single family and multi-family... why not just say

standards for all vacation rentals. Number 3 in that paragraph... allowing nonconforming uses where single family vacation rentals have been operating lawfully prior to approval of this bill. I thought we were going to... I was hoping that you would go back to things that have been operating lawfully prior to the CZO, not the date that this bill is. Do you see where I am talking about?

Ms. Yukimura: Yes, I am. Go ahead, please continue.

Ms. Elmore: As a side note, I don't believe in nonconforming uses, but... I don't see the need to have that sentence about this bill does not apply to single family transient vacation rentals in Conservation Districts because... I mean, the question came about it and you would just refer them to the State.

Ms. Yukimura: Ms. Elmore, this purpose is trying to establish the overall framework and explain some things and, yes, you may be right. Some other people wouldn't put in as many words on purpose.

Ms. Elmore: And the very last two (2) words on that page, I would take out single family and just say, transient vacation rentals and I don't see a need to say, B&B's are presently regulated through the use permit process either. If you are not dealing with bed and breakfast, why are you even talking about bed and breakfast. I don't think that next paragraph is needed, but I won't go into the reason. Okay, getting down to the law, Section 2, why are you defining bed and breakfast if you are not going to address bed and breakfast in this bill?

Ms. Yukimura: Because we need to know what we are not addressing.

Ms. Elmore: That is like saying, you need to list everything that is not... oh well. I don't know why you are changing the definition of TVRs because they wrote that definition in the CZO, they said it meant rentals in a multi unit building which, to me, eliminates single family buildings, so you are adding single family units as part of the definition which sounds like something that the Board of Realtors would really like to have in there. On page 4, I don't see why you are putting single family vacation rentals in again because the maps say, timeshare maps and the CZO refers to vacation rentals only in... as timeshares. You got that... in your definition of VDAs, you say within timeshare boundaries on the County of Kaua'i's zoning maps, so I really... I have read that CZO over and over and I cannot see anywhere in there where they meant... there ever to be single family vacation rentals. They were talking about timeshares.

Mr. Furfaro: Barbara, may I add something to those comments thus far? I just want to share with you that I think Councilwoman Yukimura has done an excellent job in putting all of those definitions in. You know, the positioning because, quite frankly, the purpose and this mission covering all of those pieces really strengthens the bill because it is very specific about what it does cover. And you will find a lot of bills that are not strong bills and they are not strong because they don't have the preamble and the purpose defined of the scope and the rationale

of why we want to cover that and I don't want to get into a debate with you, but I think what Councilwoman Yukimura has done in this piece is really showed, you know, the purpose and what we want to cover, so that we don't end up (inaudible) an opinion says, well, because it wasn't covered, then it is legal. See, and that is where she is coming from in this piece and I just wanted to offer that and I wanted to thank her for the kind of attention she is putting to make sure that it is covering a lot of the moving parts.

Ms. Elmore: I don't want to leave the impression that I don't appreciate the work that has gone on, I really do, but...

Mr. Furfaro: Well, I wasn't implying that you didn't appreciate it, I was just drumming up support how much I appreciate it, so...

Ms. Elmore: And I do believe in being as concise as possible.

Mr. Furfaro: And I think that is what she is trying to do in the purpose.

Ms. Elmore: As a person who is opposed to single family vacation rentals if they did not exist before the CZO was written, I don't want a definition of single family vacation rentals because, to me, they are non-existent unless they were there before that law was passed.

Mr. Furfaro: I think I understand your position and I am just offering it again as the rationale behind Councilwoman Yukimura's purpose and definition.

Ms. Elmore: I know I am taking a lot of time, but I am trying to read my writing and I just got this a couple of hours ago or something. I am not an attorney like some of you Councilmembers are. Why are these development standards being taken out? This Section 6 on page 6, you are taking out the whole section about development standards.

Ms. Yukimura: No, we are not. We are just taking out the Section of the bill regarding development standards. The development standards are in the present law and we are leaving that alone and it is going to remain. It is the confusion of our... what they are called Ramseyer markings, but just be assured that we are not taking out the development standards.

Ms. Elmore: But that is why I was asking in the beginning... that you are taking out things from the original CZO or just from (inaudible).

Ms. Yukimura: That is correct.

Ms. Elmore: Section 6 and Section... all of Section 6 is good because you are putting in VDAs and you simply saying (inaudible). Section 7, same thing. Page 10, Section 9, Section 8-17.5(a), you say, timeshare plans and multi-family

transient vacation rentals... existing owner before September 22, 1982 and I am wondering why not the date of the CZO.

Ms. Yukimura: This is an existing provision in the law that applies to timeshare and multi-family, but in the existing law, it just refers to transient vacation rentals because that is all transient vacation rentals were defined as. Now that we are including single family vacation rentals to explicitly prohibit them in non-VDA areas, we have to just amend this section, so that we are not referring to single family vacation rentals. It is a technical thing. This is the grandfather clause for the provision that was in... for the law that was passed in 1982 dealing only with timeshares and multi-family vacation rentals which were described as transient vacation rentals.

Ms. Elmore: In fact, I think I mentioned that date myself in earlier testimony back some time (inaudible) it is getting so confusing.

Ms. Yukimura: It is very confusing and I want to acknowledge Mr. Chun for helping me make it clear.

Ms. Elmore: I am wondering if you can give an estimate of how many nonconforming use applications you expect if this law passed as it is.

Ms. Yukimura: We have no idea.

Ms. Elmore: So anybody could apply for...

Ms. Yukimura: That is why we are trying to make it as clear and as restrictive or keeping it to the purpose and spirit of the bill.

Mr. Furfaro: But to answer your other question, may I just say, I wouldn't say that we just... we don't know, I think we are relying on some of the statistical information provided to us by Ken Stokes which indicated there were 981 transient vacation rentals on the island of which 514 were in existing VDA areas. That is not the absolute true audit, but if I remember those numbers in... specifically in his report, those are roundabout numbers.

Ms. Elmore: So if we take those numbers just for an example, we could have 440 people applying for nonconforming use expecting to be grandfathered in.

Mr. Furfaro: I think that is the way I remember those numbers and, you know, I remember numbers just because in business...

Ms. Elmore: I am not holding you to those exact numbers of what you are saying.

Mr. Furfaro: Thank you for that statement. I was hoping that you wouldn't hold me to it. I was just trying to share some information, but that is the

best estimate that we have Barbara.

Ms. Elmore: I am wondering if you can have a concise, legal definition of the word lawful in your definitions. Is that possible or is that just impossible?

Ms. Yukimura: It is pretty hard, but I am open to suggestions.

Ms. Elmore: On page 11, the last... that little (a) under 8-17.10...

Ms. Yukimura: What page are you on?

Ms. Elmore: Page 11 at the bottom next to the last paragraph that (a) refers to... uses which have been in lawful use prior to the effective date of this ordinance... once again, instead of making it be in lawful use prior to 1982, it is just the effective date of this ordinance which really seems contradiction to me. I know you were talking about timeshares (inaudible). As I see it, no vacation rentals were in lawful use unless they were there before the CZO was passed, so that is... I don't know how this language got in there implying that they are lawful already before any of this process. On page 12, you have all these ag... these ways for people to get nonconforming use certificates on ag land. Here it says, for more than 75% of the subject property is being used for farming purposes, so that means... I know that a lot of these vacation rentals on three (3) acre parcels. If they... 75% of three (3) acres (inaudible).

Mr. Furfaro: An acre is 43,000 some odd (inaudible)... it is basically saying on a three (3) acre parcel.

Ms. Elmore: 2.24 acres would have to be in farming, but that would still leave three-quarters of an acre to put that big vacation rental.

Ms. Yukimura: It might be for the farm dwelling... that is the people who are farming.

Ms. Elmore: Well, there are no farm stay operations on this island that I know of. I know the one woman came and said, they let visitors come and stay overnight, but if people come here wanting to see farms, they want to see cows fed, and the pigs fed, and the chickens... the eggs gathered in the morning... they can stay in a hotel and leave a wakeup call in time to go out and see all that on the farm, but the kinds of farms that we have here are not chicken and eggs and pigs and cows. People are planting their fruit trees and their...

Ms. Yukimura: Thank you for your opinion. Can you please finish up?

Ms. Elmore: There seems to be a conflict between that percentage that you gave on page 12 and the top of page 13 where you say, the subject vacation rental unit is no greater than 1,000 square feet because if they are allowed to have three-quarters of an acre as the vacation rental, it would (inaudible). On page 13 (e)

at the top where you say that the Planning Director shall determine whether to issue a nonconforming use certificate. You are letting... say we are taking this figure, 440 people come in and deal directly with one man to get permission to do this and I know that realtors are thrilled with that.

Mr. Furfaro: No, actually, Barbara, I think subsequently, if we understand that is what we are going to do and people are going to have to come in and apply for some permitting to be regulated which was the desire in the General Plan, we will probably add staff to manage this. But first and foremost, we need to build before we can answer that question.

Ms. Elmore: My point is, this is... your bill is such a dramatic change allowing this grandfathering that I think there should be a public hearing for each one that comes in to apply. I don't care if it takes 10 years to go through all of them. To do it in a room behind closed doors with the Planning Director, I don't think that is fair.

Ms. Yukimura: Any (inaudible) agreed by the decision of the Planning Director may appeal.

Ms. Elmore: That is after-the-fact. Why not do it upfront in the beginning?

Ms. Yukimura: Because it is a more efficient way of doing it.

Ms. Elmore: Well, is efficiency more important?

Ms. Yukimura: Can you please summarize and finish up?

Ms. Elmore: I know you don't like what I say, but, you know...

Ms. Yukimura: No, you have been here for about 10 minutes, so would you please finish.

Ms. Elmore: Bruce was here 20 minutes and there have been people up here for much longer.

Ms. Yukimura: Are there any questions of Ms. Elmore?

Ms. Elmore: When you say the public may initiate proceedings to revoke a nonconforming use certificate, what about revoking any regular use permits that... that doesn't apply or you are just talking about nonconforming only? Grandfather only? My same point on page 14. I think there should be a public hearing and not just before the Planning Director and... on the advertising, is there any complaint process about the... that arises from advertising problems? And I don't understand why buildings on the National or State register of historic places are allowed without any (inaudible). Why are they allowed to?

Ms. Yukimura: They are required to get a use permit, and so there is going to be regulation. There is about 12 properties on the island.

Ms. Elmore: So this paragraph (e) at the bottom of 14, you are assuming, I guess, that there will be vacation rentals outside of the VDAs?

Ms. Yukimura: Only nonconforming uses.

Ms. Elmore: Right, but that is the ones that I am talking about. You are assuming... this bill assumes that... in other words, it is grandfathering. There are some good thing, but you are basically giving them what they want. Thank you.

Ms. Yukimura: Thank you. Any other person wishing to testify?

Mr. Furfaro: Chairwoman, may I ask for a personal privilege here?

Ms. Yukimura: Sure.

Mr. Furfaro: Yes, could I have someone from the staff make a call to the civic center because there is a public meeting at 7 o'clock regarding the shelter and I don't think any of us from the Council have been involved, but we are going to continue to be in here in session and I would appreciate at least a call to someone in the Administration to at least acknowledge that the Council is still in session that is why none of us will be at the public hearing. Thank you Councilwoman.

Ms. Yukimura: Thank you.

Mr. Bynum: Can I make a comment on Barbara's testimony?

Ms. Yukimura: Yes.

Mr. Bynum: I just wanted to say in... I lost the page number now. On page 12 when there is language in here about ag and people doing vacation rental on modified ag and these are folks who may be struggling to make ends meet doing agriculture and if they are using... if they are serious about ag which these provisions would make sure that they were, then it could be the only way they can keep modified ag is to get some additional income from a vacation rental. So the effort here is to support people who are seriously involved in agriculture in a significant way.

Ms. Yukimura: Thank you. Anybody else wishes to testify? Jonathan Chun?

JONATHAN CHUN: Thank you Councilmember Yukimura and members of the Council. Thank you for this opportunity to comment on the last draft. Hopefully the last draft of this...

Ms. Yukimura: Second to the last.

Mr. Chun: Of this ordinance. I also appreciate the amount of work that has been done by the Council on this. It is an (inaudible) undertaking to try to address the issues of transient vacation rentals is not any easy one and the comments I make just really have to... regards to very limited area and I will try to keep my comments real precise. One, the main concern that my clients have and have been stated before and that is the grandfathering (inaudible) allowing of existing uses and within that context, I want to bring up a few points within 8-17.10 which is under Section 10 of the last one. That is...

Mr. Bynum: Page number?

Mr. Chun: Page 12 I guess, subpart (c) still carries a requirement of a 60 day period that they have to show that they were operating a transient vacation rental prior to the effective date of the ordinance. Again, there is no basis to distinguish between a 60 day or 59 or 58 and, again, the law is pretty clear that if they had a nonconforming use prior to the existence of the ordinance, they are nonconforming use, so the attempt to limit that to 60 days, I believe would have followed that. The second matter that I wanted to bring up is the agriculture not being able to apply for a nonconforming use permit if you are on agricultural land. I do recognize that the Council did try to... the author did try to accommodate some of the prior nonconforming uses which is June 4, 1976, but is now saying that the only other exception that they are going to allow for that is if you had a special use permit. One, I believe a better way to handle that and I am still going to say this is recognize the possibility. I am not saying that it is probability, but the possibility that a person that had a farm dwelling, a valid farm dwelling under 205-4.5 should be allowed to apply for it. Now whether or not that person has a farm dwelling or not, I think should have been... should be left to the process to determine, so I would suggest for (d)(2) on page 12 rather than to focus on a special use permit to focus on the fact that if the applicant has a valid farm dwelling under 205-4.5. Again, that would allow that person to come in and say, I have a farm dwelling. If you didn't have a farm dwelling, then, yes, you shouldn't have been able to apply for nonconforming use permit anyway. In regards to (d)(2), if you don't... if you think. I lost my time.

Ms. Yukimura: No, that is okay. Go ahead.

Mr. Chun: A final statement on (d)(2) is... I don't know whether it was a typo, but you are giving them to August 31, 2008 which probably is going to be after the date of the effective date of the ordinance, so it is really not a nonconforming issue that you are talking about, but a new permitting system that you are requiring. As to that, even if it is August 31, 2008, you are adding new criteria (a), (b), (c) and (d) which continues on page 13 which is not contained in 205-6 and if you are going to be using new criteria, again, that is a grandfathering issue too. If you stuck to 205-6 and just said, you had to have a special permit under 205-

6 and use the existing criteria that is contained in the State law, you might be able to reason or have a good rational basis to require that, but if you are referring to 205-6, but then you are changing requirements of 205-6, again, you run into another grandfathering problem.

Mr. Bynum: Another what kind of problem?

Mr. Chun: Well, a grandfathering problem because what you are saying is, yes, you can apply for the nonconforming use if you complied by getting a special use permit under Section 205-6, but then you are going beyond what 205-6 requires and saying and putting the fact that you need to have a Federal income tax filing with the IRS, you had to have regularly sold commercial products that go beyond providing applicants family needs... you make a limitation of 1,000 square feet and that is not contained in 205-6 and not even part of the special use permit process. So, again, you are going beyond what the State law allows and that is the only comment I would like. One fast comment (inaudible)... I know Barbara mentioned about illegal, unlawful and I think that is a very good comment. For the life of me, I don't know... there is some subtle difference, but if you look at the CZO, I think the only reference to that is under the enforcement section of the CZO and I think it uses the term unlawful, so you probably want to stick to... for consistency sake, you probably want to stick to that and that is the only comment that I have.

Ms. Yukimura: Questions?

Mr. Bynum: Just sticking with that ag rationale in 205... as I mentioned earlier, the intent is to try to recognize those folks who are actively and substantially involved in agriculture and then 205-6 says that the Planning Commission may, under such protective restrictions as may be (inaudible) permit the desired use, but only when the use would promote the effectiveness and the objectives of this chapter which is to preserve agriculture.

Mr. Chun: Right.

Mr. Bynum: And so I think that is an effort to define, you know, what those protective restrictions are that are deemed necessary.

Mr. Chun: I understand, however, if you go beyond just that, you are adding on new because, yes, you are trying to protect agriculture and I am not saying that is a bad thing, but when you are adding new requirements on that, that, again, runs a foul... what about people who have been trying to protect agriculture and who have under the prior definition of farm dwelling complies with that. So, again, you are putting a new definition that nobody knew about and nobody would have understood even if that is going to be applied later on and saying, well, because you didn't apply or didn't comply with this future requirement, everything you did in the past is no good.

Ms. Yukimura: But this is an amnesty provision actually and that is why it is prospective and it only applies to grandfathering and arguably we are defining the standards for amnesty.

Mr. Chun: Right, but the amnesty still has to recognize that if they were valid to begin with under State law, that they are allowed to continue.

Ms. Yukimura: But it is our position that they aren't valid. They are not valid on ag land and actually I have a letter from... an e-mail from Tony Ching of the Land Use Commission that says that, so starting from that premise, then we are giving them some time to become valid.

Mr. Chun: Right.

Ms. Yukimura: And you are right. It is kind of a creative approach, but I would argue that we are doing this, and putting it in the amnesty arena allows us to set some guidelines, but I under...

Mr. Chun: I understand that too.

Ms. Yukimura: Yes, and that they are consistent with State law and maybe more restrictive, but maybe the more restrictive can apply if they are consistent with State law.

Mr. Chun: My only comment without being argumentative, I think you are going down a slippery slope and it might be better to stay conservative on that, but it is the Council's call. I mean, I would note that, it is the Council's call.

Ms. Yukimura: One of our other choices is to just remove this whole section except to just say that any land located on agriculture except if it was before 1976 would not.

Mr. Chun: Yes, that is one way or like I said, you still need to address the issue if it was a farm dwelling. I think that is a legitimate issue that the Council already has noted and maybe the way to handle it just to say, either if you built prior to June 4, 1976 or they are a valid farm dwelling.

Ms. Yukimura: Um, yes, and we are not...

Mr. Chun: And then the burden is on them to show it is a farm dwelling. I mean, that is...

Ms. Yukimura: But what guidelines are there for really... I mean that whole farm dwelling is, you know, I mean it is clear to us that farm dwelling means related to a bonafide farm.

Mr. Chun: Right.

Ms. Yukimura: So we are just defining what bonafide farm is and nobody else has done it, so we have to do it.

Mr. Chun: Right, I mean, I understand the intent.

Ms. Yukimura: And, you know, in order to protect the integrity of the law as far as we are concerned, but, okay, I appreciate your comments very much, many of them are very helpful. I think on the ag ones, we are starting at a slightly different premise from what based on our legal advice and on some of the input that we have gotten.

Mr. Chun: If I could make one final comment real quickly because I was also anticipating going to the 7 o'clock hearing.

Mr. Furfaro: But we still have a full agenda.

Mr. Chun: If the message is not transferred by the Administration, I probably going to be there and I will let them know. On page 13 about the application... the continual application to renewal, again, the issue as I mentioned in my previous letters or memos is that the real issue is not whether they apply... they continue to apply for nonconforming, but whether they have abandoned and the criteria really doesn't address the issue of abandonment and I will just leave it at that.

Ms. Yukimura: Okay, thank you.

Mr. Chun: Thank you.

Ms. Yukimura: Any other questions of Mr. Chun?

Mr. Furfaro: I just have one item for Jonathan. Thank you for that piece on the attempt that we are trying to define farming a little, but that is really what the issue is here. The State doesn't define farming. The State doesn't define farm dwelling, so we have to create a definition that the Council can agree on and I did hear you concur.

Mr. Chun: You are correct. That has been the problem historically. No one really... other than real property tax (inaudible) the ordinance adopted by this Council tried to, you know, do that by putting a firm definition of farming, but in this arena about farm dwelling under 205, really, no one has stepped forward and said, this is what a farm is and you are correct, that is where the confusion historically has originated from.

Ms. Yukimura: So we are stepping forward maybe if we pass this... this particular provision and if we don't step forward now, we will step forward when we work on ag lands because the best thing we can do for this community is give clarity

and we need to do it in order to protect our farm lands and we need to do it just so that everybody has an easier time understanding and abiding by the law.

Mr. Chun: And I appreciate that and I think that is a good approach. The only thing, like I said, from my clients point of view and from the legal point of view is when you try to bring clarity, do you penalize the people that have been going on before when it was not clear and that is the only point that I wanted to make on that. Thank you.

Ms. Yukimura: Thank you.

Mr. Furfaro: Thank you.

Ms. Yukimura: Anybody else wishes to testify? Okay, if not, we will come back to order.

The meeting was called back to order, and proceeded as follows:

Ms. Yukimura: I want to suggest that we discuss this and then I will work on some more amendments and then bring it back after the... at the end of the agenda of all our... and we will vote or we will defer.

Mr. Furfaro: I just want to say that I do believe that there are other Councilmembers that are on the Committee that are pending some amendments and we might have to defer.

Ms. Yukimura: Well, I am going to be working on those amendments.

Mr. Furfaro: Okay, I just wanted to raise that.

Ms. Yukimura: I am also open to if we feel we can get done with our business recessing and having those of you who want to go to the event, go to the event and I will work on the amendments and we will come back at 9.

Ms. Iseri-Carvalho: Not me.

Mr. Kouchi: It is just how long is the shoreline setback bill going to take if it was intended to move today because Donald had text in that Doug had a personal commitment and was not available, so I think Pono Kai and bikepath items are not going to be discussed today. I also realize that after we had the motion to defer even if we wanted to go into Executive Session, we now have no posted item in the Committee of the Whole, so the Committee of the Whole is completed and Public Works essentially would be called to order to defer the items, so the only items remain in your Committee.

Ms. Yukimura: So with respect to the shoreline bill, I have a couple more amendments that we have and, you know, I can have that ready in 15 minutes, but

I would like to move the shoreline bill out and either... I mean, with the Chair's permission, we can add those amendments in the Council...

Mr. Rapozo: Which one are you talking about?

Ms. Yukimura: The shoreline setback.

Mr. Rapozo: Oh, well, I am concerned about the TVR bill.

Ms. Yukimura: Okay.

Mr. Rapozo: I am not sure and I know Councilmember Iseri-Carvalho said she had some amendments and I am not sure if hers will be done. Are yours going to be done today?

Ms. Iseri-Carvalho: No, but we can vote. Why don't we just take the vote on your amendment already and we may not have to have my amendment if you want to just take a vote on your current amendments right now. I don't want to take a recess for us to work on amendments... it is going to be 7 o'clock and then I also had a question that I posed to the County Attorney that required research which he is not going to be providing to me today.

Mr. Furfaro: So one more deferral would not hurt the quality of this bill.

Ms. Iseri-Carvalho: And that is what I am requesting simply because, you know, I did put forth my amendments and staff was unable to prepare it for today, but I did request those amendments over a month ago. But there has been a lot of other activity that staff has been working on, so I totally understand that it was not... they were not able to complete it on time for today's hearing, so I would ask the Chair to consider deferring it instead of coming back at 9 o'clock and trying to have some decent discussion with respect to my proposed amendments or your proposed amendments.

Ms. Yukimura: Well, if it is the wish of the Committee, then we will defer it. As you know, this bill has been before us for over six (6) months and, you know, I felt we were pretty close to passing it several meetings ago with a couple of things that had to be done. You know, we would work through it except for this meeting that was scheduled which, for me, our work takes precedence over that meeting, but if it is the will of the Committee to defer it, then we will defer it.

Mr. Furfaro: I would say that we have been working on this for two (2) years and another 14 days would not really matter to give everybody the appropriate time to digest what we talked about today and look and see if there are other amendments to be offered.

Ms. Yukimura: Can we then at least have a commitment then to pass it out of Committee next meeting?

Mr. Furfaro: I have no problem with that. I think there has been a lot of dialogue and I just think in fairness to the staff and we have been burdening them... we have been having a lot of work go their way including myself, I am guilty of sending stuff that way, so that would be my motion. I would ask to defer.

Upon motion duly made by Councilmember Furfaro, seconded by Councilmember Iseri-Carvalho, and unanimously carried, Bill No. 2204 was deferred.

Minutes of the June 13, 2007 Planning Committee Meeting.

Minutes of the June 27, 2007 Planning Committee Meeting.

Upon motion duly made by Councilmember Kouchi, seconded by Councilmember Iseri-Carvalho, and unanimously carried, Minutes of the June 13, 2007 and June 27, 2007 Planning Committee Meetings were approved.

Minutes of the July 10, 2007 Special Planning Committee Meeting Workshop (Kōloa-Po'ipū Area Circulation Plan).

Ms. Yukimura: I would like to defer this item because I haven't had time to look at it.

Upon motion duly made by Councilmember Kouchi, seconded by Councilmember Iseri-Carvalho, and unanimously carried, Minutes of the July 10, 2007 Special Planning Committee Meeting Workshop (Kōloa-Po'ipū Area Circulation Plan) was deferred.

**Bill No. 2226, Draft 1** A BILL FOR AN ORDINANCE ESTABLISHING A NEW ARTICLE 27, CHAPTER 8, KAUAI COUNTY CODE 1987, RELATING TO SHORELINE SETBACK AND COASTAL PROTECTION (Planning Commission recommendation)  
**[This item was deferred.]**

Ms. Yukimura: You have a question Councilmember Rapozo?

Mr. Rapozo: I have requested some amendments. I don't know if my amendments were drafted. Peter?

Ms. Yukimura: Can you give us the substance of the amendments?

Mr. Rapozo: It is pertaining to the after-the-fact permits. I acknowledge your change and what you have done is fine and I can accept the fact that the variances will not be allowed for structures already built. The additional language that I requested was simply the mechanism for enforcement and (change tape).

Mr. Kouchi: ... malfunctioning back and forth... defer it and let's go buy a new recorder and this is absurd that we cannot properly service the public.

Mr. Furfaro: I second the purchase.

Ms. Yukimura: But we still need to record this.

Mr. Rapozo: Are we on?

Mr. Kouchi: We are working again.

Ms. Iseri-Carvalho: Now it is going, we better go.

Mr. Rapozo: So that is the... the substance of my amendment was, in fact, at a request of one of our Planning Inspectors, Mr. Milnes as well as some of the other people that participated in this bill is really giving the County the ability to provide a mechanism in the bill that would require the removal of the structure prior to the permits and I think that is important. The language as it is written in your amendment Councilmember Yukimura is fine for the not granting of variances for structures that are not permitted, but...

Ms. Yukimura: Before the motion to defer, I would like to ask that everybody get amendments prepared and float it prior to if possible.

Mr. Rapozo: We tried Councilmember Yukimura. If I knew how to draft it I would.

Ms. Yukimura: And I would appreciate some notice as well just out of courtesy to let me know that you are working on these amendments and what the nature of them are. So, the Chair would now entertain a motion a defer.

Councilmember Iseri-Carvalho moved to defer Bill No. 2226, Draft 1, seconded by Councilmember Furfaro.

Mr. Kouchi: (Inaudible) we had this morning. I think we need to ask someone who offered the motion to withdraw the motion.

Councilmember Iseri-Carvalho moved to withdraw the motion to defer Bill No. 2226, Draft1, and Councilmember Furfaro withdrew the second.

Ms. Yukimura: Thank you for the withdrawal.

There being no objections, the rules were suspended.

BARBARA ROBESON: Thank you and sorry for the last minute. Barbara Robeson for the record. Are you working from the two (2) week ago version of the bill or do you have a more current one?

Ms. Yukimura: There is (inaudible) right now.

Ms. Robeson: Okay, and I will get that before I leave.

Mr. Kouchi: (Inaudible).

The meeting was called back to order, and proceeded as follows:

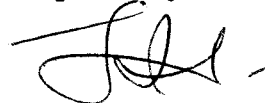
Upon motion duly made by Councilmember Iseri-Carvalho, seconded by Councilmember Furfaro, and unanimously carried, Bill No. 2226, Draft 1 was deferred.

**Bill No. 2221** A BILL FOR AN ORDINANCE TO AMEND CHAPTER 9, KAUAI COUNTY CODE 1987, RELATING TO STREET REQUIREMENTS FOR SUBDIVISIONS (Traffic calming elements)  
[This item was deferred and there was no discussion.]

Upon motion duly made by Councilmember Kouchi, seconded by Councilmember Iseri-Carvalho, and unanimously carried, Bill No. 2221 was deferred.

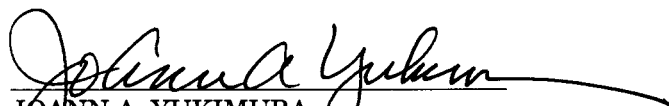
There being no further business, the meeting was adjourned at 6:49 p.m.

Respectfully submitted,



Lisa Ishibashi  
Council Services Assistant

APPROVED at the Committee Meeting held on August 15, 2007:



JOANN A. YUKIMURA  
Chair, Planning Committee Chair



11/11/11

8:28:16 AM

(August 1, 2007)(10)

FLOOR AMENDMENT

BILL NO. 2204, Relating to Transient Vacation Rentals and Bed and Breakfast operations

Introduced by: JoAnn A. Yukimura

Amend Bill No. 2204 in its entirety as follows:

“[SECTION 1. The advent of Transient Vacation Rentals (TVR) and Bed and Breakfast (B&B) operations in Residential Districts has led to concerns relating to the reduction in the long-term rental inventory and loss of communities/neighborhoods, as well as other issues.

Because of the lack of clear regulations for TVRs (including single-family dwelling types) and B&Bs, one of the high priority implementation items in the 2000 General Plan involves the development of standards and regulations for these operations. The General Plan recognizes these types of alternate visitor accommodations, however it also acknowledges the need to develop regulations and standards to ensure that these uses are properly regulated and do not create any adverse impacts.]

SECTION 1. Findings and Purpose.

The Council of the County of Kaua'i finds that there is a compelling need to regulate single-family transient vacation rentals on Kaua'i. Single-family transient vacation rentals are occurring at a greater rate and inflicting a larger impact on the community of Kaua'i than was ever anticipated by the drafters of the County's Comprehensive Zoning Ordinance. While this type of visitor unit could be compatible with the character and nature of Kaua'i and while it has certain positive advantages to the community and is desirable in terms of offering a mix of accommodations to the visitor, the uncontrolled proliferation of vacation rentals in residential and other areas outside the Visitor Destination Areas (VDAs) is causing significant negative impacts to certain residential neighborhoods, foreshadowing similar potential impacts on other areas of the island

The County General Plan, updated in the year 2000, recognizes this fact by its policy for "Alternative Visitor Accommodations," which reads as follows:

"4.2.8.2 Alternative Visitor Accommodations

(a) The County of Kaua'i shall recognize alternative visitor accommodations, such as B&Bs, vacation rentals, inns, cabins, and retreat centers.

(b) The County shall enact clear standards and permit processes for regulating alternative visitor accommodation structures and operations in Residential, Agriculture, Open, and Resort zoning districts.

(c) County development standards and permit processes shall be scaled to the size and potential impact of the use:

[...]

(d) Permitting processes should consider the cumulative impact that a large concentration of alternative visitor units can have on a residential neighborhood.”

Census data shows that seasonal rentals account for 45% of the new housing units built on Kaua‘i between 1990 and 2000, a greater percentage than housing built for long-term renters (14%) or for owner-occupied use (36%). Since 2000, out of the 2,050 new residential units, 1,070 have been built for the seasonal homes market and less than half have been for local families to rent (46) or own (936). The potential for vacation rental use increases the value and thus the selling price and investment rating of property on Kaua‘i, which increases prices and adds another potential layer of speculation in the real estate market. This also means that the limited available infrastructure and resources on Kaua‘i, including roads, water, sewer capacity, building materials, and contractor time are being used primarily for expensive and/or second and third homes rather than the primary home needs of local residents.

In oceanfront or other places of premium real estate value, second and third homes and vacation rentals (often one and the same) are displacing traditional neighborhoods where people of low and moderate income have been able to live in the past. Besides contributing to a lack of affordable housing in the community, this is changing the social character of neighborhoods where neighbors used to know each other. This has tended to make these neighborhoods more vulnerable to crime. While regulating single-family vacation rentals will not guarantee more affordable housing, it will dampen speculation and bring a halt to uncontrolled growth and cumulative impacts of vacation rentals which have affected the traditional neighborhoods of ‘Anini and Hā‘ena, and which could or are beginning to also affect neighborhoods such as Waimea Valley, Kekaha, and the makai side of Kapa‘a Town.

The Council also finds that the transient accommodation and general excise taxes on various vacation rentals are sometimes not being paid causing a loss of revenue to state and county governments and a failure to pay for impacts associated with visitors.

The purpose of this bill is to restore a balance between primary residences and single-family transient vacation rentals by: 1) requiring permits or nonconforming use certificates and setting standards for all single-family and multi-family vacation rentals, 2) prohibiting new single-family and multi-family vacation rentals outside visitor destination areas, and 3) allowing nonconforming uses where single-family vacation rentals have been operating lawfully prior to approval of this bill.

This bill does not apply to single-family transient vacation rentals in Conservation Districts, because the State has sole jurisdiction over Conservation lands.

This bill does not apply to bed and breakfast (“B&B”) operations. It is the intention of the Council to address bed and breakfast units as a separate matter after establishing a regulatory framework for single-family

transient vacation rentals. B&Bs are presently regulated through the use permit process.

Once the number of nonconforming uses are established, attrition is monitored, the Planning Department has demonstrated effective enforcement of this law, a framework for bed and breakfast operations is established, the County has adopted a functional plan for agricultural and rural lands, as well as a functional plan for tourism, the community could decide to allow additional single-family transient vacation rentals outside the VDA based on certain terms and conditions, or to continue the policy established here either "as is," or as modified consistent with the functional plans.

In order to promote a high quality of life for all people on this island, to preserve the residential character of neighborhoods, to encourage the diversity of incomes and backgrounds that has made Kaua'i a special place of aloha, and to promote health and safety and the general welfare, the Council of the County of Kaua'i does hereby enact the following law.

SECTION 2. Section 8-1.5, Kaua'i County Code 1987, as amended, is hereby amended by adding [the definition for "Bed and Breakfast operation" and amending the definition for "Transient Vacation Rentals"] or amending the following definitions to read as follows:

"Bed and Breakfast Operation (B&B)" means a use of a portion of a single-family detached dwelling unit in which overnight accommodations are provided to transient guests for compensation, for periods of less than one hundred eighty (180) days, within the same dwelling unit in which the owner or lessee resides.

"Transient or Transients" means any person who owns, rents or uses a dwelling unit or a portion thereof, for less than one hundred eighty (180) days and which dwelling unit is not the person's primary residence under the Internal Revenue Code. This definition shall not apply to nonpaying guests of the family occupying the unit, patients or clients in health care facilities, full-time students, employees who receive room and/or board as part of their salary or compensation, military personnel, low-income renters receiving rental subsistence from state or federal governments, or overnight accommodations provided by nonprofit corporations or associations for religious, charitable, or educational purposes where no rental income is transacted.

["Transient Vacation Rentals" means rentals in a multi-unit building for visitors over the course of one (1) or more years, with the duration of occupancy less than thirty (30) days for the transient occupant.]

"Transient Vacation Rentals" means a single-family or multi-family dwelling unit which, over the course of sixty (60) or more days, is provided to transient occupants for compensation or fees, including club fees, with the duration of occupancy less than one hundred eighty (180) days.

“Single-Family Transient Vacation Rental” means a single-family dwelling unit, other than a bed and breakfast operation, which is used as a transient vacation rental.

“Multi-Family Transient Vacation Rental” means a multi-family dwelling unit which is used as a transient vacation rental.

“Visitor Destination Area or VDA” are those areas designated as Visitor Destination Areas or located within Time Share Boundaries on County of Kaua‘i Zoning maps.”

SECTION 3. Section 8-3.1, Kaua‘i County Code 1987, as amended, is hereby amended by adding a new subsection (e) to read as follows:

“(e) To maintain the character and integrity of communities within residential districts and to support residents in continuing to live and raise their families in these neighborhoods.”

SECTION [3.] 4. Section 8-3.3, Kaua‘i County Code 1987, as amended, is hereby amended to read as follows:

“Sec. 8-3.3 Generally Permitted Residential Uses And Structures.

(a) The following types of residential uses and structures are permitted in districts R-1, R-2, R-4, and R-6 so long as the dwelling unit limitations established in Sec. 8-3.2 are not exceeded:

- (1) Single-family detached dwellings;
- (2) Accessory structures and uses, including one (1) guest house on a lot or parcel 9,000 square feet or larger;
- (3) Two (2) multiple-family dwelling units or two (2) single-family attached dwelling units upon a parcel of record as of June 30, 1980; and
- (4) Notwithstanding subsection (3) above, multiple family and single family attached dwellings developed pursuant to a Federal, State or County housing program.

(b) Multiple-family and single-family attached dwellings are permitted in districts R-10 and R-20 in addition to those types of residential uses and structures permitted under Subsection (a) above.

(c) Public and private parks and home businesses are permitted in all districts.

(d) Adult Family Boarding and Family Care Homes that comply with all State Department of Social Services and Housing and State Department of Health rules, regulations and requirements provided, however, that the Planning Director may require a use permit for such applications that may create adverse impacts to the health, safety, morals, convenience and welfare of the neighborhood or community that the proposed use is located.

(e) Transient Vacation Rentals, provided they are located within the designated Visitor Destination Areas established pursuant to Article 17 of this Chapter. These uses are prohibited in non-VDA areas.”

[SECTION 4. Section 8-3.4, Kaua‘i County Code 1987, as amended, is hereby amended to read as follows:

“Sec. 8-3.4 Uses And Structures In Residential Districts That Require A Use Permit.

The following uses and structures in residential districts require a use permit:

- (1) Botanical and zoological gardens.
- (2) Cemeteries, mortuaries and crematoriums.
- (3) Churches, temples, and monasteries.
- (4) Clubs, lodges and community centers.
- (5) Diversified and specialized agriculture and nurseries.
- (6) Dormitories, guest and boarding houses; but not hotels and motels.
- (7) Golf courses.
- (8) Medical and nursing facilities.
- (9) Museums, libraries and public services and facilities.
- (10) Private and public utilities and facilities, other than maintenance and storage of equipment, materials, and vehicles.
- (11) Project developments in accordance with Article 18 of this Chapter.
- (12) Retail shops and stores.
- (13) School and day-care centers.
- (14) Transportation terminals and docks.
- (15) Three (3) or more -family dwelling units upon a parcel of record as of June 30, 1980, in the R-1, R-2, R-4, or the R-6 District.
- (16) Three (3) or more single-family attached dwelling units upon a parcel of record as of June 30, 1980, in the R-1, R-2, R-4 or the R-6 District.
- (17) Residential care homes.
- (18) Adult Family Group Living Home.
- (19) Any other use or structure which the Planning Director finds to be similar in nature to those listed in this Section and appropriate to the District.”]

SECTION 5. Section 8-4.3, Kaua‘i County Code 1987, as amended, is hereby amended to read as follows:

“Sec. 8-4.3 Generally Permitted Resort Uses And Structures.

The following types of uses and structures are permitted in RR-10 and RR-20 Districts, so long as the dwelling unit limitations established in Sec. 8-4.2 are not exceeded and provided that each use or structure is incidental to or accessory to resort development:

- (1) Accessory structures and uses
- (2) Apartment hotels
- (3) Automobile service and storage
- (4) Barber shop and beauty shop
- (5) Commercial recreation
- (6) Gift shops
- (7) Golf courses
- (8) Home business
- (9) Hotels
- (10) Laundromat
- (11) Libraries
- (12) Motels

- (13) Museums
- (14) Police and fire stations
- (15) Public parks and monuments
- (16) Restaurants and food service
- (17) Retail cleaning outlets
- (18) Retail clothing shops
- (19) Retail food and drug shops
- (20) Shoe repair shops
- (21) Single family detached dwellings
- (22) Transient Vacation Rentals, provided they are located within designated Visitor Destination Areas established pursuant to Article 17 of this Chapter. These uses are prohibited in non-VDA areas.

[SECTION 6. Section 8-4.5, Kaua'i County Code 1987, as amended, is hereby amended to read as follows:

"Sec. 8-4.5 Development Standards.

(a) Residential. Subject to the density and acreage limitations in the particular Resort District as provided in Sec. 8-4.2, the standards for the development of single family detached residential structures shall be the same as those provided in Sec. 8-3.1.

(b) Hotels. Buildings containing hotel rooms shall be considered the same as multiple family dwellings subject to the same standards as provided in Secs. 8-3.5 through 8-3.8, inclusive, with the following exceptions:

- (1) there is no maximum distance requirement from buildings containing dwelling units to parking areas;
- (2) only one (1) parking space must be provided for each three (3) hotel rooms;
- (3) the maximum allowable land coverage shall be fifty percent (50%);

No hotel room in a structure containing more than three (3) rooms shall be converted to a dwelling unit without first obtaining a Class IV Zoning Permit.

(c) Motels. Development standards for motels shall be the same as those for multiple family dwellings as provided in Secs. 8-3.5 through 8-3.8, inclusive, with the following exceptions:

- (1) parking spaces must be within one hundred fifty (150) feet of the dwelling unit or motel room served;
- (2) at least one (1) parking space shall be provided for each motel room.

(d) Other Permitted Uses. Parking service, open space and other requirements applicable to each use other than dwelling units shall be the same as the regulations established in the district other than Resort where such uses are permitted and regulated.

(e) Other Requirements. Other requirements for development standards in resort districts are as follows:

- (1) The Planning Director or the Planning Commission may revise the requirements if the plan review required for a zoning permit indicates that the specific nature of the overall development reasonably warrants the revisions.
- (2) The Planning Commission may require the dedication of adequate public access ways not less than six (6) feet

in width to publicly-owned land or waters and may require the preservation of all historic and archaeological sites, known or discovered on the parcel subject to development.”]

[SECTION 7. Chapter 8, Kaua'i County Code 1987, as amended, is hereby amended by adding a new Section 8-4.7 to read as follows:

“Sec. 8-4.7 Nonconforming Use Certificate for Bed and Breakfast Operations.

B&B facilities not in the VDA that obtained Use Permits prior to the effective date of this Ordinance No. (insert number) shall be allowed to continue as a Nonconforming Use as provided in Section 8-23.2.”]

[SECTION 8. Section 8-4.7, Kaua'i County Code 1987, as amended, is hereby amended by appropriately renumbering the section as “Section 8-4.8.”]

SECTION [9.] 6. Section 8-5.3, Kaua'i County Code 1987, as amended, is hereby amended to read as follows:

“Sec. 8-5.3 Generally Permitted Uses And Structures.

(a) Neighborhood Commercial. The following uses and structures are permitted in neighborhood commercial districts:

- (1) Accessory uses and structures
- (2) Automobile services
- (3) Churches, temples and monasteries
- (4) Clubs, lodges and community centers
- (5) Household services
- (6) Museums, libraries and public services
- (7) Personal services, such as barber shops, laundromats, and shoe repair shops
- (8) Professional offices
- (9) Public parks and monuments
- (10) Retail shops and stores
- (11) Restaurants and food services
- (12) Single family detached dwellings on lots or parcels of no less than six thousand (6,000) square feet, and to a density not to exceed six (6) units per acre.

(13) Transient Vacation Rentals, provided they are located within designated Visitor Destination Areas established pursuant to Article 17 of this Chapter. Such uses are prohibited in non-VDA areas.

(b) General Commercial. The following types of uses and structures are permitted in general commercial districts:

- (1) Accessory uses and structures
- (2) Automobile sales, repair and storage
- (3) Automobile services
- (4) Churches, temples and monasteries
- (5) Clubs, lodges and community centers
- (6) Commercial indoor amusement and parks
- (7) Department stores
- (8) Hotels and motels



- (9) Household services
- (10) Light manufacturing, such as handicrafts and garment fabrication
- (11) Minor food processing, such as cracked seeds, jellies, candies and ice cream
- (12) Museums, libraries and public services
- (13) Offices and professional buildings
- (14) Parking garages
- (15) Personal services
- (16) Public offices and buildings
- (17) Public parks and monuments
- (18) Research and development
- (19) Restaurants and food services
- (20) Retail sales
- (21) Supermarkets and shopping centers
- (22) Transient Vacation Rentals, provided they are located within designated Visitor Destination Areas established pursuant to Article 17 of this Chapter. Such uses are prohibited in non-VDA areas.
- ~~[(22)](23)~~ Transportation terminals and docks
- ~~[(23)](24)~~ Warehouses
- ~~[(24)](25)~~ Wholesale outlets”

SECTION [10.] 7. Section 8-5.4, Kaua‘i County Code 1987, as amended, is hereby amended to read as follows:

“Sec. 8-5.4 Uses And Structures In Commercial Districts That Require A Use Permit.

(a) Neighborhood Commercial. The following uses and structures in neighborhood commercial districts require a use permit:

- (1) Animal hospitals
- (2) Automobile sales, repair and storage
- ~~[(3) Botanic and zoologic gardens]~~
- (3) Botanical and zoological gardens
- (4) Communications facilities
- (5) Construction materials storage
- (6) Diversified agriculture
- (7) Food processing and packaging
- (8) Light manufacturing
- (9) Multiple family dwellings and single family attached dwellings
- (10) Private and public utilities and facilities
- (11) Project development in accordance with Article 18 of this Chapter
- (12) Research and development
- (13) Schools and day care centers
- (14) Warehouses
- (15) Any other use or structure which the Planning Director finds to be similar in nature to those listed in this section and appropriate to the District.

(b) General Commercial. The following uses and structures in general commercial districts require a use permit:

- (1) Animal hospitals



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- (2) Bars
- [(3) Botanic and zoologic gardens]
- (3) Botanical and zoological gardens
- (4) Commercial outdoor amusement
- (5) Communications facilities
- (6) Construction materials storage
- (7) Diversified agriculture
- (8) Food processing and packaging
- (9) Nightclubs and cabarets
- (10) Private and public utilities and facilities
- (11) Project development in accordance with Article 18 of this Chapter.
- (12) Residential dwellings, detached, attached or multi-family
- (13) Schools and day care centers
- (14) Warehouses
- (15) Any other use or structure which the Planning Director finds to be similar in nature to those listed in this section and appropriate to the Planning Director.”

[SECTION 11. Section 8-17.1, Kaua'i County Code 1987, as amended, is hereby amended to read as follows:

“Sec. 8-17.1 Limitations On Location.

Except as provided in this section, B&B operations, time share units, time share plans and transient vacation rentals are prohibited.”]

[SECTION 12. Section 8-17.2, Kaua'i County Code 1987, as amended, is hereby amended to read as follows:

“Sec. 8-17.2 Permitted Time Share Locations.

Subject to the limitations contained in Sections 8-17.4 and 8-17.5, time share units, time share plans and transient vacation rentals are allowed:

- (a) In Hotels in Resort or Commercial Districts; and
- (b) In the Resort RR-10 and RR-20 Districts and multi-family R-10 and R-20 Residential Districts when such districts are located within the visitor destination areas of Po'ipū, Lihu'e, Wailua-Kapa'a or Princeville, as more particularly designated on County of Kauai Visitor Destination Area maps attached to Ordinance No. 436 and incorporated herein by reference. The boundary lines established on these visitor destination maps shall be transferred onto the official zoning maps for reference purposes.

(c) Time share units and time share plans are prohibited in the R-1, R-2, R-4 and R-6 Residential Districts.”]

SECTION 8. Section 8-17.3, Kaua'i County Code 1987, as amended, is hereby amended to read as follows:

“Sec. 8-17.3 Permitted Locations for Multi-Family Transient Vacation Rentals.

Subject to the limitations contained in Section 8-17.5, multi-family transient vacation rentals are allowed[:



- (a) In Hotels in Resort or Commercial Districts; and
- (b) In Resort Districts] in Commercial, Resort, and Residential Districts when such districts are located within the visitor destination areas of Po'ipū, Līhu'e, Wailua-Kapa'a, or Princeville, as more particularly designated on County of Kaua'i Visitor Destination Area maps."

SECTION [13.] 9. Section 8-17.5, Kaua'i County Code 1987, as amended, is hereby amended to read as follows:

"Sec. 8-17.5 Existing Time Share and Multi-family Transient Vacation Rental Uses.

(a) [Existing] Time Share Units, Time Share Plans and Multi-Family Transient Vacation Rentals [in Projects] Existing On or Before September 22, 1982, That Are Not Located in Visitor Destination Areas. [Nothing in this Article shall impair the use in a project of an existing time share unit, an existing time share plan, or an existing transient vacation rental when such project is not located within the visitor destination areas described in Section 8-17.2. All such existing time share units, time share plans and transient vacation rentals in such a project shall be regulated according to the terms, if any, of the project instruments.] Time share units, time share plans, or multi-family transient vacation rentals existing on or before September 22, 1982 that are not located within the visitor destination areas described in Section 8-17.2 may continue as allowed uses. However, no additional time share units, time share plans, or multi-family transient vacation rentals outside the visitor destination area shall be created [in such a project after the effective date of this section, nor shall the terms of the project instrument be amended or modified after the effective date of this section in any manner that will allow an increase in the number of time share units, time share plans, or transient vacation rentals within the project.] after September 22, 1982. The uses left unimpaired by this subsection shall not be lost by the failure to exercise the use unless it clearly appears that the use has been abandoned for a period in excess of two years. This subsection shall not apply to hotels in Resort or Commercial Districts.

(b) Existing Time Share Units, Time Share Plans And Transient Vacation Rentals in Projects Located Within Visitor Destination Areas. Time share units and time share plans in existing projects located within the visitor destination areas described in Section 8-17.2 shall be regulated in accordance with the provisions of Section 8-17.4."

SECTION 10. Chapter 8, Article 17, Kaua'i County Code 1987, as amended, is hereby amended by adding the following sections 8-17.8, 8-17.9, 8-17.10, 8-17.11, and 8-17.12 to read as follows:

"Section 8-17.8 Single Family Transient Vacation Rentals.

(a) Notwithstanding any underlying zoning designation and with the exception of properties on the National or State Register of Historic Places, single-family transient vacation rentals are prohibited in all areas not designated as Visitor Destination Areas, and

single-family vacation rentals are permitted uses within Visitor Destination Areas only where explicitly permitted.

(b) Development Standards for Single-Family Vacation Rentals permitted within Visitor Destination Areas Holders of Nonconforming Use Certificates. Development standards shall be the same as those for single-family detached dwellings in Sections 8-3.5 through 8-3.8, inclusive, with the following additions:

(1) Applicant shall designate and provide the Planning Department and the public with the name of a contact person or owner's representative who shall be available on a 24-hour, 7-days-per-week basis.

(2) Only one sign no larger than one square foot shall be allowed. The Nonconforming Use Certificate Number or the Class I-TVR permit number, as applicable, and the phone number of the 24/7 Contact person shall be printed clearly on the sign..

(3) There shall be no direct illumination of said sign.

(4) The applicant shall provide a list of requirements and information entitled "For the Safety and Comfort of You and Your Neighbors" to provide essential information to the visitor and to reduce negative impacts on the community. This shall be provided to the Planning Department at time of application and shall be posted in a conspicuous location in the transient vacation rental. This list shall include suggested curfews, guidance with respect to gatherings and noise, and what to do in cases of emergency and natural disasters.

(5) Multi-family Vacation Rentals allowed under this ordinance shall comply with Sections 8-17.8(b)(1), (2), (3), and (4)."

#### Section 8-17.9 Registration Via Permitting of all Transient Vacation Rentals

(a) All single-family and multi-family transient vacation rentals lawfully existing in Visitor Destination Areas at the effective date of this ordinance shall apply for and secure a Class I-TVR Zoning Permit no later than twelve (12) months after the effective date of this ordinance. Any new single-family or multi-family transient vacation rental established in Visitor Destination Areas subsequent to the effective date of this law shall apply for and secure a Class I-TVR Zoning Permit prior to the operation of said rental.

(b) No single-family transient vacation rental shall operate outside a Visitor Destination Area without a Nonconforming Use Certificate obtained under Section 8-17.10.

#### Section 8-17.10 Nonconforming Use Certificates for Single-Family Vacation Rentals.

(a) The purpose of this section is to provide a process to identify and register those single-family transient vacation rentals as nonconforming uses which have been in lawful use prior to the effective date of this ordinance and to allow them to continue subject to obtaining a nonconforming use certificate as provided by this section.

(b) The owner, operator, or proprietor of any single-family transient vacation rental which is operating outside of a Visitor

Destination Area on the effective date of this ordinance shall, by August 31, 2008, obtain a nonconforming use certificate for single-family vacation rentals.

(c) No nonconforming use certificate shall be issued by the Planning Director unless the applicant demonstrates to the satisfaction of the Planning Director that a dwelling unit was being used as a lawful vacation rental on an ongoing basis over the course of sixty (60) days or more prior to the effective date of this ordinance. The Planning Director, in making the decision, shall take into consideration, among other things, the following guidelines:

(1) The applicant had a State of Hawai'i general excise tax license and transient accommodations tax license for the purpose of the lawful operation of single-family transient vacation rentals for a period long enough to demonstrate actual payment of taxes.

(2) That prior to the effective date of this ordinance, applicant had deposits for reservations by transient guests in exchange for compensation for use of subject property as a vacation rental.

(3) That applicant had transient guests occupy subject property in exchange for compensation prior to the effective date of this ordinance, with a pattern of consistency that evidences an ongoing and lawful enterprise, and

(4) That on the effective date of this ordinance there were no outstanding violations of State or County land use or planning laws, including the Comprehensive Zoning Ordinance, Shoreline Management Area, and Shoreline Setback laws.

(d) No nonconforming use certificate shall be issued where on the effective date of this ordinance a single-family transient vacation rental is located on land designated "Agricultural" by State law, unless:

(1) It was built prior to June 4, 1976 (the date of enactment of this particular State law), or

(2) The applicant has a special use permit under Hawai'i Revised Statutes Section 205-6 by August 31, 2008, which specifically permits a vacation rental, provided that pursuant to the purpose underlying HRS Section 205-6, the Planning Commission, in issuing such a special use permit, finds that the applicant resides upon and conducts a farming operation (either the cultivation of crops and/or the raising of livestock, as described in HRS Section 205-4.5) upon the same lot wherein subject single-family transient vacation rental is located, and either that more than half of applicant's household income comes from such farming operations on subject property, or more than seventy-five percent (75%) of the subject property is being used for farming purposes, and

(A) the lot is no greater than 15 acres in size,

(B) applicant demonstrates that he annually files a Schedule F as part of his federal income tax filing under the Internal Revenue Code,

(C) that applicant's agricultural products are regularly sold in commercial markets that go beyond providing applicant's family's needs,

(D) the subject vacation rental unit is no greater than one thousand (1,000) square feet, and

(E) applicant meets the requirements of Section 8-17.10(c).

(e) The owner, operator, or proprietor shall have the burden of proof in establishing that the use is properly nonconforming. The following documentation may be provided to the Planning Director as evidence of a nonconforming use: records of occupancy and tax documents, including all relevant State of Hawai'i general excise tax filings, all relevant transient accommodations tax filings, federal and/or State or Hawai'i income tax returns for the relevant time period, reservation lists, and receipts showing payment. Upon a preponderance of the evidence, the planning director shall determine whether to issue a nonconforming use certificate for the single-family transient vacation rental.

(f) Failure to obtain a nonconforming use certificate by August 31, 2008 shall mean that the alleged nonconforming use is not a bona fide nonconforming use, and it shall be treated as an illegal use.

(g) The owner or lessee who has obtained a nonconforming use certificate under this section shall apply to renew the nonconforming use certificate by July 31 of every year.

(1) Each application to renew shall include proof that:

(A) there is in effect a State of Hawai'i general excise tax license and transient accommodations tax license for the nonconforming use,

(B) that the nonconforming use has not ceased for a continuous period of 12 months, and

(C) that at the time of renewal there were no outstanding violations of State or County land use or planning laws, including the Comprehensive Zoning Ordinance, Shoreline Management Area, and Shoreline Setback laws.

(2) Failure to meet these conditions will result in the denial of the application for renewal of the nonconforming use certificate.

(3) The owner, operator, or proprietor of any transient vacation unit who has obtained a nonconforming use certificate under this section shall display the certificate issued for the current year in a conspicuous place on the premises.

#### Section 8-17.11 Enforcement Against Illegal Single-Family and Multi-Family Transient Vacation Rentals.

(a) In addition to other penalties provided by law, including but not limited to Section 8-17.6, Section 8-24.1, and the Planning Commission Rules, as amended, the Planning Director or any member of the public may initiate proceedings to revoke a nonconforming use certificate upon a presentation of a signed and notarized statement(s) that either the requirements of this Chapter or the conditions of approval of the certificate have not been met, or that the applicant gave false or misleading information on the application or any attachments thereto or at any time during the application process.

(b) The Planning Director shall serve written notice of the proposed revocation and an Order to Show Cause why the certificate

should not be revoked on the applicant, by registered or certified mail with return receipt sent to the last known address of record as provided in the application.

(c) The applicant may, within thirty (30) calendar days after receipt of the proposed revocation notice, may request a hearing before the Planning Director per rules promulgated by the Planning Commission. The burden of establishing that a hearing is requested in a timely fashion rests on the applicant. If the applicant does not file a timely request for a hearing, the Planning Director shall immediately revoke the nonconforming use certificate. If a hearing is requested in a timely manner, it shall be set no more than thirty (30) calendar days after the request. If after the revocation hearing, the Planning Director determines that the proposed revocation is justified by a preponderance of the evidence, the applicant has thirty (30) days from the Planning Director's decision to file an appeal requesting a hearing before the Planning Commission. During the period that the appeal is pending, the Director's decision shall be stayed.

(d) Any person aggrieved by the decision of the Planning Director to issue, deny, or revoke a nonconforming use certificate may file an appeal within thirty (30) calendar days of receipt of said decision with the Planning Commission. The Planning Commission, after the opportunity for an agency hearing, shall render its decision either affirming or reversing the action of the Planning Director. The Planning Commission's decision may be appealed to the Circuit Court pursuant to HRS Chapter 91 and the Rules of Practice and Procedures of the Planning Commission.

(e) Advertising of any sort which offers a property as a transient vacation rental shall constitute prima facie evidence of the operation of a transient vacation rental on said property and the burden of proof shall be on the owner, operator, or proprietor to establish that the subject property is not being used as a transient vacation rental or that it is being used for such purpose legally. If any unit is found to be operating illegally, penalties established in Section 8-17.6 shall apply.

Section 8-17.12 Historic Properties Exemption. Single-Family Dwelling Units on the National or State Register of Historic Places may be allowed to operate as a transient vacation rental through a use permit and by abiding by the standards of conduct specified herein."

SECTION 11. Section 8-3.9 of the Kaua'i County Code 1987, as amended, is hereby amended by adding a new subsection (e) to read as follows, and renumbering the subsequent subsections:

"(e) Class I-TVR Permit. For the purpose of registration, a Class I-TVR Permit shall be required of all single-family and multi-family transient vacation rentals in and outside of VDAs, whether they existed on the effective date of this ordinance or were built subsequently. This requirement shall not abrogate the requirements of any other applicable statutes, codes, ordinances, rules and regulations, or other applicable statutes, codes, ordinances, rules and regulations, or other law."

SECTION [14.] 12. 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, the brackets, bracketed material, and underscoring shall not be included.

SECTION 13. If any provision of this ordinance or the 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 [15.] 14. This ordinance shall take effect upon its approval.”

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

(August 1, 2007)ji

FLOOR AMENDMENT

Bill No. 2226, Draft 1. Relating to Shoreline Setback and Coastal Protection

Introduced by: JoAnn A. Yukimura

Amend Bill No. 2226, Draft 1, as follows:

- 1) Amend Section 1 of Bill No. 2226, Draft 1, to read as follows:

“SECTION 1. Findings and Purpose. 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. Furthermore, the Planning Department is in the process of producing coastal erosion hazard maps that will be used as a basis for new shoreline setback requirements. Current shoreline setback requirements were established without adequate data on historical shoreline positions and trends. Development and other improvements on coastal lands have occurred without regard to erosion hazards. Because chronically retreating shorelines eventually threaten these improvements, there has been widespread construction of shore protection structures such as seawalls and revetments. These structures distort the natural shoreline environment, often leading to accelerated erosion on adjoining properties, [impacted public access, and beach loss.] beach loss, and reduced public access. This pattern of coastal zone management seriously degrades the natural attributes of the Kaua‘i coast as documented in the Kauai Shoreline Erosion Management Study (September, 1990).

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.

It is important that information regarding natural hazards such as coastal erosion data be incorporated into the planning process at the earliest stages of development, i.e., at the time of zoning, general plan, and development plan changes 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.

In order to protect life, property, and coastal resources against coastal hazards, this bill sets forth a procedure for establishing building setbacks from the shoreline based on scientifically documented rates of shoreline change and the history of coastal hazards in a specific place. Using a precautionary approach, the bill promotes proper siting of structures and

reduced use of the shoreline area for structures in order to ensure the longevity and integrity of Kaua'i's coastal and beach resources.

The ongoing coastal erosion study by the Planning Department will provide a public database to assist the Planning Department and shoreline area owners in this regard. Until the public data base is established, landowners will be allowed to site improvements by developing their own data through scientifically accepted methodologies specified herein. This bill serves as an interim measure until the public database of science-based erosion rates is formally established and new setback rules and ordinance are adopted by the Planning Commission, County Council, and Mayor, as appropriate.

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."

- 2) Amend Section 2 of Bill No. 2226, Draft 1, by amending proposed Article 27 to read as follows:

#### "ARTICLE 27. SHORELINE SETBACK AND COASTAL PROTECTION

[Sec. 8-27.1 Applicability. This Article shall be applicable to a) all lands abutting the shoreline, and to (b) all lands located within 500 feet of the shoreline area of the County of Kaua'i, State of Hawai'i, unless the applicant can demonstrate to the satisfaction of the Director that the applicant's proposed improvement will not be affected by coastal erosion or hazards. 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.]

Sec. 8-27.1 Applicability. This Article shall be applicable to all lands within the County of Kaua'i, State of Hawai'i, that are (a) abutting the shoreline, or (b) located within five hundred (500) feet of the shoreline unless the applicant can demonstrate to the satisfaction of the Director that the applicant's proposed improvement will not be affected by coastal erosion or hazards. 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.

Sec. 8-27.2 Definitions. For purposes of this 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 or activity 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.

“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 to the length of a line obtained by drawing a line from a point in the center of the makai (seaward) side of the lot to a point in the center of the mauka (landward) 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. [using a minimum 60 foot width as a guideline for determining the portions of the lot in which lot depth is calculated (e.g., the mauka side of the lot shall be determined where the lot reaches a minimum width of 60 feet.)]

“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 [(SRF)] (SCRFF) 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 SRF 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 (SRF/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. [(For example, inaccuracies can be introduced by using artificial changes in the vegetation line and by large seasonal changes in the beach toe.)]

(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 required or done voluntarily, the coastal erosion study shall be accepted by the Director before an application for a shoreline setback determination is deemed complete.]

(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 Kauaʻi.

“Department” means the Planning Department of the County of Kauaʻi.

“Director” means the Planning Director of the Planning Department of the County of Kauaʻi.

“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 Hawaiʻi Coastal Mitigation Guidebook, (January 2005).

“Lot” means a portion of land shown as a unit on an approved and recorded subdivision map.

“Minimum buildable footprint” means the building footprint of 2,100 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 to the extent that those exceptions are not subject to HRS Chapter 343; 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 [ninety (90)] 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, barbecues, picnic tables, benches, chairs, borders, wooden trellis, bird feeders, signs, safety improvements, 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 [provided they] that are located more than forty (40) feet from the shoreline, landscape planting and irrigation systems provided that they are directed away from [the] a validly certified 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.

“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

[(4) Provided that if any portion of a structure is non-conforming, then for the purposes of these rules, the entire structure shall be defined as non-conforming.]

“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.

“Qualified professional consultant” means a coastal scientist with a masters 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.

“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.

“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.

“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 area or shoreline setback area” [is as defined] means “shoreline area” as defined in Section 205A-41, Hawai‘i Revised Statutes, as amended.

“Shoreline Change Reference Feature [(SRF)] (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 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.

“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.**

(a) No shoreline setback line shall be established for any lot subject to this Article unless the application for a shoreline setback line [is accompanied by a shoreline survey certified within six (6) months of] includes a shoreline survey certified not more than six (6) months prior to submission of the application.

(b) For lots with an average depth of one hundred sixty (160) feet or less, the shoreline setback line shall be established based on the average depth of the lot as provided in Table 1, or at the option of the applicant, upon a coastal erosion study as provided in Table 2.

Table 1: The distance in feet of the shoreline setback line as measured from the certified shoreline based on the average lot depth in feet. See attached table and substitute for below:

If the average lot depth is:	100 feet or less	101 to 120 feet	121 to 140 feet	141 to 160 feet	161 to 180 feet	[More than 180 feet] <u>181 to 200 feet</u>	<u>More than 200 feet</u>
Then the minimum setback distance is:	40 feet	50 feet	60 feet	70 feet	80 feet	[100] <u>90 feet</u>	<u>100 feet</u>

(c) For lots with an average depth of more than one hundred sixty (160) feet, the shoreline setback line shall be established based on a coastal erosion study as provided in Table 2 and shall be no less than the setback distances set forth in Table 1 as applicable.

Table 2: The distance in feet of the shoreline setback line as measured from the certified shoreline based on the building footprint and a coastal erosion study.

For structures with a building footprint that is:	Less than or equal to 5,000 square feet	Greater than 5,000 square feet
Then the setback distance is:	40 feet plus 70 times the annual coastal erosion rate	40 feet plus 100 times the annual coastal erosion rate

(d) The average lot depth notwithstanding, any shoreline setback line established based on a coastal erosion study shall be reviewed by the Planning Commission.

(e) No zoning amendment, general plan amendment, development plan amendment, or subdivision, any of which involves lands, or any portion of land, subject to this Article, shall be approved without a coastal erosion study and a shoreline setback line established in accordance with Table 1 and Table 2. In cases where these methods result in lines that cross or intersect

each other, the most mauka (landward) segments of each line shall form the shoreline setback line.

(f) [Upon receipt of a completed application] When an application for a Shoreline Setback Determination has been certified 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 [confirm the proper delineation of the shoreline setback line on a site plan, and shall require that substantial construction be commenced within two (2) years from the date of shoreline setback determination, and that construction be completed as evidenced by a certificate of occupancy in the case of buildings for habitation within three (3) years from the shoreline setback determination.] conform to the delineation of the shoreline setback line on a site plan pursuant to Section 8-27.3.

(g) 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.

(h) For purposes of this Article, the application of Section 8-27.3 by itself shall not make a dwelling unit nonconforming.

#### Sec. 8-27.4 Minimum Shoreline Setback Requirements

Under no circumstances shall a lot have a shoreline setback line of less than forty (40) feet.

#### Sec. 8-27.5 Structures and activities subject to these rules.

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 shall not abrogate the requirements of any other applicable statutes, codes, ordinances, rules and regulations, or other law. Construction immediately inland of the shoreline 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 outside the shoreline.

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

[(a) Certain activities are prohibited in the shoreline setback area pursuant to HRS 205A-44, as amended:

(1) The mining or taking of sand, dead coral or coral rubble, rocks, soils, or other beach or marine deposits from the shoreline area is prohibited with the following exceptions:]

(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 area is prohibited with the following exceptions:

[(2)] (1) The 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

[(A)] (2) Where the mining or taking is authorized by a variance pursuant to these rules; or

[(B)] (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

[(C)] (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.

(b) [A coastal dune] 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 a minimum building footprint home. 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) Storm Buffer Zone.

(1) No structure or any portion thereof, including seawalls, groins, revetments, and other similar structures, such as fences and walls, whether built above, on, or below the ground surface, shall be permitted within the storm buffer zone as defined herein. Roads, streets, driveways, walkways, utility lines, grading and filling work and any and all other construction work not necessarily related to structures shall not be permitted within the storm buffer zone.

(2) Minor structures shall be permitted, including portable/movable public access walkways, portable/movable lighting for safety purposes, landscape planting/above-ground irrigation, and emergency temporary protection of legally habitable structures approved pursuant to Section 8-27.7(a)(8). Provided further that landscape planting/irrigation shall be directed away from the shoreline so that no landscape planting occurs seaward of the most recent certified shoreline or artificially extends the shoreline area without the appropriate approvals from the Department of Land and Natural Resources.]

[(3) (c) If any new structures are proposed to be located in the storm buffer zone, [as defined herein,] the following restrictions shall apply:

[(A) (1) All new structures shall be constructed in accordance with the standards for development in Chapter 15, Flood Ordinance, Kaua'i County Code, relating to coastal high hazard districts and FEMA guidelines regarding FIRM maps.

[(B) (2) 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 or activities from coastal natural hazards and coastal erosion.

[(C) (3) The construction of all erosion-control or shoreline hardening structures or activities shall be prohibited throughout the life of the structure or activity, with the exception of approved beach or dune nourishment, fill activities, and landscape planting and irrigation.

(4) The requirements of [subsections 8-27.6(c)(3)(A),(B) and (C)] subsections 8-27.6(c)(1), (2), and (3) 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, prior to the date of approval of all structures or activities. A copy of the recorded unilateral agreement shall be filed with the [director] Director and the [director] Director of public works and environmental management.

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

[(a) Except as provided in this section, structures are prohibited in the shoreline area without a variance pursuant to this Article. The following structures and activities are permitted in the shoreline area without a variance:]

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

(1) Existing nonconforming structures/activities.

(2) Structure or activity that received a shoreline variance or administrative approval prior to the effective date of this ordinance.

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

(4) 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 area without a variance.

[(5) A structure that has been legally permitted by a government agency and which is not defined as nonconforming, and is the subject of repairs that are valued by a licensed professional engineer or architect at less than fifty percent of the current replacement cost of the structure and which neither enlarges the structure nor intensifies the use of the structure or its impact on coastal processes.]

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

(A) The structure was not damaged by coastal hazards;

(B) The repairs do not enlarge the structure nor intensify the use of the structure or its impact on coastal processes;

(C) 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; and

(D) The repairs are permitted by building code, flood hazard regulations, and special management area requirements under HRS Chapter 205A.

[(6) Repairs to an existing dwelling unit including an attached garage or carport that was damaged or destroyed by fire, termites, natural disaster, accidental means, or other calamity, provided that:

(A) The repairs shall not enlarge, expand or intensify the use beyond the former building footprint of the dwelling unit, provided however, for every ten (10) feet the replacement structure is setback away from the shoreline compared to its original position, the replacement structure can be enlarged by one hundred (100) square feet in area;

(B) The repairs are permitted by the building code, flood hazard regulations, and special management area requirements; and

(C) The repairs are started within two-years from the date of the damage.

(D) Except that the rebuilding of the dwelling unit that is nonconforming pursuant to Article 23 of the CZO that is destroyed or damaged more than 50% shall not be allowed.

(E) For purposes of this Article, the application of Section 8-27.3 by itself shall not make a dwelling unit nonconforming.]

(6) Rebuilding a dwelling unit, including attached garage or carport, provided that:

(A) The damage was caused by fire, termites, accidental means or structural failure and not the result of coastal hazards or coastal processes;

(B) The proposed action is permitted by building code, flood hazard regulations, and special management area requirements under HRS Chapter 205A; and

(C) Substantial construction of the replacement dwelling unit is achieved within two (2) years from the date of the damage and construction of the dwelling unit is completed within three (3) years from the date of the damage;

(D) The replacement dwelling unit may be enlarged in increments of one hundred (100) square feet for every additional ten (10) feet that the replacement dwelling unit is set back from the shoreline compared to its original position.

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

[(8) A structure or activity that has been determined by the director to be a minor structure or activity.]

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

(9) Qualified demolition of existing structures.

[(b) Minor structures or activities shall be completed or operating within one year from the latter of the date of the department's determination or the date of approval of the last discretionary permit.]

(b) All other structures or activities proposed within the shoreline setback area are prohibited without a variance, including but not limited to:

(1) Repairs to a structure that is damaged by coastal hazards;

(2) Repairs that enlarge or intensify the use of the structure;  
or

(3) Repairs valued at fifty percent (50%) or more of the current replacement cost of a structure, except as allowed in Sec. 8-27.7(a)(6).

(c) If any new structure or activity is approved to be located in the shoreline setback area, the following conditions shall apply:

(A) 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, relating to coastal high hazard districts and FEMA guidelines regarding FIRM maps.

(B) 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 or activities from coastal natural hazards and coastal erosion.

(C) The applicant shall agree in writing for itself, its successors and assigns that the construction of all

erosion-control or shoreline hardening structures or activities are not be allowed throughout the life of the structure or activity, with the exception of approved beach or dune nourishment fill activities, and landscape planting and irrigation.

(D) The requirements of this subsection 8-27.7(c) 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 approval of the structure or activity. 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 approval of the structure of 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 Shoreline Setback Structure and Activity Determinations.

(a) Any structure or activity proposed in the shoreline setback area shall obtain a determination from the Director in accordance with this article.

(b) A proposed structure and activity in the shoreline setback area 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 structure or activity within the shoreline setback area shall be submitted to the department on a form prescribed by the Director.

(2) The request shall include relevant information, which may include, but is not limited to, a current shoreline setback determination 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.

(3) Within one hundred twenty (120) days from the Director's determination that the application is deemed complete, the Director shall approve, approve with conditions, or deny an application for approval/determination in accordance with the criteria set forth in this Chapter. The Director may also issue a determination that the proposed activity or structure is not subject to this Article because it is outside the shoreline setback area.

(4) The Director shall notify the commission at the commission's next regularly scheduled meeting of the following:

(A) any newly completed applications for shoreline setback determination,

(B) any newly completed applications for approval for a structure or activity proposed for a shoreline setback area, and

(C) any new shoreline setback determinations or approval or denials by the Director of structures or activities and the reasons therefore, including but not limited to the name of the applicant, the location and purpose of the structure or activity, and a discussion of the factors considered in making the decisions.

(5) The Director's shoreline setback determinations and approvals or denials shall not be final until accepted by the commission.

(6) Minor structures or activities shall be completed or in operation respectively within one year from approval or the date of approval of the last discretionary permit, whichever comes later.

(7) For any non-minor structures or activities 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 commenced within two (2) years from the date of final approval and construction thereof shall be completed (as evidenced by a certificate of occupancy in the case of buildings for habitation) within three (3) 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. In all other cases where substantial construction has not occurred prior to the deadline, a new shoreline determination shall be required.

(B) In case of failure to complete construction by the three-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 Conveyance or Land Court as applicable prior to application for a building permit. A copy of this unilateral agreement shall be submitted to the Planning Department prior to application for a building permit.

[Sec. 8-27.8] Sec. 8-27.9 Variance application. (a) A written application for variance shall be made in a form prescribed by the [director] Director and shall be filed with the [director.] Director. The application shall include plans, site plans, photographs, and any other plans, drawings, maps, or data determined by the [director] Director to be necessary to evaluate the application. The application shall also include:

(1) An administrative fee of \$300.00. [The administrative fee shall be \$7,300.00 if the application is after-the-fact;]

(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 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;

(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 director.

(b) Upon a determination by the director that the application is complete and in compliance with HRS Chapter 205A, part II and this article, the [director] Director shall submit the application to the commission. If the application is determined to be incomplete by the [director,] Director, the [director] Director shall return the application to the applicant with a written description identifying the portions of the application determined to be incomplete. The [director] Director shall submit a written report, a copy of the application, and all other documents submitted on the application to the commission prior to the matter appearing on an agenda of the 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] 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 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 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; 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. [8-27.9] 8-27.10 Criteria for approval of a variance.

(a) A shoreline 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 is necessary for or ancillary to:

(1) Cultivation of crops;

(2) Aquaculture;

(3) Major 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;

(4) Drainage;

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

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

(7) Private facilities or improvements that are clearly in the public interest;

(8) Private facilities or improvements which will neither adversely affect beach processes nor artificially fix the shoreline; provided that, the commission also finds that hardship will result to the applicant if the facilities or improvements are not allowed within the shoreline area;

(9) Private facilities or improvements 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 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.

(11) In the case where the applicable shoreline setback line does not allow for the minimum buildable footprint for a single-family dwelling unit, the commission may consider granting a variance for the protection of a single-family dwelling unit 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) The minimum buildable footprint may be reduced to 1500 square feet.

(D) If the foregoing approaches (a), (b), and (c) are done to the maximum extent practicable, the calculated shoreline setback may be reduced, provided that under no circumstance shall the shoreline setback line be less than forty (40) feet;

(E) Provided further that any new structure(s) approved within the shoreline setback area shall not be eligible for protection by shoreline hardening during the life of the structure, and that this limitation shall be written in a unilateral agreement that is recorded by the Bureau of Conveyances. A copy of the unilateral agreement shall be submitted to the Planning Department prior to the issuance of the required zoning and/or shoreline permit. Failure of the grantor to include the aforesaid deed restriction shall constitute a violation of this section, and grantor shall be subject to the penalties set forth in this article.

(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 shoreline setback rules;

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

(3) The proposal is the best practicable alternative which best conforms to the purpose of the shoreline setback rules.

(c) Before granting a hardship variance, the commission must determine 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 consider factors such as shoreline conditions, erosion, surf and flood conditions and the geography of the lot.

(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[. For purposes of this section only, "adversely impacts public views" means the adverse impact on public views and open space resources caused by new building structures exceeding the height limits set forth in Chapters 8 and 10 of the Kaua'i County Code, as amended]; and

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

(f) 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.

(g) No variance shall be granted for structures within the shoreline setback area that are unpermitted.

Sec. [8-27.10] 8-27.11 Enforcement. The director shall enforce this article in accordance with HRS Chapter 205A.

Sec. [8-27.11] 8-27.12 Penalties. Any person who violates any provision of these rules shall be subject to the penalties provided for in HRS Section 205A-32.

[Sec 8-27.12 Appeal of director's decision. Any person, including the applicant, may appeal the director's decision establishing the shoreline setback line, accepting the coastal erosion study or establishing a minor structure or activity classification pursuant to Chapter 9 of The Rules of Practice and Procedure of the County of Kaua'i Planning Commission.]

Sec. 8-27.13 Appeal of Director's decision. 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 decision of the Director under this Article to the commission. 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. [8-27.13] 8-27.14 Promulgation of Rules and Regulations.

This ordinance shall supersede the Shoreline Setback Rules and Regulations of the Planning Department of the County of Kaua'i in existence at the time of adoption of this ordinance. 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."

3) Amend Section 4 of Bill No. 2226, Draft 1, to read as follows:

"SECTION 4. This ordinance shall take effect upon its approval. [This] The requirements of this ordinance shall not affect any application which has been approved by the County Council or the Commission prior to the effective date of this [ordinance. This ordinance shall apply to any subsequent application for approval on said land.] ordinance, unless there is a subsequent approval required prior to a building permit, in which case, that subsequent application shall be subject to the corresponding requirements of this ordinance."

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

