

# MINUTES

## **PLANNING COMMITTEE**

**October 24, 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, October 24, 2007, at 4:57 p.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 (recused himself from Bill No. 2226, Draft 1)  
Honorable Mel Rapozo  
Honorable Bill "Kaipo" Asing, Ex-Officio Member  
Honorable Tim Bynum, Ex-Officio Member

Minutes of the September 25, 2007 Planning Committee Meeting.

Upon motion duly made by Councilmember Iseri-Carvalho, seconded by Councilmember Iseri-Carvalho, and unanimously carried, Minutes of the September 25, 2007 Planning Committee Meeting was approved.

The Committee proceeded on its agenda items as shown 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 are awaiting the County Attorney's opinion on some questions that we sent out on August 20 and October 15. They came in today at 9:10 a.m., so I think I am going to recess the Committee at this time and have the Committee of the Whole convene, so we can go into executive session.

SHAYLENE ISERI-CARVALHO:      Has that been passed around?

Ms. Yukimura:      Oh, I don't think so come to think of it.

Ms. Iseri-Carvalho:      I don't know if we need to go into executive session. I haven't seen the opinion.

Ms. Yukimura: Okay, we will make copies. We have copies. Thank you.

RON KOUCHI: Are we in recess? We are in session yet? Are we taking minutes of me reading?

There being no objections, the Committee recessed at 5:00 p.m.

The meeting was called back to order at 5:20 p.m., and proceeded as follows:

Ms. Yukimura: We are changing directions a bit to accommodate Ms. Diamond who has been here all day and has to catch a bus. The Kaua'i Bus. I'd like to move the vacation rentals to the end of the agenda and then take up the shoreline setback bill, so if clerk could read the item please.

**Bill No. 2226, Draft 1** A BILL FOR AN ORDINANCE ESTABLISHING A NEW ARTICLE 27, CHAPTER 8, KAUA'I COUNTY CODE 1987, RELATING TO SHORELINE SETBACK AND COASTAL PROTECTION (Planning Commission recommendation)  
[There being a tie vote (2:2:0:1) on the main motion as amended (Councilmembers Rapozo and Iseri-Carvalho voting "yes," Councilmembers Yukimura and Furfaro voting "no," and Councilmember Kouchi recused), this bill as amended will automatically be placed on the next Planning Committee meeting which will be held on November 14, 2007.]

Ms. Yukimura: You have before you a floor amendment which makes some additional amendments to the draft 1 which is the bill that... actually, it is the bill that we received from the Planning Department, so you can see the changes that were made there (underlines and there are some new definitions). There are also some changes in wording and I will answer any questions on that if you like.

Mr. Kouchi: Madam Chair, I know I've talked previously on this item and indicated that my employer has a property that abuts the coastline and could be affected by this and that ownership continues to exist. Part of my employment contract is tied into what the ultimate dispensation of that property would be and, you know, while I believe I may file or declare a conflict and potentially participate, you know, by saying that my compensation can be directly related to this matter, I do feel more comfortable asking to be excused and not participate, having made that disclosure of that potential financial interest. Thank you.

Ms. Yukimura: Thank you. Do members want some time to read this proposed amendment?

Ms. Iseri-Carvalho: I guess the question that I have is, is it proper for the Chair to introduce an amendment?

Ms. Yukimura: That is a very good point.

Ms. Iseri-Carvalho: I thought the Chair could not introduce an amendment.

Ms. Yukimura: I think the Chair can, but it has to be, I believe...

Ms. Iseri-Carvalho: You cannot. I don't think so. That is what I was told, so, you know...

Ms. Yukimura: Thank you for catching that.

Ms. Iseri-Carvalho: I think we need to follow the rules.

Ms. Yukimura: Yes, thank you. We can still be looking it over and we will get the change made.

Ms. Iseri-Carvalho: What number amendment is this JoAnn?

Ms. Yukimura: This actually is the first amendment since it came back from the Planning Department.

Ms. Iseri-Carvalho: But we... are you saying that we had not seen any variations except for today?

Ms. Yukimura: That is correct.

Ms. Iseri-Carvalho: This was all in from the last four (4) meetings that we have had?

Ms. Yukimura: Well, we have been deferring it pretty much without discussion in the last four (4) meetings.

Ms. Iseri-Carvalho: But there have been things that have been passed around to my understanding and I am just going to keep up with how many amendments that there have.

Ms. Yukimura: This is the only one.

Ms. Iseri-Carvalho: This is the only amendment and from what last meeting, was this the same that was handed out from that meeting?

Ms. Yukimura: I think there were a couple of... there was never... I think there might be a couple of definitions that have been added.

Ms. Iseri-Carvalho: So you are saying that from the first time that it came over to planning to the first time that you are making an amendment that (inaudible).

Ms. Yukimura: This is the first time that any amendment is really being officially proposed.

Ms. Iseri-Carvalho: Okay, and we just received it right now?

Ms. Yukimura: That is correct.

Ms. Iseri-Carvalho: You gave it to us and what time is it, 5:30?

Ms. Yukimura: Yes.

Ms. Iseri-Carvalho: And you expect us to read all of this and get ready to vote because we can. I mean, I can, I know what the bill is and we can vote today.

Ms. Yukimura: If the Council feels ready to vote, I would recommend that... the Committee, then I would recommend that we pass it.

Ms. Iseri-Carvalho: Alright, so can we go ahead and do that? So we are going to have to take another break to correct this?

Ms. Yukimura: Yes. Hold on, Committee is in recess.

There being no objections, the Committee recessed at 5:26 p.m.

The meeting was called back to order at 5:43 p.m., and proceeded as follows:

Ms. Yukimura: We have the amendment introduced by Councilmember Rapozo (by request) and I will answer any questions or... Councilmember Rapozo who has been in part of the discussions too and the drafting. And then we are waiting for an amendment that Councilmember Rapozo wishes to also introduce, so when that is ready, we will have it, otherwise if there are no questions, then we can move this item and just take up the IAL. Are there any questions about the amendment that has been circulated?

JAY FURFARO: Councilwoman, I appreciate the fact on page 7 from our last discussion that under the table 1, we talked in terms of the minimum setback capping at 90 feet for lots of more than 180 feet. In table 2 and I haven't had the time to digest all of this, but Maui County who is doing the appropriate documentation for the annual erosion rate set in their sub-chapter 2 that a 25 foot setback plus the distance equal to 50 times the annual erosion hazard rate from the shoreline. And, you know, we are in a position that we are close, but don't have all the parts here establishing the historical erosion rate, but in table 2, we are actually and I believe this is the status until such time we actually have the historic information. We are talking about the setback distance of 40 feet where Maui is 25 and 70 times the annual coastal erosion rate where Maui is talking 50. You know, currently, we have 40 and I was always under the impression that you would take the historical erosion rate number that we get for various areas and be similar to Maui with a 50 year calculation. I do want to point out that as we see the issues that we have at 'Aliomanu, it deals with issues regarding the building of the jetty. When we are dealing with the area outside of the Smoky Louie Gonsalves swimming pool in Kapa'a, we have an area where there was dredging done of the reef that has caused that erosion. When we are dealing with Pono Kai, we have the two (2) jetties that were built out in front of Waipouli that the experts have told us probably contributed to this aggressive erosion. So I have no problem staying with the 40 feet plus the 50 year annual erosion rate study when we get it. I think we are being overly reactive when we take... let's say the erosion rate is six (6) inches a

year, that adds another 25 feet to the shoreline setback of 40 feet, so that makes it 25. If we add another 20 years from that, that adds, you know, almost 25% more to the setback of the parcel. I just wanted to share that I am not sure I could support 70 times the annual erosion rate especially since we don't have the study yet.

Ms. Yukimura: Let me answer very good questions. The annual erosion rate is going to be plugged in, so it doesn't change the bill when we get the erosion rates. The 70 times actually is a very well established figure for the life of a wooden building which we thought 5,000 square feet... it would likely to be wooden. The greater than 5,000 square feet, you will notice is a hundred times because we expect that to be brick or cement or, you know, a much more durable one and those two (2) figures have been established in the building trade, it is very well documented.

Mr. Furfaro: It is very well documented. A wooden building has a 63 year life and so forth. I read that material as well, but I am just saying, I cannot support this at 70 times the rate.

Ms. Yukimura: And that is fine.

Mr. Furfaro: And what you are saying to me is, oh, at some time in the future, we might change the rate once we get the history.

Ms. Yukimura: No, no.

Mr. Furfaro: If that is the case, we can always change to 50, but, you know, I have family that has oceanfront property not in this County.

Ms. Yukimura: Uh huh.

Mr. Furfaro: I look at this and some of these setbacks and I said, you know, there is good rationale behind it, but it (inaudible) term I am saying. I still believe it is excessive until such time that we get the historical documentation. That is all that I am asking you to consider.

Ms. Yukimura: Right.

Mr. Furfaro: All I am saying is that until I look at that, I am not sure if I can support this.

Ms. Yukimura: Okay. Staff has reminded me that we probably should have a motion and a second just to initiate the discussion.

Councilmember Rapozo moved to amend Bill No. 2226, Draft 1 which was introduced by myself (by request) as circulated, seconded by Councilmember Iseri-Carvalho.

Mr. Furfaro: None of us know where we left off because we had such a long recess break here.

Ms. Iseri-Carvalho: It is the original bill.

Ms. Yukimura: Yea, okay, so both motions... we need a motion and a second to withdraw and then the motion is to approve Bill No. 2226, Draft 1.

Councilmember Rapozo withdrew his motion to amend; Councilmember Iseri-Carvalho withdrew her second to the motion.

Councilmember Rapozo moved to approve Bill No. 2226, Draft 1, seconded by Councilmember Iseri-Carvalho.

Ms. Yukimura: Councilmember Furfaro, you should vote as you feel.

Mr. Furfaro: Absolutely. I know that is the democratic process and I know that I am 1 vote out of 5. You asked the question and I shared it with you.

Ms. Yukimura: So I just wanted to explain the rationale for the figures and tell you that the study will produce the annual coastal erosion rate, so it will be 40 feet plus the life of the building. So if, you know, if it is six (6) (change side of tape)... or half a foot every year, then at the end of 70 years, it will be at the building pretty much. You know, it would be 70 times whatever per year erosion rate is, so you are trying to figure out where the shoreline will be at 70 years.

Mr. Furfaro: I understand that, but I want to make sure that... I equally know places on Kaua'i where the shoreline has actually grown.

Ms. Yukimura: And for that where (inaudible) an accretion, the professional set the erosion rate at zero, so it is zero times 70 is zero. So then it is the default of 40 feet and the 40 feet came from the fact that people dealing at the shoreline level like Mr. Eversole and Mr. Dennis Wong and others know that people get very nervous when the setback is 20 feet, you know, from the ocean. It makes people nervous, so that is not a good place to be.

Mr. Furfaro: Councilwoman, I am going to say something here. I just want to say, I know that. I sat on the Planning Commission with those Hā'ena properties. I fought to make the minimum of those areas at 60 feet setback (inaudible) 40. All I want to share that and I know that and I believe that. I am just saying that when I am looking at this for the few residents, local residents that we have, to put in here 70 years calculation over whatever the shoreline rate is, I think it is excessive. I can live with 50 and why do I say that, because the Maui bill is not 40, it is 25 plus 50 times the annual (inaudible). We are starting at 40.

Ms. Yukimura: And the history of the Maui bill as I understand it and it is second hand, but it is from the planners who were there. The... it was the homeowners who will be coming in when Councilmember Rapozo's amendment is proposed that caused the compromise in... the original, I think was more proposed... well, the original was proposed for the life for the building which is however long the building is going to last times the annual erosion rate is... because then the building... the ocean is expected to be pretty much at the building if it is just the life of the building plus the annual erosion rate. So there was some compromises made because of people owning existing lots that where initially they weren't allowed to rebuild. This amendment allows them to rebuild on their existing footprint if they are washed out by natural disaster or termites or fire or that sort of thing. So in that respect, there is that kind of safety valve, but in Maui,

they choose to put the safety belt by lessening the distances. So, you know, there is some consideration in the present bill to allow existing homeowners to rebuild on the existing footprint.

Mr. Furfaro: You know, I have a family home at 8404 Olowai(sp.?) Street in Makaha. The home was built in the 50's and it is an old Hick's home. I used to have to give up summer after summer to wire brush the house to paint it, to varnish it. We used to have to tent it for bugs and so forth.

Ms. Yukimura: Uh huh.

Mr. Furfaro: That house still stands today and it is almost 60 years old, so I think the question of how long a house lasts also is dependent on how long the owner puts in the effort to maintain his home in good condition.

Ms. Yukimura: Uh huh.

Mr. Furfaro: I just want to say, again, and I know the issues in Hā'ena well. You know, as I have sat on those Planning Commission hearings and even argued the point that that last corner lot should never even been added to the subdivision because the building envelope was too small. So I want to make sure we understand. I truly support the need to have establishing these particular setbacks, but when I look at the Maui bill and I look at it being based on an annual erosion study that we don't have yet and multiplying that times 50 years, I still believe that 70 is excessive.

Ms. Yukimura: Well, you know, if homeowners are conscientious as you are and so the building may last longer than 70 years, they are going to be in kind of big trouble if they use the 50 year... a 50 year age because the... you know, the building is going to last longer, but the setback is too small for the life of the building.

Mr. Furfaro: I just want to make sure that there are a lot of other things to consider, the shoreline, I mean, Rell Sun's house was right next door, the beachfront was hardened, part of our beach is hardened, you know, there are all these other...

Ms. Yukimura: And when it is hardened, it is an zero erosion rate as well.

Mr. Furfaro: I see that in here, but at the same time, there are many shoreline areas along that area that because no jettys have been built, because no dredging has occurred, because no harbor diversion has occurred that there is very little erosion and people need to initiate those kinds of studies on themselves. So, you know, I am sorry we are perhaps disagreeing a little bit on what the annual setback distance should be for this bill, but I support the effort talking about the need to have it. We are 15 feet better than Maui right out of the box and we are really urgently waiting to get our shoreline erosion study, so that we know what areas are affected and what are not. All I am saying, we can always revisit that, but for now, I believe the 70 years is rather excessive.

Ms. Yukimura: Well, I appreciate... I think this is really a good discussion because it helps people understand what the rationale of the bill is and what the

thinking is behind the numbers, so that is fine. Councilmember Iseri-Carvalho?

Ms. Iseri-Carvalho: Did the Planning Department support the bill with that rate?

Ms. Yukimura: They did.

Ms. Iseri-Carvalho: And that was the 40 feet plus 70 times the annual (inaudible).

Ms. Yukimura: Yes, those figures have not changed.

Ms. Iseri-Carvalho: Have not changed, right?

Ms. Yukimura: Right.

Ms. Iseri-Carvalho: That is all that I wanted to know.

Mr. Furfaro: And this is not the first time I am bringing this up. You have adjusted it on the minimum setback of 90 feet the first go around, but, you know, I share... clearly a concern about those places that have very aggressive erosion, but at the same time, I want to say that there are parts of the island where, you know, the shoreline goes out seasonally and there are places where the shoreline is actually growing.

Ms. Yukimura: And I believe that you are absolutely right about that and the coastal erosion rate should take that into account.

Mr. Furfaro: And that is why I am anxious to get that and at this time, I don't see anything that indicates why I couldn't support the 50 versus the 70 years. Thank you for the time.

Ms. Yukimura: Thank you. Are there any other questions? Councilmember Rapozo?

Mr. Rapozo: No questions. I just want to express that, you know, the purpose of this bill was really to protect coastal environments as well as the properties as I think was just discussed at length regarding the 70 feet basically protecting the property for 70 years. I think that is the intent for that 70 years and Councilmember Furfaro's points are well taken. Although I introduced this amendment, I just want to go to page 11 and my amendment should be coming up, I am hoping soon. On page 11, number 6, where you see right in the middle of the page is that huge section underlined which basically gives homeowners in a case of a natural disaster or fire, termites, accidental means, structural failure... if that should occur, that homeowner would be able to rebuild their home right on the original footprint regardless of what the setback was, regardless of what the erosion rate is and regardless of what the formula comes out to be. So I think it defeats the purpose of the bill because our bill... again, when we are talking 70 feet to the normal... Jay, the one that you talk about, your family, your friend that is purchasing a property and right off the bat, they got a 40 foot setback and if the erosion rate is, let's say zero, let's say one foot, or six (6) inches a year, you are talking 35 feet added to that and that is now up to 75 foot setback, but the house

that sits there today that unfortunately gets wiped out by fire or any kind of other disaster or just old structural failure. The house falls down and that person all of a sudden gets to build that house right back where it was. That is just simply, in my opinion, is not fair. What my amendment will do is will require those people to actually comply with the law. If, in fact, the law or the lot is too small to follow this law because the setback would be larger than what the buildable area would allow, then they would have to apply for a variance. That is what my amendment will show when it gets here, but I just wanted to express my concern about number 6 on page 11 because we are basically saying, hey, you know, if you live there now and I took a ride out to the coastal properties and some of these lots are very, very small. I mean they are very, very small and the way this bill reads is if that house gets wiped out, they get to build back and I just don't think it is fair that they have that opportunity, but the local resident that just purchased the property has to go back 75 or more. You know, at one foot a year, you are talking 110 feet. Now I happen to agree with the 70 feet and that is based on the testimony of the experts that we have consulted with, but I also feel that we should not make exceptions just because you are wealthy and you have a big home and you can go back and put your house on that same footprint. I cannot support that and that is why even though I introduced the amendment, not necessarily a vote in support of the bill. And as soon as my amendment gets here, I would ask that you folks seriously consider that amendment. Thank you.

Mr. Furfaro: Mr. Rapozo, I want to add that the property that I referred to in my family was acquired back in the 50's was actually plantation property and I have no friends that are currently buying... I am just trying to watch out for, you know, those particular relationships as they exist now.

Ms. Yukimura: I think the dialogue here is instructive because it is not just rich outsiders who may own property that is destroyed by termites or, you know, structural failure or natural catastrophe. It could be...

Mr. Furfaro: Kama'aina families?

Ms. Yukimura: It could be kama'aina and the thing is, if you see 6(e)... if they are damaged by coastal processes, they have to go through a variance, but if they are dama... basically destroyed because we are talking about under 6, we are talking about structures that are 50% or more damage, so it is basically a rebuilding. If they are damaged by things unrelated to coastal hazards, but also if they are damaged by natural disaster because setting them back according to the setback wouldn't have prevented them from being wiped out by natural disaster. They are allowed to rebuild on their footprint and it is a judgment call and I am very thankful actually that Councilmember Rapozo is introducing this amendment to make us see where we want to stand on it. But if we pass the amendment, I think we need to give a signal to homeowners and that is our intention, so that they can have some input on this because it wasn't like that for a while.

Mr. Rapozo: I guess what I want to prevent from happening is... in a lot that has buildable area and this house should fall because of age or whatever, fire, whatever it is. If that house is no longer a house... 51% of that home is destroyed... even though the owner has a big lot and he could move that house in compliance with this law, that section allows him to basically get a free ride to get a

smaller... a shorter setback and there is... I don't see the basis for... I don't understand what the rationale... being that everybody else would have to setback and this one here just because they come across a hurricane or whatever the case may be, they get to avoid or circumvent this law which the purpose of the law is to protect the house. So my concern is, we are going to say no problem landowner, you go ahead and build. Because you had a fire, you can go ahead and build your new house where it was or a hurricane and then they get hit again and now we had something to do with that because we allowed them to build even though they had buildable area. Again, my amendment will talk about the variance process, so in the event you don't have the buildable area, then you go get a variance and... anyway...

Ms. Yukimura: There is a lot of sense to it. Councilmember Bynum?

Mr. Bynum: I just wanted to ask Councilmember Rapozo... I am listening to what you say and I think it would probably be an owner's best interest to move the building back, you know, to protect themselves. However, I could think of... I was just thinking why you were speaking of... if what if you had an established neighborhood with four (4) or five (5) homes that were 40 feet and then this, you know, was destroyed by fire and the owner has to setback 100 feet and his neighbors are all at 40 and he has a substantial degradation of his view plain or the value of his property because if he is back a 100 feet and then he has houses in his view plain that he didn't have, so I like your intent, but I could imagine circumstances where it could be a significant impact on the owner if it wasn't in conformance with surrounding properties.

Ms. Yukimura: And Councilmember Furfaro, one sec. I just want to say, and that is why we should allow for some input if we pass the amendments, so that before we move it out of Committee. Councilmember Furfaro?

Mr. Furfaro: And I guess, you know, I am thinking again from a standpoint of, you know, kama'aina owners, oceanview or near the ocean kind of property and, you know, Mr. Bynum talks about degradation of issues that deal with the view plain and so forth. Well, you know, quite frankly, I mean that is very subjective, but let me ask you, what happens if you have this particular piece in there and you say, oh Bruddah, your house when burn down, but, you know, because you cannot build it on the old footprint, your insurance company is not going to give you the full value of the house because you now have to set it back and you have to build a smaller house. You know, that has impact too for the people that want to insure their homes. I mean, I am talking about people that have single wall wood homes, (inaudible) hut, you know, it has value. Your policy is that and that is how the whole industry is built. You know, Southern California is going to face all that right now if you didn't say you could rebuild on the footprint because the value that you insure your home for is based on the fact of its old value determined in the market from (inaudible)... its size and so forth. All of a sudden, that is something else people might have to face. I don't know the total impact of that, but there is impact if you knew that to rebuild the exact house that you had, you had to go to the Planning Commission to get a variance and when you got the variance, you might have to actually build less of a home. So the insurance company says to you, well, if that is the case, you know, we are insuring you for your potential loss, but when you lose, we don't have to pay out as much money.

Ms. Yukimura: Council Chair?

BILL "KAIPO" ASING, EX-OFFICIO MEMBER: I have a question for (inaudible-mike off).

Ms. Iseri-Carvalho: Mike.

Chair Asing: I have a question for Councilmember Rapozo and the question is, when you make reference to the variance process, are you saying in the case that you made reference to that... when the individual applies for a variance, will he in fact be given the opportunity to build?

Mr. Rapozo: Yes.

Chair Asing: So it will not stop him from not being able to build?

Mr. Rapozo: Correct.

Chair Asing: Is that correct?

Mr. Rapozo: Right. My whole purpose is... and I guess I could draw it on the board, but it is to not... if there is buildable area, then we must utilize the ordinance. If there is none, then the owner needs to come up to the Planning Commission or to the Planning Department and apply for a variance because the reasons for the variance is, obviously, if he doesn't get a variance, he cannot build a home. And if he cannot build a home, then there may be some legal ramifications that we have to deal with. Does that answer your question?

Chair Asing: Yes. Well, I was... then you make sense from the standpoint of intent of the ordinance. I mean if that is the intent of the... if the intent of the ordinance is what it is, then your rationale is in conformance with the intent of the ordinance as I see it.

Mr. Rapozo: Thank you. I mean, also now, the variance process... if, in fact, erosion rate at that level or at that location at that time is like five (5) feet a year and that person may not be allowed to build. They may not grant the variance. If, in fact, the surf at that location is of a nature that would cause definite damage... imminent damage to that property, I think it may be wise for the Planning Commission to not grant the variance. I don't think we have anyplace like that on the island, but I am just saying that landowner would have to show that it is relatively safe. You see, again, and if you go back to page 1, the last paragraph on page 1. It says, 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 scientific documented rates of shoreline change and so forth... it says using a precautionary approach, the bill promotes proper siting of structures, so I think if we want to stay in line with what the bill is designed to do, then I don't see how you make that exception where even if you had buildable space, you don't have to deal with the vari... I mean the setback.

Ms. Yukimura: And also in getting a variance, you may be required to build a smaller house because if you will see on page 15 at the bottom, number 11... in the case where applicable shoreline setback line does not allow for a minimum

buildable footprint and that is defined as 2,100 square feet, you know, then the Commission is given the leeway to give a variance to the front yard setback, the side setbacks, and then the house... they may be... then they will require the house to be even smaller, 1,500 square feet and then if those aren't don't work, then they are allowed to even move the setback. You can go and put your house in the setback area, but not anymore... there is a minimum setback requirement of 40 feet. I think Councilmember Rapozo's bill will allow even further reduction of setback area to 30 feet or maybe 20, I don't know what the...

Mr. Rapozo: Well, that is going to be up for the discussion on the table.

Ms. Yukimura: Right.

Mr. Rapozo: The other thing, I think Councilmember Yukimura is that page 16(f) which I think is vital is that in the case of a variance, that applicant will basically hold the County harmless... indemnify the County in that variance process, so we are not liable for the damage should that house fall in the ocean after two (2) or three (3) years.

Ms. Yukimura: And it also requires that that disclosure be recorded.

Mr. Rapozo: Correct.

Ms. Yukimura: So that new buyers are aware.

Mr. Rapozo: Just on a procedural thing, Councilmember Yukimura, staff just explained to me that is tough... it is difficult for them to draft my amendment, so if we could pass this, again, and it is not saying that I will support it at the full (inaudible)... at the main bill, but if we could pass this, then they can work my amendment off of the past amendment.

Ms. Yukimura: That is right. Well, actually, it will be draft 2. It will be... if we pass this, then we... it will be Bill No. 2226, Draft 2 and Councilmember Furfaro, you could prepare an amendment for the next Committee meeting to reduce the setbacks if that is what you are... or the numbers.

Mr. Furfaro: Yea, and I just want to make sure that as it has been very difficult for families to hold land without certain temptations, the reality, there are still kama'aina families that do own properties that will be affected by this. I also want to point out some of my concerns as they really deal with the insurance issues. If we find ourselves with someone who cannot rebuild their house, there is a section on your policy that says, loss of use. The loss of use also (inaudible) to the fact that you lost the house and it might put them in a very delicate situations with their insurance company if they have to file a claim for the loss of the house if they can't rebuild it. They actually lost the use of it. Those are just, you know, some of the things that I am concerned with and thank you about the 40 feet plus the 50 years as an amendment as an option.

Ms. Yukimura: Yea, and, I mean the things you are mentioning are the reasons for allowing rebuilding back on the existing footprint although it is not allowed and that is on (e) if it is 50% destroyed by coastal hazard which is basically erosion or high surf. If that happens, they do have to get a variance, but if it is

destroyed by non-related... by reasons not related to coastal erosion, then we allow them to build on the existing footprint, so... and that is what Councilmember Rapozo is disputing because he feels if they can setback, then can setback. But, you know, the problem is with existing lots because this bill because it applies at times of subdivision, general changes, and zoning will ensure that in the future the lots will not be drawn so shallow or so small and that it will... the lots will be drawn, so people can easily setback their houses with that formula which is one of the reasons we probably shouldn't change the formula, but we should give allowances for existing small lots.

Mr. Furfaro: As I said to you, that was the whole issue in Hā'ena when Planning let them put in that additional corner lot for sale.

Ms. Yukimura: Right.

Mr. Furfaro: The building envelope became so small. They should never have approved those additional lots in there that created this, you know, entitlement that people believe they have.

Ms. Yukimura: Right.

Mr. Furfaro: And I have been in the past the strong supporter about taking 40 feet to 60 feet, but, again, you have let me express myself on the 40 feet plus 70 years versus 50 years. I will draft my concerns. Thank you.

Ms. Yukimura: Uh huh, okay. Any other questions?

Chair Asing: I have a question on your statement regarding high surf. What was that high surf was not...

Ms. Yukimura: It is not treated as a tsunami.

Chair Asing: How would you define that?

Ms. Yukimura: Or actually, it will... we don't have to define it because what I was told by, actually, Mr. Eversole is if it is like... like people just informing yesterday about the 1969 high surf on the northshore of O'ahu and I don't know if Kaua'i was also... probably hit too, yea?

Mr. Furfaro: That was a famous surf (inaudible).

Ms. Yukimura: They said that if you consider, I think even... wasn't the Kaloko disaster declared by the Governor as a disaster? The State level, so it is likely that those high surf events would be declared as a disaster and they would be allowed to build on their existing footprint under this version. I actually should take...

Chair Asing: The question that I had and I can recall the, I guess in the Po'ipū area, the discrepancy on... I guess it was for insurance purposes on high surf or tsunami and there was a, you know, how do you define what is the definition that you are going to use. So when you mention high surf and then my question is, what is tsunami then?

Ms. Yukimura: We are covering tsunami by saying that it is a natural disaster declared by the President or by the Governor and using that as the defining...

Chair Asing: My gosh, if you don't have a declaration, then it is not?

Ms. Yukimura: Then you have to... well, because it would be less than... because it might be related to coastal erosion then which is the whole purpose of this bill.

Chair Asing: Wait, let me see. (Inaudible)... the Governor via declaration and that is guideline?

Ms. Yukimura: In order to be able to rebuild on the existing footprint. You see, Council Chair, if you are more than 50%, this section number 6 is you have to be more than 50% damaged. If you are less than 50%, you get to rebuild. I mean repair right where you are.

Chair Asing: Yea.

Ms. Yukimura: If you are more than 50% damaged by non-related coastal events, that wouldn't... the setback from which it wouldn't have protected you anyway, you know. Even if you follow the coastal erosion setback in a tsunami, you could very likely be washed out anyway even if you are totally complying because it is two (2) different kinds of events. So we are saying that this bill shouldn't apply or it wouldn't have really mattered.

Mr. Furfaro: JoAnn, again, I just want to point out along the (inaudible)... you know, you have a situation like that and someone loses the ability to rebuild the house, the fact of the matter is, the insurance company may not pay them anything. They could lose it where they should be paying a premium and lose the money because they will cite that you are not able to rebuild the house, so quite frankly, we are not insuring anything that is an asset that you can rebuild. That may be far fetched, but I am just saying that is kind of hard to take as a homeowner that, wow, the insurance industry is going to face some tough things with these fires in Southern California right now. And then the other thing is... and if you can't rebuild, there are some very good lawyers and there are some not so good lawyers, but there are some lawyers that might point out that this is kind of a taking.

Ms. Yukimura: So if that is your concern, then you would vote to allow it to rebuild on the existing footprint.

Mr. Furfaro: I guess those are things that we are all going to have time to think about and I just wanted to throw that out.

Ms. Yukimura: The dilemmas or the hardest parts of this bill are about existing small lots, you know.

Mr. Furfaro: Which you will find a lot of them in kama'āina families.

Ms. Yukimura: I think there could be several, yes, but that is what the committee grappled with too and it is not an easy question, but I think I would prefer addressing it under the very special category of the, you know, the existing lots and the kinds of disasters that they are affected by rather than changing the basic formula and that is my preference. The basic formula applies to all new developments, you know, where they can restructure and setback. Any other questions? Any other discussion? If not, we can... I think Councilmember Rapozo is checking on his amendment, so if it is okay, let's take a three (3) minute recess and find out where we are. We have to take a caption break in five (5) minutes, so let's take a 10 minute caption break and then I guess a dinner break is also in order. But let's do the caption break...

Ms. Iseri-Carvalho: Let's find out how much more time we need for the amendments.

Ms. Yukimura: Yes, right, so only a 10 minute caption break (also dinner break was taken).

There being no objections, the Committee recessed at 6:23 p.m.

The meeting was called back to order at 8:19 p.m., and proceeded as follows:

Ms. Yukimura: We are still awaiting a shoreline setback bill amendment, so I am going to move that to the end of the agenda and we have PL 2007-2.

**PL 2007-2** Communication (8/3/2007) from JoAnn A. Yukimura, Planning Committee Chair, requesting that the Administration be present to give a status report on the Planning Department's progress in developing a plan to implement the identification of important agricultural lands pursuant to Act 183.  
**[This item was deferred.]**

Ms. Yukimura: We sent several follow up questions to the Planning Director and have not yet received the answers although they were due last week, so I will be asking for a deferral and I so entertain a motion.

Upon motion duly made by Councilmember Furfaro, seconded by Councilmember Rapozo, and unanimously carried, PL 2007-2 was deferred.

There being no objections, the Committee recessed at 8:20 p.m.

The meeting was called back to order at 9:26 p.m., and proceeded as follows:

(NOTE: THE COMMITTEE PROCEEDED AGAIN WITH BILL NO. 2226, DRAFT 1).

Ms. Yukimura: We are on the shoreline setback Bill No. 2226, Draft 1 and Councilmember Rapozo, I believe you have an amendment.

Mr. Rapozo: Before I introduce this amendment, I would withdraw my last motion to amend as circulated with the last amendment by request.

Ms. Iseri-Carvalho: And I will withdraw my second.

Mr. Rapozo: And I will introduce and ask for a motion to approve floor amendment (2) introduced by myself as circulated.

Councilmember Iseri-Carvalho moved to amend Bill No. 2226, Draft 1 (as circulated and introduced by Councilmember Rapozo), seconded by Councilmember Furfaro.

Mr. Rapozo: And really, it is the same amendment except it includes the provision that I talked about earlier where properties that are rebuilt after a disaster or a any damage over 50% of the current replacement of the structure would basically have to go through the process. And, if, in fact, a buildable lot or their lot was too small to comply with the setback set forth in this ordinance, they would be required to go through a variance process.

Mr. Furfaro: Madam Chair, I would like to say, I had some discussion with Mr. Rapozo and earlier I stated some concerns that could be interpreted as a exposure to insurance valuation as well as the taking although I will support the amendment at this particular stage. I do want to let the Councilmember know that is a question I will surface as it relates to any question maybe about a taking or any financial exposure on the reductions through the County Attorney's Office. But at this point, I have seconded your amendment.

Mr. Rapozo: Thank you.

Ms. Yukimura: I might mention that we probably have to move this section out of... Section 8-27.7 called permitted structures because this is a list of things that are permitted, so they don't actually have to go through the law. They are permitted within the shoreline setback area and I think we want most of the repairs to be outside of the shoreline area, but we will work on clarifying amendment between now and our next meeting. So any other discussion?

Ms. Iseri-Carvalho: Yes, I do. I am sorry, are anticipating doing more amendments?

Ms. Yukimura: Yes.

Ms. Iseri-Carvalho: Well, then I don't see why we should pass it out.

Ms. Yukimura: We are not going to pass it out of Committee. I think we have to keep it in Committee especially because there is...

Ms. Iseri-Carvalho: We spent all this time for this to be kept in Committee?

Ms. Yukimura: That is correct because it is not finished. There is a lot of work yet that needs to be done and also people need to know that they are not going to be allowed to... that we need to give notice to the public, so with this amendment, we are having to keep it here unless we want to do all the work on the floor which I think is not a good idea.

Mr. Rapozo: I thought we were going to discuss that option of moving it to Council because of the time difference between now and the next Council meeting and we talked about that earlier.

Ms. Yukimura: But I think there is going to be major amendments, so there is going to be at least three (3) amendments that are going to... and we need to let people have time, so if it is the wish of the Committee to move it out, but that means we are going to have both the affordable housing bill for which there will be amendments and the shoreline setback.

Ms. Iseri-Carvalho: Really.

Ms. Yukimura: Yes.

Ms. Iseri-Carvalho: Again, with the protocol that we had established, you come to the Committee meeting prepared with your amendments. We sat here for... we took a break three (3) hours ago for dinner and we are only going to pass this out... this is ridiculous. The time that we spent here. You know, I've got a family JoAnn and I am leaving tomorrow on the first flight for an HSAC meeting and for meetings up in Kona and you are keeping me away from my family for this much hours sitting around waiting and then you are not going to pass this thing out. I mean this is just outrageous the time that we spent.

Ms. Yukimura: I am... I think everybody was doing their best in terms of preparing the amendments, but there are complex amendments and they need... even now some polishing or refinement and we are also creating some pretty big changes which I feel the public needs to know. So, but, you know, if you want to work on the floor, that is fine with me. I thought that we were supposed to do our work in Committee and I am the one who would like to see it move it, but I don't think we are done. And even this amendment needs some changes yet.

Ms. Iseri-Carvalho: But had you known that you were going to suggest to...

Ms. Yukimura: I didn't say anything about putting...

Ms. Iseri-Carvalho: You just said that earlier. Had you known... I mean I wasted three (3) hours basically waiting around until the amendments were done because you indicated that you wanted this passed out and I thought we were going to have a vote today on this.

Ms. Yukimura: We are having a vote because we want to get as close as possible as we can to passing this bill out.

Ms. Iseri-Carvalho: Well, do what you do, but we will call for a vote and let's see if you get your things passed and let's just do it that way, but I am not going to be spending another three (3) hours going through amendments. This is habitual. Every week it is like this. We are here until late at night because then we are coming on the floor and then you are doing work on the floor instead of doing it before we come to the meeting. Now, I am stuck here. This is just outrageous the amount of time that you take away from me with the kinds of things that you do on the floor. I mean that is why we have deadlines. This thing has been on for months and months and months and we deferred it and deferred it and deferred it.

Ms. Yukimura: We had deferred it and deferred it and deferred it partly because people have been away, partly because there were amendments that were wanting to be prepared and partly because we are at the end of a long Committee agenda constantly.

Ms. Iseri-Carvalho: Well, let's just call... if we have a motion, let's call for the question and let's just vote on it, otherwise I think the three (3) hours that I was here was just a waste of my time.

Ms. Yukimura: Well.

Ms. Iseri-Carvalho: So is there a motion on the floor.

Ms. Yukimura: There is a motion on the floor.

Ms. Iseri-Carvalho: Well, I am going to call for the question. Is there a second.

Ms. Yukimura: There is a second and is there any discussion? If not, all those in favor of the amendment say aye Councilmembers Iseri-Carvalho and Rapozo voting aye), opposed say "no." I am going to say "no." No, I am going to... I will say "yes," so the amendment is passed.

The motion to amend was then put, and unanimously carried.

Ms. Yukimura: Now we are back to the main motion as amended. I would recommend that we defer. I would entertain a motion to defer, so that we can do the work in Committee that needs to be done.

Mr. Furfaro: Moved to defer.

Councilmember Furfaro moved to defer.

Ms. Yukimura: Is there a second? The motion dies for a lack of a second.

Councilmember Rapozo moved to approve Bill No. 2226, Draft 1 as amended to Bill No. 2226, Draft 2, seconded by Councilmember Iseri-Carvalho.

Ms. Yukimura: Mr. Rapozo, then you are going to make the changes that you need to make to your amendment?

Mr. Rapozo: I am going to check with... I am going consider what you talked about moving the section.

Ms. Yukimura: Then I would recommend that we keep this in Committee because...

Mr. Rapozo: Well, I mean I think it is okay where it is at JoAnn.

Ms. Yukimura: It is not because it allows this to be a permitted use in a shoreline setback area. It doesn't require it to go back into the... it doesn't allow the new law to apply to it.

Mr. Rapozo: Okay, and, again, I will review it and if so, then I will prepare an amendment for the Council.

Ms. Yukimura: And Chair, you are okay with it going to the floor with it not ready?

Chair Asing: Well, normally I don't want to do that, but I'd rather you folks work it out, but at the stage that you are at right now, I am not going to, you know, say anything as far as holding you to it. It is your decision at this particular time on whatever decision your Committee comes out with is fine with me at this time.

Ms. Yukimura: Okay, all those in favor say aye.

The motion to approve was then put, and failed by a 2-2 vote (Councilmembers Iseri-Carvalho and Rapozo voting "aye" and Councilmembers Yukimura and Furfaro voting "no"). (Change tape).

Mr. Furfaro: County Clerk, did you hear the question?

Ms. Yukimura: If it is a tie vote.

PETER A. NAKAMURA, COUNTY CLERK: My apologies.

Ms. Yukimura: No, it's okay. If it is tie vote, then...

Mr. Nakamura: The main motion was to approve?

Ms. Yukimura: Yes.

Mr. Nakamura: If it is a tie vote, the motion is not passed.

Mr. Furfaro: So it goes back to Committee or it goes to Committee of the Whole.

Mr. Nakamura: The motion to amend does not pass. I assume the...

Ms. Yukimura: No, it was a motion on the main motion.

Mr. Nakamura: Then it is deferred to the next Committee meeting.

Ms. Yukimura: Thank you.

Mr. Furfaro: It does not go to the Committee of the Whole, it goes back to the Committee?

Mr. Nakamura: No.

Mr. Furfaro: Thank you for the clarification.

Ms. Yukimura: Are we okay now?

Mr. Nakamura: I believe... unless we had put it on the agenda... the bill on the agenda, the Committee of the Whole, that would be in the only way it would take it to the Committee of the Whole.

Ms. Yukimura: Okay, so then the motion dies on a tie vote and this matter is diverted to the next meeting. Is there...

Mr. Rapozo: That would be the next Committee meeting?

Ms. Yukimura: The next Committee meeting, yes.

Ms. Iseri-Carvalho: I have a question for Councilmember Furfaro. Councilmember Furfaro, will you be submitting an amendment with respect to your 40 feet plus 70 times? I know you had discussion with that.

Mr. Furfaro: I do plan to and that is what drove my "no" vote. I am not prepared with my amendment as it relates to table 2 on page 7.

Ms. Iseri-Carvalho: Alright, I understand that and you will be seeking for 40 feet, plus 50 times? Is that correct?

Mr. Furfaro: 40 feet, plus the average...

Ms. Iseri-Carvalho: Instead of 70, it would be 50 times the annual coastal erosion rate?

Mr. Furfaro: Erosion rate and that is what I will be seeking.

Ms. Iseri-Carvalho: Great.

Mr. Furfaro: It would be similar to Maui.

Ms. Iseri-Carvalho: Very well. Thank you.

Mr. Furfaro: And I apologize, I do not have an amendment prepared to that effect. I had discussion on the floor and that is something that I want to do and also, as I mentioned, I supported Councilmember Rapozo's amendment based on the fact that I want to get some feedback from the County Attorney on the taking portion.

Ms. Iseri-Carvalho: And I appreciate you submitting that amendment for setback distance of 40 feet, plus 50 times and when you are prepared with it, can you circulate it to myself because I will be considering it.

Mr. Furfaro: I hope to work this week with the County Clerk to get that done and circulated.

Ms. Iseri-Carvalho: Great. Thank you very much Councilmember Furfaro.

Mr. Rapozo: When is the next Committee meeting?

Mr. Furfaro: Two (2) weeks.

Mr. Rapozo: No, because we have...

Ms. Yukimura: It is November 14.

Mr. Furfaro: November 14.

Ms. Iseri-Carvalho: And Councilmember Furfaro, I also have an amendment that I will be circulating to the rest of the members as well as yourself in light of the discussions that we have had this evening and I hope you would consider that as well.

Mr. Furfaro: Thank you.

Ms. Yukimura: So that is good then that we will have it back in

Committee since it looks like there will be a lot of amendments. With that, we will go onto the next item which is the last item.

Mr. Furfaro: Chair, before we go, I do want to make clear that I will introduce that amendment and I do hope that we will be able to move forward after the next Committee meeting.

Ms. Yukimura: It is my wish also. Okay, our next and last item please.

**(REGARDING BILL NO. 2226, DRAFT 1, THE FOLLOWING RULES APPLY: See Resolution No. 2007-02, Rule 5(f) as follows: (f) Committee Absence, Tie Vote. At a Committee meeting, if Committee members are evenly divided on any main motion [...], the item shall be automatically referred to the next agenda of the Committee for disposition.)**

**(BACK TO BILL NO. 2204)**

Councilmember Rapozo moved to defer Bill No. 2204, seconded by Councilmember Furfaro.

Ms. Iseri-Carvalho: I am sorry, are you allowing discussion before the motion?

Ms. Yukimura: We can have the motions withdrawn if you wish to have a discussion.

Councilmember Furfaro withdrew his second; Councilmember Rapozo withdrew his motion to defer.

Ms. Yukimura: Thank you.

Ms. Iseri-Carvalho: And this is on the Act 183 or are we on the comprehensive zoning ordinance?

Ms. Yukimura: No, Bill No. 2204.

Ms. Iseri-Carvalho: And, again, I want to know what the intent of the Chair is. This bill has been on for at least a year, probably longer. Are we... there were many times that we were ready to vote on this matter and yet it showed up months later, so what is the intent of the Chair with respect to this item?

Ms. Yukimura: At least the last four (4) Committee meetings, we have been waiting for the opinion from the County Attorney which arrived today and which I had wanted to go into executive session on in the Committee of the Whole, but we don't have the attorney here right now, so we will hopefully be able to move this bill out of Committee as well at the next Committee meeting.

Ms. Iseri-Carvalho: I hope so.

Ms. Yukimura: I hope so too. Is there any further discussion?

Mr. Furfaro: Yes, I voted for this deferral as well as I think all of us received new correspondence from a new attorney that has entered the particular area representing some individuals on Lāwaʻi Road. In fact, I asked the staff to circulate that correspondence to the County Attorney and hopefully he is prepared to answer us as well as some of the other things.

Ms. Yukimura: So Councilmember Furfaro, will you be sending a request to the County Attorney?

Mr. Furfaro: Yes, I will follow up with a written request tomorrow, but I did hand or get the staff to get the piece that comes from... came from Alston Hunt Floyd and Ing Lawyers. If you folks have not seen that, I did call the attorney because it seems to have addressed the concern to me on the bill. I did talk to his office today and told him that I would circulate this with all of you folks if it was not circulated, but that, in fact, it should have been addressed to Councilwoman Yukimura for chairing the Committee. So I will hand this over my shoulder to Mr. Itamura if I can to make sure that you all have it as well tomorrow.

Ms. Yukimura: And I have it actually.

Mr. Furfaro: I was under the impression Councilmember Iseri-Carvalho that they did give it to the County Attorney today as well.

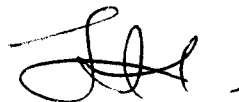
Ms. Iseri-Carvalho: Okay.

Ms. Yukimura: Thank you. Any further discussion? If not, may I have a motion to defer?

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

There being no further business, the meeting was adjourned at 9:43 p.m.

Respectfully submitted,



Lisa Ishibashi  
Council Services Assistant

APPROVED at the Committee Meeting held on November 14, 2007:



JOANN A. YUKIMURA  
Chair, Planning Committee Chair

(October 24, 2007)ji

FLOOR AMENDMENT (2)

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

Introduced by: Mel Rapozo

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] development 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. Additionally, it imposes stiff penalties for structures illegally built or illegally repaired within the shoreline setback area from the effective date of this ordinance.

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, or the seaward boundary of the lot that runs roughly parallel to the shoreline if the property is not abutting the shoreline, to the length of a line obtained by drawing a line from a point in the center of the makai (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)] (SCRF) and vegetation line. The coastal erosion study shall be carried out by a qualified professional consultant as defined in this article following procedures described in Section 4.1 of the Hawai'i Coastal Hazard Mitigation Guidebook, (January 2005). The coastal erosion study shall include but not be limited to:

(1) Mapping of the historical shoreline positions including both the 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[.] or as allowed in Section 8-22.10(a)(11)(c).

“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.

"Natural catastrophe" is a natural disaster qualifying for a governor's declaration of emergency pursuant to Hawai'i Revised Statutes Chapter 128, or a presidential declaration of emergency of a major disaster pursuant to 42USC5170, including those caused by episodic coastal hazards such as tsunamis and hurricanes, and not the result of other coastal hazards or processes such as erosion or sea level rise.

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

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

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

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

[(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.

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

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

"Shoreline 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] 181 to 200 feet	<u>More than 200 feet</u>
Then the minimum setback distance	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] Any shoreline setback line established based on a coastal erosion study [shall] may be reviewed by the Planning Commission to ensure that the law has been properly followed.

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

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

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

(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 on a minimum building footprint. This exception shall apply only to lots in existence on the date of enactment of this ordinance. Non-native vegetation may be removed only if done in conjunction with a dune restoration and re-vegetation program approved by the Director that uses naturally occurring historical endemic plant species.

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

(A) 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) 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 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.

The requirements of subsections 8-27.7(3)(A), (B) and (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, prior to the date of approval of all structures or activities. A copy of the recorded unilateral agreement shall be filed with the director and the 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 repairs do not enlarge the structure nor intensify the use of the structure or its impact on coastal processes;

(B) The repairs are valued by a licensed professional engineer or architect at less than fifty percent (50%) of the current replacement cost of the structure; and

(C) 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) Where repairs are certified by a licensed engineer to be valued as equal to or greater than fifty percent (50%) of the current replacement cost of the structure, 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 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 a single-family dwelling unit under the following guidelines:

(A) The minimum buildable footprint may be reduced to 1,500 square feet;

(B) If the foregoing approach in (A) above is applied to the maximum extent practicable, the shoreline setback may be reduced, provided that under no circumstances shall the shoreline setback line be less than forty (40) feet, except that the shoreline setback may be reduced to not less than twenty (20) feet to allow for a house with a footprint no bigger than fifteen hundred (1,500) square feet, provided that the applicant can show through the work of a qualified professional consultant that the property is not subject to undue risk from erosion, high wave action, or flooding;

(C) 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 all loss, liability, claim, or demand arising out of damages to said structures or activities from coastal natural hazards and coastal erosion;

(D) Any variance from the minimum setback shall be disclosed with every sale of property subject to this article and shall run with the land and shall be recorded in the Bureau of Conveyances or Land Court, as the case may be.

(E) The rebuilding of the dwelling unit that is nonconforming pursuant to Article 23 of Chapter 8, KCC 1987 (the Comprehensive Zoning Ordinance) that is destroyed or damaged more than fifty percent (50%) shall not be allowed.

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

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

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

(3) 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 to 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.

(4) 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 first 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 shall 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 day the application is deemed complete by the Director, the Director shall approve, approve with conditions, or deny an application for approval/determination in accordance with the criteria set forth in this Article. 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 therefor, 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. The Planning Director may submit copies of the coastal erosion study if applicable.

(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 Conveyances or Land Court as applicable prior to application for a building permit. A copy of the recorded unilateral agreement shall be submitted to the Planning Department prior to application for a building permit.

[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.] The administrative fee shall be seventy-five hundred dollars (\$7,500) if the application is made after the structure is partially or fully built without the required approvals.

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

(3) An environmental assessment prepared in accordance with HRS 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] Sec. 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 and the fact that the structure does not meet setback requirements and could be subject to coastal erosion and high wave action shall be written in a unilateral agreement that is recorded by the Bureau of Conveyances or Land Court, as the case may be. A copy of the unilateral agreement shall be submitted to the Planning Department prior to the issuance of the required zoning and/or shoreline 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.

(F) 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 any new structures approved within the shoreline setback area, and this indemnification shall be included in the unilateral agreement mentioned in Sec. 8-27.10(a)(11)(E).

(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, unless the Commission determines that a structure is necessary to protect public health and safety, and/or that removal of the structure would cause a greater public harm.

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

(a) Removal of an unpermitted structure. The Director shall, upon receipt of a complaint of an illegal structure:

(1) Determine that no permits or approvals were granted;

(2) Notify the property owner of the problem in writing and request a site inspection;

(3) Meet with any responsible regulatory authorities to resolve jurisdictional issues;

(4) Conduct a site inspection;

(5) Document the site's characteristics, such as, coastal cell, public access, public use of the area, characteristics of the beach, and any other manmade structures that may influence shoreline and/or sand transport processes where applicable;

(6) To the extent practical, determine when the structure was built and the party responsible for building the structure;

(7) Identify the primary beneficiary of the illegal structure;

(8) Evaluate how the illegal structure affects neighboring properties and the public domain;

(9) Evaluate whether removal of the structure will degrade or improve the natural environment;

(10) Where appropriate, order the removal of the structure;

(11) If the property owner refuses to remove the structure, the County may remove the structure at the Director's direction and obtain subsequent remuneration for all expenses involved in the removal. The County of Kaua'i shall not be liable for any loss, liability, claim, or demand arising out of damages related to the removal of an unpermitted structure.

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

[Sec. 8-27.11] Sec. 8-27.12 Penalties. (a) Any person who violates any provision of these rules shall be subject to the penalties provided for in HRS Section 205A-32. Where a structure is built without permits and the Director, in following the procedures outlined in Section 8-27.11(a), determines that removal of the structure would cause a greater public harm, a mandatory penalty of one thousand dollars (\$1,000) shall be imposed, plus, in the discretion of the Director, between ten percent (10%) to one hundred percent (100%) of the estimated construction cost of the unpermitted

structure shall be imposed as a penalty, considering factors such as percentage of completion, scope of work, and number of offenses.

(b) Any penalty paid pursuant to this section shall be deposited by the Director of Finance to the Planning Department's permitting budget and shall be used for the enforcement and/or education relating to the Shoreline Setback and Coastal Protection Ordinance.

[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] Sec. 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] thirty (30) days after 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.)