

This article of information has been prepared by Randy Trager; Design Build Properties Ltd March 17, 2024 from CC of Honolulu Ordinance 23-3 (July 2023) and State of Hawaii HRS 205A-42 excerpts.

Purpose is to provide the actual code [NON EXHAUSTIVE] relative to shoreline properties regarding the following topics;

1. State and County of Honolulu's concept of establishing a Shoreline physically on a property.
2. Rules for Non-Conforming Structures found to be within the Shoreline Set Back area.
3. Introduction of the Practicable Alternative towards any Re-Construction of a Dwelling
4. Shoreline Setback Variance purpose and rules.

No commentaries or interpretations are included in this article.

Commentaries or interpretations can be prepared only for a specific property upon request.

Determination of the shoreline: from State: HRS 205A-42

https://www.capitol.hawaii.gov/hrscurrent/Vol04_Ch0201-0257/HRS0205A/HRS_0205A-0042.htm

§205A-42 Determination of the shoreline. (a) The board of land and natural resources shall adopt rules pursuant to chapter 91 prescribing procedures for determining a shoreline and appeals of shoreline determinations that are consistent with subsection (b); **provided that no determination of a shoreline shall be valid for a period longer than twelve months**, except where the shoreline is fixed by artificial structures that have been approved by appropriate government agencies and for which engineering drawings exist to locate the interface between the shoreline and the structure.

(b) The chairperson of the board of land and natural resources shall cause a public notice to be published in the periodic bulletin published by the office of planning and sustainable development. All comments to the application for shoreline certification shall be submitted in writing to the state land surveyor no later than fifteen calendar days from the date of the public notice of the application. Notice of application for certification shall be identified by tax map key number, and where applicable, street address and nearest town. [L 1986, c 258, pt of §1; gen ch 1993; am L 1995, c 102, §1; am L 2021, c 152, §16 and c 153, §9]

Law Journals and Reviews

Coastline Non-Conformism. 42 UH L. Rev. 149 (2019).

Case Notes

The board of land and natural resources must consider historical evidence in making its shoreline determination. 132 H. 9, 319 P.3d 1017 (2014).

The board of land and natural resources' ultimate shoreline determination was invalid because the agency made errors of law in its amended decision, including, among other things, positing a multi-variable approach to shoreline certifications and disregarding a person's testimony. 132 H. 9, 319 P.3d 1017 (2014).

The contention that "the ultimate determination of the upper reaches of the wash of the waves at high tide ... is [solely] one for experts and those qualified under the law" is wrong as a matter of law. 132 H. 9, 319 P.3d 1017 (2014).

The issuance of an amended decision by the board of land and natural resources rendered moot any appeal from the original administrative agency decision because the original administrative agency decision was no longer effective. 132 H. 9, 319 P.3d 1017 (2014).

An Observation: The future of shoreline setbacks will render nearly every shoreline property with a dwelling as a Non-Conforming structure.

§26-1.6 Nonconforming structures.

(a) [Any] A nonconforming structure may be repaired or altered [in any manner which docs]: provided that the repairs or alterations do not increase or intensify the nonconformity and the cumulative valuation of the repairs or alterations:

(1) Does not exceed 50 percent of the replacement cost over a 10-year period of that portion of the structure that is nonconforming and located 40 feet or less from the certified shoreline; or

(2) Does not exceed 75 percent of the replacement cost over a 10-year period of that portion of the structure that is nonconforming and located more than 40 feet from the certified shoreline but makai of the shoreline setback line.

(b) If a nonconforming structure is destroyed by any means to an extent of more than 50 percent of its replacement cost at the time of destruction, it may not be reconstructed except in conformity with the provisions of this chapter and the shoreline setback rules as may be amended or superseded.

(c) Reconstruction of a nonconforming structure within the shoreline setback area requires a shoreline setback variance.

Note: Subdivision Actions are a special set of conditions Section 26-1.7

§26-1.8 Criteria for granting a shoreline setback variance.

(a) The director, as provided in §26-1.10, may grant a shoreline setback variance upon finding that based upon the record presented, the proposed structure or activity is necessary for or ancillary to:

(1) Cultivation of crops;

(2) Aquaculture;

(3) Landscaping; provided that the proposed structure or activity will not adversely affect beach processes and will not artificially fix the shoreline; or

(4) Moving of sand from one location seaward of the shoreline to another location seaward of the shoreline; provided that the director also finds that the moving of sand will not adversely affect beach processes, will not diminish the size of a public beach and will be necessary to stabilize an eroding shoreline.

(b) The director may also grant a shoreline setback variance upon finding that, based upon the record presented, the proposed structure or activity meets one of the following standards [of this section]:

(1) Shoreline-dependent facility standard. A shoreline setback variance may be granted for [an activity or] a structure or activity that is necessary for or ancillary to a shoreline-dependent facility or improvement, including but

not limited to public infrastructure, drainage facilities, and boating, maritime or [ocean sports] water sport recreational facilities; provided that the proposal is the **practicable alternative** that best conforms to the purpose of the shoreline setback rules.

From the Definitions Section; 26-1.3

Practicable Alternative. An alternative to the proposed project that is available and achievable, taking into consideration existing technology and logistics, which would accomplish the basic purpose of the project while avoiding or decreasing adverse impacts on the shoreline setback area.

(2) Public interest standard. A shoreline setback variance may be granted for a structure or activity that is necessary for or ancillary to facilities or improvements by a public agency or public utility regulated under HRS Chapter 269, or necessary for or ancillary to private facilities or improvements that are clearly in the public interest; provided that the proposal is the practicable alternative that best conforms to the purpose of this chapter and the shoreline setback rules.

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facilities or improvements that are clearly in the public interest; provided that the proposal is the **practicable alternative** that best conforms to the purpose of this chapter and the shoreline setback rules.

Shoreline Survey. A survey [performed] map rendered by a registered land surveyor for the purpose of determining the location of the shoreline in accordance with applicable Hawaii Administrative Rules.

A shoreline survey is considered a certified shoreline survey when the location of the regulatory shoreline has been determined by the State board of land and natural resources or the State surveyor in accordance with HRS § 205A-42, or its successor, and the rules adopted pursuant thereto.

Shoreline Lot. A zoning lot of record, any portion of which lies within the shoreline setback area, or if no certified shoreline survey exists, any portion of which lies within 130 feet of the natural vegetation line or debris line.

Note: A zoning lot may be determined to be a shoreline lot notwithstanding the existence of a second zoning lot or parcel situated between the first zoning lot and the shoreline.

Shoreline Setback Area. All of the land area between the shoreline and the shoreline setback line.

Shoreline Setback Line. That line established by this chapter [which runs inland] that runs mauka from and parallel to the certified shoreline at the horizontal plane.

§26-1.4 Establishment of the shoreline setback line.

(a) Except as otherwise provided in this section, the shoreline setback line is established 40 feet mauka from the certified shoreline until July 1, 2024, after which the shoreline setback line will be established at the following distances mauka from the certified shoreline:
{1} Sixty feet plus 70 times the annual coastal erosion rate, up to a maximum setback of 130 feet, on zoning lots within all development plan and sustainable communities plan areas except the Primary Urban Center Development Plan area;

provided that any property owner who believes the annual erosion rate applicable to a specific zoning lot does not accurately represent the actual erosion rate for that zoning lot may submit an application to the director requesting approval of an alternative coastal erosion rate methodology and data for the zoning lot in accordance with the procedures and informational requirements set forth in the department's rules implementing this chapter.

(2) Sixty feet on zoning lots within the Primary Urban Center Development Plan area.

(3) Sixty feet on zoning lots where historical erosion data has not been collected for the Hawaii shoreline study, or its successor, where the historical erosion data show coastal accretion, or where the historical erosion data show an annual coastal erosion rate of zero.

(b) Where the buildable area of a zoning lot is reduced to less than 1,500 square feet, the shoreline setback line may be adjusted to allow a minimum buildable area of 1500 square feet, subject to review and confirmation by the director; provided that:

- (1) The adjusted shoreline setback line may not be reduced to less than 40 feet from the certified shoreline;
- (2) The shoreline setback line may only be reduced to the minimum extent required to permit construction and repair within the reduced buildable area, including the minimum necessary area for wastewater treatment structures, required parking spaces, and other accessory structures;
- (3) The proposed structure or activity is positioned in the farthest mauka location on the zoning lot;
- (4) The buildable area is measured as a standard polygon with no angle exceeding 120 degrees;
- (5) On zoning lots that exceed 60 feet in width, the side yards may be increased so that the buildable area depth is 30 feet;
- (6) The front yard may be increased if the department of health requires wastewater treatment to be located within the front yard setback area; provided that the required front yard for the underlying zoning district may not be increased by more than 10 feet;
- (7) The proposal does not involve new shoreline hardening;
- (8) If a proposed structure is within a special flood hazard area, as defined in Chapter 21A, structural design and construction must be resilient to existing and increasing flood hazards with a finished lowest floor elevation a minimum of 3 feet above the flood insurance rate map base flood elevation; and
- (9) If a proposed structure is outside of the special flood hazard area but within the sea level rise exposure area under the scenario envisioning 3.2 feet of sea level rise by the year 2100, the lowest floor of the structure must be a minimum of 3' feet above the highest adjacent grade.

(c) Once a shoreline has been certified and a shoreline setback line has been established, no shoreline setback line may be established farther seaward as the result of a subsequent certified shoreline survey.

(d) A shoreline setback line determination approved by the director for zoning lots with erosion-rate-based setbacks may be issued at a property owner's request prior to the issuance of any land use, development, or building permits, or any subdivision actions.

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

(3) Hardship Standard.

(A) A shoreline setback variance may be granted for a structure or activity if hardship will result to the applicant if the facilities or improvements are not allowed within the shoreline setback area

(B) For the purposes of this subsection, hardship may be found only if all of the following are met:

- (i) The structures will neither adversely affect beach processes nor artificially fix the shoreline, and the applicant and landowner would be deprived of reasonable use of the land if required to comply fully with [the shoreline setback this chapter and the shoreline setback rules;
- (ii) The applicant's proposal is due to unique circumstances does not draw into question the reasonableness of this chapter and the shoreline setback rules is consistent and compatible with surrounding land uses. and is unlikely to adversely impact neighboring properties; and
- (iii) The proposal is the practicable alternative that best conforms to the purpose of this chapter and the shoreline setback rules. The analysis of the practicable alternatives must include a thorough assessment of potential impacts and consideration of mitigation measures to avoid or minimize impacts, including but not limited to the relocation or reconfiguration of structures and the restoration of coastal resources.

(C) A shoreline setback variance to artificially fix the shoreline may not be granted in areas with sandy beaches or dunes, or where artificially fixing the shoreline may interfere with existing recreational and waterline activities or natural sand and sediment replenishment that occur as part of beach processes, unless the granting of the shoreline setback variance is clearly demonstrated to be in the public interest.

(D) Before granting a shoreline setback variance on the basis of hardship, the director 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. 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 zoning lot.

§26-1.9 Conditions on shoreline setback variances.

No shoreline setback variance be granted unless appropriate conditions are imposed:

- (1) To maintain safe access to and along the shoreline or adequately compensate for its loss;
 - (2) To minimize risk of adverse impacts to coastal, beach, and marine processes;
 - (3) To minimize the risk of existing legal or proposed structures falling and becoming loose rocks, sharp or otherwise dangerous debris, or rubble on public property; and
 - (4) To minimize adverse impacts on public views to, from, and along the shoreline.
- (b) The director may condition the approval of a shoreline setback variance for structures, activities, and uses within the shoreline setback area on the property being ineligible for subsequent shoreline setback variances to construct shoreline hardening within the shoreline setback area. and stipulate that hardship may not be determined as a result of the prior shoreline setback variance approval.
- (c) The city is not liable for any losses, liabilities, claims, or demands arising out of or resulting from damages to structures or property within the shoreline setback area approved by a shoreline setback variance.

§26-1.10 Authority to act on shoreline setback variance applications.

- (a) The director shall act upon all shoreline setback variance applications according to the criteria set forth in this chapter.
- (b) The applicant shall give reasonable notice of an application for a shoreline setback variance under this Chapter to abutting property owners, affected neighborhood boards and community associations, and persons that have requested receipt of a notice.

§26-1.11 Public hearings

- (a) The director shall hold a public hearing on each shoreline setback variance application;
- (b) The director shall give reasonable notice of the public hearing for a shoreline setback variance application to the applicant affected neighborhood boards and community associations, and persons that have requested notice of the public hearing. The applicant must mail notices to neighboring property owners within 300 feet of the zoning lot, and persons that have requested receipt of a notice; provided that if a neighboring property is a condominium project, notice to the association of apartment owners of the condominium project will serve as notice to the owners of the units in the project.

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