

Chapter 23

SHORELINE SETBACKS

Articles:

1. Shoreline Setbacks.

Article 1. Shoreline Setbacks

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Sec. 23-1.1 Authority.

Pursuant to the authority conferred by HRS Chapter 205A, the standards and procedures contained in this chapter are hereby established and shall apply to all lands within the shoreline area of the city. (Added by Ord. 92-34)

Sec. 23-1.2 Purpose.

- (a) It is a primary policy of the city to protect and preserve the natural shoreline, especially sandy beaches; to protect and preserve public pedestrian access laterally along the shoreline and to the sea; and to protect and preserve open space along the shoreline. It is also a secondary policy of the city to reduce hazards to property from coastal floods.
- (b) To carry out these policies and to comply with the mandate stated in HRS Chapter 205A, it is the specific purpose of this chapter to establish standards and to authorize the department of land utilization to adopt rules pursuant to HRS Chapter 91, which generally prohibit within the shoreline area any construction or activity which may adversely affect beach processes, public access along the shoreline, or shoreline open space.
- (c) Finally, it is the purpose of this chapter to name the director of land utilization as the council's designee to exercise some of the powers and functions granted, and duties imposed, pursuant to HRS Chapter 205A, Part III.

(Added by Ord. 92-34)

Sec. 23-1.3 Definitions.

For the purposes of this chapter, unless it is plainly evident from the context that a different meaning is intended, the following words and phrases are defined as follows:

"Activity" means any grubbing or any grading or stockpiling of earth materials.

"Applicant" means any individual, organization, partnership, firm, association, trust, estate, or corporation and any agency of the federal, the state, or any county government.

"Buildable area" means that portion of a zoning lot excluding the shoreline setback, required yards, street setbacks, stream setbacks, easements and flag stems.

"Certified shoreline" or "certified shoreline survey" means the shoreline as marked on the ground and as shown on a shoreline survey which has been certified by the state department of land and natural resources under Hawaii Administrative Rules, Title 13, Chapter 222, entitled "Shoreline Certification."

"Council" means the city council of the City and County of Honolulu.

"Department" means the department of land utilization, which agency shall act as the "county planning department" under HRS Section 205A-41.

"Director" means the director of land utilization.

"Earth material" means any sand, coral or coral rubble, rocks, soil, fill or marine deposits.

"Excavation" or "cut" means any act by which earth material is cut into, dug or moved, and any condition resulting therefrom.

"Fill" means any act by which earth material is placed or deposited by artificial means and any condition resulting therefrom.

"Grading" means any excavation or fill or any combination thereof.

"Grubbing" means any act by which vegetation, including trees, shrubs or other plants, is dislodged or uprooted from the surface of the ground.

"HRS" means the Hawaii Revised Statutes.

"Nonconforming structure" means a structure or portion of a structure which was previously lawful but which is located within the shoreline setback as a result of subsequent beach erosion, or as a result of changes in the law relating to the shoreline setback.

"Practicable alternative" means an alternative to the proposed project which is available and capable of being done, taking into consideration existing technology and logistics, and which would accomplish the basic purpose of the project while avoiding or having less adverse impact on the shoreline area.

"Shoreline" means the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves.

"Shoreline area" means all of the land area between the shoreline and the shoreline setback line.

"Shoreline lot" means a zoning lot of record, any portion of which lies within the shoreline area, or when there is no certified shoreline survey any portion of which lies within 55 feet inland of the natural vegetation line. A lot may be determined to be a shoreline lot notwithstanding the existence of a second lot between the lot and the shoreline.

"Shoreline setback line" means that line established by this chapter which runs inland from and parallel to the certified shoreline at the horizontal plane.

"Shoreline survey" means a survey performed by a registered land surveyor for the purpose of determining the location of the shoreline, in accordance with Hawaii Administrative Rules, Title 13, Chapter 222, entitled "Shoreline Certification."

"Shore protection structure" means a structure which may artificially fix the location of the shoreline, including but not limited to a groin, seawall, or revetment.

"Stockpiling" means the temporary open storage of earth materials.

"Structure" means any portion of any building, pavement, road, pipe, flume, utility line, fence, groin, wall, or revetment; or anything constructed or erected with a fixed location at or under the ground, or requiring a fixed location on or under the ground, or attached to something having or requiring a fixed location on or below the ground. (Added by Ord. 92-34)

Sec. 23-1.4 Shoreline setback line.

- (a) General Rule. Except as otherwise provided in this section, the shoreline setback line shall be established 40 feet inland from the certified shoreline.
- (b) Adjustment of Shoreline Setback Line on Shallow Lots. Where the depth of the buildable area of a lot, as measured seaward from its inland edge, is reduced to less than 30 feet, the shoreline setback line shall be adjusted to allow a minimum depth of buildable area of 30 feet; provided that the adjusted shoreline setback line shall be no less than 20 feet from the certified shoreline.
- (c) Adjustment of Shoreline Setback Line Related to the Construction of a Shore Protection Structure. Once a shoreline has been certified from which a shoreline setback line can be established, no shoreline setback line shall be established farther seaward as the result of a subsequent certified shoreline survey following the construction of a shore protection structure. On a lot where the certified shoreline is permanently fixed by a shore protection structure, the shoreline setback line shall be established by measuring inland from the shoreline, as it was located prior to the construction of the shoreline protection structure.

Where the shore protection structure was constructed without a shoreline survey first being made and certified by the state department of land and natural resources, the director shall determine the prior location of the shoreline solely for the purpose of establishing the shoreline setback line. In so doing, the director shall consider the actual location of the high wash of the waves during the year and the location of the shoreline and the shoreline setback line on adjacent properties. The resulting shoreline setback line may be further than 40 feet from the shoreline established by the department of land utilization following construction of the shore protection structure.

(Added by Ord. 92-34)

Sec. 23-1.5 Prohibitions within the shoreline area.

- (a) The mining or taking of any earth material from the shoreline area is prohibited, with the following exceptions:
- (1) The taking of materials, not in excess of one gallon per person per day, for reasonable, personal, noncommercial use, provided that it does not result cumulatively in changing the topography of the shoreline area;
 - (2) Where the mining or taking is authorized by a variance granted pursuant to this chapter;
 - (3) The clearing of materials from existing drainage pipes, canals and the mouths of streams, including clearing for purposes allowed under HRS Section 46-11.5; provided that sand removed shall be placed on adjacent areas unless the placement would result in significant turbidity; or
 - (4) The clearing of the shoreline area for state or city maintenance purposes, including clearing for purposes under HRS Section 46-12; provided that sand removed shall be placed on adjacent areas unless the placement would result in significant turbidity.
- (b) Structures and activities are prohibited within the shoreline area, with the following exceptions:
- (1) Minor structures and activities permitted under rules adopted by the department which do not affect beach processes or artificially fix the shoreline and do not interfere with public access, public views or open space along the shoreline. If, due to beach erosion or other cause, the director determines that a minor structure permitted under this section may affect beach processes or public access or has become located seaward of the shoreline, the director or other governmental agency having jurisdiction may order its removal;
 - (2) Minor structures and activities necessary for or ancillary to continuation, but not expansion, of agriculture or aquaculture in the shoreline area on June 16, 1989;
 - (3) Maintenance, repair, reconstruction, and minor additions to or alterations of legal, publicly owned boating, maritime, or ocean sports recreational facilities, which result in little or no interference with natural shoreline processes. Privately owned boating, maritime, or ocean sports recreational facilities are specifically excluded from this exception;
 - (4) Nonconforming structures or structures that have received a shoreline setback variance;
 - (5) Construction, installation, maintenance, repair, and replacement of civil defense warning or signal devices and sirens.

(Added by Ord. 92-34; Am. Ord. 10-32)

Sec. 23-1.6 Nonconforming structures.

- (a) Any nonconforming structure may be repaired or altered in any manner which does not increase its nonconformity.
- (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 shall not be reconstructed except in conformity with the provisions of this chapter and the shoreline setback rules and regulations, or successor regulations. Reconstruction of such a structure within the shoreline area shall require a variance.

(Added by Ord. 92-34)

Sec. 23-1.7 Subdivision actions.

- (a) Except as provided in this chapter, no new subdivision action, including the subdivision or consolidation of land, for an existing shoreline lot to create new lots may be approved unless each new lot:
 - (1) Can accommodate a 60-foot shoreline setback, except for:
 - (A) Areas that are not within the coastal high hazard district and where the entire shoreline for the new lot is characterized by either:
 - (i) an authorized shoreline protection structure; or
 - (ii) a fixed, rocky shoreline;in which case the department may approve new shoreline lots that will accommodate a 40-foot shoreline setback; or
 - (B) Minor subdivision actions involving the subdivision or consolidation of land only for the purpose of creating easements or adjusting lot lines, and which will not result in any increase in the number of permitted dwelling units, nonresidential structures, or lots;
 - and,
 - (2) Has a buildable area adequate to accommodate the proposed development, including appurtenant uses and structures, such as parking.Accreted lands obtained from the State of Hawaii pursuant to HRS Section 501-33 shall not be included as part of the land area when making calculations of the lot size available for subdivision.
- (b) Subdivision of existing shoreline lots for the purpose of widening roadways designated on the public infrastructure maps adopted pursuant to Chapter 4, Article 8, may be permitted, upon review and approval of the director.
- (c) New residential lots may not be approved unless each new lot:
 - (1) Has a buildable area of at least 3,000 square feet; and
 - (2) Has a buildable area with a minimum depth and width of at least 50 feet.

(Added by Ord. 92-34; Am. Ord. 10-32)

Sec. 23-1.8 Criteria for granting a variance.

- (a) The director, as provided in Section 23-1.10, may grant a 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;
 - (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 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 variance may be granted for an activity or structure that is necessary for or ancillary to a shoreline-dependent facility or improvement, including drainage facilities and boating, maritime or ocean sports recreational facilities; provided that the proposal is the practicable alternative which best conforms to the purpose of the shoreline setback rules.
 - (2) Public Interest Standard. A variance may be granted for an activity or structure that is necessary for or ancillary to facilities or improvements by a public agency or by a 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 which best conforms to the purpose of this chapter and the shoreline setback rules.
Public interest shall mean principally of benefit to the general public, as determined by the director.
 - (3) Hardship Standard.
 - (A) A variance may be granted for an activity or structure that is necessary or ancillary to the following private facilities or improvements, if hardship will result to the applicant if the facilities or improvements are not allowed within the shoreline area:
 - (i) Private facilities or improvements which will neither adversely affect beach processes nor artificially fix the shoreline; and
 - (ii) Private facilities or improvements that may artificially fix the shoreline, but only if hardship is likely to be caused by shoreline erosion and conditions are imposed prohibiting any such structure seaward of the existing shoreline unless it is clearly in the public interest.
 - (B) For the purposes of this subsection, hardship may be found only if:
 - (i) The applicant would be deprived of reasonable use of the land if required to comply fully with the shoreline setback ordinance and the shoreline setback rules;
 - (ii) The applicant's proposal is due to unique circumstances and does not draw into question the reasonableness of this chapter and the shoreline setback rules; and

- (iii) The proposal is the practicable alternative which best conforms to the purpose of this chapter and the shoreline setback rules.
- (C) Before granting a hardship variance, 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 lot.
- (D) Hardship shall not be determined as a result of a zone change, plan review use approval, subdivision approval, cluster housing approval, planned development housing approval, conditional use permit, or any other discretionary land use permit granted after June 16, 1989.

(Added by Ord. 92-34; Am. Ord. 10-32)

Sec. 23-1.9 Conditions on variances.

- No variance shall be granted unless appropriate conditions are imposed:
- (a) To maintain safe access to and along the shoreline or adequately compensate for its loss;
 - (b) To minimize risk of adverse impacts on beach processes;
 - (c) To minimize risk of existing legal or proposed structures falling and becoming loose rocks or rubble on public property; and
 - (d) To minimize adverse impacts on public views to, from and along the shoreline.

(Added by Ord. 92-34)

Sec. 23-1.10 Authority to act on variance applications--Notice of application.

- (a) The director shall act upon all variance applications according to the criteria contained in this chapter.
- (b) The director shall give notice of an application for a variance under this chapter to abutting property owners, to affected neighborhood boards and community associations and to persons who have requested notice.

(Added by Ord. 92-34)

Sec. 23-1.11 Public hearings on variance applications.

- (a) The director shall hold a public hearing on each variance application, except that the director may waive the hearing on variances for the following:
 - (1) Stabilization of shoreline erosion involving the movement of sand entirely on public lands;
 - (2) Application for shore protection where a legal habitable structure is at risk of immediate damage from shoreline erosion as determined by the director;
 - (3) Other structures or activities; provided that no person or agency has requested a public hearing within 25 calendar days after public notice of the application;
 - (4) Application qualifying for an emergency permit under Chapter 25 of this code; or
 - (5) Maintenance, repair, reconstruction and minor additions to or alterations of legal boating, maritime or water sports recreational facilities, which result in little or no interference with natural shoreline processes.
- (b) The director shall give reasonable notice of the public hearing on any variance application to the applicant, to any person or agency that requested the public hearing, and to abutting property owners and any other person who requested notice.

(Added by Ord. 92-34)

Sec. 23-1.12 Variance application fee.

- (a) The application fee for a variance under this chapter shall be \$1,200.00, which shall not be refundable; provided that the fee shall be waived for city projects.
- (b) When a shoreline setback variance or minor shoreline structure permit application, or a related environmental assessment or impact statement is submitted subsequent to the applicant's having completed the activity or structure for which the variance or minor shoreline structure permit is sought, or having been cited for the activity or construction without having obtained a variance or minor shoreline structure permit, the application or processing fee shall be doubled.
- (c) When a request for a written clearance regarding compliance with the shoreline setback ordinance or confirmation regarding the nonconforming status of a shoreline structure is submitted for processing, the fee shall be \$300.00 per tax map key.
- (d) When a minor shoreline structure permit application is submitted for processing, the application fee shall be \$200.00.
- (e) When an environmental assessment or impact statement must be prepared as a prerequisite to a variance required by this chapter, and is submitted to the department of planning and permitting for processing as the accepting agency, there shall be a processing fee of \$600.00 for an environmental assessment, and \$1,200.00 for an environmental impact statement.
- (f) When a shoreline setback variance, minor shoreline structure permit, or prerequisite environmental assessment or impact statement is submitted for processing, there shall be a nonrefundable application review fee to determine whether the application is complete or incomplete, as follows:
 - (1) Applications with a fee of \$1,200.00 or more shall have an application review fee of \$400.00;
 - (2) Applications with a fee of \$600.00 shall have an application review fee of \$200.00;
 - (3) Minor shoreline structure permits shall have an application review fee of \$100.00.

When an application under this section has been accepted by the department for processing, the application review fee for the submitted application shall be counted as partial payment towards the total application fee for that submittal.

(Added by Ord. 92-34; Am. Ord. 03-12, 13-16, 14-4)

Sec. 23-1.13 Civil fines.

- (a) Any person who violates any provision of this chapter, any rule adopted pursuant thereto, any permit issued pursuant thereto, or any condition of a shoreline variance shall, upon notice issued pursuant to Section 23-1.14, be deemed to have

committed a civil violation and shall be subject to an initial civil fine not to exceed \$10,000.00 per violation and a maximum daily fine of \$1,000.00 until the violation is corrected or a variance is granted.

- (b) A variance application submitted subsequent to an applicant's having completed the activity or structure, or having been cited for the activity or the construction without having obtained a variance, shall not stay any order to pay civil fines.

(Added by Ord. 92-34)

Sec. 23-1.14 Enforcement.

- (a) Issuance of Notice of Violation and Order. If the director determines that any person is violating any provision of this chapter, any rule adopted thereunder, any permit issued pursuant thereto, or any condition of a shoreline setback variance, the director may have the person served, by registered or certified mail, delivery, or publication, with a written notice of violation and order.
- (1) Contents of the Notice of Violation. The notice shall include at least the following information:
 - (A) Date of notice;
 - (B) The name and address of the person given notice;
 - (C) The section number of the ordinance or rule which has been violated;
 - (D) The nature of the violation; and
 - (E) The location and the time that the violation was discovered.
 - (2) Contents of the Order. The order may require the person to do any or all of the following:
 - (A) Cease and desist from the violation;
 - (B) Correct the violation at the person's own expense, which may include removal of any structure and restoration of land to previous conditions;
 - (C) Pay a civil fine not to exceed \$10,000.00 in the manner, at the place and before the date specified in the order;
 - (D) Pay a civil fine not to exceed \$1,000.00 per day for each day in which the violation persists, in the manner, at the place and before the date specified in the order; and
 - (E) Appear before the director at a time and place specified in the order and answer the charges specified in the notice of violation.

The order shall advise the person that the order shall become final 30 days after the date of its mailing, delivery, or publication unless written request for a hearing is mailed or delivered to the director within said 30 days.

- (b) Effect of Order--Right to Hearing. The provisions of the order issued by the director under this section shall become final 30 days after the date of the mailing, delivery, or publication of the order. The person to whom the notice is directed may request a hearing before the director. A request for a hearing shall not stay any provision of the order. The request for a hearing shall be considered timely if a written request is delivered or mailed and postmark dated to the director within said 30 days. Upon receipt of a request for a hearing, the director shall specify a time and place for the person subject to the order to appear and be heard. The hearing shall be conducted by the director or the director's designee in accordance with the provisions of HRS Chapter 91. Following said hearing, the director may affirm, modify or rescind the order as in the opinion of the director may be appropriate.
- (c) Judicial Enforcement of Order. The director may institute a civil action in any court of competent jurisdiction for the enforcement of any order issued pursuant to this section. Where the civil action has been instituted to enforce the civil fine imposed by such order, the director need only show that a notice of violation and order was served, a hearing was held or the time allowed for requesting a hearing had expired without such a request, that a civil fine was imposed and that the fine imposed has not been paid. The director may institute a civil action in any court of competent jurisdiction for injunctive relief to prevent violation of any provision of this chapter, any rule adopted thereunder, any permit issued pursuant thereto or any condition of any shoreline setback variance in addition to any other remedy provided for under this chapter.
- (d) Nonexclusiveness of Remedies. The remedies provided in this chapter for enforcement of the provisions of this chapter, any rule adopted thereunder, any permit issued pursuant thereto, or any condition of any shoreline setback variance shall be in addition to any other remedy as may be provided by law.
- (e) Appeal in Accordance with Statute. If any person is aggrieved by the order issued by the director pursuant to this section, the person may appeal the order in the manner provided in HRS Chapter 91, provided that no provision of such order shall be stayed on appeal unless specifically ordered by a court of competent jurisdiction.

(Added by Ord. 92-34)

Sec. 23-1.15 Illegal shore protection structures.

Where the shoreline is affected by a man-made structure that has not been authorized with government agency permits required by law:

- (a) If any part of the structure lies within the current tax map boundaries of a privately owned parcel, then for purposes of enforcement of this chapter, the structure shall be construed to be entirely within the shoreline area; and
- (b) No building permit or grading permit shall be granted on a shoreline lot until the illegal structure is removed or corrected; except, however, that such permits may be granted where the director determines it necessary to protect public health and safety.

(Added by Ord. 92-34)

Sec. 23-1.16 Rules.

The department shall adopt rules pursuant to HRS Chapter 91 to implement this chapter and HRS Chapter 205A, Part III. The rules may designate high quality sandy beaches which should be preserved and may include guidelines or prohibitions relating to the types of shore protection structures which may or may not be allowed on these and other beaches.

(Added by Ord. 92-34)