

Hawaii Land Use Regulatory System

(Prepared by Hawaii County Planning Director, March 2006)

The Hawaii system of land use regulation is complex. Books have been written on the subject. What follows is a simplified version and omits many exceptions to the rules.

Private land use in Hawaii is highly regulated by a **dual system** of state and county laws. There are also federal laws that affect land use, such as wetland protection. Federal lands (such as the national parks) are not covered by state and county land use laws.

State land use classifications:

All land in Hawaii is classified into one of four classifications: Conservation (about 51% of the land on this island), Agricultural (about 46%), Rural (less than 1%), and Urban (about 2.5%). The boundaries were initially set by the State Land Use Commission (LUC), a body of nine members appointed by the Governor.

Changes to the boundaries can be done by ordinance of the County Council for areas of 15 acres or less, otherwise, the LUC must approve changes by a 6-3 vote. Only the LUC can take land out of the Conservation District. Typically, boundary amendments are initiated by landowner application and reviewed on a case-by-case basis, but the law also allows the state to conduct a periodic boundary review.

Conservation District:

Except for land that is also in the Special Management Area (SMA), as explained in more detail below, the Conservation District is solely under State jurisdiction. The Conservation District is further divided into four main subzones: Protective, Limited, Resource, and General. In terms of uses, the strictest is the Protective; the least strict is the General. There is also a "Special" subzone that can accommodate unique projects.

The Conservation District allows only a very limited range of uses, and most of these need a Conservation District Use Permit (CDUP) from the Board of Land and Natural Resources (BLNR), a seven-member board appointed by the governor. The BLNR can approve single-family homes in the Resource and General subzones, and in some situations, in the Limited subzone. House size is limited to 3500 ft² for lots less than one acre; 5000 square feet for larger lots. The BLNR can also approve, through CDUP, such things as highways, infrastructure for utilities, and resource-dependent power plants such as hydro or geothermal power.

The Department of Land and Natural Resources (DLNR) has administrative responsibility over the Conservation District.

Agricultural District.

The County administers the Agricultural District within the framework of the State land use law. State law and LUC rules limit uses in the agricultural district, most of them

relating to agriculture, including mills and other processing facilities, but allowing some non-agricultural uses such as wind energy facilities. On lots created by subdivisions approved after June 4, 1976, homes are supposed to be “farm dwellings”, or otherwise accessory to agriculture, but in pre-June 4, 1976 subdivisions the homes can be “single-family dwellings.”

Lot sizes for subdivisions in the Agricultural District are set by the County Council through zoning, but must be at least one acre by state law.

The “special permit” process potentially allows a wide range of other uses. A special permit can be issued for any “unusual and reasonable” use. For areas of 15 acres or less, the County Planning Commission decides the special permit. For more than 15 acres, the special permit must be approved by both the Planning Commission and the State Land Use Commission. Examples of common special permits are bed-and-breakfast operations and cell phone towers.

Rural District.

There are only three significant differences between the Rural District and the Agricultural District: (1) homes can be single-family dwellings, even on post-June 4, 1976 subdivisions, (2) the minimum lot size is ½ acre (with an exception to 18,500 ft²), and (3) since a recent change in the law in 2005, golf courses are permitted in Rural, but not in the Agricultural District (although golf courses previously built or approved by the counties in the Agricultural District remain legal.)

Urban District.

The urban district is entirely under county jurisdiction and uses are controlled only by county zoning.

Key References: H.R.S. Chap. 205; H.R.S. Chap. 183C; H.A.R. 13-5 (BLNR Administrative Rules); H.A.R. 15-15 (LUC Administrative Rules); Planning Commission Rule 6 (Special Permits)

County Land Use System

General Plan.

The General Plan is the overall guide to county land use decisions like zoning. The General Plan is an ordinance enacted by the County Council. The current General Plan was enacted in February 2005. The General Plan consists of a written portion, which has a set of goals, policies, standards, and courses of action, and maps. The text also includes a list of the urban, industrial, and resort areas. The maps include the “Land Use Pattern Allocation Guide Map” or “LUPAG” map, which gives the general location of land uses in the county.

When the County Council is considering a change of zone, or when the Planning Commission is considering an SMA permit, a special permit, or a use permit, the decision is supposed to be consistent with the goals, policies, standards, and courses of action in

the General Plan, and also consistent with the LUPAG map. This means, for example, if the LUPAG map shows an area as “Open”, the County Council should not approve a rezoning to allow a hotel in the area, without first amending the General Plan. Amendments to the General Plan can be initiated by the Planning Director or the Council, and must be approved by the Council by ordinance.

In most cases, however, the lines on the LUPAG map are not exact; they are meant to show the general location of potential uses.

The General Plan also contains facilities maps. The roadway facilities map is particularly important because it is supposed to guide future highway development on the island, and thus guides county CIP decisions.

Community Development Plans.

Since 1971, the General Plan has called for community development plans. The community development plans are supposed to be more specific and more tailored to the desires of various communities. Over the years, the county has not kept up with community development plans. The 2005 General Plan called for a revival of this process and included a mandate that they be adopted by ordinance. Currently, the county is working on new community development plans for Kona and Puna.

Zoning.

Zoning is the main county land use control. All areas on the island, except for federal lands like the national parks, and some areas in the conservation district, are zoned. The Zoning Code lists the permitted uses within each zone, and also the required setbacks, height limits, parking areas for commercial developments, and other controls. Within each type of zone, the zoning also controls the density. For example, an “RS-10” zone is a single-family residential zone with a minimum lot size of 10,000 square feet; an RM-2.5 zone is a multi-family zone, allowing apartment buildings, with a maximum density of one unit for every 2500 square feet of land; an A-5a zone is an agricultural zone with a minimum lot size of 5 acres.

We did not have island-wide zoning until 1967. Before that, only Hilo and some of the other towns were zoned. In 1967, a set of zoning maps were adopted by ordinance covering the entire island. Since then, zone changes are made through rezoning. Zoning changes are reviewed by the Planning Commission, but must be finally approved by the County Council through ordinance. There have been roughly 1000 individual zoning changes in the past 35 years.

Every zone will have a list of “permitted” uses, that are allowed outright without further approvals (except for needing “ministerial” permits—see explanation below—like building permits.) For example, “automobile service stations” are a permitted use in a “CV” (“Village Commercial”) zone, but not in an RS zone. If a use is not listed, it is not allowed in that zone. A few other uses can be allowed by “Use Permit”, which must be approved by the Planning Commission. For example, a church can be allowed in an RS zone with a use permit.

Key References: H.R.S. sec. 46-4, H.C.C. Chap. 25.

SMA.

The “Special Management Area” or “SMA” is an area that gets additional scrutiny. The SMA law is mostly intended to protect the environmental resources of the coastal area. The SMA maps were enacted by the Planning Commission by rule, and can be amended by the Planning Commission. The SMA is the area from the shoreline to the “SMA line”, which is plotted on these maps. The SMA varies greatly in width on different parts of the island—from almost nothing to over a mile.

Within the SMA, “development”, as defined in the SMA rules, needs either a “major” permit, which is issued by the Planning Commission, or a “minor” permit, which is issued by the Planning Director. A project needs a major permit if it is valued at over \$125,000, or if the Planning Director determines that it may have a significant environmental or ecological effect in the SMA. The SMA law also lists certain kinds of development as “exempt”, and not needing a permit, unless, again, the Planning Director determines that it may have a significant environmental or ecological effect in the SMA. The most common “exempt” action is the construction of a single-family home that is not part of a larger project. The SMA law also applies to governmental actions, so new highways and public beach parks, for example, will need SMA permits if located in the SMA.

Key References: H.R.S. Chap. 205A; Planning Commission Rule 9.

Administrative Permits.

Some land use permits and controls are done administratively within the Planning Department. The Department of Public Works and Department of Water Supply also have major roles in the development process. The administrative permits tend not to be as visible because they usually do not involve public hearings, but they can be extremely important. Among the most significant:

Subdivision.

To divide a larger property into smaller lots requires subdivision approval from the Planning Department. Example: a property that is currently 100 acres, but zoned A-5a, can theoretically be divided into 20 lots of 5 acres each by the zoning, but it first must receive subdivision approval. The main issues at subdivision are the adequacy of the roads, water supply, and drainage. Historical sites and access to the sea and mountains can also be addressed at the subdivision stage. Reference: H.C.C. Chap. 23.

Grading and Grubbing. Grading (cutting into the earth) of more than 100 cubic yards, and grubbing (mechanical clearing of the surface without cutting into the ground) of more than one acre in a year, require permits from the DPW. The Planning Department reviews grading and grubbing permit applications to determine that the proposal is in support of something allowed by zoning.

Plan Approval. Most construction of buildings in commercial, industrial, and resort zones needs “plan approval”, from the Planning Department. This is similar to a building permit review but also checks for things like adequate parking, landscaping, and ingress and egress. It is also a point where Planning staff checks for compliance with conditions of zoning.

Building Permits. Most buildings need a building permit from DPW. Planning reviews building permit applications ensure that the building is a permitted use and that it has proper setbacks.

Variances. The zoning and subdivision codes allow variances for unusual situations. For example, the fact that a lot has an unusual shape may justify a variance from the building setbacks. The Planning Director decides on variances.

Board of Appeals

The County Charter establishes a Board of Appeals, which consists of seven members appointed by the mayor. The Board of Appeals can overrule final decisions made by the Planning Director and the Director of Public Works. For example, if the Planning Director denies a subdivision variance and the applicant appeals, the Board of Appeals can overrule the denial, but only if it finds that the Director’s decision was arbitrary, capricious, or an abuse of discretion, contrary to law, or clearly erroneous.

Land Use Approval Process

For any property, some uses are allowed without any further approvals, except possibly administrative approvals such as building permits, and there is a process that the owner can go through if the owner wants other kinds of uses. This is easiest explained by example:

Take a property that is Open on the LUPAG map, Conservation in State Land Use District, Open in County Zoning, and is also in the SMA. Only a few uses are permitted outright. Most other uses in Conservation, even a house, will require a CDUP. If the owner wants, for example, to build a resort with a golf course, the owner will need the following:

1. LUPAG map amendment and amendment to list of “resort” areas—County Council.
2. State Land Use boundary amendment from Conservation to Urban—LUC. (Technically, the boundary amendment can proceed the LUPAG map amendment if this goes to the LUC but because the LUC is supposed to consider the county general plan the owner’s chances are better if the LUPAG map amendment comes first.)
3. Rezoning from “Open” to “V” (hotel/resort)—County Council

4. SMA major permit—Planning Commission (technically the SMA permit can be granted before the zone change, but on condition that it doesn't take effect until the zone change is approved.)
5. Use permit for the golf course—Planning Commission

A denial at any of these stages would keep the project from being built.

After receiving all of these approvals, the project will also need several administrative approvals, including subdivision, plan approval, and building permits.

Land Use Decisionmaking

All of the land use approvals that go to the County Council, Planning Commission, or Land Use Commission are called “discretionary” because the decisionmakers must use their personal judgment and discretion. The various land use laws contain criteria for making the decision, but in the end, the individual councilmember or commissioner will have to weigh various factors, and can vote yes or no. For example, in a rezoning that might allow new apartment buildings the issues may be the desire for new housing, the effect on traffic and neighboring properties, potential for increased runoff, impact on historic sites, loss of open space, and so on.

When a board or commission has the final decision on a permit, the hearing process is called a “contested case.” The applicant has the right to have the decision made “on the record”—that is, solely on what is officially presented to the commission. The applicant also has the right to appeal an adverse decision to court. Persons who may be affected by the application have the right to “intervene”—that is, become parties to the contested case hearing. After “intervention”, the hearing will typically become more formal. Intervenors also have the right to appeal an adverse decision to court.

Decisions made by the County Council are “legislative” and the Council does not have to follow a contested case hearing procedures.

Most administrative permits are considered “nondiscretionary” or “ministerial” because if the applicant follows the criteria in the law, the administrator must issue the permit. For example, if an applicant submits a building permit application that shows that the building complies with the building code and all other applicable laws to the letter, the building permit must be granted.

Limits of Land Use Regulation

Although the use of land is highly regulated, a land use regulation that goes too far can be considered a taking of private property, and the government then has to compensate the

landowner. A series of U.S. Supreme Court decisions govern the law of takings. It is much too complex to be summarized even in a few pages. Generally, though, a regulation can greatly reduce the value of property without being a taking. Courts have sustained downzonings that decreased the value by as much as 95%. But a regulation that deprives the owner of all “economically viable use” of the property will be considered a taking. The denial of a landowner’s request for a rezoning will generally not be a taking, unless the property has no economically viable use under its existing zoning.

The U.S. Supreme Court has also put limits on the kinds of conditions that can be attached to a land use approval. Conditions must be related to the impact of the land use change: there has to be a “rational nexus” between the land use condition and the problem. For example, it would be illegal to make an applicant pay for the re-roofing of the County Building as a condition of a rezoning to allow a shopping center: there is no “nexus” with any impact created by the shopping center. There must also be a “rough proportionality” between any condition and the impact of the project. For example, making the developer of a small residential project pay for a new fire station would violate “proportionality.”

The state and county can change land use approvals that have already been given. For example, the County Council has the power to “downzone” a property to allow much less development. At a certain point, however, the rights under existing approvals become “vested” and the government cannot take them away without paying compensation. In Hawaii, rights vest when the landowner has made substantial investments in good faith reliance on the final discretionary permit. For example, a project that has zoning, but still needs an SMA permit, is not “vested” because it has not received its final discretionary permit. If the project only needs a building permit, and the owner has spent money on architect’s fees, then it has “vested” because the building permit is not discretionary.

Caution: this description of the land use regulatory system is just a summary and does not cover all situations and exceptions.