

Shoreline Setback: The “No Build Zone”

County of Kaua‘i’s
Shoreline Setback Regulation

Ian K. Jung

HCPO 2011

Do we need shoreline setbacks?



What is the goal?



What is a setback?

- “Generally, a ‘setback’ is nothing more than the minimum amount of space required between a lot line and building line.”

Brescia v. North Shore Ohana, 115 Haw. 477, 168 P.3d 929 (2007).

Outline

- Origin of Shoreline Setbacks
- The “Process”
- County of Kaua‘i’s Shoreline Setback Regulation
- Ordinance No. 887
- 3 Highlights of Ordinance No. 887
- Beware

Origin of Shoreline Setbacks: History

- Setbacks require a lot owner to leave open areas at the sides, front, and rear of a structures and to set structures a reasonable distance back from the street, adjacent structures, or shoreline.
- In Gorieb v. Fox, 274 U.S. 603 (1927) the U.S. Supreme Court upheld the general validity of setbacks to further the general goals of open space, light and air, and safety from fire.
- Courts have declared setting setbacks are within the police powers of a municipality.

The “Process”: Intro

Step 1 →

County
Certified Shoreline
Requirement ???

Step 2 →

State -DLNR
Shoreline Certification
Determination

Step 3 →

County
Shoreline Setback
Determination

The “Process”: Background

- State - DLNR created the shoreline certification process to establish a baseline from which the County (utilizing its regulations) can measure the start of the “no build zone”.
- Certification is often required in order to acquire permits and variances necessary to set the structure’s setback from the shoreline or for improvements in the setback area.
- Effect – Creates the starting point for measuring the shoreline setback line and the buildable area on an oceanfront/near oceanfront parcel as prescribed by County regulations.

The “Process”: Step 1 (County)

- Pre-consultation with the County’s Planning Department to determine whether the structure or activity will require a Certified Shoreline (by DLNR).
- Maps (TMKs or subdivision maps) assist in identifying whether structure will trigger the requirement for a Certified Shoreline.
- If a Certified Shoreline is required, then the applicant is referred to DLNR for Step 2.
- If a Certified Shoreline is not required then the applicant moves to Step 3.

The “Process”: Step 2 (DLNR)

- To certify a shoreline, a property owner will usually hire a private licensed land surveyor to prepare a survey map and photograph and stake the suggested shoreline.
- The surveyor's findings and supporting documents are submitted to the State land surveyor for review.
- Upon the State's receipt, public notice of the application is posted in *The Environmental Notice*, and comments from the general public are accepted for 15 calendar days.
- After the 15 day window, utilizing the application materials and public comments, the State surveyor may schedule a site inspection (interested persons who submitted comments in response to the public notice are often included in the site visit).

The “Process”: Step 2 (cont.)

- Once the State surveyor is satisfied with the location of the shoreline, the application is forwarded to the Chairperson of the BLNR for review and approval.
- DLNR looks at the vegetation line and debris line referenced by the “shoreline” definition; however, DLNR has suggested other types of evidence that may be used to locate the shoreline, including: elevation, salt deposits, rock coloration, and other geomorphologic indicators, biological indicators, neighboring shorelines, anecdotal evidence provided by people familiar with the area, and evaluation of seasonal wave run-up statistics and models.
- Whether the application is approved or rejected by the BLNR Chairperson, notice of the decision is published and an appeals period begins. If there is an appeal then the BLNR takes on the issue.
- If no timely appeals are filed, or if appeals are resolved in favor of the applicant, the shoreline is “certified” and valid for twelve months.
- DLNR’s process could take 2-5 months.

The “Process”: Step 3 (County)

- Ordinance No. 887 (un-codified new Article 27 of Chapter 8 of the Kaua‘i County Code – Comprehensive Zoning Ordinance (CZO))
- The first step is to determine whether the subject lot is:
 1. Abutting the shoreline; or
 2. Not abutting the shoreline but located within 500 feet of the shoreline.
- If the subject lot is either of the two an application must be submitted and determination made (referred to as SSD).
- However, if the subject lot is not abutting and located beyond 500 feet of the shoreline, then Ordinance No. 887 does not apply.

County of Kaua'i's Regulation

- The County of Kaua'i went through 3 iterations of Shoreline Setback Regulations.
 1. The County of Kaua'i first implemented shoreline setback requirements through rules (passed by the Planning Commission)
 2. On January 28, 2008, Ordinance No. 863 (as a new Article 27 of the CZO) became effective, which was touted as one of the most progressive shoreline setback regulations
 3. After experience implementing Ordinance No. 863, several amendments were recently incorporated into Ordinance No. 887
- The Planning Department is presently drafting several amendments to improve the effectiveness of Ordinance No. 887.

County of Kaua'i's Regulation: Intent of the Shoreline Setbacks

- To establish a buffer zone to protect shorefront development from loss due to coastal erosion (for a period of time – 70 years)
- To provide protection from storm waves
- To allow the natural dynamic cycles of erosion and accretion of beaches and dunes to occur
- To maintain beach and dune habitat
- To maintain lateral beach access and open space for the enjoyment of the natural shoreline environment.
- In addition, a primary goal of the Kauai setback ordinance is to avoid armoring or hardening of the shore which along eroding coasts has been documented to ultimately eliminate the fronting beach

Ordinance No. 887: Sections

- Sec. 8-27.1 – Applicability
- Sec. 8-27.2 – Definitions
- Sec. 8-27.3 – SSD: Establishment of the Shoreline Setback Line
- Sec. 8-27.4 – Minimum Shoreline Setback Requirements
- Sec. 8-27.5 – Structures and Activities Subject to these Rules
- Sec. 8-27.6 – Prohibited Activities in the Shoreline Setback Area
- Sec. 8-27.7 – Permitted Structures/Activities within the Shoreline Setback Area
- Sec. 8-27.8 – Structure and Activity Determinations
- Sec. 8-27.9 – Variance Application
- Sec. 8-27.10 – Criteria for Approval of a Variance
- Sec. 8-27.11 – Enforcement
- Sec. 8-27.12 – Civil Fines
- Sec. 8-27.13 – Appeal of Director’s Decision
- Sec. 8-27.14 – Promulgation of Rules and Regulations

Ordinance No. 887: 3 Highlights

1. Applicability Section

- When is a structure/activity subject to the Ordinance No. 887?

2. Structure and Activity Determinations

- What types of structures/activities require a Certified Shoreline (by DLNR)?

3. SSD: Establishment of the Shoreline Setback Line

- How is the setback calculated?

Applicability

- An SSD is required for “lands” that:
 1. Abut the shoreline; or
 - For abutting properties an application is necessary, but it does not necessarily mean an setback determination is required.
 2. Not abutting the shoreline but located within 500 feet of the shoreline.
 - For non-abutting properties an applicant can demonstrate to the satisfaction of the Director that the project will not be affected by coastal erosion or hazards.
 - If the Director is satisfied based on factors such as proximity to the shoreline, topography, properties between the shoreline, and history of coastal hazard then the provisions of Ordinance No. 887 do not apply. (Sec. 8-27.1(b)).

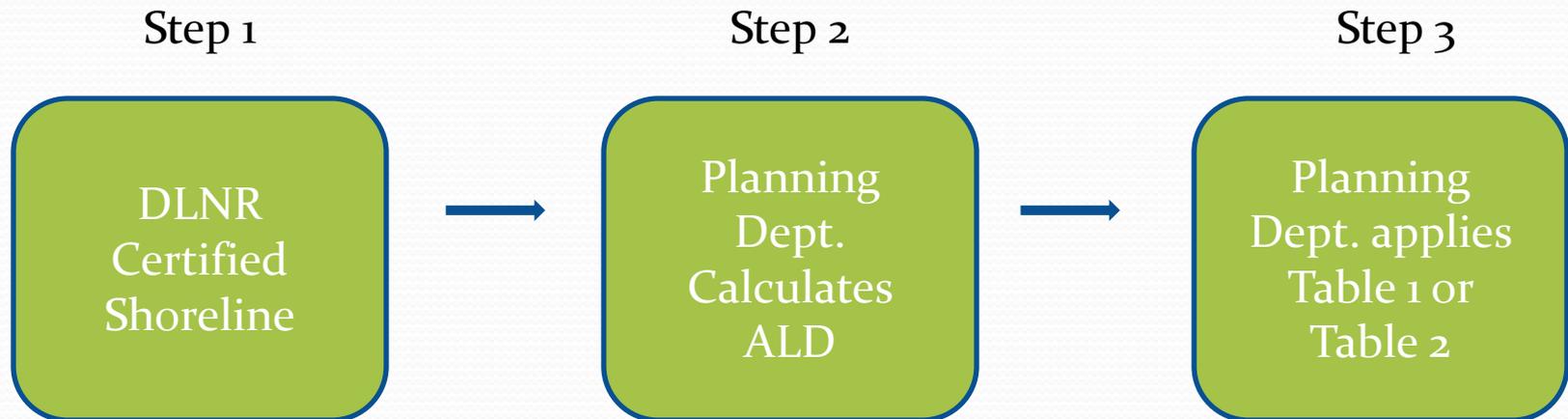
Structure/Activity Determination

- Sec. 8-27.8 proscribes what is required for the process of identifying the “no-build zone”.
- Sec. 8-27.8 is broken up into two types of improvements:
 1. Public improvements less than \$125,000 or private improvements that are repairs to lawfully existing structures; or
 2. Public improvements more than \$125,000 and private improvements that are not repairs to lawfully existing structures.

Structure/Activity Determinations

- For Gov't improvements <\$125,000 or private improvements which are repairs to lawfully existing structures a DLNR Certified Shoreline is elective at the behest (using the word “may”) of the Director along with construction and site plans and written text addressing compliance with other provisions of Ordinance No. 887.
- For Gov't improvements >\$125,000 or private improvements (not repairs) a DNLN Certified Shoreline is required (using the word “shall”) along with other information.

Calculation of Shoreline Setback



Calculation of Shoreline Setback

- To calculate a shoreline setback, the Planning Department utilizes DLNR's Certified Shoreline as the starting point.
- SSD application must be submitted within 6 months of the date of DLNR's Certified Shoreline.
- Next, the "average lot depth" (ALD) is calculated. This is obtained by adding the lengths of the two sides of a lot with a line drawn down the middle of the lot and then dividing the sum by 3.
- If the lot is irregularly shaped, triangularly shaped, on a peninsula, and/or a lot with two or more side fronting the ocean then the Director determines the ALD.

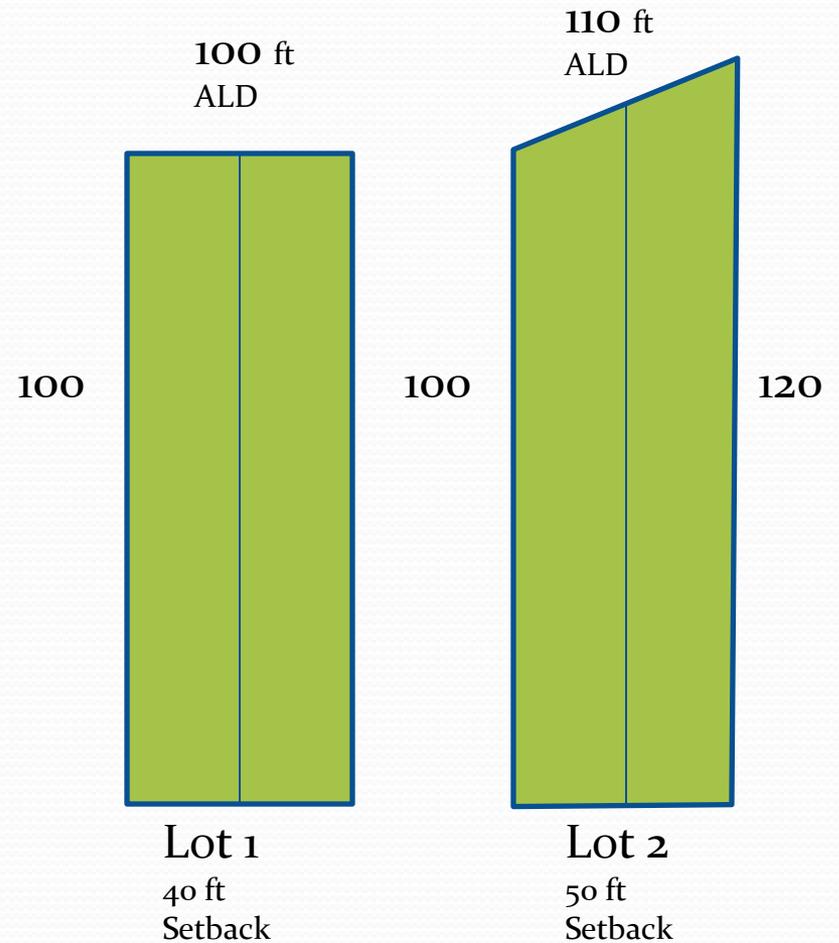
Calculation of Shoreline Setback:

Table 1

- For lots with an ALD of 160 feet or less, the shoreline setback line shall be established based on the average ALD as provided in Table 1, or at the option of the applicant coastal erosion study as provided in Table 2:

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

Calculation Example: Table 1



Calculation of Shoreline Setback:

Table 2

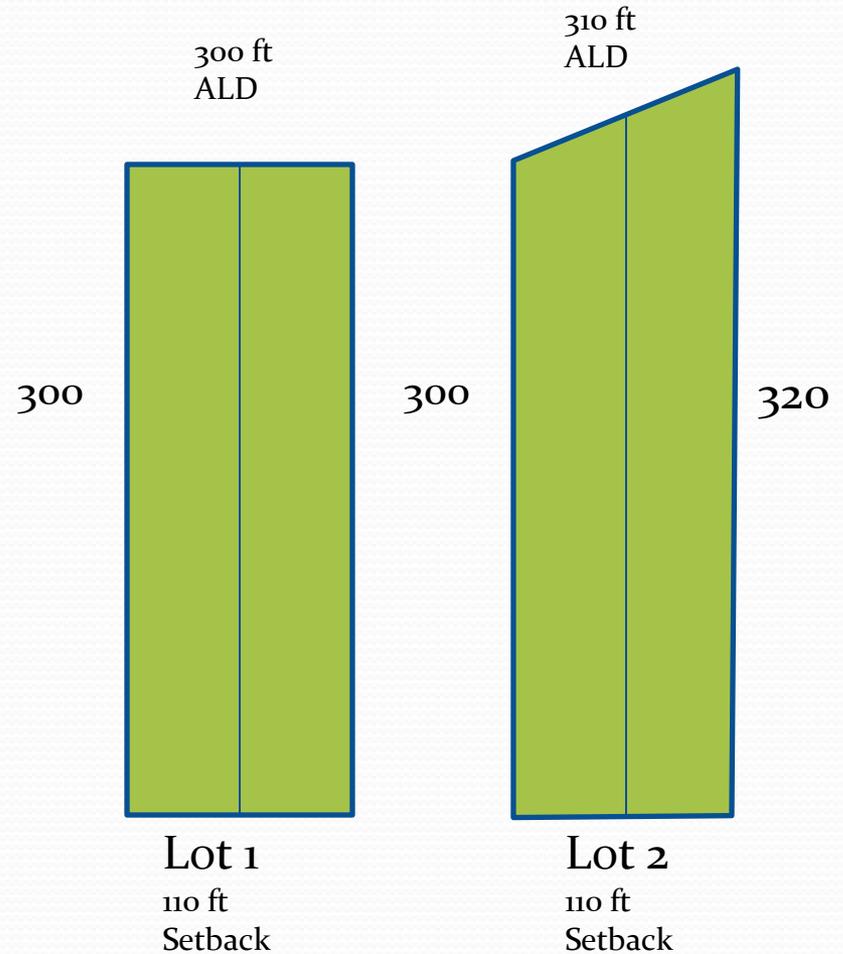
- For lots with an ALD of more than 160 feet, the shoreline setback line shall be established based on the coastal erosion study as provided in Table 2 and shall be no less than the setback distances set forth in Table 1 as applicable.
- Using the table below, for larger ALDs (>160 ft.) requires that the annual coastal erosion rate be multiplied by 70 or 100 based on the size of the proposed structure (i.e. < or >5,000 square ft.), plus 40 feet.

For structures with a building footprint that is	Less than or equal to 5000 square feet	Greater than 5000 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

Calculation Example: Table 2



3500 sq. ft House - Erosion Study Rate of 1.0 ft/year (with consistent transects)



Beware

- Distinction between structures and minor structures.
- Applications and SSDs must be ratified by the Planning Commission.
- Structures with an approved SSD have 3 years to be substantially complete (and 4 years for completion); whereas minor structures have 1 year to be complete or in operation.
- Ordinance No. 887 designates permitted and prohibited structures/activities in the shoreline setback area.
- Any use in the shoreline setback area triggers HRS 343 (EA/EIS)... Gov't projects should check exemption lists.
- Variance imposes stringent standard, plus public hearing and EA/EIS.

Questions

